THE

FEDERAL CASES

COMPRISING

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES

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

BOOK 5

Case No. 2375 — Case No. 2953

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CANA—COFFIN

Case No. 2,375—Case No. 2,953

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FEDERAL CASES.

BOOK 5.

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

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

Case No. 2,375.

CANA v. FRIEND.

[2 Cranch, C. C. 370.][1]

Circuit Court, District of Columbia. April Term, 1823.

PROMISSORY NOTE—PROTEST—NOTICE.

If the notary, not finding the indorser at home, leaves a written notice with some one of his family, it is sufficient.

[See Greatrake v. Brown, Case No. 5,743; Bank of U. S. v. Hatch, 6 Pet. (31 U. S.) 250, affirming Case No. 918; McMurtrie v. Jones, Id. 8,905; Williams v. Bank of U. S., 2 Pet. (27 U. S.) 96; Bank of U. S. v. Corcoran, 2 Pet. (27 U. S.) 121, affirming Case No. 912.]

At law. Assumpsit [by Frederick Cana] against [James Friend] an indorser of a promissory note, for $164.80, at four months. Whetcroft, the notary public, produced his notarial book in which he had stated that he notified the defendant by letter, all the parties being residents in the city of Washington; and testified that it was his general practice to call at the residence of the indorser, and, if he was not at home, to deliver a written notice to any person who came to the door when he knocked, and to request such person to deliver it to the indorser.

Mr. Wallach, for plaintiff.

Mr. Caldwell, for defendant, objected that this was not sufficient notice.

But THE COURT (nem. con.) said it was sufficient if the jury believed from the evidence that such notice in writing was so delivered at the dwelling-house of the defendant in this case. Verdict for plaintiff.

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

CANADA, The (ALLEN v.). See Case No. 219.

CANADAY, In re. See Case No. 2,377.

Case No. 2,376.

The CANADIAN.

[Brown, Adm. 11.][1]

District Court, D. Michigan. June, 1856.

CARRIERS—PASSENGER'S CONTRACT—DAMAGES.

Where the master of a schooner who had taken passage on a steamer to rejoin his vessel, was carried past the place for which he had bought his ticket, and at which the steamer usually stopped, he was held entitled to recover not only for his personal expenses and loss of time, but damages in the nature of demurrage for the detention of his vessel.

Libel for breach of contract in failing to land a passenger at the port to which he had taken passage. Libellant was the master of a vessel lying at Algonac, an intermediate port on the St. Clair river, between Detroit and Lake Huron. He had left his vessel, going up the river, and secured her a cargo, and on the 4th of July took passage on the Canadian, at Port Huron, paid his fare to Algonac, with the intention of stopping there and rejoining his vessel. Evidence was given that the steamer usually stopped there, and that the clerk informed libellant she would stop there on that trip. She did not stop, however, but carried libellant on to Detroit, whereby he was prevented from rejoining his vessel before the afternoon of the following day. The wind which had been favorable during the 4th and 5th, shifted to the northward on the evening of the 5th, and prevented the departure of the vessel before

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

noon of the 7th. She thereby lost the cargo which libellant had engaged.

John S. Newberry, for libellant.
Alfred Russell, for claimant.

WILKINS, District Judge. This action is brought to recover damages for a breach of contract in failing to land the libellant at Algonac, for which place he had purchased his ticket. The contract and its breach are admitted. Libellant took passage on the Canadian for Algonac, with the assurance that the steamer would stop there on her downward trip. He procured his ticket with that understanding, the clerk stating she would land him there. When opposite this place he refused to put the libellant ashore, but the owner being on board directed her master "to put her through and not to stop," and the steamer passed on to Detroit, taking the libellant with her. These facts are not controverted. The only question is as to the damages. These must be limited to the actual loss sustained by the libellant in consequence of the failure of the steamer to perform her contract. He was at the time owner of the schooner Oceana, which was lying at Algonac waiting for him, he having gone up to Lexington to engage a cargo for her. It is alleged, though not very satisfactorily proven, that he failed to obtain this by reason of his delay in reaching the schooner. He is entitled, however, to remuneration for his loss of time and damages in the nature of demurrage for the detention of his vessel for three days. This, with his personal outlay, amounts to $103.50, for which a decree will be entered, rejecting the estimate of the probable profits of a trip to Cleveland. This action is clearly sustainable. The passenger thus wronged should be compensated in damages adequate to the nature of the injury, and passenger steamers must be kept to the fulfillment of their engagements. Decree for libellant.

Case No. 2,377.

In re CANADY.

[2 Biss. 75;[1] 3 N. B. R. 11 (Quarto, 3); 1 Chi. Leg. News, 113.]

District Court, N. D. Illinois. Dec. Term, 1868.

BANKRUPTCY—DISCHARGE AFTER A YEAR.

1. A discharge may be granted to a bankrupt on an application made more than a year after the adjudication.

[Cited in Re Watson, Case No. 17,273; Re Lowenstein, Id. 8,573.]

2. The true construction of the 29th section gives the court a discretionary power, and, in a proper case, on explanation of the delay, a discharge will be granted.

[Followed in Re Forsyth, 4 Fed. 630.]

In bankruptcy.

DRUMMOND, District Judge. In this case the clerk has submitted to me an application by the bankrupt for his discharge.

The only objection to the granting of the discharge arises from the fact that the adjudication of bankruptcy was made by the court, on the 5th of December, 1867, and the application was not presented by the bankrupt till after the 5th of December, 1868.

The question is, has the court power to grant the discharge.

The 29th section of the bankrupt law [14 Stat. 531] declares, "That at any time after the expiration of six months from the adjudication of bankruptcy * * * and within one year from the adjudication of bankruptcy, the bankrupt may apply to the court for his discharge from his debts."

It may be thought the implication here is that no discharge can be granted unless application be made within the year, but I am inclined to think that would be rather a narrow construction of the language. The intention obviously was to promote diligence; but there is nothing which in terms forbids the discharge, if the application is made after the year. The words, it will be observed, are permissive. "The bankrupt may apply for his discharge"—not that he must or shall, within one year, so apply.

It will sometimes happen, from various causes, and without any fault of the bankrupt, that the application may be delayed, and, in such case, it would be hard to withhold the discharge. It seems to me more in accordance with the general scope and meaning of the law to construe this clause of the 29th section as giving a discretion to the court to grant or withhold the discharge, according to the circumstances of each case, when application is made after the expiration of the year. If, in a given case, the delay was the result of gross negligence on the part of the bankrupt, the court might well refuse the application. I think, therefore, that the true rule in the case under consideration is, not to grant the discharge as of course, but to permit the bankrupt by affidavit, petition, or otherwise, to explain in writing the causes of the delay; and that will be the practice adopted in the present case, and if the explanation shall prove satisfactory, the usual notice will be given to the creditors to appear and show cause why a discharge should not be granted to the bankrupt.

CANAHER v. BRENNAN. See Case No. 2,441.

CANAL BANK (UNITED STATES v.). See Case No. 14,715.

CANAL BOAT.

[Note. Cases cited under this title will be found arranged in alphabetical order under the names of the boats; e. g. "The Canal Boat Ontario. See Ontario."]

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

CANAL BOAT (LOWRY v.). See Case No. 8,580.

CANAL BOAT NO. 68 (UNITED STATES v.). See Case No. 16,027.

CANAL NAT. BANK (EMERY v.). See Case No. 4,446.

Case No. 2,378.

CANBY v. McLEAR.

[13 N. B. R. (1876) 22.][1]

District Court, D. Delaware.

CONSTRUCTION OF WILL — LEGACY TO MARRIED WOMAN—HUSBAND'S REDUCTION TO POSSESSION — PROMISE OF REPAYMENT — MOTION TO EXPUNGE PROOF—RIGHTS OF MOVING PARTY.

1. A residuary bequest directing certain real estate to be sold to the best advantage, and continuing as follows:—"and all the remainder of my estate, real, personal, or mixed, and the proceeds thereof, * * * I do give and bequeath to my daughters," etc., held to entitle one of the residuary legatees, a married woman, only to money, the proceeds of sale, and not to a share of the stocks (which constituted a portion of the residue), disencumbered, by force of the married woman's act of 1865, from the marital rights of the husband.

2. A legacy to a wife of a share of the residue of her father's estate, including the proceeds both of land and stocks, directed to be sold, does not constitute a separate estate in the wife, under the Delaware statute of 1865; and such legacy having been reduced to possession by the husband, a note and check afterwards given by him to his wife for the proceeds thereof, are nullities, and cannot be proved by the wife against the estate of her husband in bankruptcy.

[See Chappelle v. Olney, Case No. 2,613; Gallego v. Chevalle, Id. 5,200; Wickham v. Valle, Id. 17,613.]

3. Such note and check do not constitute a trust or gift in favor of the wife, nor are they sufficient evidence to support a trust, though the note bears an indorsement (assumed to be made by the husband) to the effect that the note was given for money accruing to the claimant from her father's estate.

4. Quere. Whether the doctrine of the wife's equity extends so far as to enable her to restrain her husband from proceeding at law to collect her chose in action, until he makes a provision for her?

5. The right of a wife to have interposed by bill in equity to prevent her husband from reducing to possession her chose in action by proceedings at law—even conceding such right to be established by the authorities—held insufficient to support a promise by the husband, to pay to the wife a sum equal to the proceeds arising from the sale of the wife's legacy, where the promise was made subsequently to its reduction to possession by the husband.

6. The doctrine of the wife's equity to a settlement, has no application to a case where the husband has reduced to possession a legacy to the wife, without legal process, and with her assent.

[See Shaw v. Mitchell, Case No. 12,722; In re Campbell, Id. 2,348; Ward v. Amory, Id. 17,146.]

7. In such case, there is no consideration to support a promise subsequently made, to pay to a wife a sum of money equal to the amount received from the legacy.

8. On the hearing of a motion to expunge a proof, the moving party is entitled to open and close.

9. If the testimony of the bankrupt is desired on a motion to expunge a proof, he should be summoned as a witness.

10. The answer to a petition to expunge a proof cannot be used as evidence.

11. The papers annexed to an answer to a petition to expunge a proof, can only be used as evidence by being proved in the usual manner.

In bankruptcy. Petition [by William Canby, assignee in bankruptcy of John P. McLear & Son] to expunge proof of claim [of Amelia F. McLear].

Several questions of practice were raised and decided at the hearing, viz.: First. The court held that as the proof stood as a prima facie claim on which a dividend would be paid, unless some proceeding was taken to impeach it either in law or fact, the burden of showing that it was not a proper claim rested upon the assignee, and entitled him to the opening and reply. Second. Upon affidavit of the claimant filed, application was made by her counsel for an order for the examination of John P. McLear, one of the bankrupts, and husband of the claimant, under section 5086, United States Revised Statutes. The record disclosed the fact that no subpoena had been issued for him. The court denied the motion, and remarked, that if an examination of John P. McLear were desired with respect to the present hearing, he should be summoned as a witness. John P. McLear was then offered as a witness, but objection being made to his competency, he was withdrawn without a decision being had upon the objection. Third. Claimant had annexed as exhibits to her answer to the petition, certain papers which were sought to be treated in the argument, supported by her affidavit to the answer of her counsel as proofs. Upon objection made, the court ruled, that neither the answer nor any papers annexed to it could have any effect as evidence; that the answer was a voluntary affidavit, operating only as a plea traversing the allegations of the petition, and could not be used as evidence for the claimant, though she bound herself by any admissions of fact contained in it; and that the papers annexed to it could only be made evidence by being proved in the usual manner, subject to the right of cross-examination.

George H. Bates and Edward G. Bradford, Jr., for assignee.

Benj. Nields, for claimant.

BRADFORD, District Judge. Amelia F. McLear, the claimant, is the wife of John P. McLear, one of the bankrupts, and is and was at the time of making proof of her claim, the mother by him of three children, now living. Her claim is based, 1st, upon a certain promissory note, which reads as follows: "$2,955.54. Wilmington, Del., Janua-

[1] [Reprinted by permission.]

ry 1st, 1867. Six months after date I promise to pay to the order of Amelia F. McLear, at the First National Bank of Wilmington, twenty-nine hundred and fifty-five dollars and fifty-four cents, without defalcation, for value received. John P. McLear,"— and, 2d, upon a check for nine hundred and eight dollars and four cents, drawn by John P. McLear in favor of the claimant, January 1st, 1867: which check it is alleged was lost or mislaid, and could not be produced at the time of the proof of her claim. The two sums above-mentioned, with legal interest, constitute the amount of the claim filed.

Thomas C. Alrich, the father of the claimant, died in June —, 1865, leaving a last will and testament, by which he made provision for his wife and children. The clause in the will which bears upon the question presented is as follows: "And as my dwelling-house and lot would amount to more than I could give to any one of my children, I direct my executors to sell and dispose of them to the best advantage, and all the remainder of my estate, real, personal, or mixed, and the proceeds thereof, including the amount of the mortgage and bank stocks reserved for my wife, I do give and bequeath to my daughters, Elizabeth D. Porter, Susanna C. Bush, Adaline G. Besson, Harriet S. Clark, Amelia F. McLear, and my son William A. Alrich, or their heirs or assigns, to be equally divided among them, share and share alike. * * * I do hereby nominate, constitute, and appoint my two sons-in-law, William Bush and John P. McLear, the executors of this my testament and last will." The will was duly proved, and William Bush and John P. McLear were duly qualified as the executors thereof. The estate of the deceased embraced, among other property, sundry stocks, which were not sold by the executors, but were divided among the parties entitled to receive the same. The bequest to Amelia F. McLear was not a specific legacy, nor was it a demonstrative legacy, to be paid out of a specific fund pointed out for that particular purpose; but it was a general pecuniary legacy to be paid by the executors, who were directed to sell real estate and personal estate, including the stocks, etc., to raise the moneys thus to be distributed according to the terms of the will. There was no trust raised by the will in favor of the claimant, nor was any separate estate given to her by the will, in opposition to the marital rights of her husband.

The law of the state of Delaware at that time created no such separate estate; for this bequest did not come within the provisions of the act of 1865. That act provides, "That the real estate, mortgages, stocks, and silver-plate belonging to any unmarried woman at the time of her marriage, or to which she may become entitled at any time during her coverture, shall remain and continue to be her sole and separate property, and shall not be subject to the disposition of her husband, etc." It was claimed by the counsel for the claimant, that she was entitled, under the will, substantially to a share of these stocks ordered to be sold; that they constituted the substance of value which was intended by the testator to be given, and by a fair and liberal construction, should be considered as that which was given; and that consequently the claimant, under the laws of Delaware, was entitled to shares of stock, or the proceeds of their sale, disencumbered from any marital rights on the part of her husband. The court cannot take this view of the case. Money was here the precise subject-matter of the bequest, and the construction of the statute even in doubtful cases must lean to the support of the common law rights of the husband. Although the will of Thomas C. Alrich directed these stocks to be sold by the executors, and the proceeds thereof to be divided among the various legatees therein named, no sale was made by the executors, but by consent of the parties interested, the stocks were divided in kind among the parties entitled to receive the same; John P. McLear having had transferred to himself in his individual name on the books of the respective companies the shares which his wife would have taken, had he not asserted his marital rights to take them into his own possession. He also received into his possession, as his wife's share of the cash in the hands of the executors for distribution, the sum of nine hundred and eight dollars and four cents. Amelia F. McLear could not have validly claimed these stocks, for they were not bequeathed to her, or in trust for her; nor was there any act or consent needed from her to invest her husband with full power to take possession of the stocks, for, they having been substituted for money by consent of all the parties capable of giving consent, he was the proper person to take possession of them. John P. McLear subsequently sold the stocks which he had received on account of his wife's legacy, for the sum of two thousand nine hundred and fifty-five dollars and fifty-four cents. Thus, having not only become possessed of these stocks, but also having converted them into money, and having received the above-mentioned sum of nine hundred and eight dollars and four cents, John P. McLear reduced the legacy, or chose in action of his wife, into his absolute possession and control. And this is not all; for he completely converted it to his own use by reason of his putting most of this money into his own business operations as a banker, and the rest into a dwelling-house purchased in his own name, and for his own use and benefit. There can therefore be no dispute as to the fact of conversion to the husband's use. It is true that mere possession is not conclusive evidence of conversion by the husband; but in this case, so far as we have considered it up to this point, there

was a complete appropriation to his own use and benefit, without the slightest intimation so far of any intention that his wife should have a separate interest in the moneys, or the stocks, or the fund produced by them.

On the 1st of January, 1867, some nine months, on an average, after the moneys arising from the sale of the stocks which had been transferred to John P. McLear, were received by him, and a considerably longer period after the above-mentioned sum of nine hundred and eight dollars and four cents had been received by him, the note and check in question were given. Assuming now, for the purposes of argument, that the words written upon the back of the envelope annexed to the answer of the claimant were in the handwriting of John P. McLear, and related to the shares of stock which he had received, and to the check for the nine hundred and eight dollars and four cents also received by him; and assuming further the genuineness of the handwriting on the back of the promissory note for two thousand nine hundred and fifty-five dollars and fifty-four cents, and waiving any objections which might justly be made to the deficiency of proof of the loss of the check, and that proper and diligent search had been made therefor, what are the equitable rights of Amelia F. McLear in the premises, in the enforcement of which a court of equity should assist her, growing out of the execution and her possession of the note and check? The writing on the envelope contains these words, "Certificates of stocks belonging to Amelia F. McLear" and "J. P. McLear's check for nine hundred and eight dollars and four cents," and also other words pointing to the time when, and the persons to whom John P. McLear sold some of the stock. The writing on the back of the promissory note is as follows: "This note is for money accruing to my wife from her father's estate. It has been invested by me in my business, except nine hundred and eight dollars and four cents which I put into my dwelling, No. 709 French street." Are these expressions and words, together with the other facts in the case, sufficient to entitle Amelia F. McLear to the claim she has made? The fact is beyond question, that a complete conversion of the stocks and moneys, both in point of fact and in point of title, had been made. The written statement on the back of the note above-mentioned is conclusive upon this point. All the declarations of John P. McLear in writing upon the envelope and the note, cannot alter or in any way affect the established fact that, long before this note was given, or the writing made upon the envelope, John P. McLear had converted to his own use the moneys arising from the property which represented the share of Amelia F. McLear in her father's estate. It may be, and we think, from the fact that John P. McLear several times spoke of the stocks and moneys as belonging to his wife, it is probably true, that he intended to make, and believed he was making some kind of provision for his wife, at least that he thought he was entering into a contract, which he hoped to have executed at some future time.

Of what value to Amelia F. McLear were this note and check? Amelia F. McLear was a legatee of her father, Thomas C. Alrich. Had John P. McLear been under the necessity of applying to a court of equity for assistance in obtaining this legacy, the court would not have granted it without his making a suitable settlement on his wife;—and even admitting the correctness of the law contended for by the claimant's counsel, that a court of equity would go so far as, upon the wife's application, to restrain the husband from proceeding in a court of law for the recovery of his wife's legacy, until he should make a suitable provision for her;—John P. McLear has not brought himself within either of these cases. He obtained the legacy without legal process and converted it to his own private use, and as it appears, with the consent of his wife. The real question is, will such a contract by a husband with his wife, made long after the legacy has been not only reduced to possession, but converted to the use of the husband, be valid? Every executory contract must be based on a consideration—no matter whether this contract be made between married persons or not—and the main question here to be decided is, was there any consideration for the note at the time it was given? There was none; for she had no separate estate to give to her husband as a consideration for the note; it was all gone, used, diverted into new channels. He required no aid at her hands to enable him to enjoy to the full his marital rights with respect to this legacy. None of the circumstances (which control many of the cases cited) of aid by the wife, necessary to the successful prosecution of her rights by the husband, occur in this case. And the claimant is driven to this position, that, as she had a right, if she had seen fit to exercise it, to have restrained her husband by a bill in equity, from proceeding at law to recover the legacy, had it been necessary for him to do so, this option to refuse her assent to his recovering this legacy, had it been necessary for him to go into a court of law for that purpose, constituted in itself a valid consideration for the note given by John P. McLear to his wife. Many and conflicting cases were cited, to show what is the law in this country as to the power of the wife to restrain her husband, by bill in equity, from proceeding at law to recover a legacy, or chose in action bequeathed her. An extended examination of authorities on this point would involve too much time and labor, since it is unnecessary to the decision of this case. It must be conceded, however, that

New York authorities and others in this country assert this right in favor of the wife—and if this question were presented, this court would have to decide between the more modern cases, enlarging the sphere of the rights of married women, and those which stand by the ancient landmarks, and rest upon the antiquated idea that separate and conflicting interests in one household do not conduce to domestic harmony and unity. This question, however, need not be examined, for we have already said that no such case was presented to this court—and the probability that Amelia F. McLear might have enjoined her husband, had it been necessary for him to sue for the legacy in a court of law, cannot create a consideration for this note and this check. No court has gone to such a length. Such a decision would overthrow all the settled law on the subject of enforcing voluntary executory contracts in a court of equity. The nearest case to this presented is that of Estate of Hinds, 5 Whart. 138, in which Chief Justice Gibson held, that a certificate of a husband, that he had borrowed money of his wife and promised to pay the interest to her annually, furnished sufficient evidence that he held the money as trustee for the wife, and not in his own right. It will be observed that case differed from this in two particulars—1st, the question was between the wife and the representatives of the husband; and, 2d, he received from his wife the money which was in her own possession, so that he had not as yet reduced it to his own possession. Had the case there been between the creditors and the wife, and had Hinds had the money in his possession, and used and invested it before making this certificate of loan and promise to pay interest thereon to his wife, it would then have been in point. This is a strong case to show what will amount to a declaration of trust—and it could have been decided on no other principle than that there had not been a conversion of the chose in action, and that this act was evidence that he did not intend to convert it; and his promise to pay interest on the sum loaned, was to be fairly construed as a declaration of trust. Indeed, the chief justice says in this very case, that the certificate of loan and promise to pay was worthless as a promise from a man to his wife.

In Tritt's Adm'r v. Colwell's Adm'r, 31 Pa. St. 228, Judge Strong, now of the supreme court and presiding judge in this circuit, who gave the opinion of the court, on page 234 says: "An actual use of the wife's chose in action for his own purposes works a transfer of her ownership"—a terse and admirable statement of the law as applicable to this case. In Woodworth v. Sweet, 51 N. Y. 8, the same principle is laid down by Judge Leonard, in the commission of appeals. This also was a case of retention by the wife of the separate estate, and borrowing by the husband. And he says a "promise to repay money so borrowed by the husband cannot be regarded as nudum pactum. The equity to have a settlement made on her constitutes the valuable consideration for the note." Now, in this case before the court, there was and could be no equity for a settlement to Amelia F. McLear when the note and check were given, for, in the language of Justice Strong, "there had been an actual use of the wife's chose in action for his own purposes" by John P. McLear, so that the equitable right was destroyed, and could not be the basis of any consideration for the note and check.

The case of Jaycox v. Caldwell, 51 N. Y. 395, is a like case, in which the promise to pay is based on the consideration of the wife having loaned to the husband her own estate in her own possession. The case of Riley v. Riley, 25 Conn. 154, is not in point; the notes given were in consideration of money borrowed by husband before marriage, and the husband said if she would not proceed to collect them against him, they would be good against his estate, and he directed her to keep the notes. The court held that this was in the nature of an ante-nuptial settlement. I can find no case where there has been an absolute conversion of the property, in which a promise to pay back money obtained from the separate estate of the wife is considered valid. If there is such a case, it is in the teeth of all the well-settled principles of equity governing such cases. There is, however, one case, Turner v. Nye, 89 Mass. [7 Allen] 176, which is in many points identical with this before the court. A note was given by the husband to the wife for the proceeds of sales of lands coming by descent to the wife; and another note for moneys received from trespass on lands of wife, and these notes were delivered to the wife; the husband made memoranda on notes, showing from what source the money was received, and that the money was used to build his dwelling-house, and at the time of delivery made the declaration that they belonged to her, and afterwards, when giving her money, paid it as interest money—yet the supreme court of Massachusetts would not hold his estate liable in equity for the payment of these notes after the husband's death. The court would not consider these notes as declarations of trust, and bases the decision on the special ground that there had been a complete conversion by the husband before the notes were given. This case is direct authority on the point, that this note and check could not be upheld as a gift; it could not be the subject-matter of a gift, even if a perfect delivery and separate possession had been proven; and it is also direct authority on the point, that as a note or contract as between man and wife it is utterly void.

It will be observed that in Turner v. Nye, "at or about the time of receiving the mon-

ey" by the husband with the consent of the wife, the notes were given, so that the case is not so strong as the one before the court, where the conversion was nine months old before the existence of the note or check. The court regrets that the law will not permit the payment of this claim; as doubtless it was the bona fide intention of John P. McLear that his wife should be secured at some future day in this amount. Had he registered these stocks in the name of his wife; had he placed the money in the hands of a third party for her use; had he given her exclusive possession of the note or bond of a third person; had he allowed her to receive the stocks and money arising from their sale, and then borrowed from her and given his note, there might be ground for relief. But as it is, John P. McLear did nothing but give his promise to his wife, who was not capable in law of receiving it or profiting by it. It is to be regretted that Amelia F. McLear cannot be admitted on common and equal grounds with other creditors; but the court does not see how it can be done consistently with the decisions controlling such causes. The claim must, therefore, be stricken off. Let such an order be entered.

CANBY (RANDOLPH v.). See Case No. 11,559.

Case No. 2,379.

The CANDACE.

[1 Lowell, 126;[1] 3 Am. Law Rev. 575; 9 Int. Rev. Rec. 177.]

District Court, D. Massachusetts. Feb., 1867.[2]

SHIPPING—PASSENGER ACT OF 1855—WHEN FINE A LIEN ON VESSEL.

Section 15 of the act of 3d March, 1855 (10 Stats. 720), which enacts "that the amount of the several penalties imposed by the foregoing provisions * * * shall be liens on the vessel or vessels violating these provisions," does not apply to the fine imposed on the master by section 1 of that act, upon his conviction of a misdemeanor, but only to the civil penalties imposed on owners as well as masters, by sections 2 and 8 of the act, for a violation of sections 2–5, 7.

[Cited in The Strathairly, 124 U. S. 570, 8 Sup. Ct. 612. Applied in The Sidonian, 38 Fed. 443.]

Libel of information by the United States against the brig Candace, alleging that the master took on board at a port in the Cape de Verd Islands, and brought to Boston eleven passengers, without providing them with the space required by St. 1855, c. 213, § 1 (10 St. 715). The allegations were, that the height from the deck or platform on which these passengers were carried, to the deck above, was less than six feet, whereby the master became liable to a penalty of fifty dollars for each passenger so carried, amounting in all to five hundred and fifty dollars, and that the amount of this penalty was a lien on the vessel. The owners of the brig filed their claim and answer, in which, after requiring the government to make out the facts alleged, they denied, as matter of law, the liability of the vessel. It was proved that the passengers had only the height of five feet and one-tenth allotted to them, instead of six feet as required by the statute. The master had not been tried on the indictment pending against him for these breaches of the law.

W. A. Field, Asst. Dist. Atty., for the United States.

The fifteenth section of the act provides, "that the amount of the several penalties imposed by the foregoing provisions regulating the carriage of passengers in merchant vessels, shall be liens on the vessel or vessels violating those provisions, and such vessel or vessels shall be libelled therefor, in any circuit or district court of the United States where such vessel or vessels shall arrive." This applies to all penalties of a fixed amount. The master, if convicted, could be fined no more and no less than fifty dollars for each passenger.

T. H. Russell, for claimants.

Admitting the facts to be as laid in the information, we object, 1. That the penalty imposed by the first section of the act does not apply to the height between decks, but only to the superficial area of deck; and 2. That before any penalty under that section can be recovered by libel against the vessel, the master must first be convicted and fined.

LOWELL, District Judge. Upon a careful consideration of the statute, I am satisfied that the penalties referred to in section 15 are the numerous pecuniary penalties imposed by sections 2 and 8, and not the fines imposed by sections 1 and 6. By section 2, if the berths are not sufficient and suitable, the owners and master shall severally forfeit five dollars for each passenger, to be recovered by the United States in any port where the vessel may arrive or depart. By section 8, the owners and master shall severally forfeit and pay to the United States two hundred dollars for each violation of any one of the three preceding sections, and fifty dollars for each violation of still another section, to be recovered in any circuit or district court within the jurisdiction of which the vessel may arrive or from which she may be about to depart, or where the owners or master may be found. It is clear that the fifteenth section gives a right of action against the vessel itself as well as against the master and owners personally, to recover these sums or any of them; a point which was very doubtful upon those sections alone, because

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

[2] [Affirmed by the circuit court. (Case not reported.]

they do not, in terms, give an action against the vessel, though they do give jurisdiction to the courts of the district in which she may be found.

But to apply the fifteenth section to the fines which may be imposed upon the master when convicted of a misdemeanor under the first or sixth section is more difficult. In the first place, the penalty is or may be partly imprisonment. By the sixth section, for wilful failure to supply and distribute provisions, the master must be both fined and imprisoned, and both are discretionary with the court within certain limits; and both together are spoken of as a penalty; but it is a penalty which could not be enforced against a vessel. The case as applied to the first section is not so free from doubt; here the fine is a fixed amount, and could be ascertained before conviction, and is called a penalty, and whether there shall be any imprisonment for a violation of this section is discretionary with the judge; but if imprisonment is imposed, it is certain that both that and the fine are but one penalty for one misdemeanor, and no doubt they would have been so termed in this section if the context had required them to be mentioned together, as it does in the sixth section. It seems, therefore, that the penalty imposed by this section is not of a nature to be recovered against the vessel. But even if we could separate the punishment, and consider the fine by itself as the "amount of the penalty," referred to in the fifteenth section, there would be great difficulties and objections remaining. Suppose this fine to be recovered of the vessel in the first instance, how could the master on his trial for the misdemeanor avail himself of the fact? Not in bar certainly, for it is neither an acquittal nor a conviction, nor does it go to the whole of his punishment. Or suppose the master tried and acquitted, how could that judgment avail the owners of the vessel in a civil suit for the penalty?

Again, a lien is commonly, if not always, a security for a civil debt or responsibility, including civil forfeitures under the revenue laws. To hold a lien over the property of a wrong-doer as security for a fine which may be imposed upon him after conviction of the offence is unusual, and would not often be useful, because the defendant always stands committed [3] until his fine is paid; and this is the highest security known to the law for any pecuniary liability; but that such a fine should be sued for before it is imposed, and against the goods of a third person, is surely without precedent. Again it is to be observed, that what I have called the civil penalties of sections 2 and 8 may be recovered by a personal action as well as by proceedings against the ship, and are imposed upon the owners [in terms],[4] as well as the master; but the fines of the first and sixth sections are imposed upon the master only, and are to be recovered only by indictment, and no allusion is made in these two sections to any other remedy, nor to a proceeding in the district where the vessel may be found.

When, therefore, I consider the kind of penalty mentioned in the first section, which may be partly imprisonment, the person upon whom it is imposed, being the master only, the mode of its enforcement by a criminal trial and sentence, the absence of allusion to any responsibility of the owner or vessel; in all which respects it differs from the mere pecuniary civil penalties imposed by the other sections; and further that the ordinary office of a lien is to be security for a debt or civil liability, and the great difficulty of applying it in fact in aid of the criminal responsibility of a third person, and find that there are in the statute many civil pecuniary forfeitures or penalties to which the fifteenth section giving these liens is properly and exactly applicable; and that to the only other criminal penalty mentioned in the act, it cannot possibly be applied, before conviction of the master, because the amount is not fixed until then,—I am constrained to conclude, that it does not [at least before the conviction of the master,] [4] give a lien upon the vessel for the fines which may be imposed upon him for a violation of the first section of the act.

Decree for the claimants.

CANDACE, The (UNITED STATES v.). See Case No. 2,379.

CANDALERO, The (McGRATH v.). See Cases Nos. 8,809 and 8,810.

CANDEE (DAY v.). See Case No. 3,676.

CANDEE (EVORY v.). See Cases Nos. 4,582 and 4,583.

Case No. 2,380.

In re CANFIELD.

[5 Law Rep. 415; 1 N. Y. Leg. Obs. 234.]

District Court, N. D. of New York. Nov., 1842.

PETITION IN VOLUNTARY BANKRUPTCY—PRIOR INVOLUNTARY PROCEEDINGS.

A petition by a debtor to be declared a bankrupt will be received, notwithstanding a petition for a compulsory decree has already been filed, and an order of notice to show cause thereon obtained by a creditor against the same debtor.

[Applied in Re Flanagan, Case No. 4,850.]

In bankruptcy. [In the matter of Philemon Canfield.] In this case the question was whether a petition by a debtor praying to be declared a bankrupt, could be received, notwithstanding a petition for a compulsory decree had already been filed, and an order of notice to show cause obtained thereon by a creditor against the same debtor.

[3] [3 Am. Law Rev. 575, gives "convicted."]

[4] [From 3 Am. Law Rev. 575.]

[4] [From 3 Am. Law Rev. 575.]

CONKLING, District Judge. I can perceive no sufficient reason why the pendency of the creditor's petition, on which no decree of bankruptcy has yet been granted, should be considered a bar to the right of voluntary petition, secured by the act to the debtor. The act contains no such limitation of this right. The debtor may have good reasons for wishing to exercise it, notwithstanding the prior prosecution of a petition in invitum. He may be apprehensive that it may be voluntarily abandoned; or he may know that the charges it makes against him are unfounded, and think proper to contest their truth, and thus defeat the petition. I cannot see that any injury can possibly be done to creditors by allowing this practice, while in one respect it is advantageous, by giving them the benefit of the petitioner's schedules of debts and property without expense.

Case No. 2,381.

CANFIELD v. REED et al.

[Oliver's Forms (Ed. 1842) 496.]

District Court, D. Massachusetts. June, 1832.[1]

SEAMAN—INJURY IN THE SHIP'S SERVICE—LIABILITY FOR EXPENSES OF CURE—LACHES.

[1. A seaman belonging to a whaling ship was injured in the home port so severely as not to permit of his removal for a considerable time to the marine hospital, even though he had a right to be admitted there. No measures were taken to place him in such asylum. *Held*, that the ship owners were liable to reimburse him for expenses of cure, and of board, nursing, and attendance.]

[See note to Case No. 1,992.]

[2. The omission of such seaman to make any claim for more than a year after the close of the voyage does not affect his right to reimbursement.]

[In admiralty. Libel by William Canfield against Sheffield Reed and others, owners of the ship Albion, for compensation and reimbursement for injuries sustained by the libelant, in consequence of exposure, while in the discharge of his duty as a seaman.]

Andrew Dunlap, for libelant.

DAVIS, District Judge. This libel is for the recovery of compensation or reimbursement of expenses for board, medicine, surgical aid, attendance, and nursing, incurred by the libelant in consequence, as he alleges, of his having been severely frozen in his feet, whilst he was in the service of the ship Albion, owned by the respondents, of which ship Sheffield Reed, one of the respondents, was master. The ship Albion, returning from a whaling voyage, anchored nearly opposite the light-house on Clarke's point, New Bedford, in the afternoon of February 17th, 1831. Captain Reed landed at Fairhaven, and gave permission for one of the mates also to go on shore. On the return of the boat which conveyed Captain Reed on shore, and when that permission was communicated, both the first and second mates, Severance and Hatch, expressed a wish to avail themselves of it. They finally concluded to go together, taking care to select a boat's crew for their conveyance, in whom they could assuredly confide that would return on board the ship that night, and in proper season. Winslow, a boatsteerer, Lyman, Nash, Spooner, and the libelant, took those officers on shore. They landed at New Bedford between seven and eight o'clock on that evening, and the boat's crew, excepting Spooner, who absented himself after visiting and taking supper at the house of one of Winslow's friends, left that house at nine o'clock, and immediately afterwards proceeded in the boat towards the ship. Soon after their departure from the wharf, there was a change of wind and weather; the cold became intense; they were surrounded and greatly impeded by cakes of drifting ice, and could not reach the ship, but, after unavailing efforts for that purpose, were driven out into the bay; remained in the bay, inclosed in ice, and, suffering extremely from cold, until between eleven and twelve o'clock at night of the following day, (the 18th of February,) when they were relieved by persons from the shore, and conveyed to New Bedford. Canfield, the libelant, was the greatest sufferer among these deserving individuals. His feet were so badly frozen as to render amputation of his toes necessary, and he was confined in a painful and crippled state, for relief and cure, at lodgings in New Bedford, for a long period,—a year or more,—and remained an unfortunate, and, in a great degree, helpless, cripple, having also incurred heavy expenses for board, nursing, and surgical aid.

This demand made on the owners, is repelled on various grounds. It is said that the service in which Canfield and his associates were engaged was a voluntary one, and not necessary for the service of the ship, or which they were required or compelled to perform; that the libelant and his companions disobeyed the injunctions of the mate, respecting the time allowed to them to remain on shore, and that they delayed their return unreasonably, feasting and drinking on shore, to a late hour, ten o'clock, before they attempted to go on board the ship; that the libelant was forthwith duly discharged, with the rest of the crew, and received his share of earnings in the voyage, according to agreement, without any claim or demand on his part or behalf for damages or compensation on account of the premises, and that he has not since made any such demand, until the commencement of the present suit; that the ship was furnished with a medicine chest, conformably to law, and that the libelant might have obtained relief and cure, so far as his case was curable, in the United States Marine Hospital, to which, it is said, he had a right to claim admittance.

[1] [Affirmed in Reed v. Canfield, Case No. 11,641.]

In regard to that portion of the defence which imputes the misfortune to culpable delay or disobedience on the part of the libelant and those who accompanied him, I cannot think it is sustained by the evidence. It was reasonable, and doubtless was considered so by the mate, that they should have some brief opportunity to refresh themselves before their return to the ship, and I do not find that the license given to them was abused. They did not spend their time "in feasting and drinking to a late hour," as the answer alleges, but merely partook of a moderate supper, at an early hour, offered at the house of a friend, and left the house at nine o'clock, laudably intent upon the performance of their duty to go on board the ship, and without any incapacity, as appears to me, from any improper indulgence, to perform all that their duty required. Nor can I think, that the ready engagement of the libelant and his companions to perform the service of bringing the two mates on shore, and to return that night, can have any just bearing or operation towards defeating or diminishing a claim to compensation, in consequence of an incidental misfortune, if otherwise well supported.

This is a calamitous case. Happily, there is seldom occasion to inquire into and apply the principle of maritime law, in reference to such casualties. The general and familiar doctrine, that a seaman, falling sick or wounded in the service of the ship, is to be relieved or cured at the expense of the ship, is indeed of frequent and familiar application in such instances occurring aboard, and expenses accruing from such cause are paid and sustained by the owners, excepting so far as they may be diminished by the ship being furnished with a medicine chest. It is argued that an obligation of this sort is only applicable to casualties occurring aboard; but I do not find sufficient ground for such limitation. "If the seaman," says Cleirac, "in the performance of his duty, and while rendering service to the master and to the ship, be wounded, and receive hurt or damage, he is to be cured, furnished with medicine, fed, and fully indemnified, at the expense of the ship." Us et Costumes de la Mer. 31. This passage is part of the learned author's comment on the 7th article of the Laws of Oleron, and, in the same connection, he quotes the 18th article of Wisbuy, 39th of the Hanse Towns, the 27th and 28th of the Ordinances of Charles II., and 16th of Philip IV. The ancient law, as we find it laid down by this venerable writer goes further in favor of the seaman than our usage. "If," says he, "the seaman be maimed in the defense of the ship against enemies or pirates, and be rendered incapable of labor for the rest of his life, he shall, besides his expenses, have a support so long as he may live, at the expense of the ship and her cargo. 'Il aura du pain tant qu'il vivra." He reports a case, in which a French seaman, who had been made prisoner by the Turks, the vessel and cargo being released, recovered, in a suit against the owners, the amount paid for his ransom, with other incident expenditures. The judgment, which was rendered in a court at Bourdeaux, was affirmed by the court of appeal. Such extensive relief we have not found urged or required from owners of ships in modern times. If compensation is to be expended on such a scale, we expect it rather from the public, than from the individual shipowner; and it is contended that in this case the legal provision, by the establishment of marine hospitals, fully embraces the subject, and that the owners of our ships, such provision existing for sick or wounded seamen at home, are exonerated.

But I do not find when the libellant, belonging to a whaling ship, could be admitted to the marine hospital. The crews of vessels engaged in the fisheries are not required to pay hospital money, and are, by the existing regulations, precluded from the benefit of the marine hospitals in cases of hurt or illness accruing in fishing voyages, unless it should appear that the applicant, in some previous voyages of another description, had paid hospital money. If, however, the libellant were admissible to the hospital by law, and according to the rules of the establishment, his case was so severe as not to admit, for a considerable time, of his removal; and, if the owners of the ship be legally bound for the expenses of such cure, until the suffering seaman be placed in the hospital, it would seem incumbent on them to take measures for placing him in that asylum. It appears, indeed, that the legal rights and duties of the parties, respectively, in reference to this unhappy case, were not considered at the time when the offences commenced and before the settlement of the voyage. This presents difficulties in the case for which, perhaps, there is no complete remedy. An enforcement of the libellant's legal claims, at this time, against the owners, may subject them to the sole payment of a demand, which may have been properly chargeable to the whole concern.

The omission to make any claim of this description, until more than a year elapsed after the close of the voyage, was probably owing to the libelant's want of information of his legal rights, and, as was suggested in argument by his counsel, his claim for reimbursement of his necessary expenses, under his distressing circumstances, did not occur to his view until the publication of the case, recently decided in the United States district court in New York—Case of Robinson v. Gifford [Case No. 11,951a], inserted in the New Bedford Mercury of March 2nd, 1832. I regret the embarrassment which such a demand now occasions

to the owners of the Albion, but, in obedience to the rules and principles of maritime law applicable to the case, I find myself bound to award to the libelant a reimbursement for the expenses of cure and of board, nursing, and attendance during the operation.

Amount awarded, $415.11 damages, and costs of suit. On an appeal to the circuit court, this decree was affirmed. [See Reed v. Canfield, Case No. 11,641.]

NOTE [from original report]. When a seaman is disabled by an accident in the actual discharge of his duty, it is a general rule that he is to be cured at the expense of the ship. Holmes v. Hutchinson [Case No. 6,639]. If a mariner, sent out to sea, or on shore, in the service of the ship, is taken and carried into slavery, he will be entitled to receive his whole wages. And, if the ship arrives safe, he will be entitled to an indemnity for his ransom money. Code de Commerce, liv. 2, tit. 5, art. 267, cited in Jacobsen's Sea Laws, 147. See, also, Rodman's Translation, 182. This indemnity he will be entitled to recover of the owners of the ship and cargo. But the law is laid down with some variation in the Encyclopedie Methodique (Jurisprudence) under the article Matelot: "Le matelot pris dans le navire, et fait esclave, ne peut rien prétendre contre le maître, les propriétaires, ni les marchands pour le paiement de son rachat. Mais il en est autrement, lorsque, ayant été envoyé en mer ou à terre pour le service du navire, il vient à être fait esclave; il est alors fondé à prétendre le paiement de sa rançon; savoir, sur le navire seul, s'il n'avait été commandé que pour le service du vaisseau simplement; ou, sur le navire et la cargaison, si le service avait eu l'un et l'autre pour objet il faut néanmoins, pour que la prétention du matelot soit autorisée, que le navire arrive à bon port; au surplus, le paiement de la rançon n'est pas dû indéfiniment au matelot, ce n'est que jusqu'à concurrence de 300 livres; mais il gagne outre cela ses loyers entiers, comme s'il avait servi tout le voyage," etc.

Where seamen contract for a lawful voyage, but are made the victims of an illicit voyage, for which they never intended to contract, and in which they have no voluntary participation, and the ship and cargo is seized, and they are imprisoned, they will be entitled to full wages from the time of their shipping and on the voyage to the time of their return to the United States, deducting their advanced wages, and whatever they may have earned (if any) in any intermediate employment. Shepard v. Taylor, 5 Pet. [30 U. S.] 675. Where a ship is captured, and the crew are forcibly put on shore by the captors, and the vessel is afterwards ransomed, but the seamen have no opportunity of rejoining her, they will be entitled to full wages, subject to a contribution to the ransom money. Girard v. Ware [Case No. 5,460].

CANFIELD (REED v.). See Case No. 11,641.

Case No. 2,382.

CANFIELD v. STATE NAT. BANK OF MINNEAPOLIS.

[23 Int. Rev. Rec. 319; 1 N. W. (O. S.) 173; 1 Thomp. Nat. Bank Cas. 312; 2 Cin. Law Bul. 238.]

Circuit Court, D. Minnesota. Sept. 14, 1877.

RIGHTS AND POWERS OF NATIONAL BANKS — PRELIMINARY INJUNCTION—WHEN GRANTED.

[1. Under Rev. St. § 5136, par. 7, granting national banks such incidental powers as may be necessary to carry on the business of banking, a national bank may accept stock and notes for which it was given as security, as collateral security for a loan to the holder thereof, and may sell the stock at any time after the loan becomes due.]

[See note at end of case.]

[2. The power to sell the stock is unaffected by the fact that the notes and the loan have been long overdue.]

[3. Where complainants' equity is not clear, and reasonable doubt exists as to the facts upon which a motion for a preliminary injunction is based, it should not be granted unless it appears that the act sought to be enjoined will work irreparable injury.]

[In equity. Bill by Thomas H. Canfield against the State National Bank of Minneapolis and the Minneapolis Agricultural & Mechanical Association, to establish an equity in stock and property of the defendant corporation the agricultural association.]

In this cause a motion is made for an injunction, and is heard upon bill, and answer used by defendants as an affidavit, and a counter affidavit. The allegations in the bill of complaint are, briefly, that the complainant is the owner of about sixty-five acres of land in Hennepin county, in this district, of which he is in possession, and that the defendants claim some interest therein adverse to him, and he desires that the respective claims may be litigated. He states that the Minnesota Agricultural & Mechanical Association, was organized in June, 1871, as a body corporate, with a capital stock of $40,000, represented by shares of $50 each, all of which was taken by certain parties therein named, and that the corporation, soon after its organization, purchased the land now in the possession of the complainant, for the sum of $10,000, and erected buildings upon the same of equal value. That the object of the association, and the purpose for which the property was purchased and the buildings erected, were confined to holding fairs, of which one or two were held during 1871, and none since. That the real estate was placed under the control of William S. King, one of the stockholders, and a director, to be used by him as he saw fit, a majority of the stock being owned by him; and that prior to August 14, 1873, he had purchased and acquired the stock of the corporation, and that it had been transferred to him by the other holders and owners. Also, that King had, prior to the above date, acquired the real estate in fee, and free from all claims and demands of the association, and of each of the other directors and former stockholders, with an obligation on the part of the association to make and execute a conveyance of the same to King, his heirs and assigns, or to such person as he might designate as grantee. The bill further states that the complainant contracted with King for the purchase of the real estate, August 14, 1873, and the same was finally consummated and deeds were executed and delivered to him by King, and also by all of the

directors of the association, but no delivery of any stock was made as he states on account of his forgetfulness and inadvertence in requesting it. It also appears substantially in the bill, that Brackett, one of the directors, borrowed money of the bank in April, 1873, for which he gave his note and transferred as collateral to it, two hundred shares of stock of the Agricultural and Mechanical Association, and three promissory notes of Wm. S. King, dated in November, 1872, for the payment of which the stock had been pledged; and also that R. J. Mendenhall, one of the directors of the association, borrowed money from the bank and gave his note and transferred as collateral, one hundred shares of stock and certain notes of Wm. S. King, dated 1872, for the payment of which the stock had been pledged. It is charged that the bank has no title whatever or claim to the remaining five hundred shares of stock, and that it was never deposited as collateral, or pledged in any manner. The maturity of the notes for which the shares of stock were pledged is alleged, and that the bank is about to sell them at public auction, having given notice thereof.

The answer of the defendant the bank denies the material allegations in the bill as above stated, but admits that it holds the three hundred shares of stock substantially as therein set forth, and also states that in July, 1873, King, owner of the five hundred shares remaining, borrowed certain gas stock, property of R. J. Baldwin, the cashier of the bank, to enable himself to raise a certain amount of money, and in consideration of the loan, transferred the five hundred shares to Baldwin, as security for the return of the gas stock, and also to retain as additional security for the payment of the Brackett and Mendenhall notes, held by the bank. It is charged that the security taken by the bank is in violation of law, and an injunction is asked restraining the sale of the stock by the bank.

Palmer & Bell, for the motion.
George Bradley, contra.

NELSON, District Judge. The shares of stock held by the bank are a security not objectionable, in my opinion, to section 5136, par. 7, Rev. St. U. S. If so, the right to sell three hundred shares pledged as collateral to the King notes, originally given Brackett and Mendenhall, is not doubtful. A second pledgee holds the security to the extent of the debt for which it is pledged, and can sell at any time after the debt is due and payable. It is optional with the bank to stand to its remedy against the pledge or sue for its debt, and the law gave it the right to sell, ex mero motu, on proper notice of an intention so to do, or to file a bill in equity to foreclose and sell under a decree. 2 Hill. Mortg. Append. 526. Although the King notes and the Brackett and Mendenhall notes had been overdue a long time, it is not deprived of this privilege given by law to select its remedy.

It is charged that the bank has no title to the remaining five hundred shares of stock, and that the same have not been pledged or deposited with it as a collateral security for any sum whatsoever, or with any right to sell. The answer of the bank, which was used upon the motion as an affidavit, denies this allegation, and the counter affidavit and exhibits produced by the complaint do not overcome, but rather support, the substantial claim set up in the answer by the bank to a lien upon this amount of stock. Applying the usual rule on motions of this kind, the complainant's equity is not so clear as to entitle him to an injunction, for there is reasonable doubt as to the facts upon which the motion is based, and the injury resulting from a sale of the stock is not irreparable. The purchaser would take only such title as the pledgor had at the time the security was given, and the rule of caveat emptor will govern.

Having come to a conclusion adverse to the complainant's application for the reasons stated, it is not proper to consider, at this time, the effect of the judgment set up in the answer as a defence, in a case in which the parties are substantially reversed. Motion for injunction denied.

[NOTE. After denial of the application for an injunction to restrain the sale, and on September 15, 1877, the 800 shares of stock were sold by the bank to one J. M. Knight. Knight thereafter transferred 720 shares of the stock to Dorilus Morrison, and on February 25, 1878, the agricultural association by its directors, elected for that purpose by Knight and Morrison as sole stockholders, conveyed the real estate to them in the following proportions: Nine-tenths thereof to Morrison, and the remaining one-tenth to Knight. On October 28, 1878, Morrison conveyed his undivided interest in the real estate, and his 720 shares of the capital stock, to Jacob K. Sidle and Robert B. Langdon, by deed adsolute, but in fact to them as trustees for a number of persons. On August 14, 1880, complainant filed a supplemental and amended bill, to which he added, as parties defendant, Knight, Morrison, Rufus J. Baldwin, to whom the 500 shares had been delivered as collateral security for the return of certain gas stock, Sidle, Langdon, and William D. Washburn, S. W. Farnham, James A. Lovejoy, and George A. Brackett, persons for whose benefit the deed to Sidle and Langdon was executed, setting forth that, at the time of the sale, the bank had in fact no lien on the stock, having settled King's indebtedness by the acceptance of certain Northern Pacific Railroad bonds, and seeking to charge Sidle, Langdon, and Knight as holders of the legal title to the stock and the property represented by it in trust for the complainant, and praying for an account and a conveyance. The circuit court rendered a final decree in favor of complainant establishing his equity as prayed for, subject to the payment to Knight of $569.58, and to Sidle and Langdon the sum of $8,646.55. See 14 Fed. 801. From this decree the defendants appealed to the supreme court.

[Prior to the filing of the bill, and in October, 1873, defendant the State National Bank, and Baldwin, its cashier, brought an action

against Canfield in the Minnesota state court, to which action neither King nor the association were parties, wherein it was finally adjudged by the supreme court of that state that Canfield never acquired any title to the real estate from the agricultural association; that the defendant bank was the bona fide holder of the stock as collateral security, and had a right to have the property of the corporation applied to its redemption, but that Canfield was the equitable owner of said stock, subject to the rights of the bank. See Baldwin v. Canfield, 26 Minn. 43.

[On the hearing of the appeal from the circuit court, the supreme court of the United States, Mr. Justice Matthews delivering the opinion, held that the judgment of the Minnesota supreme court conclusively established for the purposes of the case, that the deed to Canfield was void, and that his equity to the stock was inferior to that of the bank; that the agreement between King and the bank as to the railroad bonds did not operate as a release of the latter's lien upon the stock, and that, in the exercise of the privilege of redemption, Canfield should be charged the sum of $12,430.33, the amount paid by Morrison for the nine-tenths of the stock; and, as thus modified, the court affirmed the decree of the circuit court, and remanded the cause for further proceedings. Minneapolis Ass'n v. Canfield, 121 U. S. 295, 7 Sup. Ct. 887.]

CANIEO (CAMERON v.). See Case No. 2,340.

Case No. 2,383.

CANIZARES v. The SANTISSIMA TRINIDAD.

[Bee, 353;[1] Hopk. Rep.]

Admiralty Court, D. Pennsylvania. 1788.

BOTTOMRY—GROUNDS OF HYPOTHECATION—EXTRA WAGES—MASTER'S AUTHORITY TO CONTRACT FOR.

1. The true grounds of hypothecation are the necessities of the case, and the want of personal credit.

2. A captain has no power to bind his owners and their vessel to the payment of mariner's wages for three months after his discharge, and after all services at sea and elsewhere have ceased.

"To the Honourable Francis Hopkinson, Esquire, Judge of the Court of Admiralty of the State of Pennsylvania:

"The bill of Manuel Sagas de Canizares respectfully sheweth: That Don Juan Joseph de Aguire Perez, of the city of Cadiz, in the kingdom of old Spain, now resident in the city of Philadelphia, was and is owner of a certain brigantine called the Santissima Trinidad; and that Narisco Sanchez y Serna was commander of the said brigantine, being thereto properly authorized and appointed, the said brigantine being of the burthen of 120 tons, or thereabouts. That the said Narisco Sanchez y Serna, being on the high seas and within the jurisdiction of this court, viz. at the Havannah, in the island of Cuba, was under the necessity of taking up money on the freight and property of the said brigantine, the said brigantine having suffered by storms and tempests on the high seas, and the crew of the said brigantine being in want of provisions. In consequence whereof, and from the prolongation of the voyage thereby occasioned, the said Narisco Sanchez y Serna did then and there, upon the high seas, and within the jurisdiction of this court, borrow from Santiago Cupisono the sum of 200 Mexican dollars, equal to the sum of £75 lawful money of Pennsylvania; in consideration whereof, the said Narisco Sanchez y Serna did, on the 6th day of June, 1788, on the high seas, and within the jurisdiction of this court, by a certain writing, with the proper hand of the said Narisco Sanchez y Serna, then captain, thereto subscribed, (which said writing is here exhibited to this court) contract, covenant and agree with the said Santiago Cupisono, and to him did hypothecate the said brigantine, and her freight, in the words following, viz. (The contract, in the Spanish language), the meaning and purport of which words are as follows, to wit: 'Received of Mr. Santiago Cupisono the sum of two hundred dollars, current money of Mexico, for the victualling and first expenses of the brigantine, which sum I will pay at first sight, in the name of the owner Don Juan Joseph de Aguire Perez, who is in Philadelphia: which cash I receive, mortgaging the freight, the brigantine and her rigging, as the said Santiago Cupisono has lent me the above sum for the advantage of the vessel at Havannah. June 6th, 1788. Narisco Sanchez y Serna.' And afterwards, to wit, on the 13th day of August, in the year of our Lord last aforesaid, the said Santiago Cupisono, by his endorsement on the said writing,[2] with his proper hand thereto subscribed, did order the contents to be paid to your libellant. And your libellant in fact says, that the said brigantine did arrive safely from the port of Havannah to the port of Philadelphia on the 12th day of October in the present year. And the said Narisco Sanchez y Serna, the said captain, did not, neither did the said Don Juan Joseph de Aguire Perez, owner of the same brigantine, pay, or cause to be paid, to your libellant, the said sum of 200 dollars, or any part thereof, which, according to the true intent and meaning of the said writings, so as aforesaid exhibited, the said Narisco Sanchez y Serna, and the said Don Juan Joseph de Aguire Perez ought to have paid to your libellant; although your libellant hath demanded the said sum both from the same Narisco Sanchez y Serna, the captain, and the said Don Juan Joseph de Aguire Perez, the owner, at Philadelphia aforesaid. And your libellant begs leave further to represent, that your libellant is an able seaman and pilot, well acquainted with the several harbours in the

[1] [Reported by Hon. Thomas Bee, District Judge.]

[2] Translation of the Endorsement.

"For me, pay to the order of Manuel Sagas de Canizares, the above expressed sum, for value received of him. Havannah, August 13th, 1788. Santiago Cupisono."

island of Cuba, and on the continent of North America, and, as such, was shipped on board the brigantine Santissima Trinidad at Havannah, by Narisco Sanchez y Serna, now or late captain, master and commander of the said brigantine, at the monthly wages in the account hereunto annexed,[3] mentioned; to sail from the said port of Havannah to the port of Philadelphia; and that it was stipulated by and between the said captain and your libellant, that in case the owners of the said brigantine should think proper to discharge your libellant at the port of Philadelphia, in such case, your libellant should receive three months' wages, and be furnished with a passage back to the said port of Havannah.[4] That the said brigantine did accordingly sail from the port of Havannah and arrive at the port of Philadelphia, and your libellant continued on board the said brigantine during all the said voyage, and did his duty as a seaman and a pilot aforesaid, until the said vessel arrived at the port of Philadelphia, and your libellant was discharged from doing any more duty on board the said brigantine by the captain and owner thereof. And although your libellant hath requested the said captain and the said owner to pay him three months' wages, and to furnish him with a passage back to the Havannah, according to the agreement aforesaid, yet the said captain and owner have hitherto refused, and still do refuse, to do the same. Wherefore, your libellant prays, that the process of this honourable court may issue against the said brigantine, and that she may be condemned by a sentence and decree of this honourable court, and that the said brigantine may be sold, and the money arising from such sale may be applied to the payment of the said several sums due to your libellant. And your libellant shall ever pray, &c. December 19, 1788."

HOPKINSON, District Judge. This libel states two separate claims of Canizares, the complainant, against the brigantine Santissima Trinidad. The one founded on an hypothecation of the said vessel, made by the then captain to Santiago Cupisono at Havannah, for 200 dollars advanced by the said Cupisono for necessaries for the said brigantine, as it is said, and to enable her to prosecute her voyage; which instrument of hypothecation is endorsed or assigned over by the lender to the present libellant: and the other, founded on a written contract between the said Narisco Sanchez y Serna, then captain, and Canizares, the libellant, made at Havannah, respecting the wages he should receive for serving as pilot and mariner on board the said brigantine, in her voyage from Havannah to Philadelphia. As these claims arise from different contracts, it is manifest that they must be separately considered.

To determine on the force of this instrument of bottomry, I shall first state the circumstances necessary to the formation of a genuine hypothecation, according to the maritime law; and then take a view of the history of this vessel's voyage, and her situation at the Havannah, when Cupisono advanced the money in question. As to the first, I have had occasion, in three former suits in this court, to state the doctrine respecting a maritime hypothecation, and have not since found reason to alter my opinion of the principles on which these causes were decided. The cases to which I refer were Liebart v. The Emperor [Case No. 8,340], Turnbull v. The Enterprize [Id. 14,242], and

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[3] The Account Annexed to the Libel.

The Brigantine Santissima Trinidad, to Manuel Sagas de Canizares, Dr.

1788. Dec. 19.			
To cash lent in Havannah to Captain Narisco Sanchez y Serna, commander of the said brigantine, by Santiago Cupisono.....	£ 75	0	0
To 5 months and 19 days' wages, from July 1st to Dec. 19th, at £7. 10s	42	5	0
To three months' pay, agreeable to contract	22	10	0
To his passage to Havannah.....	22	10	0
	162	5	0
Received in Havannah two months' advance	15	0	0
	147	5	0
To one month's boarding Mr. Canizares has been obliged to find....	5	12	6

[4] Translation of the Agreement.

"The commandant general of the navy, and the intendant general, &c. having both obliged me to take, as all other vessels do, a second pilot, as by order of his majesty, no vessel, small or great, can leave his dominions without having on board a first and second pilot. In consequence whereof, in the name of the owners, I have sought for Don Manuel Sagas de Canizares, second pilot of the navigation of Indies, and captain and first pilot in the French navy, as he has proved by his papers exhibited to the said intendant, in whose presence, treating of his wages, after having inquired of several other persons, found it more convenient and cheaper to pay him twenty dollars current money of America per month. And in case the owners think proper to suspend these commissions, they shall bring him back to this port of Havannah, paying him, above his wages, three months besides his passage, as the decency of his office requires it. And in all the ports where the said vessel shall go, he shall receive the half of the daily allowance of a first pilot, which is seven reals and 3-15 current money, and for a second pilot four reals; or in case he does not receive provisions, &c. agreeably to the ordinances of Bilboa and the regulations of the navy; and in case this present agreement should not be complied with, he shall present it to the minister, that he may oblige them to pay what is hereby promised. Two to be written of the same tenor; one for the warranty of Don Juan Joseph de Aguire Perez, to be signed in his name by the captain of his vessel, and another in the same manner to be left, as the original, in the naval office, with the commissary Mr. Domingo Labadores, each having the same strength, as if they had been made and executed before a notary public at Havannah. July 1st, 1788. Narisco Sanchez y Serna. Manuel Sagas de Canizares.

"Received in advance forty dollars. Manuel Sagas de Canizares."

Forbes v. The Hannah [Id. 4,925]. The first and third of these causes were carried into the high court of errors and appeals, were there again solemnly argued and considered, and, without the intervention of any new testimony to alter the case, the sentences of the admiralty were confirmed on the same, or nearly the same, principles. I can only now repeat the substance of what was then observed. (Here the judge recapitulated the doctrines advanced, and the authorities cited in the three foregoing causes, and then proceeded to say:)

"I shall now state the history of the voyage of this brigantine, as the same may be deduced from the testimony exhibited.[5] It appears, that this vessel was chartered on account of the king of Spain, and was to sail from Philadelphia with a cargo of flour for Carthagena; that the flour was there to be sold, and a cargo of dye-wood purchased and brought back to Philadelphia, or some port of the United States. Such was the designated voyage. But, it seems, the captain, instead of returning to Philadelphia from Carthagena, went to Jamaica with an adventure of his own; to what amount does not appear. That at Jamaica he purchased dry goods fit for the Havannah market, and then sailed with the brig to Havannah, where he disposed of the goods he had bought at Jamaica, on his own account. That at Havannah he borrowed 200 dollars of Cupisono, and executed the instrument called an hypothecation, to engage the vessel and her freight to Cupisono as security for this sum. That part of this money was expended in paying wages to the sailors, and part in supplying them with fresh provisions. That the vessel was refitted at the king's arsenal, and at the expense of the intendant. And that she afterwards sailed for and arrived at the port of Philadelphia. I agree with the counsel for the libellant, that the validity of an hypothecation ought not to depend upon the regularity of the captain's conduct with respect to his owners, previous to the time of her arrival in a foreign port, and of lending money for the relief of the ship's necessities; and will go farther, and say, that neither ought it to be affected by the captain's subsequent conduct, provided the lender was in no ways privy to, or knowingly assistant in, his obliquities.

[5] There was but one deposition produced in this cause, viz. that of the late captain of the brig. It might have been a question, whether his testimony was legally admissible or not, but he was not objected to as a witness by the proctors for either side. His deposition was in these words: "Narisco Sanchez y Serna, a witness produced on the part of the libellant in this cause, on his solemn oath on the holy Evangelists of Almighty God, saith: That he, this deponent, received the 200 dollars mentioned in the libel (he being then captain of the said brigantine at the Havannah) of Cupisono, by the hands of the libellant; which money, or any part thereof, he, the deponent, hath not paid to Cupisono again; and that he employed the said money in paying wages to the crew, and in furnishing fresh provisions, until he should receive money from the intendant. That a survey was ordered upon the vessel, and a report made to the intendant, and he then received a verbal order to take his vessel from the bay to the upper part of the harbour, where the king's warehouses are, there to discharge, and after that to transport his vessel to the king's arsenal, where she was repaired and had a new bottom. That he, the deponent, had no money, nor any person to whom he could apply to obtain the same. That the vessel leaked before he went into the Havannah to such a degree, as to make more than thirty inches of water in an hour. That he never knew Mr. Cupisono; but he had had three or four days' acquaintance with the libellant. That he requested the libellant to borrow him some money, and he took him to Mr. Cupisono's, where the money was paid to him. That the paper marked 'A,' exhibited in this cause and shown to him, is a contract made between the libellant and the deponent. That at the house of Cupisono, the said Cupisono insisted upon the vessel and freight being hypothecated to him, otherwise he would not lend the money. That Cupisono knew that the vessel put in in distress—that every body knew it, and that he, the deponent, had told Cupisono of it.

"Being crossexamined, he saith, that the sailing orders (marked 'B') are the sailing orders he received. That the paper (marked 'C') is the charter-party signed between him and the freighter. That the paper (marked 'D') is the account delivered by the deponent, on his return, to his owners. Being asked how he came to apply to the intendant for money, he saith, that he presented a memorial to him for that purpose. Being asked whether he got any money in consequence of the memorial, he says, that he did not; but he was obliged to present five or six memorials. Being asked, how long after he arrived at the Havannah he presented a memorial, he answers, that he received the money from Cupisono the first Sunday after his arrival. Being asked on what day he arrived at the Havannah, he answers, that he does not remember whether it was on Thursday or Wednesday; that the memorial was presented to the intendant after the money was received from Cupisono. That in the conversation he had with Cupisono, he told him that he expected to receive money from the intendant, as he was chartered on account of the king. That he took on board a passenger at St. Martha, who was to proceed with him to this country. Being asked, whether, being at Jamaica, he did not dispose of an adventure of his own, he answered, he did, but they were not goods of the king's; that he invested the proceeds in dry goods, which he intended to dispose of at the Havannah. That he told Cupisono that he had contraband goods on board which he had brought from Jamaica. That in the course of conversations with Cupisono (for he had several) he does not recollect particulars. That Cupisono did not ask him the nature of his voyage. That Cupisono knew that the vessel was freighted with dye-wood on account of the king, and was designed for some port in the United States. That he had informed. Cupisono that he had received money from the intendant; but that a little while before he sailed he met Cupisono, who asked him how he was off for money? to which the deponent replied, that he should be much straitened, whereupon the agreement (marked 'E,' exhibited in this cause) was made and executed between them. That he was near two months and an half at the Havannah. Being asked, whether the paper (marked 'E') was given on the day it bears date, he answers, that it was not given on the day it bears date, nor does he recollect whether it was the day after, or three or four days after, but that the money was bona fide paid by Cupisono and received by the deponent, and that he does not recollect when the paper (marked 'E' the hypothecation bond) was executed."

It has been urged on the other side, that the law of hypothecation was designed solely for the benefit of the owners, and an inference drawn, that if it can be shewn that the owners of a vessel have not been benefited, but injured, by the captain's conduct and consequent hypothecation, it ought not to be allowed. But this law has for its object the good of commerce in general. And no stranger would lend money on hypothecation, if his lien on the ship was to be invalidated by some future proof that the voyage was irregular, or that the captain had deviated from the orders of his owners and injured their interests, either before or after the hypothecation made. But where shall we find, in the present case, that necessity which should justify the captain's conduct, and be the ground of a genuine hypothecation? This vessel was chartered by the king of Spain or his agent, the cargo on board was on the king's account, and she arrives in a leaky and disabled condition in one of his majesty's ports, where he had an officer stationed. This officer, the intendant, orders the brig to the public warehouse to be discharged, and then round to the king's arsenal to be repaired; all which was done at the king's expense. In truth, I cannot conceive a case of less necessity, or one wherein a more certain and able relief could be depended upon.

But, it is said, there were considerable delays before the intendant interfered, and that the captain was obliged to send in five or six memorials, and in the mean time the mariners were in great want of wages and fresh provisions, and that in this necessity the captain applied to Cupisono for 200 dollars, who refused to lend them unless the vessel should be hypothecated for his security. It appears, however, by the deposition, that the money was lent by Cupisono before the captain had made any application at all to the intendant, and therefore the neglect of the intendant could not have occasioned the necessity of borrowing money from Cupisono. That the captain of a vessel in the king's service, and in one of his majesty's ports, should not have credit for a few days' provisions, until the proper officer could be applied to, is too incredible to be seriously admitted. Still less can it be a sufficient ground for an hypothecation, that the mariners must have wages paid to them, in a place where it does not appear that any wages were due, nor is it probable that any could be due, because this was neither the conclusion of the voyage, nor even a port of delivery. The money ought to have been lent solely on the faith of the hypothecation, and not on any personal credit; but here was a strong and well founded credit, for it is in testimony that Cupisono knew that this brig was chartered for the king's service, and it is expressly said, that the money was borrowed to pay wages and procure fresh provisions until money could be had from the intendant.

Further, in the quotation from Molloy, b. ii. c. 11. s. 11. it is said: "When a master is out of the country, and where he hath no owners, nor any goods of theirs, nor of his own," &c. Now it is confest that the captain had property of his own, and, as it should seem, to a considerable amount, since it was sufficient to induce him to violate his duty to his owners, in taking the brig, contrary to their orders,[6] on a trading voyage to Jamaica for his own benefit; that at Jamaica he bought goods suitable for the Havannah market, and actually sold them at Havannah, though contraband—and that Cupisono, the lender, was privy to these circumstances. So that, instead of the lender's having the brig alone to look to for his security, he had two substantial personal credits to depend upon, viz. the intendant from whom he might expect repayment of moneys advanced for the use of a vessel in the king's employ, and the captain, whose property he might have attached before he left the island, if satisfaction was not made. This circumstance alone, that is to say, Cupisono's knowledge that the captain had property of his own on the spot, sufficient to answer the present exigencies of the vessel, would have invalidated the bond as a maritime hypothecation, inasmuch as it removes that necessity which the law requires.

There is a circumstance in the present case, which, although not in itself conclusive, forms too striking a feature in the transaction to pass unnoticed. A singularity peculiar in a maritime hypothecation is, that the law allows an extraordinary premium or interest to the lender, even to any extent, according to the risk to be run; because, if the ship should be lost, the money lent is lost with her. But here a stranger lends 200 dollars to a captain in distress, without even stipulating for common legal interest for the use of his money. I say, this alone might not be conclusive against the hypothecation, because a stranger may be as

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[6] Translation of the Sailing Orders.

"Philadelphia, 18th of October, 1787. Don Narisco Sanchez—Dear Sir: You will observe the following orders: When you arrive at Carthagena, you will say that you carry 300 barrels of flour for the king and troops. You will deliver my letter to Don Manuel Garcia del Rio, to whom it is directed. He will sell your venture and remit me the amount to pay your creditors. You must not stay long in these ports, and if you have the good luck to be despatched soon, you will come back with the cargo of dyewood, which you will take at that port. If it is in January and the river is frozen, you will go to New York, where you will deliver your cargo to Don Sabrados de los Monterros, and will write me by post. You will take a particular care of your people, and suffer no disorder. The said Don Garcia will give you the cash you shall want for the provisions of the brig, desiring you to be very saving in all, but let nothing be wanted, and keep good order. In case you should not be despatched soon, you will present a memorial to the viceroy, conforming yourself to the charter-party. May God grant you a good voyage. Juan Joseph de Aguire Perez."

generous as he pleases; but, in connexion with the other circumstances, it gives room for suspicion that the engagement of the brig to Cupisono was not made within the rules and spirit of the maritime law. For the above reasons, I adjudge that the bill in this cause be dismissed, so far as the same hath respect to a claim of 200 dollars, said to have been lent on the credit of the brig Santissima Trinidad.

I am now to consider the libellant's demand of wages for serving as pilot and mariner on board this vessel from Havannah to Philadelphia. The counsel for the libellant hath rested his claim of £87 5s. for wages, on a written contract made at the Havannah, between Narisco Sanchez y Serna, then captain, and Canizares. But it has been contended, on the other side, that as this agreement is in writing, and bears a seal, and is not, according to the terms thereof, in the usual way of agreeing for mariners' wages, it becomes a special contract, and is not properly of admiralty jurisdiction. Its being in writing, however, is no more than a testimony or memorandum of the agreement made, and does not affect the jurisdiction of this court. What is called a seal, appears to be nothing more than a printed stamp, for which a duty is paid to the crown: certainly, it is not the seal of the parties, or of either of them. But, as to the terms of the contract, these are indeed out of the usual course, and deserve further consideration.

One of the reasons for allowing mariners to sue in the admiralty for their wages is, that the debt arises from services performed, or to be performed, at sea; and a lien on the ship is given them for security, because the contract they make is supposed to be on the credit of the ship. Now, although the wages of 20 dollars per month, promised in the present case, appear to be extravagant, yet as the difficulty of getting a person qualified to serve both as a skilful pilot and able mariner might have been great, I think the rate of wages per month ought to be allowed as contracted for. But I cannot, upon any principle, allow, that a captain hath a power to bind his owners and their vessel to the payment of a mariner's wages for three months after his discharge, and after all services at sea or elsewhere have ceased. If he could legally do this for three months, why not for six or for twelve months, or even saddle his owners with an annuity for life to a mariner, for a few weeks' actual service? How far the common law might consider this contract as binding on the captain personally, it is not my business to say; but, as judge of admiralty, I shall be far from doing my part towards establishing a precedent by which captains, in addition to the great power they necessarily have over the property of their employers, may have that of obliging them to the payment of unlimited sums for an unlimited time. The captain might have engaged for his owners, to pay wages per month during the service, or a specific sum for the run, to any amount justifiable by the circumstances and necessities of the case; but to bind the owner to periodical payments to a mariner, after a total discharge from the service, is what I believe no captain of a vessel ever before attempted. For, whether this was to be paid all at once, or at three several times, it matters not; the contract is for three months' wages after discharge.

There is another claim under this contract for 60 dollars, to take the libellant back to the Havannah, on being discharged here. The maritime custom is, that if a master or owner discharge a mariner in a foreign port, before the completion of the voyage for which he is engaged, some reasonable allowance shall be made, over and above the wages due, to enable him to return to his own country, or to go to the port which, by the articles, should have completed the voyage. And this allowance is usually the amount of one month's wages. And it is a reasonable custom, where the mariner is willing to perform articles and finish the voyage, but the master or owner thinks fit to discharge him sooner, for their own convenience, and without just cause of complaint against the mariner. This part of the contract before us is, therefore, consistent with maritime custom, but certainly unreasonable as to the sum promised. Whatever power a captain may have by law to bind his owners by contracts made abroad for the services of the ship, yet he cannot oblige them beyond what is usual and customary, without shewing that the unusual charge arose from the necessity of the case. The present charge is expressly made for conveying the libellant back to the Havannah. I have therefore inquired what is the usual charge for a passage from this port to the Havannah, and find that 40 dollars is an ample and generous allowance.

Fraud and collusion between the captain and Canizares, the libellant, have been suggested, but not proved. Yet, if I had not found that this cause might and ought to be determined on general principles, there are two circumstances in the case which would have induced a more strict inquiry into this captain's conduct. The one, which I have already noticed, is Cupisono's lending money on hypothecation, without securing or even asking for common interest; which, though a possible, is not a usual occurrence. The other, is a contract between the captain and Canizares, which concludes with these remarkable words—"Each," (that is, the original and copy) "having the same strength as if they had been executed before a notary public at Havannah." The question naturally occurs, and why was not this contract made and executed before a notary public at the Havannah? An honest captain, who is reduced to the necessity of binding his

owners to hard and unusual terms, would at least take care that nothing should be wanting in point of form and public notoriety to justify his conduct. And, besides, I suspect that this contract, which bears a printed seal, or stamp, could not be legally executed, according to the regulations of the Spanish maritime laws and customs, but in the presence of a notary, or some public officer. But it was not necesary to clear up these appearances, as the cause may be decided on other grounds.

Upon the whole, I adjudge and decree, that Canizares, the libellant, have and receive from Juan Joseph de Aguire Perez, the respondent, the sum of 112 dollars and 60-90ths of a dollar, equal to £42 5s. Pennsylvania currency—that is to say—

	£.	s.	d.
For five months and nineteen days' wages, from July 1st to December 19th, at twenty dollars per month..	42	5	0
For his passage to the Havannah..	15	0	0
	57	5	0
From which deduct forty dollars paid in advance at Havannah.....	15	0	0
There remains.....	42	5	0

With respect to the £5 12s. 6d. added to the account, and charged for a month's boarding, I shall take no further notice of it than to observe, that it is neither mentioned in the libel, nor supported by any vouchers or testimony whatever. Finally, I adjudge, that the libellant pay one half, and that the respondent pay the other half, of the costs and charges of this suit.

Case No. 2,384.

CANNELL v. MILBURN et al.

[3 Cranch, C. C. 424.] [1]

Circuit Court, District of Columbia. April, 1829.

PLEADING AND PROOF—VARIANCE.

If the legal effect of the instrument be the same, whether the words constituting a variance be inserted or not, the variance is not material.

Debt on a sealed note. Plea, "owe nothing" without oyer, and issue.

Mr. Neale, for defendant, objected to the admission of the sealed note in evidence, because it contained the words "for value received," which were not in the declaration.

Mr. Hodgson, for plaintiff.

THE COURT (MORSELL, Circuit Judge, absent,) overruled the objection, and CRANCH, Chief Judge, referred to the case of Ferguson v. Harwood, 7 Cranch [11 U. S.] 408 where the supreme court held, that if the legal effect of the instrument be the same, whether the words be inserted or not, the variance is immaterial.

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

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

CANNON (CONVERSE v.). See Case No. 3,144.

Case No. 2,385.

CANNON v. DAVIS.

[1 Cranch, C. C. 457.] [3]

Circuit Court, District of Columbia. Nov. Term, 1807.

CIRCUIT COURTS—DISTRICT OF COLUMBIA—JURISDICTION—APPRENTICES.

This court has jurisdiction to discharge an apprentice upon petition, on account of cruelty of the master, and to bind out the petitioner to another master.

On the petition of Margaret Matilda Cannon, an apprentice, to be discharged from her indentures on account of cruelty of her master [Thomas Davis].

THE COURT, after some argument, decided (nem. con.) that they had jurisdiction in this case, and being satisfied of the cruelty of her master, Thomas Davis, ordered the apprentice to be removed, the indentures to be cancelled, and the child to be bound out to George Drinker. See the act of Virginia, 11th December. 1792, c. 95, § 15, p. 174.

CANNON (LOCKE v.). See Case No. 8,440.

CANNON (McNEIL v.). See Case No. 8,913.

CANNON (PEOPLE v.). See Case No. 10,967.

Case No. 2,386.

CANNON v. The POTOMAC.

[3 Woods, 158.] [1]

Circuit Court, D. Louisiana. April Term, 1878.[2]

COLLISION—DIVISION OF DAMAGES—DEMURRAGE—APPLICATION OF INSURANCE MONEYS.

1. A collision took place between two steamboats caused by the fault of both, but the fault of one was greater than that of the other. *Held*, that the court could not gauge the demerit of the boats in assessing the damage to be borne by each. If both were in fault, though in different degrees, the damage should be equally divided between them.

2. Demurrage forms a fair subject for the allowance of damage in collision cases.

[See The Baltic, Case No. 824.]

[See note at end of case.]

3. Two steamboats had collided with each other by the fault of both, and were adjudged to pay each one-half the damage. One of the boats received insurance money to cover part of her damage. *Held*, that it was not to be deducted from the share which the other steamer was adjudged to pay, even though the underwriters had voluntarily released her from all claim for her fault in causing the collision.

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

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

[2] [Reversed in part, and affirmed in part, in The Potomac v. Cannon, 105 U. S. 630.]

4. In such case, the owners of the insured boat were allowed to apply their insurance money to that portion of their loss for which they had no redress against the other boat.

[See note at end of case.]

On appeal from the district court of the United States for the district of Louisiana.

Admiralty appeal. The libel was brought by [John W. Cannon] the owner of the steamboat [Robert E.] Lee against the steamboat Potomac [James A. Batchelor and others, claimants], to recover damages for a collision which took place between the two boats on the Mississippi river, about one mile above Natchez, on the morning of December 21, 1870. Both boats were damaged by the collision, but the injury sustained by the Lee was much the greater.

[The district court found that both vessels were in fault, and, in assessing the damages, decreed that the amount paid by the insurance companies to libellant should be deducted from libellant's damages; and, from this decree, libellant appealed.]

[The Robert E. Lee was insured on two-thirds of the valuation, by valued policies, by which, in case the insurers should pay any loss, the assured agreed to assign to them all right to recover satisfaction from any other person, or to prosecute therefor at the charge and for the account of the insurers, if requested, and that they should be entitled to such proportion of the damages recovered as the amount insured bore to the valuation in the policies. The insurers paid the libellant two-thirds of the damage, and released and assigned to the owners of the Potomac all their right in any damages growing out of the collision.][3]

B. Egan, for libellant.

J. Ad. Rosier, for claimant.

BRADLEY, Circuit Justice. If I were to believe the evidence of the officers of the two boats which came into collision in this case, I should be forced to the conviction that a collision was utterly impossible. They show most clearly, on the one side and the other, that both vessels had come to an entire standstill, if they were not, in fact, backing, before they met. That both vessels gave signals when they were 800 yards apart, but neither heard that of the other, which I can only account for on the supposition that they were given at the same instant of time. The flat contradictions which we are obliged to encounter in cases of this sort are a melancholy evidence of the effect of self-interest on the memories, if not on the consciences, of men. Some facts, however, seem to be indisputable. Both sides agree that a collision did in fact occur, and that serious damage was inflicted on both vessels. They concur also in the fact that the collision occurred nearer to the Mississippi than to the Louisiana shore, and at no great distance from the former—as near, in fact, as was safe for large steamers to run at that stage of the water—and to the east of the center line of the channel. They concur in the fact that the two vessels did not meet head on, but at an angle of at least forty-five degrees, if not greater than that, the starboard of the Potomac being presented to the larboard of the Lee, in such a manner that the stern of the former was driven almost squarely into the bow of the latter, penetrating to her kelson. A very slight difference in their positions, that is, if the Lee had been a few feet to the larboard of her position, or if the Potomac had been a few feet to the larboard of hers, without any change in their relative angle of direction, the thing would have been reversed, and the Lee would have penetrated the bow of the Potomac in exactly the same manner as the Potomac did that of the Lee. Which of them should be the penetrating vessel was a sheer matter of accident. There is nothing in that circumstance which throws the least light upon the question where the fault lay. That there was fault somewhere must be conceded. Two such manageable boats as these were, could not have come together with so much water-way as they had, and in such a clear and quiet night, without some carelessness or inattention on one side or other, or on both sides. I have stated that it is a conceded fact that the vessels came together at an angle of at least forty-five degrees. The weight of evidence is, that they even struck more squarely than that; that is, that at the time of collision, they were crossing each other's course more directly and squarely than at an angle of forty-five degrees. The officers on each side, respectively, endeavor to throw the blame of this upon the other side. The officers of the Lee say that she was heading straight up the river, and that the Potomac, being further out in the channel, as she approached the Lee, turned around to the larboard, as if she were rounding to at a landing, and struck the Lee nearly squarely upon her bow. On the other hand, the officers of the Potomac say that she was heading straight down the river, following the bend of the Mississippi shore, and that the Lee, being on the Louisiana side of the channel, in the vicinity of the bar there, turned to the starboard and attempted to cross to the Mississippi side, in front of the Potomac, and athwart the course she was properly pursuing. Either of these statements would account for the angle at which the vessels came together; but they are directly opposed as to which vessel was following the line of the channel, and which was crossing it. The angle at which they met we are certain about, but the course of the respective vessels at the moment of meeting, relative to the line of the channel, is disputed by directly contrary averments on each side.

[3] [The above additional facts were taken from The Potomac v. Cannon, 105 U. S. 630.]

There is a third hypothesis which would bring the vessels together at the angle at which they struck, and which would not require that either of them should have crossed the channel, namely, by supposing that both vessels were pursuing the general line of the channel, on the Mississippi side of it, and approaching each other nearly head on (which, if both are to be believed with regard to their own vessels respectively, must have been the case), and that just before meeting, both vessels, in order to pass each other, turned in the same direction, towards the Mississippi shore, the Lee to her right, and the Potomac to her left, as two men sometimes do on the side-walk, and thus come together. This manoeuvre would cause them to meet at the angle they did, and would be in harmony with all the absolutely certain facts of the case. It would square with the assertion so positively made on both sides, that they were on the Mississippi side of the river, and that they were following the general course of the channel. It would also accord with the facts asserted on each side respectively; by the pilot of the Lee, that he intended to pass the Potomac on the right, and by the pilot of the Potomac, that he intended to pass the Lee on the left. They both say that they signaled respectively to that effect. Is it not possible that as they approached each other, and found that they were in close proximity, each urged his helm in the direction of his thoughts, on the supposition that the other was apprised of his intention, and would pursue the same idea? This supposition would produce exactly the results which actually happened, and would relieve the parties from the imputation of a great deal of gratuitous swearing. To appearance it would be true, that the approaching vessel would seem to be attempting to cross the track of that on which the observer stood. I am disposed to think that this is the true solution of the relative movements of the vessels, and of a great deal of the apparent contradiction in the testimony. The question then arises, which party was to blame for not avoiding this collision? It certainly need never to have occurred if proper diligence had been observed on both sides. Where is the want of diligence to be found? By the rules of navigation on the Mississippi river, it was the duty of each party to signal the other as to the side on which he would pass. It was the duty of the Lee, as the ascending steamer, to do this first, and if she met with no response from the other steamer when they were within eight hundred yards or half a mile of each other, to stop and back until she could succeed in getting some response. The officers of the Lee say that such signal was given by them, viz., one whistle, indicating their intention to pass on the starboard side, and that they did not get any responsive signal from the Potomac; hence it was clearly their duty to proceed no further, but stop and back and wait. On the other hand, the descending boat, the Potomac, had a right to control the mode of passing by signaling her intention; and her officers say that she did give the signal of two whistles, indicating her intention to pass on the larboard side, but that they heard no signal from the Lee. Then it was their duty, when within eight hundred yards of the Lee, to stop and back until a communication could be exchanged. This they say they did. Now, if the statements on both sides be true, it is impossible that a collision could have occurred. Eight hundred yards distance was abundantly sufficient to enable them to check their speed and come at least to an entire stand-still before meeting. It is evident that either one, or both, did not perform that duty; they could not both have commenced stopping and backing at a distance of eight hundred yards from each other. This was their special duty under the circumstances. They both admit that no signal from the other was heard. To stop and back, and to commence to do this at eight hundred yards distance, was the specific duty of the moment. One, or both, certainly failed in performing this duty.

Two specific duties were incumbent upon the managers of the respective vessels: First, to signal at the required distance; and, second, on hearing no signal from the other, to commence stopping and backing at the required distance. Which of them neglected, or did both of them neglect, either of these duties? I have carefully looked over all the material evidence in the case, and have read the elaborate briefs of the counsel, and am forced to the conclusion that there was negligence on both sides. It is apparent from the case that both vessels, after having approached within a distance of eight hundred yards of each other, continued to make headway, and that the collision occurred at an intermediate point not far from that which was due to an equal amount of headway on both sides. In other words, so far as I can gather from the evidence, they met about midway of the distance which separated them when the first signal was given. The place of meeting was lower down than the place where the Potomac alleges that she gave her signal, and was higher up than the place where the Lee alleges that she gave her signal, and the relative movements of position of the vessels respectively seem to have been about the same. The evidence of negligence on the part of the Lee is quite clear. Leaving out the interested testimony of her officers, we have that of several passengers on board of her at the time, who all unite in saying that the captain was not on duty at the time, but was sitting in the social hall, engaged in conversation with the passengers, and that he never left the hall until the collision occurred, and that the Lee kept on her usual rate of speed; that no whistle was sounded; that the bells for reversing the

wheels were not rung until the moment preceding the collision, and several of them state that the pilot, before leaving the wharf boat at Natchez, had been drinking with his friends to a considerable extent, and although they seem to speak on that subject with reluctance, they say enough to give the distinct impression that he had taken enough liquor to be somewhat under its influence. Had the captain been at his post and on the lookout, there would have been a better chance of the Potomac's signal being heard on the Lee. On the other hand, laying aside the interested evidence of the officers of the Potomac, and looking to that of those who were free from any such bias, the weight of the evidence seems to be that she did not commence to stop and back until within a short distance of the point of collision—within, at least, the distance of four hundred yards of the Lee.

Mahlon Rush, one of the strikers on board the Potomac, states that he was in the Texas hall and heard the engine bells ring to stop her, and then the two short whistles of the Potomac; he then ran out on the hurricane roof, and as he went out he heard Captain Schunk halloo to the other boat, "stop that boat." He says, "The Lee was about one hundred and fifty yards from us when I heard our bells ring to stop, and she had got within a hundred yards of us before our engines stopped." He corrects this statement afterwards by saying that the boats were about three hundred yards apart, as near as he could judge, when he first went out on the roof. He afterwards says that "the two boats were three hundred yards apart when the engines were stopped, and about two hundred or two hundred and fifty when the starboard engine commenced backing;" and it is conceded that the larboard engine did not back at all. He says also that 'both boats were headed quartering towards the Mississippi shore, right after the collision. John Fink, a passenger on the Potomac, says, "I was sitting by the stove in the hall, engaged in conversation, and about a minute before the collision took place, I heard the Potomac's stopping bell ring; right after that her signal blew; right after that her backing bells rung, and that frightened me, I jumped up and started to the door forward, and I met the bar-keeper coming in at the door, and says he, 'follow me; for God's sake do not go there;' I ran back after him, and about two-thirds of the way towards the stern, when I felt and heard the jar of the collision between the two boats." It is evident from this testimony, and much more could be cited to the same effect, that the stopping and backing of the wheel, the giving of the signal by the whistle, and the collision, all followed one another in rapid succession, and that no sufficient interval of time between these successive events occurred to render it possible that the Potomac commenced the process of stopping and backing at a distance of eight hundred yards from the Lee, or anything like that distance.

I cannot review the evidence in detail. I can only say that after having carefully examined it, I am forced to the conclusion that there was some neglect, at least, on the part of the Potomac in reference to the duty of stopping and backing, and I am by no means satisfied that her signal was given by the whistle at the required distance from the approaching steamer. The rules and regulations adopted for the government of pilots of steamers navigating the rivers flowing into the Gulf of Mexico, are explicit on the subject of the precautions to be observed when steamers are about to meet and pass each other. (The justice here read the first and second rules, which require signals to be exchanged as soon as the vessels are within eight hundred yards of each other, indicating the side on which they will pass each other; and, if not exchanged and understood, requiring them to stop and back.) These directions are so plain and easy to be observed, that no vessel should be regarded as without fault which fails substantially to follow them. In my judgment there was such a failure on both sides in this case, which caused this disaster. I think there is stronger evidence of negligence on the part of the Lee than on the part of the Potomac. If I were permitted to gauge the demerit of the parties, I should be inclined to do so; but the law does not permit this to be done. If both parties are in fault, the damage is to be sustained by them equally. As to the actual damage which was allowed on the one side and on the other, having examined the master's report and the decree, I see no reason for disturbing the result to which the district court came.

A question is made with regard to the allowance of profits to a damaged steamer whilst undergoing repairs. It is well settled by the decisions of the supreme court, and by the general practice in admiralty in this country, that demurrage forms a fair subject for the allowance of damage in such cases. The Granite State, 3 Wall. [70 U. S.] 310; The Black Prince, Lush. 568. I think there is no error in the decree in this regard. The amount of damage allowed for the time the respective vessels were laid up, seems to have been reached in a proper manner. The average net earnings of the Lee for a certain period of time, embracing that of her detention for repairs caused by this collision, were taken as the basis of ascertaining the amount due to each trip, and the number of trips lost was a subject of very simple calculation. The value of the Potomac's time whilst she was laid up was based upon the evidence and declarations of those concerned in her, and was fixed at $100 a day. From the evidence before the master, I am disposed to think that the allowances were correctly made.

I have more difficulty with regard to a charge made against the Lee for the insurance money which she received from her underwriters. That is ordinarily a matter with which her adversary, in a case of collision, has nothing to do, and it seems to me a little hard on the owners of the Lee that they should not be permitted to apply their insurance to that portion of their damage for which they have no redress against the other vessel.

The result of the decree is to give to the owners of the Potomac the benefit of the insurance money belonging to the Lee, by deducting it from the moiety of the damage sustained by the Lee, for which the Potomac was made liable, instead of deducting it from, or allowing it to go upon, the other moiety for which the owners of the Lee have no recourse against any person. Had the owners of the Potomac refunded this amount to the underwriters upon the claim of the latter to be subrogated to the rights of the Lee against the Potomac, it might have been different, but as I understand the evidence, the underwriters made no claim against the owners of the Potomac, but voluntarily released all demands against them, and assigned to them any supposable rights they may have had. I am not satisfied that this transaction entitles the owners of the Potomac to have the amount of the insurance deducted from the moiety of the damage to the Lee, for which they were responsible. In my judgment, therefore, the decree should be corrected in that respect, and the owners of the Potomac should be made liable to pay one-half of the damage sustained by the Lee, without any such deduction. The decree will be drawn accordingly.

[NOTE. From the decree herein an appeal was taken by the claimants of the Potomac to the supreme court, where the circuit court decree was reversed, in so far as to deduct from the sum of $6,047.37, awarded to the libellant for one-half the excess of damages sustained by the Lee, the sum of $2,476.51, being one-third of the sums paid to him by the insurance companies, and in all other respects the decree was affirmed.

[The court held, in the opinion delivered by Mr. Justice Gray, that the Lee being engaged in, and peculiarly fitted out for, a particular business, the measure of allowance for the damages caused by her detention by reason of the repairs rendered necessary by the collision might be arrived at by averaging the net profits of her trips for the season, in the absence of any other satisfactory way of ascertaining her charter value, and that as the amount for which the Lee was insured was only two-thirds of her valuation, leaving the owner to stand his own insurer for the remaining third, and as the damages to be recovered were for the injury to his whole interest, and the insurer had no right to more than two-thirds of the damages recovered, the insurers, therefore, within the limit of their policy, were responsible to the assured for the entire damage to his vessel, and not merely for the moiety thereof, which, because of the fault on her part, as well as on the part of the other vessel, was all that he could recover against the latter, and the sum paid to him by the insurers was as equally applicable to the portion of the damages for which he could not recover against the other vessel as for that portion for which he could; consequently, only one-half of two-thirds, or one-third of the sum paid to libellant by the insurers, could be treated as paid on account of the damages, and that third only could be deducted from the damages. The Potomac v. Cannon, 105 U. S. 630.]

Case No. 2,386a.

CANNON et al. v. VOSE et al.

[Betts' Scr. Bk. 554.]

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

CHARTER PARTY — PAYMENT OF CHARTER MONEY.

[In admiralty. Libel by William Cannon against Francis Vose and others. Reference ordered.]

Platt, Gerard & Buckley, for libelants.

Benedict, Burr & Benedict, for respondents.

BETTS, District Judge. This was a libel filed by the owners of the brig Excelsior to recover from the defendants an alleged balance of $550 upon a charter of the brig to them for a voyage to Port au Prince and back for the sum of $1,400, of which one-half was by the charter to be "considered earned and due on discharge of outward cargo, but payable by the charterers in New York, except what might be required for disbursements in Hayti to the amount of $150." The one-half of the charter money was admitted to have been received and $150 of the other half. The respondents set up that the master of the brig allowed her to be seized for debts incurred for her at Port au Prince, and they advanced moneys there to free the vessel to the amount of $511.10, and the balance, $188.90, they paid after suit brought. The question was whether what they had paid at Port au Prince was to be credited upon the charter money beyond the $150 specified in the charter.

Ordered, that it be referred to a commissioner to ascertain whether the sum of money paid by the respondents to the master of the vessel at Port au Prince, or upon his draft at that place, or paid the libelants since the commencement of the suit, satisfies in full the $700 payable on the charter party, together with costs of suit due at the time of payment thereof.

CANOE (UNITED STATES v.). See Case No. 14,718.

Case No. 2,387.

CANON CITY & S. J. RY. CO. v. DENVER & R. G. RY. CO.

DENVER & R. G. RY. CO. v. ALLING et al.

[Trans. Rec. U. S. Sup. Ct. Oct. Term, 1878, p. 9884.]

Circuit Court, D. Colorado. June 1, 1878.[1]

RAILROADS—RIGHT OF WAY OVER PUBLIC LANDS—THE GRAND CANON—APPROPRIATION—CONFLICTING RIGHTS—PRINCIPAL OFFICE.

[1. The certificate of incorporation filed by the Denver and Rio Grande Railway Company, under Rev. St. Colo. c. 18, defining its line in part as continuing from a point at or near Canon City "up the valley of the Arkansas through the Big canon of the same to a point at or near the mouth of the South Arkansas river," was not such an appropriation of the right of way through the Grand canon as was contemplated by the act of June 8, 1872 (17 Stat. 339), recognizing the incorporation of that company under the Territorial Laws of Colorado, and granting and confirming to it a right of way.]

[See note at end of case.]

[2. The surveying and staking of the proposed line of road by such railway company did not amount to an occupation and appropriation of the right of way granted to that company by the act of 1872.]

[See note at end of case.]

[3. Nor was the building of the road from Pueblo to Canon City such an occupation and appropriation,—as it appeared that the company had halted at the latter place for three years, and had constructed another line of road on a route inconsistent with an intention to extend its line beyond Canon City.]

[See note at end of case.]

[4. A certificate of incorporation of a railway company, designating its "principal place of business," and setting forth that its principal business would be carried on in certain counties named, in which its line was to be located, is a substantial compliance with Act Colo. 1876, (11th Sess. 41), requiring such a certificate to designate the "principal office," and name of the county, in which the principal business of the corporation is to be carried on.]

[See note at end of case.]

[5. The Canon City and S. J. Ry. Company alleged that it had surveyed its line of road, and on a hearing as to the propriety of injunctions previously granted restraining that company and the Denver Company from interference with each other in the construction of their respective roads supported such allegation by exhibiting a copy of the profile of the line through the Grand canon apparently approved by the secretary of the interior. *Held*, that the court would regard the survey and location as having been made in accordance with the act of March 3, 1875 (18 Stat. 482), granting a right of way to any duly-organized railroad company which shall have filed proofs of its organization with the secretary of the interior, and requiring such a company, within 12 months after the location or survey of 20 miles of its road, to file a profile of its road with the register of the land office for approval by the secretary of the interior; and that, therefore, the right to occupy and use the canon for railroad purposes vested in the Canon City Company as against the Denver and Rio Grande Company.]

[6. Under Act Cong. March 3, 1875, providing for the use of any canon, pass or defile by more than one railroad company, two roads, granted a right of way through a canon, have the right to construct their lines if it is physically possible, irrespective of the width of way granted.]

[On April 20, 1878, the Canon City & San Juan Railway Company filed its complaint against the Denver & Rio Grande Railroad Company to enjoin interference with the construction of the line of the former company through the Grand canon. The complaint was filed in the third judicial district of Colorado, and an injunction was granted therein, and on the 22d of April, 1878, the suit was removed to the circuit court.

[The Denver Company filed its complaint against Alling, Locke, and Magrue, incorporators of the Canon City Company, and against the Atchison, Topeka & Santa Fe Railway Company, on the 27th of April, 1878, to enjoin the defendant the Canon City Company from occupying or attempting to occupy the Grand canon, and a temporary injunction was granted.

[On June 22, 1877, the secretary of the interior declared in an official communication his approval of the proofs of organization of the Canon City Company, and of a map showing the line of its road for a distance of 20 miles.[2]

[The portions of the act of March 3, 1875, referred to herein granted a "right of way through the public lands of the United States" to any railroad "company duly organized under the laws of any state or territory, * * * which shall have filed with the secretary of the interior, a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road." The 2d section provides: "That any railroad company whose right of way or whose track or road-bed upon such right of way passes through any canon, pass or defile shall not prevent any other railroad company from the use and occupancy of said canon, pass or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. * * *" Section 4 declares that any railroad company desiring to secure the benefits of that act shall, "within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located, a profile of its road; and upon the approval thereof by the secretary of the interior, the same shall be noted upon the plats in said office, and thereafter all such lands over which such right of way passes should be disposed of subject to such right of way."] [2]

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

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[1] [Reversed in Denver & R. G. Ry. Co. v. Alling, 99 U. S. 463.]

[2] [From statement by Mr. Justice Harlan, in Denver & R. G. Ry. Co. v. Alling, 99 U. S. 463.]

HALLETT, District Judge. Two companies claim the same right of way for a railroad through the Grand canon of the Arkansas river where there is room for only one road. That remarkable defile is in the public domain, and each company claims under an act of congress. The interpretation and application of these acts present a question under the laws of the United States which may properly be considered in this court pursuant to the provisions of the act of 1875 (18 Stat. 470). The jurisdiction in equity to determine the right and restrain any disturbance of it is not doubted since there is no adequate remedy at law. The first of these suits was brought in the district court of Fremont county, and an injunction was there allowed restraining the defendant company from prosecuting work in the canon. After some days that suit was removed into this court on petition of the defendant therein under the authority of the act of 1875, and the defendant in that suit brought a new suit in this court against the corporators of the first named company and some others to enjoin them from disturbing its right to occupy the canon. The reason for bringing this last suit against the corporators of the San Juan Company and not against the company itself is an irregularity in the organization of the latter company on which the plaintiff relies to impeach its validity. Argument was heard in the last mentioned suit on a motion for injunction, and perceiving that the same matters were involved in both suits and that the right was somewhat doubtful, it was thought best to continue the injunction in the first suit and allow a like writ in the second; in effect to place both parties under restraint until mature consideration of the questions presented could be had. The bill in the first suit was something lame and impotent, and the plaintiff therein was allowed to file an amended bill upon which a writ was issued of the same scope and effect as that allowed in the second suit. As the controversy stands both parties are enjoined from prosecuting the work of a great public improvement where one must be entitled to go on, and therefore the court should not halt between opinions.

Both cases will be taken into view in this discussion and the allegations in each bill, so far as they are not in conflict, will be taken as true. It is believed that enough is admitted in the records of the two cases to determine the right to a preliminary injunction. The Denver and Rio Grande Railway Company, defendant in the first suit and plaintiff in the second, has the senior claim, and in ascertaining its right we shall reach the principal question in the case. That corporation was organized in the year 1870, under chapter 18 of the Revised Statutes of the territory (Rev. St. p. 115). The object of the corporation, as expressed in the certificate, was to construct a number of railway and telegraph lines, or perhaps it would be more correct to say a trunk line with numerous branches. The principal line was to be extended from Denver through Colorado and New Mexico to El Paso in the state of Chihuahua, and there were to be seven branches, one of them extending to Salt Lake City in Utah, and the others to various points in Colorado and New Mexico. These lines were defined generally in the certificate as extending from place to place, or lying in the valley of some stream or through some canon or pass in the mountains, but no attempt was made to give courses and distances, or to specify in any other way the exact location of the routes selected. Indeed it seems that the various lines had not been fixed except as to the general direction, and no survey had been made by which they could be definitely located. Referring to the principal line which was more particularly defined than any of the branches, the part which includes the disputed territory is as follows: "Commencing at Denver, Colorado Territory, thence running up the valley of the South Platte river, on the southeast side thereof to a point at or near the mouth of Plum creek; thence up the valley of Plum creek to a point at or near the forks of East Plum creek and West Plum creek; thence up the main east branch of Plum creek valley to the lake in township eleven (11), range sixty-seven (67) west, on the crest of the ridge dividing the waters of Plum creek and Monument creek; thence down the valley of the Monument creek to a point at or near the junction of the valleys of the Monument and Fountain qui Bouille, or to a point in the Fountain valley below the mouth of the Monument, if the detailed survey shall determine the latter to be the most eligible; thence by the valley of the Fountain or across its west tributaries to such a point on the Arkansas river, at or above Pueblo, as may be found upon a detailed survey to be the most eligible for intersecting the same; thence up the valley of the Arkansas river to a point at or near Canon City; thence continuing up the valley of the Arkansas through the Big canon of the same to a point at or near the mouth of the South Arkansas river; thence by the valleys or the adjoining slopes of the South Arkansas river and of the Poncho creek, to the summit of the divide between the waters of the Arkansas and the San Luis park (known as Poncho Pass); thence by the most eligible route in a general southerly direction down the San Luis valley to the valley of the Rio Grande del Norte."

Everyone who is at all acquainted with the geography of the country, will know that the line between the mouth of Monument creek and Canon City, as thus described, embraces a strip of country more than forty miles wide, in which the road might have been located. If it was more restricted in the mountain region beyond Canon City, it was because the valley of the Arkansas was narrower there, and not from any effort of the corporation to

describe the line with accuracy. Further on in the San Luis valley, which is many miles wide, it takes the whole valley for its location, and so also down the Rio Grande river through New Mexico. It is to be observed, however, that the act under which the corporation was organized did not require any description of the lines of road to be constructed, or even that the termini of the roads should be stated. But it did require a statement of the objects of the company, and in the case of a railroad perhaps that would be most conveniently done by giving some general description of the road. That was a general act providing for many different corporations, which was probably intended to comply with the direction of congress in 1867, that territorial assemblies should not grant private charters, but could, by general acts, permit the incorporation of persons for mining, manufacturing and other industrial pursuits. 14 Stat. 426. It contained general provisions applicable to all corporations which should be organized under it, and special provisions which were applicable to some; only railroad companies were not of this latter class, but were left to the general provisions of the act, which required no designation of the route or termini of the road further than would be necessary in stating the objects of the company.

Without other authority than was given by this general act of the territory, the company built its road to Pueblo. On the 8th day of June, 1872, congress passed an act granting to the company right of way over the public lands, and confirming the powers given to the company by the territorial law. The act requiring the company to build its main line as far south as Santa Fé, within five years, which period is by a later act extended to ten years. 19 Stat. 405. The material part of the act for present consideration is as follows: "That the right of way over the public domain, one hundred feet in width on each side of the track, together with such public lands adjacent thereto as may be needed for depots, shops, and other buildings for railroad purposes, and for yard room and side tracks, not exceeding twenty acres at any one station, and not more than one station in every ten miles; and the right to take from the public lands adjacent thereto, stone, timber, earth, water, and other material required for the construction and repair of its railway and telegraph line, be, and the same are hereby granted and confirmed unto the Denver and Rio Grande Railway Company, a corporation created under the incorporation laws of the territory of Colorado, its successors and assigns." 17 Stat. 339.

On behalf of the Rio Grande Company it is contended that this act conferred an exclusive right to occupy the Grand canon of the Arkansas river for railroad purposes; that the certificate of organization is a public record of which congress had notice at the time of passing the act, and as the canon is mentioned in the certificate as a point on the line of the road, the company was authorized and required to build in that place. And certainly it will be conceded that congress was advised of everything that the law required to be stated, and that was in fact stated in the certificate of incorporation. That certificate was evidence of the corporate existence under the territorial law, and congress, in recognizing the company and confirming to it the powers given by the law of the territory, must have acted with reference to it. And so if the act had required the corporators to describe the various lines of road which the company proposed to build, and they had so described them with particularity in the certificate, the effect of the act of congress would not be doubtful. In that case the act of congress would operate as a present grant of the particular way or ways described in the certificate. But the certificate does not in fact locate the different lines of road with such particularity as is required in granting a right of way. Said the supreme court of Massachusetts: "A way ex vi termini imparts a right of passing in a particular line." Jones v. Percival, 5 Pick. 485. And if the line is not described with reasonable certainty it cannot be said that the grant is of a particular way by description. No one will contend that a grant of right of way to a railroad company, either by the government or an individual, must specify the exact line of the road, but at least the track to be traversed by the road must be designated. The description must come within something less than forty miles of the line of location. In this certificate there is nothing like a description of any particular line. The mention of points and places on the various lines was but an indication of the general course and direction of those lines and the statement that the line should be in a certain valley was not more definite. Like the mouth of Monument creek, the Arkansas river, Canon City, and other points on the line, the object of naming the Big canon of the Arkansas river was apparently to give the general course of the road. Certainly it cannot be said that naming these points and places is a sufficient description to charge the public lands along the line with an easement of which purchasers would have notice. If it is claimed that we should separate the big canon from the remainder of the line and accept that portion as sufficiently described because its mighty walls enclose a narrow space, the proposition cannot be entertained. The grant is an entirety as to all public lands lying in the course of the several lines of road, and it would be absurd to say that it was intended to pass this canon by description and nothing more. Congress had already learned the strategical value of passes and defiles in the mountains, and when it was intended to grant such places by description the right of other companies to oc-

cupy the same ground was reserved. 17 Stat. 202.

We may say, that this was no grant of a particular way over the public domain, and we have yet to consider its effect as a general authority to appropriate the public lands to the uses of the company. That it is in terms such a grant, no one can deny and we should hesitate to say that it may be void for uncertainty. We may concede the power of congress to charge all the government lands in perpetuity with a floating easement which may be asserted at any time against innocent purchasers who have bought of the public lands in good faith, but we should be slow to believe that such was the intention unless it is plainly declared. If by the act of 1872 the company acquired a present right to appropriate for right of way and stations any lands that were then public lying in the general course of any of its lines farms, villages and towns that have been taken up since that time must yield to such right. It is not to be presumed, however, in the absence of express declaration that such a result was intended by congress. "If A seized of a great waste, grants the moiety of a yard land lying in the waste without ascertaining what part, or the special name of the land, or how bounded, this may be reduced to a certainty by the election of the grantee. But it is otherwise in the case of the king's grant for there can be no election in that case and therefore the grant is void for uncertainty." Bac. Abr. tit. "Grant," H. 3. And so we may say in accordance with the principle that a grant to a corporation shall be strictly construed in favor of the public and against the corporation, that the act of 1872 gave nothing except upon the location and construction of the road. In the general act of 1875 (18 Stat. 482), and in most special acts granting right of way over public lands (16 Stat. 395; 17 Stat. 202, 212, 224, 340, 343, 393, 612; 18 Stat. 130, 274, 306, 309), provision is made for filing a plat of the route selected with the secretary of the interior, and the line of the road is then minuted on the plats of the public surveys in the local office. In this way full notice is given to purchasers and all who may be interested in the subject of the right claimed by the company. Any sale of the lands must be made subject to the easement, and hence the necessity for specifying the lands so to be affected. Under these acts it seems very clear that no right is secured by the company until the plat is filed with the secretary. In the act of 1872, and in some other acts (14 Stat. 211, 237, 240, 290, 294; 16 Stat. 192; 17 Stat. 280), no such provision is found, and the omission suggests that some other method of designating the lands appropriated by the company was intended. That method, in the absence of any other prescribed by law, can only be the use and occupation of the lands for the purpose indicated in the act. As under acts of the first class the company will not acquire any interest in the public lands until the plat shall be filed, so under acts of the second class no interest is acquired until the lands are occupied by the company. Under all acts regulating the sale of public lands the grantee is required to designate the part which he will take in order that it may be segregated from the general mass; it is so under homestead and pre-emption laws and all other laws for disposing of public lands unless the acts of this class shall be regarded as an exception. Certainly there can be no hardship in requiring these companies in accepting the bounty of the government to conform to the general rule. Referring to a similar act the supreme court of California says: "It was doubtless the purpose of the act merely to give a right to enter on the public lands, assuming them to be vacant, and its effect is to relinquish to the plaintiff (the R. R. Co.) any claim for compensation that might belong to the United States, as proprietor under any proceeding under the state law to appropriate the land for public use." Northern R. Co. v. Gould, 21 Cal. 260. So here it may be said that the act of 1872 authorized the company to go upon such of the public lands as should be found vacant and unoccupied, and appropriate them to the uses of their roads. In this sense it was a grant in presenti, but not otherwise, and any rights in the public lands secured by others under existing laws before any occupation or appropriation by the company, must be respected by the latter. In Central Pac. R. Co. v. Dyer, Case No. 2,552, this conclusion was apparently rejected upon grounds which are not stated, but I have not been able to adopt the views of the distinguished judge who delivered the opinion in that case.

Having ascertained that no interest in the lands in controversy passed to the company under the act of 1872 until it should appropriate them to its own use, we have next to inquire whether there was in fact any such appropriation of the Grand canon before the rival company set up a claim to it. On this point the company avers: First. That in the years 1871–2 it surveyed and located its line through the canon, and set substantial stakes upon it. Second. That it did in the same years "in sundry places in and near said canon grade and excavate the bed and line of its said railway." Third. That about the year 1875 it completed its road from Pueblo to Canon City.

If any of these acts afford evidence of occupation and appropriation by the company such as the public were bound to respect, its right was thereby established. That the surveying and staking does not afford evidence of that character is clear enough on

reason and authority. Merritt v. Northern R. Co., 12 Barb. 606; Morris & Essex R. Co. v. Blair, 1 Stock [9 N. J. Eq.] 635. As I had occasion to say some years ago in another case which arose under a similar act of congress, the modern practice of surveying several routes in order to induce the people to give lands, bonds or other aid, or give the right of way on favorable terms, in consideration of the building of the road on one or the other of the lines so surveyed, must tend strongly to discredit any such evidence of location. Indeed railroad companies, in this country at all events, are constantly surveying new routes in an experimental way, and no one is disposed to accept anything less than the building of the road itself as evidence of a permanent location. As to the work alleged to have been done "in and near" the canon, it will be observed that the language of the bill is exceedingly vague. If a road-bed was constructed for any considerable distance, which would in itself afford evidence of the character of the improvement, that would be an act of appropriation which no one could deny. But to overturn a few shovelfuls of earth here and there would not leave any intelligible sign of the company's occupation. The charge in the bill is entirely consistent with very little work, and for the present purpose of determining the right to a preliminary injunction it must be regarded as insufficient. If at the hearing it can be shown that substantial work was done there another view may be taken of it. As to building the road from Pueblo to Canon City, if before any adverse occupation of the canon the company had shown a purpose to go on from the latter place, some weight might be given to it. With a line located and in process of construction from place to place no other company would be allowed to interfere, under an act even more vague and indefinite than that of 1872. But the company halted for three years at a town at the base of the mountains, which might be regarded as a permanent terminus. Meanwhile if reference may be had to a fact which is not in the pleadings, but may be taken as belonging to the history of the country, the company reached the San Luis valley by another line, and that is in the course of the line through the Grand canon towards El Paso. These circumstances do not show a purpose to prosecute the work beyond Canon City, but they tend in the opposite direction; and this must also be rejected as failing to show occupation and appropriation by the company.

At the time this controversy arose the land in and along the Grand canon was of the public domain and still subject to occupation and appropriation under the act of 1872, if it had not been previously appropriated by the rival company. That company is known in the pleadings as the Canon City and San Juan Railway Company, and its corporate character is denied upon the ground that its certificate of incorporation is defective. The act of 1876 (11 Sess. 41) provides among other things to be set out in a certificate of incorporation, "the name of the town or the place and the county in which the principal office of the company shall be kept and the name of the county in which the principal business of the company shall be carried on." A substantial compliance with this act was all that was required. Spring Valley Waterworks v. San Francisco, 22 Cal. 434. As to the first clause requiring the office of the company to be designated the corporators of the San Juan Company declared in their certificate "the principal place of business of said company shall be Canon City, in the said county of Fremont." In the case of a railroad company the "principal place of business" is obviously the "principal office." With manufacturing corporations this may not be true, but a railroad company having business all along its line has no principal place of business other than its general or principal office.

As to the second clause of the act above recited, which requires the county in which the principal business will be carried on to be stated, it was sufficiently observed by stating the counties in which the road was located. As before observed, the company will do business wherever the road may run, and its "principal business," if that can be separated from the general office, must be along the whole line of road. If this clause of the act has any application whatever to railroad companies it ought to be sufficient to state the counties through which the road will pass. It would seem idle to state separately after giving the location of the road in the certificate that the principal business of the company would be carried on in the counties of Fremont and Lake, where the road would be built. The certificate is regarded as complying substantially with the act and therefore sufficient.

The act of 1868, on the same subject (Rev. St. p. 118), under which the Rio Grande Company was organized, was quite different. It required "the name of the town and county in which the operations of the said company shall be carried on" to be given; and the corporators of that company designated the principal office, but did not attempt to locate the "operations" of the company in any town or county. If any defect arose out of that omission it was probably cured by the act of congress of 1872. In the bill filed by the Rio Grande Company it is alleged that the defendant never did in fact survey any line through the canon, and this, if true, may be of weight. The latter company, however, in its bill avers that the survey was duly made and the allegation is supported by a copy of the profile of the line which appears to be approved by the secretary of the interior. For the present we

must regard the survey and location of that line as having been made according to the act of 1875 (18 Stat. 482), and sufficient to vest in the company the right to occupy and use the canon for railroad purposes as against one claiming under the act of 1872.

That the Rio Grande Company may be admitted to the same right of way if there is room for two roads in the canon seems to be clear, and perhaps that company may be entitled to use the track of the San Juan Company if there is room for but one road. This last question may be passed for the present, and as to the first it is only necessary to say that both companies cannot go on with the work of construction at the same time in a narrow defile, such as the canon is said to be. To permit it would be to perpetuate the conflicts which we were lately asked to suppress. If the San Juan Company must admit its rival to its right of way or to its track, that can only be done after its road has been built. In building its road through the canon, however, due regard must be had to the rights of the other company, and the line must be so located as to admit of the construction of another road, if that be possible. Under the act of 1875 one company cannot appropriate all the available ground in a canon, pass or defile to the exclusion of another, if less than the whole will reasonably answer its purpose. To enforce this provision perhaps the court, upon proper demand therefor, should control the location and building of the first road to such extent as may be necessary to protect the rights of other companies who may wish to use the same canon. This question can be better considered at the term which is near at hand, and the parties may then be heard as to the proper course to be pursued. Until then the San Juan Company will be allowed to proceed with the work of grading the line only which will admit of change and correction without serious loss to the company. That is to say the company may proceed in its own way to grade the road, but we reserve the right to correct the location and grading upon complaint made to us by the Rio Grande Company, if we find that we have power to proceed in that manner.

DILLON, Circuit Judge. The Denver and Rio Grande Railway Company has the right to construct its railroad through the Big canon of the Arkansas under the act of congress, June 8, 1872 [17 Stat. 339]. The Canon City and San Juan Railway Company has the like right under the act of congress of March 3, 1875 [18 Stat. 482]. The first named company's rights as against the last named company, or any company duly organized, were not complete and exclusive as to any part of the canon until actual location and adoption of its line by corporate acts or action followed by actual use and appropriation. That this was done by the first named company prior to March 3, 1875, does not appear with such certainty in the bill or pleadings, as to afford a basis for a judicial order in its behalf. Assuming, therefore, at this stage of the cause, that there was no consummated exclusive right in the Denver Company at the time when the Canon City Company was organized (Feb. 15th, 1877), we have the case of a concurrent right in the two rival companies to construct their roads through the canon and to use and occupy the canon for that purpose. The second section of the act of March 3, 1875, contains a special provision which in the supposed state of facts applies to these companies. It provides that "any railroad whose right of way or whose track or road bed upon such right of way, passes through any canon, pass, or defile, shall not prevent any other railroad company from the use and occupation of the said canon, pass, or defile, for the purposes of its road in common with the road first located, or the crossing of other railroads at grade." I concur in Judge HALLETT'S opinion that the pleadings as they stand do not show a state of facts which give the Denver Company an exclusive right to the use of the canon. What the proofs may hereafter show cannot of course be anticipated.

The canon is alleged to be only forty-five feet in width at the narrowest portion. It is alleged by the Denver Company that not more than one railway with way of the width in the act of congress granted (100 feet in width on each side of the track) can be constructed through said canon. But it does not appear that it is physically impossible to construct two lines of railway through the canon. The intent of congress is plain that canons and defiles in the public domain shall not be monopolized by one company. If there is room for two lines in this canon, each company, so far as now appears, has the right to use and occupy the canon for the construction of its road. Usually thirty feet in width, and even less, is ample space for two parallel lines of railway track. If each company desires to construct its line through the canon each should be permitted to do so, if it is practicable. If a center line be drawn through the canon, one company should be restricted to the space on one side of that line and the other to the space on the other side of that line, if this will allow of the construction of the two lines of railway in the canon, and no other course is more equitable. If it is uncertain whether the course above suggested is practicable, i. e. whether there is space for the two lines of railway in the canon, a commission of one or more disinterested engineers can be hereafter sent by the court to report the facts to the court for its information. If only one road can be constructed there, on the pleadings and the present status of the case, I think the Denver Company is not entitled to an injunction against the Canon City Company. If both companies

are ready to go forward to construct their roads immediately, one company should not be permitted to adopt a route which will prevent the other company from an equal, fair and reasonable use of the canon. "Equality is equity." Such are my general views as to the law of the case as it is now presented.

The precise order that ought to be made at this time is somewhat uncertain, by reason of an allegation by way of an amendment to the bill of the San Juan Company, which the demurrer admits. That amendment is as follows: "Plaintiff further avers that by reason of the narrow and crooked course of said canon through the close or narrow part thereof, not more than one railway can be constructed through the said narrow part, except by laying the track of one of said railways across the track of the other in many places, nor without great and constant hazard of collisions between the trains operated on said two railways." It may be taken sufficiently to appear as the case stands, that both companies cannot go on with the work of construction at the same time. It does not to my mind satisfactorily appear that there may not be room for two lines in all parts of the canon. The San Juan Company as above held on the pleadings, as they now stand, has the prior right of occupation, and it may, if it chooses, go on with the work of grading and construction between this and the term (which occurs in a little more than a month), meanwhile to lay no iron until further orders, and meanwhile the Denver Company to be enjoined. The Denver Company can then show that the San Juan Company are proceeding improperly with a view unfairly to monopolize the entire route and to exclude it if such is the fact. We can then adopt such course and make such orders as may appear to be right and just to each of the companies. Knowing our general views of their respective rights under the two acts of congress, it may not be too much to hope that they may adjust the controversy by agreement. I recommend a temporary order in conformity with these views if Judge HALLETT concurs.

[NOTE. In the action instituted by the Canon City Company the Denver Company filed a cross bill setting up substantially the same facts as in its original bill against Alling and others, and upon the final hearing two decrees were made, August 24, 1878,—one, in the suit of the Canon City Company, recognizing its prior right to proceed in the construction and operation of its road through the Grand canon without interference or obstruction by the Denver Company, with the right to the latter to thereafter exhibit its bill to compel the Canon City Company to so change, locate, and construct its road as to permit the convenient and proper location by the Denver Company of its own road, or to compel the Canon City Company to permit the Denver Company to occupy the track and roadway of the former company if at any point in the canon it should be impracticable to conveniently lay down or safely operate two distinct lines of railway; the other dissolving the preliminary injunction theretofore granted in the suit of the Denver City Company, and dismissing its bill.

[From both of these decrees the Denver City Company appealed to the supreme court, which reversed the same, holding that by the act of June 8, 1872 (17 Stat. 339), the Denver and Rio Grande Railway Company was granted a present beneficial easement over the route designated, which, upon actual location and appropriation, made a perfect title, and by relation took effect as of the date of the grant; and that the surveys of such company, followed by an occupancy of the canon in April, 1878, in advance of the Canon City and San Juan Railway Company, for the purpose of constructing the road, was a final appropriation of the way granted; but that the Denver Company, by its acceptance of the benefits of the act of March 3, 1877, extending the time for completing its road, must be held to have assented to the provisions of the act of March 3, 1875 (18 Stat. 482), that any other railroad company duly organized under the laws of any state or territory might use and occupy the canon for the purposes of its road in common with the road first located; and that in this case, where it was found impossible in any portion of the canon to lay more than one road-bed and track, the Canon City Company should have the right to use such road-bed and track in common with the Denver Company after its completion. Denver & R. G. Ry. Co. v. Alling, 99 U. S. 463.]

CANSEY v. The SHARK. See Case No. 2,526.

CANTER (UNITED STATES v.). See Case No. 14,719.

Case No. 2,388.

The CANTON.

[1 Spr. 437;[1] 21 Law Rep. 473.]

District Court, D. Massachusetts. Oct., 1858.

SEAMEN'S WAGES—LIEN—MARITIME SERVICE—LACHES.

1. Persons employed to load, navigate, and unload a vessel plying between Quincy and Boston, principally for the transportation of stone, she being licensed for the coasting trade, and being propelled by sails and the usual apparatus of a coaster, have a maritime lien upon such vessel for their wages.

[Applied in The May Queen, Case No. 9,360. Cited in The Sarah Jane, Id. 12,349; The Norfolk, Id. 10,297. Distinguished in The Sarah E. Kennedy, 29 Fed. 266.]

[See note at end of case.]

2. Where the contract of service is for the navigation of tide waters, and laying stone in wharves is merely incidental and subsidiary to the principal business, the whole service may be maritime.

[Cited in The Charles F. Perry, Case No. 2,616; The General Cass, Id. 5,307; Raft of Spars, Id. 11,527; The Artisan, Id. 568; The Champion, Id. 2,584; The Minna, 11 Fed. 760. Distinguished in The Ole Oleson, 20 Fed. 384.]

3. But if the navigation is merely incidental and subsidiary to some other business, which is not maritime, the contract, as a whole, will not be maritime.

4. A vessel's being sailed by the master, on shares, does not affect the lien of the seamen

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

for their wages. Their knowing that she was so sailed, makes no difference.

[Cited in The Galloway C. Morris, Case No. 5,204; The Montauk, Id. 9,717; The International, 30 Fed. 376; The L. L. Lamb, 31 Fed. 33.]

[See The Bambard, Case No. 831.]

5. The lien for wages is not lost by delay in enforcing it, where no third person has acquired any right to the vessel, and the owner has not been injured by the delay.

[Cited in The Helen M. Pierce, Case No. 6,332; The Sirocco, 7 Fed. 600.]

[See Holmes v. The Lodemia, Case No. 6,642; Freeman v. The Jane, Id. 5,086; The Dubuque, Id. 4,110; The Artisan, Id. 567; Anderson v. The Solon, Id. 363.]

In admiralty. This was a libel in rem, for wages earned on board of the sloop Canton, of thirty-five tons, during the summer of 1856. The answer alleged, 1st. That the libellants were not seamen, nor engaged in maritime service, and that no lien existed for their services; that the vessel was employed in freighting and laying stone in and about Boston, and between Quincy and Boston. 2d. That in accordance with the general custom at Quincy, this vessel was hired by the master, on shares, and that he victualled and manned her; that this fact was well known to the libellants when they were hired by him; and that this knowledge, coupled with the fact, that they received pay from time to time, from the master, was evidence that they trusted solely to the master for their pay, and so waived any lien that they might otherwise have had. 3d. That the claim was stale, and no lien could be enforced at this time. And in support of each of these grounds of defence, the claimants relied upon the case of Packard v. The Louisa [Case No. 10,652].

C. P. Curtis, Jr., for libellants.

H. F. Smith, for claimants.

SPRAGUE, District Judge. This is a libel in rem, for wages. The services are not denied; but the claimants, in the first place, contend that the employment of the libellants was not maritime in its nature; and this defence finds countenance in the case of Packard v. The Louisa [Case No. 10,652], which vessel was similarly employed. The only question actually decided in that case was, whether, after the expiration of three years, during which time the vessel had gone into the hands of bona fide purchasers, without notice of the claim, the lien could be enforced; and it was very clear that it could not. Whatever remarks may have been made upon other points, by the learned judge of the circuit court, were obiter dicta, not necessary to the decision of the case. Indeed, they were scarcely dicta, for the judge merely indicated the inclination of his mind, without expressing any decided conclusion upon the questions. I do not, therefore, regard them as binding authority upon this court.

There is another case, however, of more direct bearing,—Thackarey v. The Farmer [Id. 13,852],—in which Judge Hopkinson refused to issue process for wages against a vessel of forty-two tons, engaged in transporting fuel from Cooper's creek, across the Delaware river, to Philadelphia. The libel in that case alleged the services to have been rendered on the high seas; and that learned judge tried to draw a line of distinction, which should exclude small craft, engaged in local business, such as the transportation of fruit, provision, or fuel, on the Delaware, from admiralty jurisdiction. Some confusion seems to have existed in his mind, touching the necessity for the services being rendered on the high seas, in order to give a lien therefor. But it is clear, that services on tide-waters, or navigable rivers, may create a maritime lien. There are many decisions to this effect, and Judge Hopkinson himself has so held, in the case of a steamer plying between different ports on the Delaware river. Smith v. The Pekin [Case No. 13,090]. Now, this vessel, the Canton, was engaged in navigating tide-waters. She was enrolled and licensed for the coasting trade [which would not have been done had not the service contemplated been maritime in its nature].[2] The actual employment of the libellants was to load the vessel at Quincy, not as quarry-men, but to take the stone on board from a wharf, to navigate the vessel to Boston, and there to unload her. She carried stone principally; but she also carried lumber, and one cargo of lime. She was propelled by sails, and the other usual apparatus of a coaster, and the persons engaged on board of her must have been possessed of some skill in navigation. They must have been able to "hand, reef and steer," the ordinary test of seamanship. These duties the libellants performed. They must also have known the rules of navigation, for the avoidance of collision and had they, from want of skill, run afoul of another vessel, the owners of this sloop would have been responsible for the damage. I cannot hold that the libellants were only landsmen.

It is further urged, that, by the authority of the case of Thackarey v. The Farmer, in order to constitute the service on a river, maritime, and to give jurisdiction in admiralty, the vessel must be engaged in "commerce and trade." Judge Hopkinson does not extend this test to vessels employed on the high seas, and why that requisite should attach to vessels on one part of the water within the admiralty jurisdiction, and not to others, I am unable to perceive. A mere passenger vessel is not engaged in commerce or trade. A whaling voyage is only a hunting expedition. A vessel engaged in the exploration of the North seas, is not employed in commerce or trade, and yet, in each of these cases, the services of the seamen are cer-

[2] [From 21 Law Rep. 473.]

tainly maritime, and they have a lien therefor on the vessel.

The laying of stone in the building of wharves, it is argued, is not a maritime service. [This is true as an insulated service, but it may be so connected with and subservient to a far greater and more important contract that the whole may be deemed maritime].[2] And such service was performed by the libellants, in the case of Packard v. The Louisa, as well as in the present suit. The general rule, in regard to this, may be thus stated: If the contract is for the navigation of tide-waters, and laying stone in wharves, is merely incidental and subsidiary to the principal business, the whole service may be considered maritime. But if, on the contrary, the navigation is merely incidental and subsidiary to some other business, which is not maritime, of the owner or hirer of the vessel, such, for instance, as the transportation across a river, of the stone to be used by him in the construction of a building, upon which he is engaged, then the contract, as a whole, would not be maritime.

This vessel was engaged in transporting stone, an article of merchandize, on tide-waters. The master says, that eight or nine trips were occupied with freighting wharf stone, and in laying the wall of a wharf, for which the stone was intended, and that upon each of such trips an hour's delay was caused by laying the stone regularly, instead of unloading it, upon a wharf, in the usual manner. The master's book, however, shows but one such trip. But even though there had been nine, this was merely subsidiary to the principal business, and I do not think that such incidental employment for nine hours, in six months' service, can deprive that service of its maritime character. These stones were hoisted out of the vessel in the usual manner, and were lowered into the wall of the wharf. This is equivalent to an agreement by the crew of any other vessel, to pile up the cargo on the wharf, on arrival. It is only a variation of the method of unloading. I am, therefore, of opinion, that these libellants were engaged in a maritime service, and that they are entitled to come into this court to enforce their lien for such service.

2d. The second ground of defence cannot be maintained. Supposing the libellants to be seamen employed in maritime service, they have a lien on the vessel, whether she be sailed on shares or not. Their knowing that she was so sailed, can make no difference. Whoever is the owner, the seamen have the vessel as security, and they are not bound to heed arrangements made with third parties. [They always know that there is some owner, and behind that owner's liability, whether he be the general or special owner, they have the thing to look to for their wages].[2]

3d. There having been no change of ownership in the vessel, the position, that the lien has been lost, by delay in enforcing it, is untenable, as no innocent third party is injured. It has been urged, that a good practical limitation to these claims would be the time of settlement between the master and owners. This cannot be adopted as a [fixed] [2] rule, because such settlement might be had at so early a period, as to give the seaman no reasonable opportunity to enforce his right. But if the seamen, knowing that the vessel had been taken by the master on shares, and that he ought to pay their wages, should permit an unreasonable time to elapse, after the termination of the season, without collecting their wages, or making known to the owners their claim, and the owners lulled into security by such neglect, should make a final settlement with the master, upon the supposition that the wages had been paid, and thereby lose the means of indemnifying themselves against the claim of the seamen, there would be much force in the suggestion. But, in this case, there has been no settlement, and no injustice can be done by the enforcement of the claim, at this time. A decree for the wages must be entered for the libellants. [A motion was made by the counsel for the claimants that the costs of the libellants be taxed according to the Statute of the United States of 1847, c. 55 [9 Stat. 181]; but the court ruled that the Statute of 1853, c. 80 [10 Stat. 161], regulating fees in United States courts, was inconsistent in this respect with the act of 1847].[2]

NOTE [from original report]. See The Mary [Case No. 9,190]; M'Cormick v. Ives [Id. 8,720]. As to the delay in enforcing the lien, see The Bolivar [Id. 1,609]; The Eastern Star [Id. 4,254]. As to the lien for seamen's wages upon a ship sailed on shares, see Skolfield v. Potter [Id. 12,925]; Webb v. Pierce [Id. 17,320].

[NOTE. A service to be maritime must have some relation to commerce or navigation; some connection with a vessel employed in trade,—with her equipment, her preservation, or the preservation of her crew. Cope v. Vallette Dry-Dock Co., 16 Fed. 924, citing Thackarey v. Farmer of Salem, Case No. 13,852; The Hendrick Hudson, Id. 6,355. The employment must be in and about the safety and navigation of the vessel. Boon v. The Hornet, Id. 1,640.]

Case No. 2,389.

In re CANTRELL.

[6 Ben. 482.] [1]

District Court, E. D. New York. April, 1873.

CHATTEL MORTGAGE — CONTEMPORANEOUS AGREEMENT.

A chattel mortgage was given by C., who was afterwards adjudged a bankrupt. The assignee in bankruptcy having sold the property, the mortgagee petitioned to be paid the proceeds, in satisfaction of the mortgage. It appeared, that an agreement was made, contemporaneous

[2] [From 21 Law Rep. 473.]

[2] [From 21 Law Rep. 473.]

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

with the mortgage, that the mortgagor should retain possession of the mortgaged property, make sales of it from time to time as he might desire, and receive the proceeds for his own use. The debt for which the mortgage was given was an actual one, and unpaid: *Held*, that, under the laws of the state of New York, the mortgage was void, and the petition must be denied.

[See In re Burrows, Case No. 2,204.]

[In bankruptcy. Matter of Samuel Cantrell.]

BENEDICT, District Judge. The question presented for my determination, upon this petition, is, whether the petitioner has a right to claim the proceeds of certain personal property of the bankrupt, taken and sold by the assignee in bankruptcy, because of a chattel mortgage upon the property, held by the petitioner. This mortgage, the assignee insists, is void, for the reason that it has here been shown, by evidence, that an agreement existed between the mortgagor and mortgagee, contemporaneous with the mortgage, that the mortgagor should retain possession of the mortgaged property, deal with and make sales of the same, from time to time, as he might desire, and receive the proceeds for his own use. Upon the evidence, I find that such an agreement existed, and I find further, that the effect of such an agreement is not destroyed by the evidence introduced by the petitioner, which, as I also find, shows an actual loan of the money sought to be secured by the mortgage, and an actual present indebtedness of the amount sought to be recovered, namely, $2,276.25. Under the law of the state of New York, as I understand it, upon such facts, the mortgage should be declared void. Being so found, it gives the holder no right to the proceeds of the property taken and sold by the assignee. The prayer of the petitioner must, therefore, be denied.

CAPE ANN ISINGLASS & GLUE CO. (MANNING v.). See Case No. 9,041.

Case No. 2,390.

CAPE GIRARDEAU & S. L. R. R. v. WINSTON et al.

[4 Cent. Law J. 127.] [1]

Circuit Court, E. D. Missouri. Jan., 1877.

PETITION FOR REMOVAL—TRUST DEED—NECESSARY PARTIES — EFFECT OF ACT OF 1875 —CONSTITUTIONALITY OF ACT OF 1866.

1. In a suit brought in a state court by the plaintiff corporation to set aside a deed of trust, made by its officers and another corporation of the same state, a removal of the cause to the United States court was sought by the surviving trustee in the deed of trust and one of the bondholders under it. *Held* that, the latter corporation being a necessary party, and no final or effectual determination of the case made by the bill being possible without its presence, the petitioners could not have the cause removed under the act of 1866 (Rev. St. § 693, cl. 2), as to them.

[Cited in Donohoe v. Mariposa Land Co., Case No. 3,989; Steinkuhl v. York, Id. 13,356.]

2. Per Treat, J.: That part of the act of 1866 embraced in clause 2 of section 639, Rev. St., is repealed by the act of March 3, 1875, or if this be not so, these provisions of the act must be *held* to be unconstitutional.

Motion to remand to the Cape Girardeau circuit court.

This cause was instituted in the Cape Girardeau circuit court, to declare a mortgage void, so far as the property of the Cape Girardeau and State Line R. R. is concerned, being a road-bed situate in the counties of Cape Girardeau, Bollinger and Stoddard; and to remove the cloud upon the title of said company occasioned by the mortgage. The petition substantially sets out that the president of the Cape Girardeau and State Line R. R., by authority of the directors of the company merely, without any authority therefor conferred either by the charter or the general laws of the state, and without being thereto authorized by a vote of the stockholders of the company, joined with another corporation, namely, the Illinois, Missouri and Texas Railway Company, in the execution of a mortgage to secure $1,500,000 of the first-mortgage bonds of said last-named company, and which had and were to be issued by said last-named company from time to time, and which mortgage was made to said Frederick Winston and one David Hoadley, who has since departed this life. Winston is made a defendant to the bill of the Cape Girardeau and State Line R. R.; so also the Illinois, Missouri and Texas Railway Company; and also William J. Alt, a bondholder of some of the bonds issued by the last-named company, and numerous other known holders of said bonds, as well as all the unknown bondholders. In the Cape Girardeau circuit court, Winston and Alt made a motion to remove this cause to this court, and it has, accordingly, been docketed here. The plaintiff now moves the court to remand the cause to the Cape Girardeau circuit court.

Louis Houck, for motion.

Hitchcock, Lubke & Player, contra.

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

TREAT, District Judge. This cause was removed into this court by Frederick S. Winston and William J. Alt. Plaintiff brought suit against the Illinois, Missouri and Texas Railway; also the trustees under the deed of trust named (Winston being the surviving trustee), and several corporations and individuals alleged to be holders of bonds secured by a deed of trust executed by the defendant corporation, to-wit: the Illinois and Texas Railway Company, upon the property of the plaintiff, pursuant to the alleged con-

[1] [Reprinted by permission.]

tracts and other writings obligatory in the petition set out and referred to. The said cause was removed by Winston and Alt, on the hypothesis that the act of 1866, that is, the second clause of section 639, of the Revised Statutes of the United States, governed their rights, and that they were within its terms. It is apparent that, if the act of 1866, in the respect named, is still in force, the controversy, so far as it concerns said Winston, who is the trustee, can not be determined without the presence of the grantor in the deed—which deed is sought to be invalidated—nor can the case be determined as to the rights of Alt, who is one of the many bondholders secured by the deed of trust. Therefore, if the motion is to be controlled by the act of 1866, the cause must be remanded. If this be not correct, it becomes necessary to decide whether the act of 1875 (18 Stat. 470) repeals the act of 1866, as reproduced in clause 2, section 639, of the Revised Statutes. Section 10 of the act of 1875, declares that "all acts and parts of acts in conflict with the provisions of this act are hereby repealed." Section 2 of the act of 1875 declares that "when, in any suit mentioned in this section, there shall be a controversy wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit," etc. If the purpose of this act (1875) was to restore what, obviously, is the constitutional limit of the jurisdiction of United States courts, by confining them to controversies which are wholly between citizens of different states, then the act of 1866 is repealed.

The strange anomaly presented by the act of 1866, whereby suits were "split," leaving one portion to be tried in a United States court, and the other in a state court, it may have been designed by the act of 1875 to remove from the statute-book. It will be observed that section 2 of the act of 1875 contemplates, as does section 1 of the same act, that the controversy must be "wholly" between citizens of different states. Under repeated decisions of the United States supreme court, prior to the act of 1866, all of the parties, plaintiff and defendant, had to fall within the provisions of the act of 1789. If the act of 1866 was constitutional, the strange result followed that, where a United States circuit court had no original jurisdiction, and could have none constitutionally, from the joinder of parties, it could acquire jurisdiction, despite the status of the parties, by removal from a state court. The constitution contemplated, as frequently decided, that the party plaintiff and the party defendant, whether including one or many persons, should be citizens of different states. How, then, consistent with its requirements, could a suit instituted in the state court, which, as there instituted, would be beyond federal jurisdiction, be removable into a United States court by changing the suit, through the splitting process, into two suits? If this were allowable, then fragments of suits would be substituted for entire suits, and, through a strange process, the United States courts would obtain jurisdiction of fragments where they had none of the suit itself. Hence the conclusion is: First, that this case does not fall within the terms even of the act of 1866; second, the act of 1866, in the respects named, is repealed by the act of 1875; third, if neither of the foregoing propositions is correct, those peculiar provisions of the act of 1866 must be held to be unconstitutional and void.

DILLON, Circuit Judge. I concur in the result of the foregoing opinion, for reasons which I proceed briefly to state.

Two only of the many defendants united in the petition to remove the cause. The removal was sought under the act of 1866 (Rev. St. § 639, cl. 2), the petition for the removal being filed at the September term, 1876, of the state court. The petition only sought to remove the cause so far as it related to the two defendants, Winston and Alt, and the state court only ordered the cause as to them to be transferred to this court. As to all the other defendants, it still remains in the state court. Winston, as surviving trustee in the deed of trust, represents all the bondholders, including Alt. A deed of trust was made, purporting to be executed by the plaintiff corporation and one of the defendant corporations, viz.: the Illinois, Missouri and Texas Railway Company, both Missouri corporations, upon property which the plaintiff's bill claims to belong to it, to secure bonds executed by the said Illinois, Missouri and Texas Railway Company. The bill alleges that the said deed of trust, for want of authority in the plaintiff's officers to execute it, and for other reasons, did not bind the plaintiff corporation, and is ineffectual to convey its property or create a lien upon it; and the prayer of the bill is that the deed of trust be declared void, so far as it covers the property of the plaintiff (which would seem to be the main security), and that the bondholders under the deed of trust be declared to have no lien upon the said property, and for general relief.

It seems to be too plain to admit of any doubt that, to the bill to annul the deed of trust, the two companies which executed it as grantors are necessary parties. The Illinois, Missouri and Texas Railway Company executed the bonds, and it appears from the bill that this company, by reason of the contracts and conveyances therein set forth, had, or claimed to have, an interest in the property conveyed by the deed of trust. No effectual decree could be made, such as the bill seeks, without the presence of the Illinois, Missouri and Texas Railway Company. Now, no attempt was made to transfer the

cause, so far as it concerned the company last named. The plaintiff corporation has the right to an adjudication of the case made by its bill. The bill was properly constructed, and contained the parties necessary to secure the relief sought. To the determination of the case made by the bill, the Illinois, Missouri and Texas Railway Company was a necessary party, and there can be no final or effectual determination of the case made by the bill without the presence of that company. If the attempted removal of part of the case here were sustained, this court might decree the deed of trust invalid; and the state court, on the part of the case remaining there, might make a decree precisely the other way; and to both decrees the plaintiff would be a party.

I am of opinion that the case made by the petition for the removal is not one which is embraced within the act of 1866, as it is embodied in section 639, cl. 2, of the Revised Statutes. It is not, therefore, necessary for me to give any opinion whether the second clause of section 639 is repealed by the act of March 3, 1875, or, if not thus repealed, whether it is in conflict with the provisions of the federal constitution, which limits the extent of the jurisdiction of the courts of the United States. The motion to remand must be allowed. Motion sustained.

CAPE GIRARDEAU COUNTY (WESTERMANN v.). See Case No. 17,432.

Case No. 2,391.

CAPELLE v. HALL.

[12 N. B. R. (1875) 1.][1]

District Court, D. Delaware.

PARTNERSHIP—FRAUDULENT ACT OF ONE PARTNER.

1. A partner is bound by the act of his copartner within the scope of the business of the firm, even if that act be fraudulent as between the partners.

2. B., a member of the firm of E. H. & Co., obtained from S., the bankrupt, two notes made by S. to the order of E. H. & Co. and for their accommodation, and it was understood that the notes should be paid at maturity by E. H. & Co. The notes were obtained by B. without the knowledge of H., his partner, and were indorsed with the firm name, and discounted at bank, and the proceeds used by B. for his own purposes in fraud of H. H. paid the notes at maturity, and proved them as a claim against the bankrupt estate due to him as an individual. *Held*, that H. was bound by the knowledge of his partner that no consideration passed to S. for the notes, and by B.'s agreement that the firm would pay notes at maturity, and that the proof must be expunged.

[Compare Babcock v. Stone, Case No. 701.]

Petition [by George S. Capelle, assignee of Jacob Sinex] to expunge proof of claim by the respondent [Edwin Hall].

[1] [Reprinted by permission.]

Geo. H. Bates, for petitioner.

Thos. J. Clayton, for respondent.

BRADFORD, District Judge. I am asked to strike off two promissory notes held by Edwin Hall, of the city of Philadelphia, from the list of claims proven, for reasons stated in the petition of George S. Capelle, assignee in bankruptcy of Jacob Sinex. The first note is dated May 21, 1870, at Chester, Pa., and is for the payment, at four months, of the sum of fourteen hundred and eighty-six dollars, to the order of Edwin Hall and Company, and by them indorsed and signed "Jacob Sinex." The second note is dated June 22, 1870, at Chester, Pa., and is for the payment of thirteen hundred and eighty-six dollars, at four months, to the order of E. Hall & Co., and by them indorsed and signed "Jacob Sinex." Edwin Hall claims as indorsee of E. Hall & Co. It is admitted that one E. M. Broomall was at the same time a member of the firm of E. M. Broomall & Co., and also of the firm of E. Hall & Co., and was so at the time of the making of both the above-mentioned notes. It is admitted that E. M. Broomall, as a member of the firm of E. Hall & Co., obtained both the notes in question from Sinex, without the knowledge of Edwin Hall, the other member of that firm. It is also admitted that Sinex gave the notes in question into the hands of E. M. Broomall, with the understanding that he, Sinex, was in no case to be called on for payment of the same, but would be protected from any such liability by the payees of the note, Sinex simply loaning his credit to enable E. Hall & Co. to borrow money on the note. In short, the one gave and the others accepted the notes as accommodation notes. It will be observed, then, that these notes were both made to E. Hall & Co., as the payees thereof, to the same firm, though on one note it is called E. Hall & Co., and on the other "Edwin Hall & Co."

Let us consider the case of the note for fourteen hundred and eighty-six dollars first. The payment of this note is objected to by the assignee on two grounds: First, Edwin Hall being a partner in the firm of "Edwin Hall & Co.," at the time this note was given, must be presumed to have had notice that the note in question was received without any consideration whatever passing from the partnership to him, and as the firm could not sue, so Edwin Hall, as an individual member of the firm affected by this presumed knowledge of the want of consideration, and bound by the act of his partner, though unknown to him at the time, could not sue Sinex; and, secondly, if Edwin Hall ever was the legal owner of this note, he became so by purchasing it after it was dishonored, and took it subject to all equities as between the original parties, viz.: Sinex and "Edwin Hall & Co." As the

result of the admissions of counsel and the evidence in this case, I think it is established that this note was presented for discount by E. M. Broomall, on behalf of E. Hall & Co., to a bank in Philadelphia, that it was there discounted, and the funds passed to the credit of Edwin Hall & Co., and were drawn out by E. M. Broomall, as the funds of "Edwin Hall & Co." That on the day this note became due, without the same having gone to protest, but to save the same from protest and protect himself from suit as a member of the firm of Edwin Hall & Co., Edwin Hall did then and there pay the said note, and thus became the owner and possessor of the same, by transfer and delivery of the party who had discounted it. Edwin Hall paid this note with his own individual funds. Did the fact that Edwin Hall was a member of the firm of "Edwin Hall & Co.," at the time of the making and delivery of the note in question to E. M. Broomall, incapacitate him from suing Sinex on said note, in case it should be transferred legally to him as an individual for a valuable consideration. If the affirmative of this proposition is true, it settles the question of liability on these notes. This note was an accommodation note given by Sinex to the firm of Edwin Hall & Co. It was to enable that firm to raise money on the strength of Sinex's name. It is a mistake to suppose it was an accommodation note to E. M. Broomall. Broomall represented the firm of Edwin Hall & Co. in requesting this accommodation, and the —— firm were the payees of the note. The funds to be raised could pass to none but the payees or their order. They were passed to the credit of the firm in point of fact, and the subsequent fraud of Broomall in using the funds for his own private benefit, does not in the least affect the relation in which the payees stood to the accommodation maker. This firm then and there agreed not to call upon Sinex for payment of that note, on the ground distinctly understood between them, that there was no consideration for it. I say this firm then and there agreed, for I consider Mr. Edwin Hall, the claimant, was bound by the act of his partner, E. M. Broomall, in that transaction, and none the less because it was unknown personally to him at the time.

The trust reposed by one partner in another is of the most extensive and serious character; so wide is the range that every honest partner is absolutely in the power of any dishonest one with whom he may have rashly associated himself. But while he may suffer from the wrongful acts of his dishonest partner, he owes it to the business community both in morals and in law that no one doing legitimate business with the concern, still more no one befriending the concern by a loan of credit, should suffer because of the acts and representations of one whom the innocent and honest partner had selected as his agent, and to whose acts and representations he had requested full faith and credit to be given. I take it for granted, in the transaction of the affairs of a general business firm, the taking of accommodation paper and the consequent necessary agreement, growing out of that fact, not to call upon the maker for payment, is fully within the scope of the purposes of such a partnership and of the means proper to effect such purposes, and an act to the consequences of which, therefore, one partner can and does bind the other. The general principle governing such cases is well stated by Chancellor Kent (3 Comm. 41) in these words, viz.: "The act of one partner, though on his private account and contrary to the private arrangement among themselves, will bind all the parties if made without knowledge in the other of the arrangement, and in a matter which, in the usual course of dealing, has reference to business transacted by the firm;" and again on the same page: "In all contracts concerning negotiable paper the act of one partner binds all, and even though he signs his individual name, provided it appears on the face of the paper to be on partnership account, and to be intended to have a joint operation." Does the contract or agreement made by a member of a firm in the name of the firm who are the payees of an accommodation note, and who raise money on the same, not to call upon the maker for payment, bind the other member who was personally ignorant of the transaction? How far is the ignorant partner liable for the acts and declarations of the other? In 7 East, 210 (Swan v. Steele), the court decide the liability of one partner for the act of another on the following facts: A, B, and C traded under the name of A and B in the cotton business (C being a secret partner); A and B traded alone under the same firm name in the business of grocers, and to pay a debt they owed in the grocery business indorsed over a bill belonging to the firm in which C was then partner in the cotton business—and this without the knowledge of C; held, C was liable to be sued on this indorsement, the plaintiff not knowing at the time of the misapplication of the partnership funds.

This case illustrates the liability of one partner for the acts of the other, even when the act is a fraud on the innocent partner. In Jacaud v. French, 12 East, 317, where money had been received by one member of a firm unknown to the other member, for the purpose of paying certain bills, and the former, instead of paying, as was requested, diverted the funds to another purpose, and afterwards when these bills came into the hands of another firm for value, of which the partner ignorant of the reception of the money for the purpose aforesaid was also a member, and the cotton firm brought suit on these bills, the court held that the plaintiffs could not recover, and used these words: "Jacaud, being a partner with Blair, must

be considered as having together with Blair (the fraudulent partner of the first firm) received money from the drawees to take up this very bill, how then can he, because he is also a partner with Gordon (the other individual member of the second firm suing on the bills) in another house, be permitted to contravene his own act, and sue upon this bill which has been already satisfied as to him." This case establishes the principle that an act of one partner which amounts to a defense against an action thereafter brought, if it had been performed by all the members of the firm, will, although in fraud of the other innocent and ignorant partner, be a defense not only in an action brought by him individually, but by any other firm of which he was at the time a member. Not only is he prevented from suing separately by reason of being bound by the act of his dishonest partner, but this incapacity disables another firm receiving the said bill for value, of which he was also at that time a member, from suing, inasmuch as he is a necessary party to their suit. In that case one partner (the dishonest one) performed an act which amounted to a valid defense, although unknown to the innocent partner, and that act bound the ignorant and innocent partner. In this case one partner makes a contract to take up accommodation paper lent to the firm of which he is a member, certainly a valid defense in a suit by payees against the maker. And how can the principle be different where the suit is sought to be sustained by one of the individual payees composing the firm making this contract, instead of both? Richmond v. Heapy, 1 Starkie, 202, was an action brought to test the validity of a commission in bankruptcy, and the question was, whether the commission was supported by a good petitioning creditor's debt, and the facts are these, viz.: One of three partners undertook to provide for two bills of exchange drawn by the three partners, and accepted by a fourth person, when they should become due. It was held that the three partners could not prove their claim on the acceptance in bankruptcy, that they were bound by the conduct of the one partner taking the acceptance as an accommodation one, although they were ignorant of the fact, and it was in fraud of their rights.

Now this case would be the same exactly as ours, if the claim in this instance was sought to be proved by "E. Hall & Co." It does establish, however, that this agreement not to sue Sinex, arising out of the acceptance of this paper as accommodation paper for the firm, was the act of the firm, and consequently the act of the individual members of the firm. For in this case the bills were drawn in the names of the three members, as in ours the note was given to and received by all the members of the firm, viz.: E. M. Broomall and Edwin Hall. Now, if the firm (in the case last cited) could not sue because by the act of one of its members it had created a defense, why, in our case, when a complete defense has been made by the joint act of all the individual members, should one of those individual members be permitted to do (that is, sue on this note) that which he has jointly with his partner promised not to do? What has he done that entitles him to bring such suit? He has paid the note in the hands of the holder, and that is just what he, together with his partner, promised to do, and which, if he, or his partner, or both, had not done, and Sinex had been made to pay by the owner of the note, he could have been forced to pay by law to the extent of all his property liable to process. In the case of Sparrow v. Chisman, 9 Barn. & C. 241, where one of several partners in a banking house drew a bill in his own name upon a third party, on the condition that the drawer should provide for the same when due, it was held that all the partners in the banking firm could not recover on the bill. Baily, Justice, in this case, says: "A party to whom an acceptance is given on a condition that he will provide for it when due, and who does not perform that condition, cannot sue the acceptor, and if Peckover, the party making the promise, therefore, could not have sued alone, how can he sue jointly with others? His partners, being bound by his acts, cannot recover through him." May we not ask, in reference to the case before us, if both partners made this promise not to sue, and both are bound by such promise as the act of the firm, how can one of these promisors sue individually? It was the agreement not to hold him responsible for the payment of the notes which induced Sinex to give them; this agreement and undertaking grows necessarily out of the transaction. Edwin Hall, by his authorized agent, was a party to that agreement, and cannot be permitted to contravene it.

This case may be placed in another point of view by applying to it a well-known principle of law applicable to promissory notes. Story on Promissory Notes, on page 517, in discussing the rights of an indorser who takes up or pays a promissory note, says: "If, indeed, any of those parties, either as maker or indorser, be such merely for his accommodation, then his claim is ended; for the payment has already been made by the very party who is ultimately bound to indemnify and reimburse all the others; and the law, to avoid circuity of action, will treat it as a direct extinguishment." In this case, a member of a firm, Edwin Hall, finds a note going to protest on which he, as a member of the firm of Edwin Hall & Co., is liable to be held responsible. Not with a view to speculation, but as he himself says in his evidence in reference to the fourteen hundred and eighty-six dollar note: "As it had been discounted for the firm and bore our indorsement, I paid it;" and in reference to the thirteen hundred and eighty-six dollar

note: "It bears our indorsement, and at maturity I paid it." He, as the representative of the firm, discharged a firm liability by paying this note. It is true, he can make his partner, E. M. Broomall, account with him for furnishing funds with which to satisfy a partnership debt; but the debt is no less satisfied as against the partnership, and as Edwin Hall was one of the accommodation payees liable to be sued and made responsible by Sinex, had he been forced to pay the note, it makes no difference whether this payment be considered a payment by the firm, or a payment by a member of the firm on behalf of the firm (if, indeed, such a distinction can be drawn). As the law avoids all circuity of action, the statement of the indisputable fact that Edwin Hall could, as a partner of the firm of Edwin Hall & Co., have been made liable to the extent of all he possessed to Jacob Sinex, the accommodation maker, had he been forced to pay these notes, seems to settle the question of Edwin Hall's right of suit. Authorities have been cited by the claimant's counsel to show that where there was a cross note, there was a consideration, and the cases, which, no doubt, are law, are sought to be applied to the question of the notes under examination.

This line of argument is inconsistent with the express and repeated declaration of counsel on both sides at the hearing, that these two notes were accommodation notes; that is to say, that there was no consideration passing from Edwin Hall & Co. to Sinex for them. Under these circumstances, even were it true in point of fact that Sinex gave a cross note of Edwin Hall & Co. in exchange for one or both of these notes, I could treat such cross note only as a means of indemnity received by Sinex in case he should be made liable on his notes to Edwin Hall & Co.; any other view of the case would be inconsistent with the admissions that these notes were accommodation notes. But there were no cross notes between these parties. The note given as an indemnity was the note of E. M. Broomall and not the note of the firm. Nor was there any specific exchange of securities—each party holding himself and themselves liable on the paper primarily given by themselves as makers. There is no evidence whatever of this. There is no evidence whatever that Sinex desired or took the note of E. M. Broomall with a view of raising money upon it. As, then, they were not cross notes between the same parties, for their mutual accommodation, nor an exchange of securities between the same parties, and as the parties by their counsel admit that these two notes in question were accommodation notes, I am bound to treat them as accommodation notes. The authorities therefore cited by the claimant's counsel in reference to the sufficiency of the consideration of a cross note, though no doubt law, are in no wise applicable to the facts of this case. So, too, the authorities cited going to show that a bona fide holder of accommodation paper can recover against such accommodation maker or indorser although he knew at the time he took such paper that it was for accommodation only, are no doubt good authorities on that point. But the difficulty arises from their having no application to the facts of this case. If the holder, in all other respects, has a right to sue, the fact that he knew the paper to be accommodation, when he took it, does not destroy that right, but in this case Edwin Hall never had a right to sue, for he was one of the accommodation payees, and, having been paid by the parties, or one of the parties, ultimately liable to pay it, it was extinguished and its negotiable quality destroyed.

It is no doubt a hardship that Edwin Hall should be cheated by his partner. That is the result of misplaced confidence (too frequently happening among business men), when a little more care and caution would have avoided all the evil. When Edwin Hall entered into partnership with E. M. Broomall, he gave him a letter of credit to the business world, and he plainly said to Jacob Sinex and all others doing business with the firm, Whatever arrangements you make within the scope of our partnership business I will ratify; and now, when the firm has through one of its partners, E. M. Broomall, accepted a favor, the loan of credit, which they made available and turned into cash, and made the arrangement not to call upon Sinex for the payment of the notes thus loaned, to permit either or both of those partners to sue Sinex would not only be destructive of the fundamental principles on which the liability of the partnership for the act of the individual member is based, but would be unjust and inequitable to Sinex in the highest degree—as he based his conduct on the promise of the partnership, through one of its members, that he would not be called upon for the payment of the notes. And further, Mr. Edwin Hall could not be permitted to contravene by his action now, that which he authorized his partner to do. If Mr. Sinex was deceived as to the wishes and desires of the partnership in giving these notes, Mr. Edwin Hall enabled E. M. Broomall to do so, by giving him the credit arising from this partnership relation with him. If there is hardship in the one case it is of Mr. Edwin Hall's own creation. The hardship in Sinex' case is one which arises not from any fault or negligence of his own, but from his trusting to the declarations of Edwin Hall that E. M. Broomall was a trustworthy man. On no ground of law, nor from any consideration showing any equitable right in the matter, can these claims be sustained. The clerk will therefore enter an order that the claims aforesaid be disallowed and that the claimant pay the costs of the hearing of the rule.

Case No. 2,392.

CAPELLE v. TRINITY M. E. CHURCH.

[11 N. B. R. (1875) 536.] [1]

District Court, D. Delaware.

FOLLOWING STATE DECISION — LIMITATION OF ACTIONS—CHURCH SUBSCRIPTION—VALIDITY—CONSIDERATION.

1. The construction given by the state courts to the state act of limitations recognized and enforced by the United States bankrupt court.

2. The bankrupt having been a non-resident at the time the cause of action accrued, and it not appearing by the proof when he became a resident of the state, nor that he had resided more than three years in the state since the cause of action accrued, although the creditor was a corporation of another state, *held*, that the state act of limitations could not be allowed as a defense to be set up by the assignee.

3. A claim was proved by a church corporation, founded upon a verbal promise by the bankrupt to M., that he (the bankrupt) would pay eight hundred dollars if M. would subscribe a portion of the indebtedness due from the church to M., the promise being subsequently publicly announced by the bankrupt in the church, in the presence of the congregation; it appeared by the proof that expenses had been incurred by the trustees of the church, upon the faith of the subscriptions generally, though not that any definite expenditure was made upon the faith of this particular subscription. *Held*, that the promise was founded on a good legal consideration, upon two alternative grounds: First, it was one of two mutual promises for the benefit of the church, each being the consideration for the other, and the claim provable by the beneficiary; and, secondly, that as a promise to the church, partly upon the faith of which expenses were incurred, it would sustain an action of assumpsit, and might be proved in bankruptcy.

[Cited in Sturgis v. Colby, Case No. 13,574.]

Petition by [George S. Capelle] assignee [of Jacob Sinex] to have the claim filed [by the Trinity M. E. Church of Chester] expunged.

Geo. H. Bates, for petitioner.

Geo. M. Pardoe, for respondent.

BRADFORD, District Judge. The questions to be decided in this case come up on the hearing of a rule to show cause why a certain claim of the Methodist Church, in the city of Chester, in Pennsylvania, called "The Trinity M. E. Church of Chester," should not be stricken off from the list of claims proven, and declared void. The reasons given are two-fold: First, it is alleged that the debt was barred by the statute of limitations, of this state, and could not be enforced if suit were brought thereon within the jurisdiction of this state; and, secondly, that there was no valid legal consideration for the claim, which would be necessary to be established in an action of assumpsit brought for its recovery.

George E. Capelle, the assignee in bankruptcy of the bankrupt Sinex (adjudged bankrupt on his own petition), moves the court in this matter, by petition, to have this claim stricken off, under the last clause of the 22d section of the bankrupt act [14 Stat. 528], which is in these words: "The court may, on the application of the assignee, or of any creditor, or of the bankrupt, or without any application, examine upon oath the bankrupt, or any person tendering, or who has made proof of claims, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or when the proof shows the claim to be founded on fraud, illegality, or mistake." From the evidence in this case it appears that in the month of February, 1867, the bankrupt Sinex had a conversation with the witness David McGinniss, who was then engaged, or about to be engaged, in plastering the vestibule of said church, concerning a subscription of money for the use of the church. That the result of this conference was an agreement and undertaking, by both the witness and the bankrupt, to give certain sums of money, viz.: the sum of eight hundred dollars to be given by the bankrupt, and one-half the amount of a certain bill for plastering, due the witness from the said bankrupt, on account of work done on the said church building, to be given by the said witness, each at the time making the undertaking of the other, the consideration on which his own promise was founded. There was no subscription in writing, nor were the promises reduced to writing, at any time. Sinex was at that time treasurer of the church. The witness then held no official relation to the church. Afterwards, and it must have been very shortly afterwards, although the witness does not state the exact time, Sinex read aloud, before the assembled congregation, of whom the witness was one, the amounts subscribed by himself and the witness, with the subscriptions of others, repeating his own subscription as eight hundred dollars, five hundred dollars of which was to be set down as for himself and three hundred dollars for his wife. The witness proves that Sinex said, on the occasion of the public meeting, that the debt of the church (then amounting to the sum of twelve or thirteen thousand dollars) would have to be paid, and he would give eight hundred dollars towards it. On this occasion three or four thousand dollars were subscribed. It is proven by the witness that this subscription, together with others, were an inducement to the church to go on and finish their work, on the faith of which they did place a certain heater in their main building, and afterwards, on the faith of the said subscription, together with others, they did finish the main audience room. The witness is positive that this subscription of Sinex, among others, was often placed before the board of trustees as a basis of credit on which the heater in question could be procured. The witness also states that three years since he, with one Clara Fricke, went to Sinex for this subscription, and since then

[1] [Reprinted by permission.]

—about two years ago next June—made a demand of Sinex for this subscription. It is not stated what was his reply on either of these occasions, except that there was no denial of the claim, but, as I recollect the testimony, a plea of inability to pay at that time. The subscription was in February, 1867. At that time the church was a corporation, incorporated under the laws of the state of Pennsylvania, and the bankrupt was a citizen of the same state, and it does not appear that he was a resident of this state for the period of three years before the cause of action accrued. These are the material facts disclosed by the evidence in reference to the debt or claim sought to be stricken off and declared void.

First. In reference to the operation of the statute of limitations, as applied to such a contract as that proven (supposing it to be such an one as gives a valid cause of action by reason of being founded on a sufficient consideration), I am of opinion that the assignee cannot avail himself of the defense of the statute of limitations to this claim. The United States courts are solicitous to conform to the decisions made by the state courts in construing the laws of the state, and among them the acts of limitation. By the 34th section of the judiciary act of September 24, 1789, "these acts of limitation form a rule of decision in the courts of the United States, and the same effect is given them as is given in the state courts." "We are bound," says Mr. Justice Catron in [Harpending v. Reformed Protestant Dutch Church] 16 Pet. [41 U. S.] 455, in delivering the opinion of the supreme court of the United States, "to conform to the decisions of the state courts of the state of New York in the construction of these acts of limitation." Now, the court of errors and appeals of the state of Delaware has given an elaborate judgment on the very point raised in this case; and, as the lex fori governs in all cases in the application of the acts of limitations, this court will be guided by that decision. The case is Wells v. Jones, 2 Houst. 329. It was there held that where the defendants making promissory notes resided out of the state at the time the cause of action accrued, and never became residents of this state, the act of limitations did not run against them, although the plaintiffs themselves always were non-residents. That the statute of limitations does not commence to run against any one residing out of the state at the time of the accruing of the cause of action, and only commences on the entry of such person into the state as a resident. The court gives a construction to the 14th section of chapter 123 of the Revised Code, and particularly to these words, as governing the case before them, i. e.—"If at the time when a cause of action accrues against any person, he shall be out of the state, the action may be commenced within the time hereinafter limited therefor, after such person shall come into the state in such manner that, by reasonable diligence, he may be served with process;" and lays down the position that in no case shall the statute of limitations run against one who was non-resident at the time of the accruing of the cause of action until he comes into the state under the circumstances described in the section cited. As Sinex was a non-resident at the time of the accruing of the cause of action, and it does not appear when he became a resident of this state, and, consequently, as it does not appear that he has resided in this state for a period more than three years since the accruing of the cause of action, his case comes within the exception of this statute, and I must declare that such act of limitation cannot be allowed as a defense by the assignee against this claim.

Second. Was there such a valid consideration as would support an action of assumpsit if one were brought to recover this subscription? It will be noticed—1. That this contract was not reduced to writing. There was no subscription-book or other written entry or promise, but it rested wholly on verbal statement. 2. There was no time fixed for the performance of the contract or the payment of the money. 3. There was no executed consideration from the church to the promisor at the time of making the promise; but the consideration expressed was the agreement between Sinex and McGinniss that each would give money for the use and benefit of the church (a common object of interest to the parties) on the express condition that the other would do the same. And it also appears that McGinniss, before the filing of the claim, has paid his subscription. 4. It is proven abundantly that the church, on the faith of this subscription among others, did incur additional expense and charges, although it is stated by the witness that he does not know that any expense, or undertaking, was encountered or begun on the strength of this subscription alone.

1. I am not aware that there is difficulty in the way of recovery, were this proceeding in the form of an action of assumpsit, from the fact that this contract is not reduced to writing. All parol contracts are of equal dignity, whether reduced to writing or not, and are equally enforceable in courts of law, unless they are made void on some grounds of public policy. The statute of frauds of our state makes void any "agreement that is not to be performed within the space of one year from the making thereof." But the proper construction of this statute is that the contract or agreement must expressly show that it was not to be performed within a year from the making thereof; and as there was no allusion to the time when this subscription was to be paid, such a verbal contract is not made void by our statute of frauds. This contract may be looked upon as a parol agreement by Sinex, with McGinniss as the promisee, to pay a certain sum of money to the corporation, or for the use of the corporation; or it

may be considered as a direct promise made by Sinex to the corporation (if there were at the time any person or persons authorized to receive such a proposition on behalf of the church) to pay the amount of his subscription to them for their own use and benefit. It is claimed by the assignee that this contract is nudum pactum—that is, absolutely void, by reason of there being no valid consideration for the promise. Undoubtedly, consideration is of the essence of every contract. Where the contract is under seal, consideration will not only be presumed, but cannot be denied by the party to the seal, unless in cases of fraud. Where the contract is in writing, but not under seal, to pay money, consideration will be presumed, but may be rebutted by the party to be charged with the payment. Where the evidence of the contract rests altogether on verbal statements, there the consideration must be affirmatively established by the plaintiff, or there is no proof of the contract, as the consideration constitutes the essence. Treating McGinniss, then, as the promisee, and Sinex as the promisor, what was the consideration for Sinex's promise? Very clearly, and distinctly, and expressly, it was the promise of McGinniss to pay a sum certain as his subscription—a promise for a promise—a consideration executory at that time, but fulfilled and executed long before the filing of this claim. This was, without doubt, a valid promise of Sinex's, and founded on a good consideration. A loss sustained by the plaintiff, or, in such a case as this, by the promisee, as an inducement to the promisor to make the promise, is as good a consideration on which to found a promise as an advantage conferred upon the defendant by the plaintiff or promisee. Addison on Contracts (page 22) says: "But if the contract has been executed by the performance of the act forming the consideration for the promise, then it is no answer to an action to say that the plaintiff was not, by the terms of the original contract, bound to do the act, and that there was consequently no mutuality of obligation."

The right of the party benefited by the promise to the fruits of an action are sustained by numerous authorities, ancient and modern, English and American. "Upon a promise to the father to give so much with his daughter in marriage, the daughter may have the action, for she is the meritorious cause." Com. Dig. p. 206, "Action on the case upon assumpsit," E. "Upon a promise to B. to pay twenty pounds to an infant at his full age, and to educate him in the meantime, the infant shall have the action." Id. "If the heir promise his father, who intended to cut down timber for the portion of his daughter, to pay so much for her portion if he will not cut it, the daughter shall have an assumpsit against the heir." Id. "If a promise be made to A., upon payment of fifty pounds, to reassure land to B., the assumpsit may be by B." Id.; Pigott v. Thompson, 3 Bos. & P. 149, and cases there cited. So in Marchington v. Vernon, 1 Bos. & P. 101, note, Buller, Justice, says: "If one person makes a promise to another for the benefit of a third, that third may maintain an action upon it." Chief Justice Gibson recognizes the principle, but draws the distinction between parol contracts and contracts under seal, and quotes from the ancient authorities. Uhland v. Uhland, 17 Serg. & R. 268. Hind v. Holdship, 2 Watts, 104, is a modern authority directly in point, in which not only is the right to the fruits of an action given to the one having the beneficial interest, but the action is in form brought by him. So in Stewart v. Hamilton College, 2 Denio, 403, Chancellor Walworth holds to the right of action in the party having the beneficial interest. To these might be added a multitude of authorities to show the legal interest a person has who is not the promisee in a simple contract, but who takes the beneficial interest under and by such contract. It is admitted, however, that there is a conflict of authority in England as to who shall appear as plaintiff on the record in a court of law, and Mr. Brown, in his book on "Actions at Law," page 102, says, "It is now undoubted law that an entire stranger to the consideration cannot sue upon a parol contract." Yet the same author, on page 104 of the same work, says, a "servant or agent may sue on a contract entered into by him as such, when he has a beneficial interest in its completion in regard to commissions or otherwise, or a special property or interest in the subject-matter of the agreement." That is, in other words, a person who has no right of action because the contract was not made with him individually but in his representative capacity, may, if he has a beneficial interest in the completion of the contract, or a special property or interest in the subject-matter of the agreement, sue in his own name. Now, this church has the special interest, in the subject-matter, of being entitled to all the money to be paid, and has a beneficial interest in the completion of the contract, to the extent of the amount of the subscription to be paid. It would appear, then, that this case does not come within the class of cases where, by the preponderance of authority, the plaintiff must be the party from whom the consideration flows. Supposing, however, it does, with divided authorities in England, I prefer to follow the decisions of our own country, of Chancellor Walworth and the supreme court of Pennsylvania, for I know of no American decisions to the contrary. And even if all the authorities gave the right of action in a court of law to the promisee in this case, viz., McGinniss, from whom all the considerations flowed, as long as the church is to be considered as the cestui que trust of the fund, and the claim is proved by the properly constituted officer of the church, and the court in bankruptcy deals with these cases upon equitable principles, I should not have the claim

stricken off because it had been proven by the treasurer of the church instead of the promisee, Mr. McGinniss.

Viewing this case, therefore, as presenting a contract by Sinex with McGinniss, to pay to the church eight hundred dollars, on the consideration (then executory, but afterwards, before proof of claim, executed) of McGinniss paying the amount of his own subscription, I have come to the conclusion that the contract was a valid one, founded on a legal and sufficient consideration, enforceable in the courts of law, and to be allowed by this court. And here I might rest this opinion, but as there is another ground on which this subscription, in my judgment, may be upheld, and as the case is interesting and important, it may be well to examine the second view (already noticed) which may be taken of this contract, viz., a contract directly with the church, by Sinex, the bankrupt.

The first question which arises is, was any promise made by Sinex to, and accepted by, this corporation? A corporation acts and contracts through its agents. The trustees of this church were legally competent to receive a gift of money for the use of the church. They were equally competent to accept a promise to give money. Was any such promise given to, accepted by, and acted on, by the said trustees? I think the evidence conclusively shows such to have been the case. The promise, after divine service, in full assembly of the members of the church, Sinex reading aloud the amounts of his own with other subscriptions; the prompt action of the trustees of the church in making this subscription the basis of credit in improvements for their building and placing a heater therein; the virtual admission by Sinex of the claim of the church against him for this subscription, in the interviews afterwards had between him and McGinniss, in relation to this matter, all establish the proposition that a promise was made to, accepted by, and acted on, by the trustees of this church. Now, was this promise binding on the promisor? It is claimed by the assignee that it was not, and for the reason that it was without any legal consideration. I think that there was such legal consideration, and consequently that the said promise was binding. A promise made and not revoked (which is an open and continuing promise until revoked), accepted, and acted upon by the promisee to the extent of incurring expense by the promisee, on the faith of the performance of the promise by the promisor, is a valid promise, and sustained by a valid consideration, viz., a loss sustained by the plaintiff, and no authorities need be cited to show that this is as valid a consideration to support the promise as an advantage gained by the defendant as a consideration for this promise. A parol promise, then, made to a church to pay a certain sum of money as a subscription for the use and benefit of the church, accepted and acted on by way of incurring expenses and increasing the liabilities of the church, is a valid promise, and enforceable in the courts of law. This proposition is sustainable by reason and authority. No doubt, a mere subscription standing alone, whether followed by the giving of a promissory note or not, is not binding, there being no consideration for the promise. In Boutell v. Cowdin, 9 Mass. 254, this was the case (a note having been given for the amount of the subscription). In Phillips Limerick Academy v. Davis, 11 Mass. 113, there were subscriptions, but no note given. The court in this case said there was no valid consideration, but also says, "It is a promise to give, connected with a similar promise by others to give to the same appropriation and purpose, but these promises are not mutual among the subscribers, so as to make the promise of one, or the performance of it, a consideration for the promise of another."

So that the inference in this decision is, that there would have been a valid consideration had the promise of one been made the consideration of the promise of the other (an authority sustaining the view treating this contract as one between Sinex, as the promisor, and McGinniss, as the promisee). In Farmington Academy v. Allen, 14 Mass. 172, the subscription is held valid because the defendant recognized or re-acknowledged, his promise by contributing work, and also knew that expenses were incurred by the said corporation, on the faith of the subscriptions on the building; and thus, in the opinion of the court he ought to be considered liable, on the common counts, for money paid and expended, at his request, to the extent of his subscription. In this case there is an element which does not exist in ours, viz., contribution to the work by the defendant as a part payment of his subscription (the necessity for which we shall hereafter consider). But before this last decision, in the case of Holmes v. Dana, 12 Mass. 190, it had been decided "that where sundry persons agreed to lend to the editors of a newspaper the sums set against their respective names, the same to be paid to one of their number as agent, and this agent advanced moneys to the editors on the ground of the subscription, he had a right of action against the subscriber who refused to pay the sum he subscribed." In this case, the court says: "The true ground of the action is that by reason of the contract, Larkin (that is, the agent) was led to confide in the engagement of the defendant so far as to advance his own money for him; and the defendant and the other subscribers having made Larkin the trustee to receive and appropriate the money for objects of importance to them, were bound in equity and good conscience to restore it. The only question which could arise in this case was whether Larkin was induced to advance his money by the subscription and by the confidence placed by him in the subscribers. The jury having so

found, the verdict is unquestionably right." There can be no difference in principle, because the money was to be paid in this case to a trustee of the subscribers' own choosing, instead of the cestui que trust,—and the case is directly in point as an authority to show that a promise otherwise voluntary, if accepted and acted on by the plaintiff to his own expense and loss, on the faith of the promise, is a valid promise in law and founded on a good consideration. It will be observed also that in this last cited case, there is nothing said about re-acknowledgment on the part of the subscribers, Bridgewater Academy v. Gilbert, 19 Mass. 578, is an authority against the claimant. Trustees of Amherst Academy v. Cowls, 23 Mass. [6 Pick.] 427, is a case in point, and establishes (after reviewing all the cases) the general proposition that the promisor shall be bound when he stands by and sees a corporation undertake obligations which can be enforced against it on the faith of his promise. In the course of a long opinion Judge Parker says: "If by means of his contribution or his solemn promise to pay, the body to whom he has pledged his word should incur expense, become under legal obligations, or otherwise pursue the purpose and intent of the legislature in granting them the charter, this is a sufficient legal consideration to support such a promise. In this respect the principles of common honesty cannot be at variance with the law of the land; and no case from English or American reports has been cited to warrant so unjust a principle." Now in this case there was a note, and that note expressed on its face that it was for value received, and also recited the subscription made a year before. Yet it was admitted that all this did not prevent the defendant from setting up want of consideration; but the court said: "But it is quite sufficient to create a consideration, that the other party, the payee, should have assumed an obligation in consequence of receiving the note (in our case in consequence of receiving the verbal promise), which he was compellable at law or equity to perform, unless the promisor should be able to show when sued that the payee had refused, or was unable or had unreasonably neglected to perform the engagement on his part, in which case a defense might be raised on the ground of a failure of consideration." In Trustees of Church in Pembroke v. Stetson, 22 Mass. [5 Pick.] 506, it is held distinctly "where members of a religious society, which had a ministerial fund in the hands of an incorporated board of trustees, voluntarily subscribed to increase the fund, and afterwards gave their promissory notes to the trustees for the amount of their respective subscriptions, it was held that the notes were founded on a sufficient consideration." And in this case, Parker, Justice, comments on the case of Boutell v. Cowdin (cited first by the assignee's counsel), and objects to the construction which has been placed upon it, as not having been intended at the time. In Warren v. Stearns, 36 Mass. 80, cited by assignee's counsel, Chief Justice Shaw says, in the course of his opinion, "where a promise has been made to a person or a body capable of suing, and they upon the strength of such promise before it has been revoked, have advanced money or incurred expense, this has been held a good consideration," and quotes Farmington Academy v. Allen, 14 Mass. 172, as sustaining this position, and further says, "this case was decided expressly on the ground that the defendant had become liable as upon an implied promise for money paid, the plaintiff having expended money on the faith of his promise." In Trustees of Williams College v. Danforth, 29 Mass. [12 Pick.] 541, although the case was not similar in the facts to this, Chief Justice Shaw upholds the validity of the subscription and says, "the subscription, in the first instance, was in the nature of a proposal to the College, by its terms not binding until accepted and before acceptance revocable." This doctrine of the promise standing open until revoked, and, when accepted, binding the voluntary promisor, is also referred to in Thompson v. Page, 42 Mass. [2 Metc.] 568.

I think, on the whole, that the result of the authorities in Massachusetts is that a parol promise to the trustees of a church or religious society, not revoked until after the church, on the faith of that promise, has incurred expenses and subjected itself to new liabilities, is a valid promise, and founded on a good and sufficient consideration. I have seen no case reported where the contract to give was not reduced to writing; but, I repeat, where no statute requires such contract to be in writing, it is of equal dignity and of equal binding force, if a consideration is proven, as if it were reduced to writing under seal. In McAuley v. Billenger, 20 Johns. 89, the court sustains the principle that where a subscription is made, and the subscriber permits the trustees of the church, or the persons having the beneficial interest in the promise, to undergo expense on the faith of that promise, such subscription is binding. In Stewart v. Hamilton College, 2 Denio, 403, in the court for the correction of errors, in the state of New York, the following propositions, among others, are established and announced by Chancellor Walworth: "The agreement of a single individual to make a donation of money to a literary or religious institution, without any undertaking on the part of the donee to do anything," is not of binding force. "But when several persons subscribe to raise money for an object in which all feel an interest—e. g., to support a religious or literary institution—the mutual promises of the several subscribers form a valid consideration for the promise of each." And "the party for whose benefit such subscriptions

are made may maintain assumpsit against the several subscribers, although such party is not connected with the consideration."

It will be observed that in the case which we are examining the mutual promises were more distinct, as the one was made the express condition of the other, and, further, that the condition has been executed by McGinniss, so that the chancellor's reasoning applies to this case a fortiori. It is also to be observed that it is high American authority for the bringing of an action, and consequently the proof of the claim by the party beneficially interested in the promise, although no consideration springs from him. Mr. Parsons, in his book on Contracts (volume 1, p. 378), adopts this proposition: "Where advances have been made, or expenses or liabilities incurred by others, in consequence of such subscription, before any notice of withdrawal, this should, on general principles, make them obligatory, provided the advances were authorized by a fair and reasonable dependence on the subscriptions; and this rule seems to be well established." Addison, in his excellent work on Contracts (page 22), says: "But in these cases, and in all cases where there is no mutuality of contract and obligation, there is nothing to bind the party to the continuance of his promise so long as nothing has been done upon the faith of it; and the party making the promise or giving the undertaking may, at any time before it has been accepted and acted upon, and any portion of the intended consideration been accomplished, retract such promise or withdraw such undertaking, and place himself in the same situation as if it never had been made." Hind v. Holdship, 2 Watts, 104, cited by counsel for the church, is not the case of a subscription, but is direct authority showing the right of the party beneficially interested in the promise to bring suit, although a stranger to the consideration; and Uhland v. Uhland, 17 Serg. & R. 268, quoted in Watts, is the authority from Chief Justice Gibson for the right of the party beneficially interested in the promise to bring suit, although, not the promisee, and a stranger to the consideration. In Caul v. Gibson, 3 Barr. [3 Pa. St.] 416, Judge Burnside lays down broadly the binding force of these church subscriptions as settled law. In Norton v. Janvier, 5 Harr. [Del.] 346, Judge Booth rules in favor of the binding force of these subscriptions. In this case the subscription was made upon a condition that a certain amount should be raised by subscription or otherwise for the payment of the debt of the church; and the court held that the performance of the condition was a sufficient consideration. I know of no other case in Delaware. There are some cases cited from Vermont and New Hampshire, which I regret not being able to obtain. I think the clear result of the authorities in New York and Pennsylvania is that a promise to give funds to a church for church purposes, or other religious or charitable institutions, not revoked until after the church or other institution, on the faith of the promise, has incurred new expenses and new liabilities for objects and purposes within their proper sphere of action, is a valid promise, and founded on good and sufficient consideration. Standing by and permitting this new expense and liability, incurred on the strength of his promise (if not alone, yet certainly on the strength of his promise aggregated with those of others), he is properly, from a legal position, and certainly equitably, on grounds of good morals and good faith, considered as liable for money paid to and for his use and at his request, which they have a right on the common counts to recover. Now, this reasoning, it will be observed, is on the supposition that this promise was made directly to the church. If, on the other hand, the true view of this contract is that of promise to Mr. McGinniss, founded on McGinniss' mutual promise to subscribe, and that promise was (as is proved) executed, then there is proven full and ample consideration, and all the nice distinctions founded on the sufficiency of consideration which arise in the former view of the case are swept away.

The only question which now remains to be considered is, was there any condition to be performed by the church before they could claim the subscription, or was there the happening of any contingency upon which the right to make the claim was barred? If there was such condition to be performed, and by the fault of the church it was not performed, then there could be no just demand for this subscription, or if the contingency which, by the agreement of the parties, was to bar the claim, happened, then there could be no right of action. On one occasion Sinex said "the church was in debt, and he would give eight hundred dollars towards paying it." This does not appear to have been said on the special occasion of his promise to McGinniss; but it may be assumed, for the sake of the argument, that he desired his subscription, either in whole or in part, to be appropriated to the debt of the church. What then? Has he ever tendered the money to them for this purpose? and have they ever refused to apply it, thus tendered, to such a purpose? There is no evidence whatever of such a state of facts; there is no evidence that the church has paid all its debts; and there is none that, if the money is paid, the church will not apply every dollar to their payment. The subscriber who seeks to avail himself of this defense must show either that there was no debt to which the fund could be applicable according to the intention of the parties at the time of the subscription, or a refusal to apply the subscription money according to the intention of the parties. The evidence does not disclose either of these

states of facts, nor is there any proof that anything was to be done by the church other than what was done before demand of the subscription. Supposing Sinex's subscripuon was intended for paying off the church's existing debts, there is no proof that all, or the most of, these subscriptions were for that purpose; and the certain expectation of receiving eight hundred dollars to be applied to existing debt was an inducement and valid reason why necessary expenses should be in the future incurred, if within reasonable and proper bounds. So that, while Sinex's money was to be applied to existing debt, the agreement by him, to pay eight hundred dollars on account of it, operated in the same manner to induce the contracting of new necessary liabilities as if there had been no direction given by him for the application of his subscription.

I therefore allow the claim, and direct that the costs of the proceedings be taken from the funds in the assignee's hands.

CAPEN (HARRIS v.). See Case No. 6,118.

CAPITOL BANK (RIX v.). See Case No. 11,869.

CAPRICCIO, The. See Case No. 7,248.

Case No. 2,393.

The CAPT. GEO. W. WRIGHT.

[8 Ben. 219.] [1]

District Court, E. D. New York. July, 1875.

SALVAGE—COMPENSATION.

A canal boat, which had been cast off from a tow and was adrift in Long Island Sound, was picked up by a boat's crew of fifteen persons from Northport, and was libelled for salvage. The vessel was appraised and bonded at $400. *Held*, that such services to such boats in the sound ought to be encouraged; and the salvage was fixed at 50 per cent. of the stipulated value.

In admiralty.

Thomas Young, for libellants.
Benedict, Taft & Benedict, for claimant.

BENEDICT, District Judge. This is an action for salvage. The services consisted in going out into Long Island Sound from Northport to bring in a canal boat, known to have gone adrift from a tow. It is conceded to be a case of salvage. The only question submitted is as to the amount.

The increasing navigation of the Sound by canal boats towed by tugs involves considerable danger to the canal boats when the tows are caught by heavy weather. The boats are then often cast adrift, and when adrift and abandoned, as they generally are, are in great peril, owing to their inability by reason of their construction to withstand the seas, and their liability to go to pieces if they strike the shore. I consider, therefore, that encouragement should be held out to persons along the Sound to offer prompt and efficient aid to canal boats so situated, in order that these boats, in case of disaster, may as soon as possible be placed beyond the power of the sea. In view of this consideration, and looking at all the circumstances of the present case, including the fact that the value is small and some fifteen persons are to share in the salvage, I consider it a case in which to award fifty per cent. of the value of the boat as proper salvage.

The value of the boat has been fixed by a regular appraisement at $400, and the stipulation for value, which now represents the boat in this court, is for that amount. The decree must therefore be for $200 and costs.

If the salvors do not agree upon the division of this sum between themselves, they may present that question to me, upon a statement of the names of the salvors and the facts material to be stated.

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

Case No. 2,394.

The CAPTAIN SPEDDEN.

[Blatchf. Pr. Cas. 127.] [1]

District Court, S. D. New York. March, 1862.

PRIZE—RUNNING BLOCKADE.

Vessel and cargo condemned as enemy property, and for an attempt to violate the blockade.

In admiralty. The vessel and cargo were taken for the use of the government on appraisal, at the place of capture, in the Gulf of Mexico, and the vessel was afterwards lost at sea. The vessel and cargo were confiscable under the act of July 13, 1861 (12 Stat. 225).

BETTS, District Judge. This schooner and her cargo were captured as lawful prize on the 12th of January, 1862, in Biloxi river, by the United States steamer New London. The vessel and her cargo, consisting of lumber, were appraised under orders of Flag Officer McKean, of the United States navy, at Ship island, in the Gulf of Mexico, by a board of naval survey, and both were taken to the use and service of the United States, at such appraisal. The papers and documents found on board the vessel, with the official appraisement of the vessel and cargo, were placed before the court on the hearing of the cause. A motion was issued against the vessel and cargo on the 5th of March, and returned duly served on the 18th of March, 1862, and, no person making appearance in

[1] [Reported by Samuel Blatchford, Esq.]

the suit, or claiming the prize, the district attorney, upon the papers and preparatory proofs submitted to the court, moved for condemnation of the vessel and cargo as lawful prize. The vessel was enrolled and licensed, under the authority of the Confederate States, at New Orleans, April 27, 1861. She was owned by a naturalized citizen, resident at New Orleans, who left New Orleans in her, under a pass from the rebel authorities, November 30, 1861, and the cargo was laden on board, by the master and owner of the vessel, at Harrodsburg, on the Biloxi river, and near the town of Biloxi, in the state of Mississippi, with intent to be transported thence to Biloxi, on the bay of that name, and Gulf of Mexico. The vessel, after her arrest, was foundered and lost in a gale at or near Ship island, in the Gulf of Mexico. It was, accordingly, physically impossible to have her bodily in this port, to commence proceedings in rem against her as prize. The vessel evaded a blockaded port —New Orleans—to obtain, in another blockaded port, the cargo on board at the time of her capture, and was intercepted in her destination to another part of the same port. Had she been a [neutral] vessel, she would, therefore, not have completed the voyage out from New Orleans, so as to be discharged of the offense thereby committed. The Christiansberg, 6 C. Rob. Adm. 382, and notes.

This case also falls within the terms of the act of congress of July 13, 1864 (12 Stat. 255). The proclamation of the condition of the Rebellion in the states of Louisiana and Mississippi was issued August 16, 1861, and this vessel having proceeded from one of these states to the other, and being there found laden with enemy property, both she and her cargo would come within the provisions of that act, as well as under the general rules of the prize law, for having violated or intending to evade the blockaded ports by a further voyage by sea. See cases referred to in preceding decisions. Judgment of condemnation and forfeiture of the value of the vessel and cargo absolutely to the United States, conformably to the appraisement, is ordered accordingly.

CARBARGA, The (INGERSOLL v.). See Cases Nos. 2,276 and 7,038.

CARBERY (MAYE v.). See Case No. 9,339.

CARBERY (NEWTON v.). See Cases Nos. 10,189 and 10,190.

CARBERY (READ v.). See Case No. 11,604.

CARBERY (THOMPSON v.). See Cases Nos. 13,945 and 13,946.

CARBERY (UNITED STATES v.). See Case No. 14,720.

CARBON STOVE CO. (THATCHER HEATING CO. v.). See Case No. 13,864.

CARD (DODGE v.). See Case No. 3,951.

Case No. 2,395.

CARDINEL et al. v. SMITH et al.

[Deady, 197.] [1]

Circuit Court, D. California. March 14, 1867.

REVENUE ACT OF 1866—GOODS IN HANDS OF MANUFACTURER—FORFEITURE—REMEDIES OF CLAIMANT—CONSTRUCTION OF STATUTE.

1. Section 63 of the act of July 13, 1866 (14 Stat. 169), which provides that a person claiming goods which have been seized as forfeited under the internal revenue act, must give bond to the collector for costs and expenses, etc., is not compulsory, and does not prevent the owner of goods which he alleges to have been seized unlawfully, for maintaining an action against the seizing officer for the damages occasioned by the trespass.

2. By section 70 of the act of July 13, 1866 (14 Stat. 173), it is in effect provided that canned goods in the hands of the manufacturer, on and after August 1, 1866, shall pay a duty; and by the same act (Id. 144), it is declared that a retail or other dealer in such goods, for all the purposes of taxation, "shall be deemed the manufacturer thereof;" while in Schedule C (Id. 145) it is provided that such goods when "made, prepared, and sold or offered for sale or removal for consumption in the United States, on or after October 1, 1866," shall be liable to a stamp duty. *Held*, that a retail or other dealer who offered such goods for sale after August 1, 1866, was to be deemed and held the manufacturer thereof, and that such goods were liable to pay a duty, and if offered for sale without the payment thereof, were forfeited to the United States.

[See note at end of case.]

3. Where the intention of the legislature is in some particular ambiguously expressed, it is the duty of the court so to construe its act so as to make it harmonize in such particular with the general purpose, plainly expressed.

4. When an act (14 Stat. 144) declares that dealers in canned goods, under certain circumstances, "shall be deemed the manufacturers thereof," it is equivalent to declaring that such dealers shall be treated and held liable as if they were manufacturers, notwithstanding they are not such in fact.

This action was tried by the court, without the intervention of a jury. It was brought [by Adolph Cardinel and Augustine Lusulsky] against the defendants [W. C. S. Smith and Jerome B. Walden] for taking and carrying away certain canned meats, fruits, etc., alleged to be the goods of the plaintiffs, in the district court of the state for the seventh judicial district, and by the defendants removed to the United States circuit court, under section 67 of the act of July 13, 1866 (14 Stat. 171). The facts of the case are sufficiently stated in the opinion of the court.

W. W. Pendegast, for plaintiffs.
R. F. Morrison, for defendants.

DEADY, District Judge. In making the seizure and sale complained of, the defendants acted in their official capacity—Smith as collector of internal revenue for the fifth district of California, and Walden as constable of Napa township—and upon the assump-

[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission.]

tion and claim on their parts, that the goods seized were liable to pay a duty as provided in Schedule C of the act aforesaid, and were forfeited to the United States on account of having been exposed to sale by plaintiffs without the duty thereon having been paid by affixing the proper stamps thereon. It is insisted on behalf of the defendants that this action cannot be maintained, even if the seizure was wrongful, because the plaintiffs, it is said, are confined to the remedy provided or allowed by section 63 of the act of July 13, 1866 (14 Stat. 169). This section allows any person, who may claim goods that have been seized as forfeited to the United States, under the internal revenue act to file a bond with the collector for costs and expenses, and thereupon the collector must give notice of his proceedings to the district attorney, who must proceed to have the alleged forfeiture adjudicated in the proper court. But this provision is neither compulsory nor exclusive, and does not prevent the claimant from adopting and pursuing any other existing remedy. Indeed, section 63 aforesaid, is primarily intended to govern the conduct of the collector in the disposition of goods seized as forfeited to the United States, and in no way affects his liability to an action by the party aggrieved in case of an unlawful seizure. At common law any officer, including a sheriff acting under process, who seized goods of another by mistake or otherwise without sufficient authority, was liable to an action of trespass therefor. True, congress, for the purpose of preventing officers of the customs from being harassed by actions for vindictive damages, has provided that where the property seized, has been adjudged to the claimant as not liable to seizure, if the court certifies that there was probable cause for the arrest, no action can be maintained therefor. The claimant is restored to his property by the judgment of the court, but the fact, judicially ascertained, that there was probable cause for the taking and detention, is made a bar to an action for damages for the mere detention of the property. But in regard to these goods, there has been no proceeding in rem to determine their liability to seizure as forfeited to the United States. The plaintiffs' goods have been taken from them by the defendants, and the former, instead of claiming them, giving surety for costs, and thereby taking the case into court upon the naked question of forfeiture, have seen proper to abandon the goods and sue the defendants in trespass for the value thereof. Unless, then, the taking or seizure was lawful, the defendants must respond in damages to the extent of the value of the goods, and look to the government, which has had the benefit of the seizure, to reimburse them. Assuming that the seizure was unlawful as alleged, the plaintiffs have not mistaken their remedy, and may maintain this action.

The only remaining question in the case is, were these goods, at the time they were offered and exposed for sale, liable to pay a duty? If they were, they were forfeited to the United States and the seizure was lawful, otherwise not. Schedule C, as amended by section 9 of the act of July 13, 1866 (14 Stat. 145), declares, that such goods as these when "made, prepared and sold or offered for sale, or removed for consumption in the United States, on and after the first day of October, 1866," shall be liable to a stamp duty. The plaintiffs purchased these goods before October 1, 1866, and afterwards offered them for sale. The seizure was made on October 22. This being so, of course they were "made and prepared" before October 1. It is insisted by the plaintiffs that this provision of the act should be read so as to declare that these goods, whether sold or offered for sale, or removed for consumption, etc., after October 1, should also be made and prepared—manufactured after that date. I think this proposition reasonable and grammatical, and so far as this clause of the statute is concerned, settles the question in favor of the plaintiffs. The alternative is only applied to the selling, offering for sale or removing for consumption after October 1, but in either case the goods so sold, offered or removed, to be liable to the duty, must have been "made and prepared" after said date. But this is not all. Said section 9 also provides (14 Stat. 144): "That any person who shall offer or expose for sale any of the articles named in Schedule C, * * * shall be deemed the manufacturer thereof, and subject to all the duties, liabilities, and penalties imposed by law in regard to the sale of domestic articles without the use of the proper stamp or stamps denoting the tax paid thereon." If, when the plaintiffs exposed these goods for sale on October 22, 1866, they were in contemplation of law the manufacturers of them, it was their duty to first affix "thereon the proper stamp," in default of which the goods were forfeited to the United States and liable to seizure. 13 Stat. 296, 482.

By section 70 of the act of 1866 (14 Stat. 173) it is provided that "whenever by the terms of this act a duty is imposed upon any articles, goods, wares or merchandise, manufactured or produced, upon which no duty was imposed by either of said former acts, it shall apply to such as were manufactured or produced, and not removed from the place of manufacture or production on the day when this act takes effect." The same section declares, "that this act shall take effect when not otherwise provided on August 1, 1866." The goods in question fall within this category, as no duty was imposed upon such goods "by either of said former acts." These are the only provisions of the internal revenue acts that bear upon the question.

Taking this legislation together, what was

the intention of congress as to taxing these goods? That intention when ascertained it is the duty of the court to give effect to, without regard to any other consideration. For the plaintiff it is contended that congress did not intend to impose a duty upon canned goods made or prepared before October 1, 1866. So far as the language of Schedule C is concerned, it supports the argument. But it is evident from the provision just quoted from section 70, that such was not the intention of congress in regard to all such goods as had not been "removed from the place of manufacture or production" before August 1, 1866; for this section expressly provides that the duties specified in Schedule C should be imposed upon such goods. And if the intent of this provision was uncertain or open to argument, every consideration of just public policy in the imposition of taxes would conduce to this conclusion. To tax canned goods after October 1, and exclude from the operation of the law, all such as were manufactured before that date, would, to that extent, be an unjust discrimination in favor of the owners of the latter class of goods. Congress having thus provided for the taxation of canned goods "not removed from the place of manufacture or production" before August 1, 1866, from this fact, the inference is reasonable that it also intended to tax those which, although removed, had not yet passed into the hands of the consumer. No reason is given, why canned goods in the hands of the manufacturer when the act of 1866 took effect, should be liable to pay a duty, while the same class of goods in the hands of the jobber or retailer, should be exempt. At the same time it is admitted, that if congress has not provided for taxing such goods in the hands of the merchant, as well as the manufacturer, whatever may appear to have been the general purpose of its enactment, the court cannot supply the omission. But if the intention of the legislature in this particular be doubtful, or ambiguously expressed, it is the duty of the court to construe the act, if possible, so as to make it harmonize in such particular, with the general purpose, plainly expressed.

Taking the whole legislation together, I do not think that congress intended to exempt the goods of the plaintiffs from taxation, because they were "made and prepared" before October 1—if exposed for sale after that time. If the question turned upon the language of the provision in Schedule C only, the conclusion might be otherwise. But the law of the case is not found in this provision alone. In fact, these schedules are mere brief indexes of subjects, the general legislation concerning which, is found elsewhere in the body of the acts. The clause of section 9 (14 Stat. 144) above quoted, in my judgment, settles the law of this case against the plaintiffs. Their counsel, apparently conscious that the letter of this section was against them, sought to modify its effect, by endeavoring to show that when it declares that "a person who shall offer or expose for sale, any of the articles named in Schedule C, * * * shall be deemed the manufacturer thereof," it only creates a disputable presumption that such person is "the manufacturer thereof," which, in this case, is overcome by the admitted fact, that the plaintiffs are not the manufacturers, but only the vendors of the articles. The word "deemed" in this connection means "judged," "determined;" and when it is enacted that the vendor of an article shall for any purpose, "be deemed the manufacturer thereof," for such purpose, he is to be absolutely considered such manufacturer. Indeed, it would be of little use for congress to declare that a vendor of canned goods, for the purpose of internal revenue, should be deemed a manufacturer thereof, if such declaration could be overcome and held for naught, by showing that, in fact, he was not such manufacturer. Now, by such declaration, congress does not undertake to destroy the distinction, in fact, between the two persons or occupations, but only that the law applicable to the manufacturer of canned goods, shall also be applicable to the vendor thereof—that in this respect, and for this purpose, they shall be treated alike.

The internal revenue act [14 Stat. 98] is a piece of patch work, and it is sometimes difficult to reconcile its various provisions with each other. Its great length, and the multiplicity of subjects which it embraces, enhances the labor of understanding it. I confess I do not feel the utmost confidence in the present construction and application of it, though I feel well satisfied that it is just and equal in its consequences. As has already been observed, if a tax like this is only imposed upon articles manufactured after it takes effect, it operates as an unjust discrimination against the future manufacturer. And I am free to admit that this consideration has had its influence upon my mind in reaching the conclusion that congress did not intend to tax canned goods in the hands of the manufacturer when the act took effect, and exempt the goods in the hands of the seller, because manufactured before that date.

It appears that the commissioner of internal revenue has decided this question both ways. By a circular from the "Office of Internal Revenue," dated October 3, 1866, it was declared, that "all canned goods, either in the hands of the manufacturer or purchaser, sold or offered for sale on and after the first instant, are required to be stamped as specified in Schedule C of the act of July 13, 1866." By a second circular on the subject, from the same office, dated October 27, 1866, it was declared: "While it is believed that it was the purpose and intent of congress to impose a stamp tax upon the above named articles (canned goods) if sold, or of-

fered for sale, or removed for consumption in the United States, on or after October 1, 1866, regardless of the time of their manufacture or production, that intent is so imperfectly expressed as to render it doubtful whether under a proper construction of the language of the statute such a tax can be collected." It is probable that by the time the second circular reached the revenue offices, nine tenths of the goods in question, such as had passed out of the hands of the manufacturer or producer before October 1, 1866, had paid the duty. It is also to be observed, that the decision of the commissioner appears to have been based upon the language of Schedule C alone, without reference to the other sections of the act above cited. Again, the commissioner, as a matter of public policy, might instruct his subordinates to refrain from enforcing this provision of the act according to this construction, for the reason that it was involved in some doubt, and might lead to unprofitable litigation. In some such light, I read the decision in the second circular. A department ruling made under such circumstances and from such motives, well enough in itself, can have but little weight in a court called upon to determine what the law actually was, as appeared by the acts of the legislature, at the time of this seizure.

There must be judgment for the defendants in bar of the action, and for their costs and disbursements.

[NOTE. As to who is to be deemed a manufacturer within the meaning of the act of 1866, see U. S. v. Weedon, 3 Fed. 623; Hendy v. Soule, Case No. 6,359; In re Whipple File Co., Id. 17,522; U. S. v. Houghton, Id. 15,396.]

CARDWELL (DOWELL v.). See Case No. 4,039.

Case No. 2,396.

CARDWELL v. REPUBLIC FIRE INS. CO.

[12 N. B. R. 253;[1] 7 Chi. Leg. News, 282.]

District Court, N. D. Illinois. 1875.

MARINE INSURANCE — FORFEITURE FOR NONPAYMENT OF PREMIUM NOTE — STRANDING OF VESSEL—PAYMENT OF NOTE — SUBSEQUENT LOSS OF VESSEL IN GALE.

1. Where a note is given for the premium on an insurance policy containing the provision that if the note is not paid at maturity the policy becomes void while it remains overdue and unpaid, and after the dishonor of the note the vessel insured strands, whereupon the master has the note paid, and afterwards a gale comes up and the vessel is lost, the insurer is not liable.

2. Though the weather was fair at the time of the stranding, and continued so until after the note was actually paid, yet the proximate cause of the loss was the stranding of the vessel, and under these facts the policy was not revived.

[1] [Reprinted from 12 N. B. R. 253, by permission.]

Waite & Clark, for creditor.

Tennys, Flower & Abercrombie, for defendant.

BLODGETT, District Judge. This is a motion to expunge a claim proved by Wm. P. Cardwell against the estate of the bankrupt. There is no dispute as to the material facts. The claimant was the owner of the schooner D. O. Dickinson, and a policy in his favor for the season 1869, for the sum of five thousand dollars, was issued by the bankrupt company on the hull, tackle, apparel, and furniture of said schooner, to expire on the 5th of December, 1869. The insured gave the company a note for the premium on this policy, payable on the 8th day of October, 1869, with a condition in the body of the note and also in the policy, in these words: "And in case this note is not paid at maturity the full amount of premium shall be considered as earned, and the said policy becomes void, while the note remains overdue and unpaid." The note was not paid when due, and on the night of the 7th of October said schooner, laden with a cargo of lumber, left the port of Oconto for the port of Chicago, and about two o'clock on the morning of the 8th she ran aground on what is known as Strawberry reef, a sandbar projecting from Chambers' island, near the outlet of Green bay. No serious damage was done to the schooner by the stranding. Her bows ran hard on to the sand, and although an anchor was at once carried out and efforts made by the crew to work her off, they were unable to move her, owing to the bad holding ground, which was a soft sandy or gravelly bottom. Finding that he could not get her off by his own efforts, the captain, who was the owner, with the most efficient part of his crew, took the yawl boat and proceeded to Menominee, about thirty miles distant, for a tug, where they arrived about eleven o'clock in the morning. From that point the owner telegraphed to his agent in Chicago to pay the premium note, and the same was paid at half-past eleven o'clock in the forenoon on the 8th of October, without any disclosure to the insurance company of the condition in which the vessel then was. The services of a tug were procured, and the captain, with the tug, returned to the schooner about five o'clock in the evening of the 8th. The captain of the tug found the water too shallow in the vicinity of the schooner to enable him to reach her with his lines and decided to go for a lighter, which he did, leaving the schooner still hard aground. During the 8th, and up to about four o'clock of the morning of the 9th, the weather was pleasant and with no sea running, and the vessel appeared to be in no immediate danger; but about four o'clock in the morning of the 9th a gale came on from the southwest, causing a heavy sea, which broke over the stern of the vessel and finally filled her with water, and before the gale subsided she was a total wreck.

The company refused to pay the insurance, and a suit at law was commenced, but before it could be tried the company was adjudged a bankrupt, and this claim for the amount of the policy and salvage services, in all five thousand five hundred and fourteen dollars and twelve cents, was proven up against the estate of the bankrupt, which the assignee now seeks to have expunged. The defense set up by the assignee is, that at the time the loss occurred the policy had become void by the non-payment of the premium note, and, therefore, the company was not liable. In Williams v. Albany City Ins. Co., 19 Mich. 451, this clause was construed to simply suspend the policy while the insurance remained unpaid. And if payment of the premium was made before expiration of the policy, it was revived and became again operative; but if the loss occurred during the interval in which the policy remained suspended, the company was not liable, therefor, on the policy. This construction of the intent and meaning of the contract seems to me sound, and was acquiesced in by the counsel on both sides in this case. The material question is, when did the loss occur within the spirit and meaning of the policy? Was it when the vessel stranded on the sandbar in comparatively mild weather, or when she was actually broken in pieces by the gale? Or, in other words, was the vessel lost within the meaning of the contract when the premium note was paid at half-past eleven o'clock on the forenoon of the 8th of October.

It seems to me that the proximate cause of the wreck of the vessel occurred when she stranded on this sandbar. From that time on she was beyond the control of her crew. She was no longer a vessel afloat and capable of being maneuvred by those in charge of her, but was a helpless and inert mass, incapable of performing the functions of a ship. True, she received no such immediate damage as necessarily involved her destruction, if good weather had continued and help had been obtained; but she was within the jaws of destruction with no power to help herself, and at the mercy of the elements; and when the gale came on it only completed the wreck which had begun with the stranding.

It is conceded by the counsel for the claimant that the policy was suspended and inoperative from the time the note fell due till paid, and, of course, if the loss is to date from the time when she struck on the bar, then the policy was inoperative at the time of the loss.

Claimant's counsel contend that the immediate cause of the loss of the vessel was the gale, which began on the morning of the 9th, insisting that the proof shows that the vessel was not considered in any danger, by her captain or crew, up to that time; and that the gale and not the stranding, on the morning of the 8th, is to be deemed the proximate cause of the wreck, but, as I have already intimated, I cannot agree with that view of the case. The proximate cause of the wreck, in my opinion, was the stranding, which held the vessel helpless while the gale beat her in pieces. But for the stranding she would have been far beyond that place, and probably at or near the end of her voyage, before this gale came on.

The cases cited from 12 Wall. [79 U. S.] 194 [Howard Fire Ins. Co. v. Norwich & N. Y. Transp. Co.]; 11 Johns. 13; 12 East, 646; 2 Biss. [Case No. 14,345], as to what was the proximate cause of loss in those cases, respectively, do not seem to me in point. The case from 12 Wall. [79 U. S.] (Howard Fire Ins. Co. v. Transp. Co.), which seems at first glance the most analogous, was that of a fire risk on the hull of a steamer. A collision occurred by which the steamer was injured so as to let in the water, and owing to the influx of the water she took fire and her upper works burned off so that the rest of the hull sank. It was found, as a fact in the case, that but for the fire, which destroyed the buoyant parts of the hull, she would have floated, notwithstanding the injury from the collision, and the court, therefore, held that the fire was the proximate cause of the loss as against the fire insurance company. So in the case of The Union [Case No. 14,345]. The learned judge held that the proximate cause of injury to the libellant was his own negligence in attempting to leap from the tug, and not a collision which had occurred some moments before.

The claim must be expunged.

CARENOUGH (THOMPSON v.). See Case No. 13,947.

Case No. 2,397.

CAREW et al. v. BOSTON ELASTIC FABRIC CO.

[3 Cliff. 356; 5 Fish. Pat. Cas. 90; 1 O. G. 91; Merw. Pat. Inv. 111.][1]

Circuit Court, D. Massachusetts. May Term, 1871.

PATENTS—PROCESS FOR REWORKING VULCANIZED RUBBER—REISSUE TO EXECUTOR—SPECIFICATION—AMENDMENT—CONSTRUCTION—INFRINGEMENT—PRACTICE—DAMAGES—INCREASE BY COURT.

1. Where an original patentee has deceased and his estate is under administration, his executor or administrator may make a surrender and obtain a reissue.

[See Smith v. Mercer, Case No. 13,078.]

2. The commissioner may allow the original specification to be amended in the reissue, and he may permit the applicant for a reissue to redescribe his invention, including in the new description and claims not only what was well described before, but also what was suggested

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission. Merw. Pat. Inv. 111, contains only a partial report.]

or indicated in the original specification, drawings, or patent-office model.

[Cited in Whitcomb v. Coal Co., 47 Fed. 659.]

[See Tucker v. Tucker Manuf'g Co., Case No. 14,227; Draper v. Potomska Mills Corp., Id. 4,072; Woven-Wire Mattress Co. v. Wire-Web Bed Co., 8 Fed. 87; Telegraph Co. v. Wiley, 17 Fed. 234.]

3. New features, ingredients, or devices, neither described, suggested, or indicated in the original specification or model, cannot be embodied in the new description.

[See note at end of case.]

[See Sarven v. Hall, Case No. 12,369.]

4. An inventor described his improvement in his original patent as a process for working over vulcanized rubber and moulding it into any desired shape; and stated that in carrying the process into effect many foreign articles of less cost than rubber could be incorporated so as to produce a substance having all the valuable properties of vulcanized rubber at such reduced cost as to admit of its being applied to many more useful purposes. The description in a reissue stated that the principal features of the process consisted in applying heat by means of steam to rubber mixed with substances commonly used in vulcanizing rubber, or to rubber compound which has once been vulcanized either with or without the addition of fresh rubber, the same, whether the rubber or the compound, is or not pressed into moulds or dies of the desired form, and the steam introduced into steam-chambers or steam-jackets, and thereby conducted around the moulds or dies which come in contact with the compound to be moulded into the desired form. The corresponding passage in the original specification was in effect that the principal features of the new process consisted in applying heat either to rubber in its native state, or to rubber with the substances commonly used in vulcanizing rubber which has once been vulcanized by means of steam. The description further stated that the rubber compound while being heated was pressed into moulds or dies to give it the desired form. Also that the steam was conducted around all portions of the moulds or dies which come in contact with the rubber or compound to be moulded. Also, by this means the process of curing rubber was greatly facilitated, and vulcanized rubber which had before resisted all attempts to remould it was readily pressed into any desired shape. *Held*, that the substance of the two descriptions in these portions was the same, and that the original one sustained that of the reissue.

5. It is the duty of the court to collect the intention and meaning of the inventor from the whole specification, and, if practicable, to adopt such a construction as will render the patent available for the purpose for which it was granted.

[Cited in La Baw v. Hawkins, Case No. 7,960.]

6. The reissued patent did not embrace the invention of Charles Goodyear, which was for curing the native rubber when combined with or in the presence of sulphur by submitting the same to a high degree of artificial heat, and also for a manufacture called vulcanized India-rubber, being a compound of India-rubber with sulphur chemically altered by a high degree of heat, because that invention was disclaimed in the original specification, and it was stated to be the chief feature of the invention to cure again vulcanized rubber and mould it into any desired shape, and because the reissue also stated that the value of vulcanized rubber ceased when the article made out of it was worn out, and that foreign substances might be mixed with rubber compound so as to form a substance having the properties of vulcanized rubber, but composed of cheaper materials.

7. Where one paragraph in a reissue specification would seem to lead to a construction which would make void the reissue, explanation of its meaning may be sought in a succeeding one.

8. Where the process and purpose are plainly suggested and understood, and the language in an original specification is suggestive of new terms and names used in the reissue, such new names and terms do not show that the reissue is descriptive of an invention different from that set out in the original.

9. The correct practice is, where infringement to any extent is admitted, if the patent is held to be valid, to enter an interlocutory decree for complainant and send the cause to a master to ascertain the amount the complainant is entitled to recover.

10. Under the act of July 8, 1870 [16 Stat. 206], where a decree is entered for complainant, he may recover, in addition to the profits to be accounted for by the respondent, the damages he has sustained, and the court may in its discretion assess the same.

11. Profits are to be accounted for in such case by the respondent wherever the decretal order to that effect is entered, and if the injuries sustained by the complainant from the infringement are greater than the gains and profits realized by the respondent, then the complainant is entitled to recover compensation for the excess of the injuries beyond the amount estimated for profits of the respondent.

[Cited in Buerk v. Imhaeuser, Case No. 2,107.]

[See note to Case No. 2,142.]

12. Actual damages are assessed in the first instance, but the court may in its discretion increase the amount to a sum not exceeding three times the amount estimated and assessed as the actual damages sustained beyond the gains and profits realized by the respondent.

[Cited in Star Salt Castor Co. v. Crossman, Case No. 13,320.]

[See Stimpson v. The Railroads, Case No. 13,456; Allen v. Blunt, Id. 217; Kneass v. Schuylkill Bank, Id. 7,876; Schwarzel v. Holenshade, Id. 12,506.]

On the 29th of August, 1854, letters-patent [No. 11,608] were granted to Daniel Hayward, since deceased, for certain new and useful improvements in the manufacture and in the process of manufacturing vulcanized rubber, for the term of fourteen years, and on the 28th of August, 1868, the letters-patent were extended in the name of [Caleb Swan] the executor of the patentee for the further term of seven years from the expiration of the original term of the letters-patent. Subsequently to the extension of the patent, —to wit, on the 15th of December in the same year,—the executor of the original patentee, by deed of assignment in due form, conveyed all his right, title, and interest in the letters-patent to the first-named complainant, through whom, by virtue of certain agreements, the other complainants derived their titles. By virtue of that conveyance the legal title to the letters-patent became vested in the assignee, and the record showed that he, on the 6th of July, 1869, surrendered the letters-patent on account of a defective or insufficient specification, and that a new patent was issued to the same party, and,

as the complainant alleged, for the same invention. [Reissue No. 3,531.] They also allege that the original patentee was the original and first inventor of the improvement; that they, the complainants, were the owners of the reissued letters-patent, and of the exclusive right to make and use the invention, and vend the same to others to be used, and that they were entitled to be protected in the enjoyment of that exclusive right during the residue of the term for which the reissued letters-patent were granted. Acquiescence by the public in their claim, that the exclusive right to the improvement belonged to them, was also alleged, and that they would have derived large gains and profits from the manufacture of the patented product but for the wrongful doings of the respondents; and they charged that the respondents, ever since the reissued letters-patent were granted, had unlawfully and wrongfully made, used, and sold large quantities of articles composed of the patented product, and manufactured in the manner and by the process patented and secured in their letters-patent, and that they, the respondents, had received great gains and profits from the manufacture and sale of such articles, and from the unlawful use of their invention. Process was issued and duly served, and the respondents appeared and filed an answer. The defences urged were as follows: 1. That the executor of the original patentee was not authorized by law to surrender the original letters-patent and to obtain the reissued letters-patent described in the bill of complaint. 2. That the reissued letters-patent were not granted for the same invention as that described in the specification of the original letters-patent. 3. That the patentee in the original letters-patent was not the original and first inventor of the alleged improvement. 4. That the respondents have not infringed, except to a small extent, the patented invention as alleged in the bill of complaint.

[Defendant demurred to the bill, and the demurrer was overruled. See case No. 2,398, next following.]

Whiting & Russell and J. E. Maynadier, for complainants.

George Gifford and F. A. Brooks, for respondents.

CLIFFORD [Circuit Justice]. Authority to accept the surrender of an original patent in certain cases where the specification is defective or insufficient, and to grant a new patent to the inventor of the improvement, is conferred upon the commissioner of patents, and where he accepts the surrender and grants a new patent, his decision in the premises, in a suit for infringement, is final and conclusive, unless it is apparent upon the face or the reissued patent, as matter of legal construction, that it is not for the same invention as that secured in the original letters-patent. 5 Stat. 122; 16 Stat. 206; Seymour v. Osborne, 11 Wall. [78 U. S.] 542.

Controversies of the kind where the original patentee has deceased, and where the reissued letters-patent were in the name of the executor or administrator, have often come before the courts, and the printed arguments for the respondents refer to no decided cases where it is held that the letters-patent are invalid on that account. Goodyear v. Providence Rubber Co. [Case No. 5,583]; 9 Wall. [76 U. S.] 788.

Specifications in letters-patent are frequently found to be defective or insufficient, and where the original patentee has deceased and his estate is under administration, it is difficult to see any solid objection to the power of his executor or administrator to make the surrender and obtain the reissue. Patents which are inoperative or invalid by reason of a defective or insufficient description or specification, if the error arose by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, may be surrendered, and the commissioner is authorized, upon the payment of thirty dollars, to cause a new patent to be issued to the inventor for the same invention for the residue of the period then unexpired, for which the original patent was granted, and the repealed patent act, under which the reissued letters-patent were granted in this case, provided that "in case of his death, or any assignment by him made of the original patent, a similar right shall vest in his executors, administrators, or assigns." 5 Stat. 122; 16 Stat. 106.

Reissued letters-patent must, by the express words of the section authorizing the same, be for the same invention, and consequently, where it appears on a comparison of the two instruments as matter of law that the reissued patent is not for the same invention as that secured in the original patent, the reissued patent is invalid, as the commissioner in that state of the case must be held to have exceeded his jurisdiction. Power is unquestionably conferred upon the commissioner to allow the specification to be amended, if the patent is inoperative or invalid, and in that event to issue a new patent in proper form, and he may doubtless under that authority allow the patentee to redescribe his invention, and to include in the description and claims of the patent, not only what was well described before, but whatever else was suggested or substantially indicated in the specification, drawings, or patent-office model, which properly belonged to the invention as actually made or perfected. Interpolations of new features, ingredients, or devices, which were neither described, suggested, nor indicated in the original patent or patent-office model, are not allowed, as it is clear that the commissioner has no jurisdiction to grant a reissue unless it be for the same invention as that

embodied in the original letters-patent. Seymour v. Osborne, 11 Wall. [78 U. S.] 544.

Apply those rules to the case at bar, and it is clear as anything in legal decision can be, that the second defence set up by the respondents cannot be sustained. Certain parts or passages of the specification of the reissued patent are incorporated into the answer of the respondents as showing that the reissued patent describes and claims an invention or certain features of an invention different from that described and secured in the original patent; but the court is of a different opinion, as everything described in the parts or passages of the original specification selected and embodied in the answer as supporting that defence is found either fully set forth or plainly suggested or substantially indicated by the inventor in the specification or drawings of the original patent. He describes his improvement in the original letters-patent, as a process for working over vulcanized rubber and moulding it into any desired shape; and he states that in carrying the process into effect, many foreign articles of less cost than rubber may be incorporated into the rubber so as to produce a substance or compound having all the valuable properties of vulcanized rubber, at such a reduced cost as to admit of its being more extensively used than heretofore, and to be applied to many new and useful purposes. The respondents select as the chief ground of complaint the following parts or passages contained in the specification of the reissued letters-patent. Pressure, says the patentee, in certain cases is necessarily applied in order to give homogeneousness to the material and to free it from blisters and other imperfections, and where rubber goods which were vulcanized by the ordinary process in ovens or steam-boilers, are blistered or imperfectly vulcanized, it is found that that the defects may be cured by placing the material between steam-jackets, and under pressure, and that the blisters and imperfections may be removed by the action of heat and pressure there applied.

Preceding that part of the specification embodied in the answer as the one describing a different invention from that secured in the original patent, the patentee states that in some cases the mere confinement of the compound between the surrounding steam jackets or chambers may be sufficient without the application of any actual pressure before the compound is vulcanized, inasmuch as the material always expands in bulk during the process of vulcanization, which produces a pressure upon the surfaces by which it is surrounded and confined. Vulcanized rubber, the patentee in the reissued letters-patent states, ceases to be of value when the article constructed from it had become worn out, as it is well known that it possesses properties which practically prevent its being used a second time, and he proceeds to represent that the improvement consists in a new process for vulcanizing and moulding any compound of rubber capable of being vulcanized, and that the improvement is applicable also to working over and revulcanizing rubber compound which has already been vulcanized and put to use. He also states that by the process many foreign substances may be intermixed with the ordinary rubber compound, whether already once vulcanized or newly compounded for vulcanization, so as to form a substance having the valuable properties of vulcanized rubber compound although composed in a great part of cheaper materials. Superadded to those representations is the further statement that the principal features of the process consist in applying heat by means of steam to rubber mixed with substances commonly used in vulcanizing rubber, or to rubber compound which has once been vulcanized, either with or without the addition of fresh rubber, the same, whether the rubber or the compound is or not pressed into moulds or dies of the desired form, and the steam introduced into steam-chambers or steam-jackets and thereby conducted around the moulds or dies which come in contact with the compound to be moulded into the desired form. Much reliance is placed upon that passage of the specification of the reissued patent as showing that the specification describes an invention different from that described in the specification of the original patent; but the court is clearly of the opinion that it fails to establish any such proposition within the meaning of the patent law. Some difference undoubtedly exists between the phraseology of that passage and the corresponding passage in the specification of the original patent; but the substance of the two descriptions is the same as clearly appears by comparing that passage with the language employed in the specification of the original patent, in which it is stated that the principal features of the new process consist in applying heat either to rubber in its native state, or to rubber with the substances commonly used in vulcanizing rubber which has once been vulcanized by means of steam. No attempt is made to show that the introductory representation of that passage differs in any essential particular from the corresponding representation in the specification of the reissued patent, but it is insisted that the succeeding portion of the paragraph falls short of sustaining the corresponding feature in the new patent. The court is unable to sustain that proposition, as the patentee states in effect, in continuing the description of his process, that the rubber or compound while thus heated, is pressed into moulds or dies which give it the desired form, "the steam being conducted around all portions of the moulds or dies which come in contact with the rubber or compound to be" moulded into the desired form. "By this means the process of curing rubber is greatly facilitated,

and vulcanized rubber, which has hitherto resisted all attempts to remould it, is readily pressed into any desired shape."

Other references to the respective specifications might be made to show that the reissued patent is for the same invention as that embodied in the original patent, but it is not necessary to pursue the subject, as it is quite evident that the new patent does not contain anything which is not fully described or substantially suggested in the specifications or drawings of the surrendered patent. Three varieties of apparatus are described as sufficient to illustrate the application of his improved process to the production of different articles manufactured of rubber and its compounds. He then remarks that the essential feature of the process is not the use of such a form of machine, or of moulds or dies, but that it consists in "so introducing steam to the moulds and dies as to cause it to circulate entirely through and around the same, or substantially so, so that substantially every part of the rubber or compound which bears against the moulds or dies shall come in contact with a surface heated by steam," softening the compound so that it may be moulded into the requisite shape or form by the pressure of the dies. Special reference is made to the fact that the words "uneven surfaces," "blisters," or "smoothing surfaces," or "plating articles" are not mentioned in the specifications of the original patent; but it is a sufficient answer to that suggestion to say that the term "moulding rubber" and its compounds may well include all that is meant by those particular phrases.

Want of novelty is the next defence, and in connection with the general allegation that the original patentee is not the original and first inventor of the improvement, the defence is presented in two or three special forms which will be noticed as a part of the same defence. Proofs were taken on both sides, and the complainants at the final hearing introduced in evidence the reissued letters-patent as described in the bill of complaint. Such evidence, that is, the letters-patent on which the suit is founded when introduced by the complainant, afford a prima facie presumption, if they are in due form, that the patentee is the original and first inventor of what is therein described as his improvement, and the complainants, when the true meaning of the claims of the letters-patent is ascertained, are entitled to the benefit of that presumption. Much difficulty is experienced in determining the true meaning of the specification and claims of the patent, as they contain many expressions tending to support the charge that the patentee of the reissued patent intended to embrace the invention of Charles Goodyear, which was for curing the native rubber when combined with or in the presence of sulphur, by submitting the same to the action of a high degree of artificial heat, and also for the new manufacture called vulcanized India-rubber, being a combination of India-rubber with sulphur chemically altered by the application of a high degree of heat. If so construed as to include that invention, the letters-patent would certainly be invalid, as that patent was of a prior origin, and its validity was sustained in this court, and affirmed in the supreme court. Goodyear v. Providence Rubber Co. [Case No. 5,583]; Id., 9 Wall. [76 U. S.] 795.

But the rule ut res magis valeat quam pereat is as applicable to patents as to any other instruments in regard to which it is the duty of the court to adopt a liberal construction in order to give effect to the intention of the parties. Ryan v. Goodwin [Case No. 12,186]; Evans v. Eaton, 3 Wheat. [16 U. S.] 512.

Where doubts arise, it is the duty of the court to collect the intention of the parties from the whole instrument, and, if practicable, to adopt such a construction as will give it effect and render it available for the purpose for which it was granted. Apply that rule to the construction of the letters-patent, and it is quite clear that the specifications and claims of the patent do not embrace what was invented by Charles Goodyear as described in his letters-patent. Express disclaimer of any such pretensions is contained in the original letters-patent, in which the patentee states that he does not claim the curing of India-rubber in its natural state when compounded with sulphur and lead by the use of heat or of steam, nor the compounding of sulphur, white-lead, or coal-tar with India-rubber, and he admits, in terms too explicit to be denied, that "all those have been the subjects of previous patents." Confirmation of that view is also derived from the statement of the patentee in the specification of the original patent, that the leading and most important feature of my improvements is the curing again and reproducing of vulcanized rubber from scraps or fragments which have once been vulcanized. Working over vulcanized rubber and moulding it into any desired shape is, in the opinion of the court, the main feature of the invention as described in the original patent, but it is certain that the patentee also states that many foreign articles may be so incorporated with the India-rubber or caoutchouc, either in its native state or when vulcanized, or otherwise prepared, as to produce a substance which has all the properties of vulcanized rubber. India rubber in the native state may unquestionably be used in a certain proportion as an ingredient of the compound, but the main feature of the invention is to prepare old vulcanized rubber, with or without foreign articles, for a second use by means of moulds or dies. Heat generated by steam is applied, whether the substance is rubber in the native state, or rubber with the substances commonly used in vulcanizing the same; but the patentee in the original patent proceeded to say that the rubber or compound, while thus heated, is pressed into moulds or dies, which give it the desired form, and that the steam

is conducted around all portions of the moulds or dies which come in contact with the rubber or compound.

Enough is also found in the specification of the reissued patent to lead to the same conclusion. Prior to the invention, as the patentee in the new patent states, the value of vulcanized rubber ceased when the article as manufactured was worn out, or had served the purpose for which it was prepared, as it could not be worked over or used a second time. Beyond doubt the next succeeding paragraph of the specification gives some support to the indefinite and unlimited construction assumed by the complainants; but it is clear, if that view is adopted, that the reissued patent would be void in having been granted for a different invention from that described in the original specification. Satisfactory explanation to the contrary, however, is found in the latter clause of the same paragraph, in which it is said that many foreign substances may be intermixed with the ordinary rubber compound, whether already once vulcanized or newly compounded for vulcanization; and the succeeding paragraph shows, even more conclusively, what the actual invention is, and that the patentee never pretended to embrace any of the improvements made by the great inventor in this department of the useful arts. Many foreign substances, he says, may be intermixed so as to form an article having the valuable properties of vulcanized rubber compound, although composed in a great part of cheaper materials; and he then proceeds to say, that the principal features of his process consist in applying heat, by means of steam, to rubber mixed with substances commonly used in vulcanizing rubber, or to rubber compound which has once been vulcanized, either with or without the addition of fresh rubber, the rubber or compound while thus heated being pressed into moulds or dies of the desired form, and the steam being introduced into steam chambers or jackets, and thereby conducted around the moulds or dies which come in contact with the compound. Pressure of some sort is doubtless necessary in order that the compound may be forced into all parts of the mould or die, and that the material or manufacture may be made smooth and uniform. Objection is made that the word "blisters" is not used in the original patent; but the objection is without merit, as the process and the purpose are plainly suggested and easily understood. Steam-jackets are not named in the original patent; but the language employed is scarcely less suggestive, and fully justifies the action of the commissioner, in granting the reissued patent. Mention should be made that the patentee describes the respective ingredients to be used in preparing rubber in its natural state, as well as for conducting the process of revulcanization, or for working it over a second time; but it is unnecessary to dwell upon that topic, as the patentee states, in express terms, that he does not claim any peculiar compound, or any particular arrangement of machinery, as that part of the invention does not consist in a new composition of matter, nor in a new machine, and he must abide by that disclaimer. Appended to that is another statement which deserves a passing notice, as the representation, if embodied in a claim, would render the claim void, unless it could be limited to such compounds as those described in the specification. He states that the process is applicable to all compounds by means of suitable apparatus; but it is clear that the original patentee never set up any such claim, and if he had, it could not be sustained, as it may be that other compounds, not now known, may yet be discovered, which will prove to be vulcanizable. Goodyear v. Providence Rubber Co. [supra].

Viewed in the light of those explanations, as the specification must be, it is quite clear that the patentee intends to use the compound for vulcanizing rubber, whether old rubber or native rubber, and whether used with or without foreign articles, together with the application of a high degree of heat as the primary means of vulcanization or revulcanization, and that the compound is composed substantially of the same ingredients and in substantially the same proportions as those described in the specification of the great inventor of that improvement.

Beyond question, the inventor in the case before the court intended to use substantially the same ingredients as the primary means of vulcanization or revulcanization; but he admits that those means are public property, and he does not profess to describe anything of the kind as a part of his invention. Subject to these explanations and qualifications, he proceeds to say that the first part of his invention relates to moulding the compound used, and consists in the use of a mould which is heated by steam before the compound is placed in it, or before the pressure is applied for moulding it, the other portion of the mould or die being also heated by steam and brought into its place with force sufficient to cause the compound, which is softened by the heat, to completely fill the mould, and he states that that part of the invention is especially useful when a compound is used which contains a portion of old vulcanized rubber. Immediately following, and without any intervening explanation, is the equally explicit statement as to the second part of the invention, which the patentee says relates to the application of the heat necessary for curing the compound, and "consists in applying it by means of steam in steam-chambers or steam-jackets, the heat of the steam being conducted by the walls of the steam-chamber or steam-jacket which comes in contact with it." Carefully examined, it will be seen that the second claim of the patentee is for the mode described in applying heat by means of steam in steam-chambers or steam-jackets,

and also the mode of conducting it to the compound by the walls of the steam-chamber or steam-jacket. He does not claim to be the discoverer that heat will cure the compound, nor even the ingredients of the compound, as those matters were discovered by an antecedent inventor. External pressure is generally necessary to some extent, and the third part of the invention, as the patentee states, consists in applying the necessary heat to the compound while under pressure, either external or such as is produced by the expansion of the compound when confined in the moulds.

These claims are repeated at the close of the specification; but it is unnecessary to give give them much separate examination, except to say that they must receive the same construction as that given to the claims mentioned in the body of the specification. Suppose that it is so, still the respondents insist that the art of placing such compound or compounds in moulds or between metallic surfaces or dies, and then applying heat and moulding the same into the desired form either in large chambers or ovens, filled with steam of the proper temperature, was well known and used before the invention was made by the original patentee in this case. They also allege in their answer, that the art of smoothing the surfaces of goods by means of steam contained within the walls or chambers formed in rollers or dies, was also known and used before the date of that invention. Remarks respecting the invention of Charles Goodyear are unnecessary, as it has already been shown that the letters-patent in this case, when properly construed, do not describe the invention of the patentee as embracing anything which was patented to the former inventor. Brief reference only need be made to the patent of Thomas Hancock, as it is evident that the invention differs widely from that of the complainants in the case before the court. His moulds were different, as he employed the steam-boiler process, and not the mould surrounded by steam-chambers, as described in the complainant's patent. He formed the article in the mould before he applied heat, and in inner surface of the mould, or to the article order to prevent the compound from adhering to the mould, he employed silicate of magnesia, and applied the same either to the as formed of the compound, and in many cases he removed the article from the mould before it was vulcanized. None of the mechanism employed by the original patentee in this case is described in the specification of the Hancock patent. All that need be said respecting the patent of Samuel Lord and that of John Smith is, that the patent granted to the former was for an improvement in pressing whole pieces of woolen cloth, and that of the latter was for the construction of moulds heated by steam or otherwise for shaping the brims of hats, and that they are not of a character, in the opinion of the court, to supersede the invention secured in the reissued letters-patent of the complainants. Such part of the invention of the complainants described in the letters-patent as consists in the means of constructing the mould, or of modifying the pressure, upon the material while the heat is being applied for the purpose of vulcanization, is substantially admitted to be new and useful within the meaning of the patent law, and the court is of the opinion that each of the three claims, if properly construed and limited as herein described, is valid.

Discussion of the objection taken in argument that the alleged improvement, as described in the specification, is not patentable, may well be omitted, as the remarks of the court already made in defining the invention show that the defence cannot be sustained.

Grant that the construction of the patent adopted by the court is correct, and it follows that the charge of infringement to a certain extent is admitted; and the correct practice where infringement to any extent is admitted, if the patent is held to be valid, is to enter an interlocutory decree for the complainant, and send the cause to a master to ascertain the amount which the complainant is entitled to recover. Such gains and profits only as were made by the respondent in the unlawful use of the invention could be recovered by the complainant in an equity suit, prosecuted under the repealed patent act, as appears by several decisions. Livingston v. Woodworth, 15 How. [56 U. S.] 558; Providence Rubber Co. v. Goodyear, 9 Wall. [76 U. S.] 804. Different rules, however, are enacted in the new patent act, which provides that the complainant, when a decree is rendered in a suit in equity for an infringement, shall be entitled to recover, in addition to the profits to be accounted for by the respondent, the damages he has sustained thereby, and the further provision is, that the court shall assess the same or cause the same to be assessed in its discretion, and that the court shall have the same discretionary power to increase the damages as that given by the act where the damages are found by a verdict in an action on the case. 16 Stat. 206.

Profits are to be accounted for by the respondent in every such suit, whenever a decretal order to that effect is rendered against the respondent for an infringement, and if it appears that the injuries which the complainant sustained by the infringement are greater than the gains and profits realized by the respondent in making and using the invention, and vending it to others to be used as estimated and assessed, then the complainant is entitled to recover compensation for the excess of the injuries sustained, beyond the amount estimated and assessed for the gains and profits received by the respondent. Actual damages for the injuries sustained by the complainant beyond

the amount estimated and allowed for the gains and profits made by the respondent, must be assessed in the first instance; but the court in its discretion may increase the amount so allowed to any sum according to the circumstances, not exceeding three times the amount estimated and assessed as the actual damages sustained beyond the gains and profits realized by the respondent. Prior acts and parts of acts set forth in the schedule of acts annexed to the last section of the new act are declared by the first clause of that section to be repealed; but the next clause of the same section provides that the repeal enacted shall not affect, impair, or take away any right existing under any of said laws. Pending actions are in terms saved from all the consequences of the repeal; and the further provision is that all actions and causes of action, both in law and in equity, which have arisen under any of said laws "may be commenced and prosecuted to final judgment and execution in the same manner as though this act had not been passed," excepting that the remedial provisions of the act shall be applicable to such causes of action if commenced and prosecuted subsequent to the passage of the new act. 16 Stat. 216. Damages for the infringement of letters-patent, where the wrongful acts were committed by the respondent subsequent to the passage of that act may, in certain cases, be recovered by the complainant in an equity suit, beyond the gains and profits made by the wrong-doer; but it is clear that the case before the court is not of that character, as fully appears by the allegations of the bill of complaint.

Decree for complainants, to be framed in conformity to the opinion of the court.

[NOTE. In respect to the proposition that reissued letters-patent must be for the same invention, and that, where it appears, on a comparison of the two instruments, as matter of law, that the reissued patent is not for the same invention as that secured by the original patent, the reissued patent is invalid, see Knight v. Baltimore & O. R. Co., Case No. 7,882; Matthews v. Boston Machine Co., 105 U. S. 54; Putnam v. Yerrington, Case No. 11,486; Hammond v. Franklin, 22 Fed. 833; Brown v. Selby, Case No. 2,030; Heald v. Rice, 104 U. S. 737; Swain Turbine Manuf'g Co. v. Ladd, 102 U. S. 408; Giant Powder Co. v. California Powder Works, 98 U. S. 126; Sickles v. Evans, Case No. 12,839; Stephens v. Pritchard, Id. 13,407; Batten v. Taggert, Id. 1,107; Campbell v. James, Id. 2,361; Cammeyer v. Newton, Id. 2,344; Goodyear v. Berry, Id. 5,556; Corn-Planter Patent, 23 Wall. (90 U. S.) 181; Tarr v. Webb, Case No. 13,757; Meyer v. Maxheimer, 9 Fed. 99; Gill v. Wells, 22 Wall. (89 U. S.) 1; Wood Paper Patent, 23 Wall. (90 U. S.) 566; Driven-Well Cases, 16 Fed. 387; Ball v. Langles, 102 U. S. 128; Vogler v. Semple, Case No. 16,989; Rayer & L. S. M. Co. v. American Printing Co., 19 Fed. 428; Russell v. Dodge, 93 U. S. 460; Hopkins & D. Manuf'g Co. v. Corbin, 103 U. S. 786; Averill Chemical Paint Co. v. National Mixed Paint Co., 9 Fed. 462; Dunbar v. White, 15 Fed. 747. See, also, McCrary v. Pennsylvania Canal Co., 5 Fed. 367; Sharp v. Tifft, 2 Fed. 697.]

Case No. 2,398.

CAREW et al. v. BOSTON ELASTIC FABRIC CO.

[Holmes, 45.][1]

Circuit Court, D. Massachusetts. March, 1871.

PATENTS—REISSUE TO EXECUTOR.

Where a patent has by the death of the patentee devolved upon his executor, and has been by him assigned, the assignee may take a reissue in his own name and for his own benefit.

Bill in equity to restrain alleged infringement of reissued letters-patent [No. 11,608], originally granted David Hayward, August 29, 1854, for an improvement in the manufacture of india-rubber, and extended for the further term of seven years; and for an account.

The bill alleged, with other matters not material, the grant of the letters-patent to Hayward; his death, and the appointment of one [Caleb] Swan as his executor before June 3, 1867; the extension if the letters-patent for the further term of seven years, from August 29, 1868, on the application of Swan as executor; an assignment thereof by Swan, as executor, to James S. Carew, one of the complainants, on the 18th of December, 1868; and the surrender of the letters-patent by said Carew, and grant of a reissue to him [No. 3,531] on the 6th of July, 1869.

The defendant demurred to the bill, alleging for cause of demurrer, that Carew, not being the executor or administrator of Hayward, the patentee, nor an assignee of the letters-patent under any assignment by Hayward made, but the assignee of Hayward's executor, was not authorized by law to apply for and obtain a reissue of the letters-patent; and that the reissue was therefore invalid.

W. G. Russell, for complainants.

F. A. Brooks, for defendant.

SHEPLEY, Circuit Judge. The only question raised by the demurrer in this case is, whether, after the decease of a patentee without having made any assignment of his patent, and the patent has thereby devolved upon the executor, and has been by him assigned, the assignee of such executor has, by law, the right of taking out, in his own name and for his own benefit, a reissue of such patent.

The thirteenth section of the act of July, 1836 (5 Stat. 122), provides, that "whenever any patent which has heretofore been granted, or which shall hereafter be granted, shall be inoperative and invalid by reason of a defective or insufficient description or specification, or by reason of the patentee claiming in his specification, as his own invention, more than he had or shall have a right to claim as new; if the error has or shall have arisen by inadvertency, accident, or mistake, and

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

without any fraudulent or deceptive intention, it shall be lawful for the commissioner, upon the surrender to him of such patent and the payment of the further sum of fifteen dollars, to cause a new patent to be issued to the said inventor for the same invention, for the residue of the period then unexpired for which the original patent was granted, in accordance with the patentee's corrected description and specification; and, in case of his death or any assignment by him made of the original patent, a similar right shall vest in his executors, administrators, or assignees.

It is contended, in support of the demurrer, that the sole right to surrender and reissue under section thirteen is given: First, to the patentee, if living without having assigned; second, to his executors and administrators, after his decease without assignment; and, third, to the assignee where there has been an assignment before the death of the patentee; and to no one else. It is claimed that although the assignee of the patentee himself, or any subsequent assignee under him, may take out a reissue, the assignee of the executor cannot do so. This is practically saying, that the right which vests in the administrators or executors in relation to reissue is not a similar right to that of the deceased patentee, but a more limited and restricted one: for, if the position of the respondents is tenable, while the patentee himself could convey to his assignee, and the assigns of such assignee, the right to a reissue, his administrator or executor, by transferring the patent, would deprive the patent of the benefit and advantage of the remedial provisions of the thirteenth section; and no error arising from inadvertence, accident, or mistake could be corrected by a reissue, if the patent had once devolved upon a personal representative of the patentee and been by him transferred, although no such lapse of remedy would occur by reason or in consequence of any number of transfers or assignments through other persons, or their personal representatives or assigns.

The statute provision is remedial, and like all remedial statutes, is to be construed liberally, so as most effectually to meet the beneficial end in view and prevent a failure of the remedy. Giving to remedial statutes a benignant interpretation, the letter of the act will be sometimes enlarged, sometimes restrained, and sometimes a construction made ultra the strict letter; but not, as has been well and wisely said, contra the strict letter. Lord Coke says, "Cases out of the letter of a statute, yet being within the same mischiefe or cause of the making of the same, shall be within the same remedie that the statute provideth; and the reason hereof is, for that the law makers could not possibly set downe all cases in expresse terms." 1 Inst. 24b.

The supreme court of the United States, when dealing with the statute in question, has construed it liberally, having regard to the general intent and object of the patent law. Although the strict phraseology of the statute limits the right to obtain a reissue to the original term of fourteen years, the court has construed it to continue during the term of the extension of the patent. And although in express terms the eighteenth section of the act of 1836 only authorizes the grant of an extension to the patentee himself, the court has sustained the grant of an extension to an executor or administrator. Wilson v. Rousseau, 4 How. [45 U. S.] 646. So the validity of a patent reissued for error in the specification, before the statute authorizing such surrender and reissue, has been affirmed. Grant v. Raymond, 6 Pet. [31 U. S.] 218; Shaw v. Cooper, 7 Pet. [32 U. S.] 292, 315.

These decisions are founded upon the principle, that the rights conferred by the patent law, being property, have the incidents of property, and are capable of being transmitted by descent or devise, or assigned by grant. If, therefore, the words of the statute were, upon the strictest rule, capable of the narrow construction contended for, it would be the duty of the court, following the analogy of the cases cited, to give such a construction as would carry out the evident intent and object of the law, rather than one which would obviously render valueless the right granted in express terms to the executor and administrator.

But the language of the statute itself is incapable of this narrow construction. Giving to the patentee the right of surrender and reissue, it makes that an assignable right, and then provides that in case of his death a similar right, that is, a right to surrender and reissue with the incident or quality of assignability, shall vest in his executor. The words used in the statute are usual and apt words to denote assignability. The assignee contemplated in the statute is the assignee of the executor as well as the assignee of the patentee.

If the demurrer could be considered as properly raising the question presented in argument whether under the statute it is requisite before a patent can be reissued that the patentee himself should make oath to the amended specification, it would be a sufficient answer to say that the statute does not require this. After the death of the original patentee the executor or administrator may make the amended specification, and it is not readily perceived why there should exist any greater objection to an amended specification filed and sworn to by an assignee under a grant than to one filed and sworn to by an assignee under operation of law. For this purpose, the owner of the patent by assignment may by fair construction be considered the patentee. Washburn v. Gould [Case No. 17,214.]

Demurrer overruled.

[NOTE. On the final hearing of this case there was a decree for complainant. See preceding case, No. 2,397.]

Case No. 2,399.

CAREY v. ATKINS et al.

[6 Ben. 562.][1]

District Court, E. D. New York. June, 1873.

DELIVERY OF CARGO—BILL OF LADING—BREAKAGE.

1. A ship received on board, in Havre, a number of millstones to be carried to New York, under a bill of lading containing the clause "not accountable for breakage." On the delivery of the stones, four were found to be broken, and two others never came to the possession of the consignees, who brought this action against the owners of the ship to recover the value of the six stones: *Held*, That it was incumbent on the owners of the ship, at least, to show that the two missing stones were discharged upon the wharf and placed with the others in that part of it which had been selected for the deposit of the libellant's goods.

2. As the respondents had not furnished such proof, they were liable for the value of the missing stones.

3. It was not made to appear that there was any negligence in stowing or landing the stones, and, under the bill of lading, the respondents were not liable for breakage not shown to have arisen from negligence.

[See note at end of case.]

[Libel by Samuel Carey against the bark Amelia, Joshua Atkins and Edwin Atkins, claimants.]

James K. Hill, for libellant.

Owen, Nash, & Gray, for respondents.

BENEDICT, District Judge. This is an action to recover the value of six millstones, part of a shipment made in Havre, upon the bark Amelia, to be delivered to the libellant in New York. Of a number of stones shipped, two never came to the possession of the libellants; and of those which were received, four were broken. As to the two missing stones, the ship must be held liable, there being no satisfactory evidence of their delivery in New York. They may have been landed from the vessel, but the delivery of the cargo was conducted in a very loose and unsatisfactory way, and the persons who conducted it appear to have little knowledge as to what disposition was afterwards made of the cargo. They know nothing of the missing stones. It was incumbent upon the ship, at least, to be able to show that the missing stones were discharged upon the wharf and placed with the others in that part of the wharf selected for the deposit of the libellant's goods. The testimony furnishes no evidence as to how many of the libellant's stones were landed, nor how many stones were set apart for the libellant upon the wharf, but does disclose that the two missing stones were never receipted for or taken by the carman, and never came into the actual possession of the libellant. The ship is, therefore, liable for their value.

As to the broken stones, the case is different. The stowage of the ship is proved to have been good, and there is no evidence of any negligence on the part of the ship in the stowing of the stones or in the landing of them upon the wharf. The bill of lading contains an exemption of liability for breakage; and, upon the proofs, the ship is not liable, upon such a bill of lading, for breakage not shown to have arisen from negligence.

[NOTE. That an exception in the bill of lading from liability for breakage exempts the vessel from loss by breakage not caused by negligence, see Six Hundred and Thirty Casks of Sherry, Case No. 12,918; The Delhi, Id. 3,770; Wilson v. National Steamship Co., Id. 10,112; The Pereire, Id. 10,979; Hus v. Kempf, Id. 6,943. And see, also, Nelson v. Woodruff, 1 Black (66 U. S.) 156; Clark v. Barnwell, 12 How. (53 U. S.) 272.]

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

Case No. 2,400.

CAREY v. COLLIER.

[56 Niles' Reg. 262.]

Circuit Court, S. D. New York.

COPYRIGHT—ACT OF 1831—RESIDENT.

[An officer of the British navy,—traveling through the United States, and considering himself a British subject,—during his stay, filed a declaration of intention to become a citizen. It appeared that, at a time when trouble with Canada seemed imminent, he had offered his services to the province. *Held*, that he was not a resident of the United States, within the meaning of the copyright act of 1831.]

[See Keene v. Wheatley, Case No. 7,644; Boucicault v. Wood, Id. 1,693.]

BETTS, District Judge, presiding. An application was made to the court last week to obtain an injunction to restrain Mr. Collier from selling a cheap edition of Captain Marryatt's new novel, "The Phantom Ship," on the ground that the copyright had been purchased from the author by Carey & Hart. It was contended in favor of the application that Captain Marryatt was, at the time of the sale of the copy-right a resident of the state of Pennsylvania, and therefore had a right, under the law of 1831, to dispose of his works in the same manner as any other American citizen. Against the application it was urged that Captain Marryatt was not a resident of the country, and therefore not entitled to avail himself of the provisions of the law. Captain Marryatt, it was stated, came to this country in the spring of 1837, and traveled over a considerable part of the country. He visited Philadelphia during his stay in the country, and while there, filed a declaration of his intention to become a citizen of the United States. It appeared that, during the whole of the time he was in this country, he not only considered himself a British subject, but was an officer in the British navy, and that during the trouble in Canada, last year, he offered his services, to be employed as an officer in the provincial army.

The judge said that the only question for the court to decide was whether Captain Marryatt was a resident of the country. The term resident had been decided to mean a permanent inhabitant of the state. It was evident that a man who was a mere transient visitant, whose family, business, intentions and relations were all abroad, could not be considered a resident, and the filing a declaration of an intention to become a citizen, could not make him one. The court therefore decided against the application.

Case No. 2,401.

CAREY et al. v. The KITTY.

[Bee, 254.][1]

District Court, D. South Carolina. March 25, 1808.

LIABILITY OF OWNERS FOR SEAMEN'S WAGES.

The owners of a vessel are liable for wages if the vessel prove insufficient to pay them.

[See Bronde v. Haven, Case No. 1,924; Skolfield v. Potter, Id. 12,925.]

[In admiralty. Libel by Carey and others against the schooner Kitty and her owners].

No case including this question has been brought before me hitherto. I have fully considered the arguments that have been adduced, and have looked into the precedents of this court; as well as those in Clarke's Praxis, a book of high authority. I find that before, and since the American revolution, suits like the present have always been sustained. The arguments adduced to the contrary do not appear to me sufficient to overset the old practice of the court. I decree, therefore, that the process prayed for against the owners of the Kitty be granted, if the vessel should not prove to be sufficient for payment of seamen's wages.

[NOTE. For subsequent proceedings, see next following Case, No. 2,402.]

Case No. 2,402.

CAREY et al. v. The KITTY.

[Bee, 255.][1]

District Court, D. South Carolina. April, 1808.

DEATH OF SEAMAN—RIGHTS OF REPRESENTATIVES TO WAGES—DEDUCTION.

1. If a seaman dies before the stipulated voyage is completed, his representatives shall have his wages up to the time of his death, and not beyond it.

[See note at end of case.]

2. A slave entered on board as a seaman, and escaping from the vessel, shall not occasion a deduction from the wages of the rest, by way of contribution.

[See Knap v. The Eliza and Sarah, Case No. 7,873; Brown v. The Neptune, Id. 2,022; Wilson v. The Belvidere, Id. 17,790; Edwards v. Sherman, Id. 4,298.]

[1] [Reported by Hon. Thomas Bee, District Judge.]

[In admiralty. Libel by Carey and others against the schooner Kitty and her owners.

[For decision as to the liability of the owners see next preceding case, No. 2,401.]

Two questions have been argued on behalf of the libelants in this cause.

1. Whether wages shall be paid for Martin Dear, (who died during the voyage, on the coast of Africa) beyond the time of his death. 2. Whether any and what deduction ought to be made from the wages of the rest of the crew, by way of contribution for the loss of a negro slave belonging to the owners, who ran away from the vessel at Sierra Leone, and remained there.

The first point has never been contended for before me till now; the uniform practice having been to allow wages to the time of the seaman's death, and no longer. This has been acquiesced in till some late decisions in the district court of Pennsylvania, determined by the judge of that district, and confirmed by Judge Washington in the circuit court. See 1 Pet. 155 [Scott v. Greenwich, Case No. 12,531]. Without questioning these authorities at present, it may be sufficient to observe that the courts of one state may be allowed to differ from those of another. In this state, the records of the court of admiralty shew that wages of seamen have never been allowed beyond the time of their death. The marine ordinances, quoted on this occasion, vary. The laws of Oleron, Wisbuy, and the Hanse Towns, allow wages to the end of the voyage: those of France, collected by Valin, only to the time of death. Reasons that existed when those laws were framed, may not be applicable in the present state of commerce. Voyages were then much shorter, seldom extending beyond the Mediterranean, the Baltic, the Adriatic, and the coasts of the Atlantic. Seamen engaged themselves for two or three months, out and home, and, in case of death before they returned, the utmost sum claimable by their representatives, was trifling in comparison of what may be due in these days, when voyages are not infrequently extended to one, or two years. Will it, then, be expected that the wages of a seaman who dies at the end of the first month shall be recoverable for the period of a whole year? I think not. It may also be observed that contracts with seamen are merely personal, no mention being made in them of executors, administrators, or assigns. Even in England, the right of these last to any wages does not seem to be settled; Abbot states it as doubtful. It is much to be desired that some general rule be established by congress, or by the decision of the supreme court of the United States: till then, I see no good reason to depart from the former practice in this court, both before and since the revolution. I decree, therefore, that the wages of Martin Dear be allowed up to the time of his death, which, from the evidence produced, happened nearly three

months before the vessel sailed on her return voyage.

As to the second point, the doctrine of contribution is tolerably well settled, that where damage happens to vessel or cargo, mariners must bear their share of the loss. For, freight is the mother of wages, and if embezzlement cause a deduction from the freight, it is reasonable that they who are to be paid from it, should lose in proportion. In the present case, a slave of the owner, who is entered in the ship's articles as one of the seamen, in the station of cook, deserts from the vessel in a foreign port, and obtains his freedom by the laws of that country. For this loss the owner claims a contribution from the wages of the crew. But I do not see how the general principle of contribution can apply to this case. This man was no part of the vessel or cargo; he was shipped as a seaman, and can never be so considered as to authorize the present demand. But it is said that disobedience of orders occasioned the loss; that such neglect of duty amounted to a breach of the contract in the articles, and that, on that score, a deduction should be made. There was, however, no evidence of any orders being given to the crew. The mate, indeed, had directions not to permit any of the crew to go ashore at night; but there is no proof that he gave orders to that effect, and, as he did not return with the ship, he cannot be examined to this point. The discipline on board of this vessel appears to have been very relaxed; there seems to have been no watch appointed for the night when this negro made his escape; if there was, no persons are named as having been upon that watch, and it is possible that the negro himself may have been upon that duty. If so, how can blame attach to the others?

Upon the whole, I see no cause to make any deduction from the wages of the crew on this account; and I decree accordingly.

[NOTE. In Walton v. The Neptune, Case No. 17,135, it was held that, in the event of the death of a seaman, his full wages should be paid to his heirs as if he had served out the whole voyage; the words "his full wages," in the seventh article of the laws of Oleron, being construed to mean his "wages as much as if he had served out the whole voyage." In Scott v. The Greenwich, Id. 12,531, the administrator was allowed wages until the time of the seaman's death, and the balance in dispute lodged in the court until the determination of another case. In Natterstrom v. Hazard, Id. 10,055, it was held that the representatives of a deceased seaman were not entitled to wages beyond the time of his death when the engagement was by the month. But in Sims v. Jackson's Adm'x, Id. 12,890, which was an appeal from the district court, the expression "full wages," in the article of the laws of Oleron referred to, was held to mean "the same wages which the mariner would have been entitled to had he lived, and served out the whole voyage of the vessel;" and that, as the mariner had shipped for the voyage at a certain rate of wages per month, and died before the completion of the voyage, the administratrix was entitled to wages for the entire voyage; and that the monthly rate was no more than a rule to adjust the quantum for the voyage. In The Coriolanus, Id. 7,380, it was held that it was settled law in admiralty that the representatives of a seaman dying on the voyage in the service of the ship were entitled to his wages for the whole voyage. In Writer v. The Richmond, Id. 18,104, the claim of the administrator was rejected because at the time of the shipment as able-bodied the seaman was in fact affected with a severe pulmonic complaint, of which he died on the voyage.]

Case No. 2,403.

CAREY v. NAGLE.

[2 Abb. U. S. 156;[1] 2 Biss. 244; 9 Am. Law Reg. (N. S.) 362; 3 Am. Law T. Rep. U. S. Cts. 131; 4 West. Jur. 351; 2 Chi. Leg. News, 293.]

District Court, D. Wisconsin. Feb. Term, 1870.

MUTUAL INSURANCE—PREMIUM NOTES—ACTION ON —DEFENSE OF BANKRUPTCY.

1. By a supplement to its charter, a mutual insurance company was authorized to insure "for a specific rate of premium to be paid in cash, in the same manner as insurance companies" not mutual "are accustomed to do" The object of the supplement was to enable the company to issue two classes of policies, one on the mutual, and the other on the non-mutual plan, the premiums on the latter to be paid in cash. *Held*, that the company might accept a note for such premium, instead of cash; the taking it being a mere extension of the time of payment, and none the less a payment in cash.

2. The bankruptcy of the company is no defense to an action by the assignee of a note given for the premium on a policy of insurance.

At law. Trial of an action upon a promissory note.

This was an action by the assignee in bankruptcy of the Milwaukee Insurance Co., to recover the amount of a note made by the defendants to the company for a policy [No. 25,502, dated May 28, 1868][2] for two hundred and forty dollars, payable in sums of sixty dollars on the first day of May annually for four years, without interest until due, and in case default should be made in the payment of any of the installments, then the whole to become due. The company was incorporated and did business for several years as a mutual insurance company, issuing policies and taking back notes, such policy holders being members of the company. By the act to amend the act to incorporate the company, it was provided that "the company shall have power in their discretion to make any and all insurance which by law they are or may be authorized to make, to any person or persons with whom they may agree to that effect, for a specific rate of premium to be paid in cash, in the same manner as insurance companies other than mutual insurance companies are accustomed to do. And in all such cases the insured shall not become members of the

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

[2] [From 2 Biss. 244.]

company, nor in any wise entitled to any share of the profits, premiums, or earnings, nor in any wise liable for the losses, debts, or liabilities of the said company, and all premiums received for such insurance shall be passed to the general credit of the company, and all losses growing out of said special policies shall be paid in like manner as losses under the ordinary policies of the company."

Mann & Cotzhausen, for plaintiff.
Butler & Winkler, for defendant.

MILLER, District Judge. A policy was issued for four years, under the amendment to the charter of the company, upon receipt of the note in suit for the payment of the annual premium. It is contended by the defendant's counsel that the premiums should be paid in cash simultaneously with the delivery of the policy, and that the company could not accept a note payable at a future time. The object of the amendment to the charter was to invest in the company the additional power to issue policies as a stock company for a specific rate of premium to be paid in cash. Insurance under this act may be made in the same manner as by other insurance companies not mutual. Policy holders stand in a different relation to the company from those under the mutual system. The insured under the amended charter are not members of the company, nor entitled to a share of the profits, premiums, or earnings of the company, nor subject to losses. I do not think the act requires premiums to be paid [in cash] [3] simultaneously with delivery and acceptance of policies. The act authorizes the company to make insurance to any person for a specific rate of premium to be paid in cash, in the same manner as stock companies. The company was not prohibited from extending the time of payment of premiums in cash. The company could transact business in this respect, as other companies, and make its agreement with the insured as to the time of payment of premiums in cash. The note was a mere regulation of the time of payment, for the accommodation of the defendants. The premium was to be paid in cash, but the time of payment was extended. There is no statute law prohibiting such extension. The policy issued to these defendants imports a settlement of the premiums to the satisfaction of the company simultaneously with its execution and delivery, and binds the company in case of loss by fire, even if the note had not been given, or if the insured should become insolvent and unable to pay the premium. It is an everyday practice with stock companies to issue policies upon credit, containing exemption from liability on non-payment of the premiums. A provision in a policy duly executed, that no insurance, whether original or continued, should be binding until the actual payment of the premium, and the written acknowledgment thereof, does not invalidate a subsequent contract by parol, to renew such insurance for a premium not paid at the time the risk attaches, but postponed to a future day. Trustees of First Baptist Church v. Brooklyn Fire Ins. Co., 19 N. Y. 305. In New York Firemen Ins. Co. v. Sturges, 2 Cow. 664, notes were received for premiums. See, also, Commercial Mut. Ins. Co. v. Union Mut. Ins. Co., 19 How. [60 U. S.] 318; Furniss v. Gilchrist, 1 Sandf. 53; McIntire v. Preston, 5 Gilman, 48; Hamilton v. Lycoming Mut. Ins. Co., 5 Barr [5 Pa. St.] 339. The contract between the insurer and the insured is mutual, but independent, and failure of one party literally to comply on his part does not exempt the other from liability. I am satisfied that under the amended charter, the company had lawful authority to issue policies, upon a simultaneous payment of the premiums in cash, or upon an extension of the time of payment by taking a note, or even without a note or security.

It is not necessary to consider the question whether the defendants are estopped from making this defense. The note in suit is a portion of the capital of the company for the payment of losses by fire. If defendants' property, covered by the policy, had been damaged or destroyed by fire, the company was bound by its contract of insurance to pay the loss. And in case of distribution of assets among creditors under the bankrupt act, defendants would be entitled to their pro rata share. The note, being accepted by the company in lieu of cash paid at the date of the policy, is recoverable as so much assets, and defendants are in no worse condition by giving the note in lieu of paying the premium. Hone v. Boyd, 1 Sandf. 481; White v. Height, 16 N. Y. 310; Sterling v. Mercantile Mut. Ins. Co., 32 Pa. St. 75; Sands v. Hill, 42 Barb. 651; Huntley v. Beecher, 30 Barb. 580; Alliance Ins. Co. v. Swift, 10 Cush. 433; Huntley v. Merrill, 32 Barb. 626; Clark v. Middleton, 19 Mo. 53. Upon the same principle, the insolvency of a corporation is no ground for restraining collection of subscriptions for stock. Dill v. Wabash Val. R. Co., 21 Ill. 91. And stockholders are liable on their subscription to the stock of an insolvent company. Ogilvie v. Knox Ins. Co., 22 How. [63 U. S.] 380. Judgment for plaintiff.

NOTE [from original report in 2 Biss. 244]. That the insolvency of the company is no defense to a premium note, has the weight of the following authority: Lester v. Webb, 5 Allen, 569. Nor does the insolvency of the company entitle the insured to the cancellation of his premium note by surrendering his policy and making a pro rata payment. Hone v. Boyd, 1 Sandf. 481.

[3] [From 2 Biss. 244.]

Case No. 2,404.

CAREY v. WASHINGTON.

[5 Cranch, C. C. 13.][1]

Circuit Court, District of Columbia. Nov. Term, 1836.

MUNICIPAL CORPORATIONS—WASHINGTON—POWERS—LICENSES.

1. The corporation of Washington has no power to prohibit free colored persons from selling perfumery.

2. Quaere, whether they have authority to require any person to take a license to sell perfumery.

3. The corporation has no power to restrain or prohibit any person from the full exercise of all his rights, under the general law of the land, unless the power so to restrain or prohibit is expressly given by the charter, or necessarily results from some given express power.

[Cited in Washington v. Casanave, Case No. 17,225.]

Appeal from the judgment of a justice of the peace for the county of Washington.

The warrant, dated on the 23d, and returnable on the 24th of November, 1836, was to arrest the defendant, etc. [Isaac N. Carey], to answer to the mayor, board of aldermen and board of common council of the city of Washington in a plea that he render unto them the full sum of fifty dollars which he owes and unjustly detains, "for that he the said Isaac N. Carey, being a free negro, did, on the 22d day of November, 1836, sell perfumery in the city of Washington, without first having obtained a license therefor, contrary to the act or acts of said mayor, etc., on that subject made and provided."

Mr. Dandridge and W. L. Brent for the appellant, and Bradley for the appellees, admitted the following facts:

That the appellant was residing in the city of Washington before the 29th of October, 1836, and had complied with the requisitions of the by-law of 1827, respecting the admission and residence of free colored persons. That he kept and sold perfumery, and paid for a license therefor, previous to the said 29th of October, 1836, and that his said license expired on the first Monday of November, 1836. That he applied to the mayor of Washington for a renewal of his said license on or before that day, who refused to grant such license under the ordinance of the 29th of October, 1836. That he continued to keep and sell perfumery after the expiration of his said license. The justice rendered judgment for a fine of 25 dollars, from which judgment the defendant appealed. This fine was imposed under the by-law of the 28th of October, 1831, entitled "An act providing additional revenues for the corporation," by the first section of which it is enacted that the taxes on certain licenses therein enumerated should be fixed at certain rates, and among others the following: "On each license to sell hardware, medicines, perfumery, jewelry, and watches, twenty dollars." And by the third section it is enacted, "That if any person or persons shall sell, barter or keep, as in the first section of this act enumerated, without first obtaining a license therefor, he, she, or they shall forfeit and pay, for each and every offense, a fine not less than ten nor more than fifty dollars, to be recovered and disposed of as are other fines for violations of the laws of the corporation." The 3d section of the by-law of the 29th of October, 1836, under which the mayor refused to grant a license to the appellant to sell perfumery, is in these words, "It shall not be lawful for the mayor to grant a license, for any purpose whatever, to any free negro or mulatto, except licenses to drive carts, drays, hackney-carriages, or wagons."

W. L. Brent and Mr. Dandridge, for appellant.

Mr. Bradley, for appellees.

CRANCH, Chief Judge, delivered the following opinion (MORSELL, Circuit Judge, observing that he concurred only in that part of it which denied the power of the corporation to prohibit free colored persons from selling perfumery):

This action is founded on the by-law of the 28th of October, 1831, entitled, "An act providing additional revenues for the corporation." This by-law is very badly expressed: but we can understand the intention of the corporation to be, to raise a revenue by granting licenses to sell, or by imposing fines for selling, without license, the articles, for the sale of which licenses were to be granted. But it is said that the defendant tendered the price or tax, for a license to sell perfumery, and demanded a license, from the mayor, which he refused to grant, because he was forbidden by the by-law of the 29th of October, 1836, § 3, to grant such a license to a colored person. The defendant's counsel contend that this by-law is void, because the corporation had no power to forbid the mayor to grant the license; nor to discriminate between white and colored persons; nor to forbid any free colored person to carry on the trade of selling perfumery, which was a trade lawful to white persons. The third section of the by-law of the 29th of October, 1836, says, "It shall not be lawful for the mayor to grant a license, for any purpose whatsoever, to any free negro or mulatto, except licenses to drive carts, drays, hackney-carriages, or wagons." This clause, taken in connection with the act of the 28th of October, 1831, requiring a license, and imposing a penalty of from 10 to 50 dollars for selling without license, amounts, in effect, to a prohibition to free

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

colored persons to carry on the business of selling any of the articles, for the sale of which a license is required by the by-law of the 28th of October, 1831. The by-laws must not be repugnant to the general law of the land, further than such by-laws are justified by the express provisions of the charter.

By the general law of the land, free colored persons have a right to exercise any lawful trade or calling which white persons may exercise: a by-law forbidding them to do so, is contrary to the general laws of the land, and void, unless authorized by the charter. The selling of perfumery is a lawful business, or occupation. No express power is given to the corporation, by the charter, to prohibit or restrain it, or to license it, or to require a license to use or pursue it. The exercise of it is not, in itself, a nuisance. The corporation has no authority, under the power "to lay and collect taxes" to require the person exercising it, to obtain a license to do so; for the power, given by the charter, to lay and collect taxes, is only "to lay and collect taxes on real and personal property." The licenses, which the corporation may require, are expressly designated; and are confined to "auctions, retailers, ordinaries and taverns, hackney-carriages, wagons, carts, and drays, pawn-brokers, venders of lottery tickets, money changers, hawkers and peddlers, and theatrical and other shows and amusements." Their express power of restraining and prohibiting, is confined to tippling-houses, lotteries, and all kinds of gaming, and nightly and other disorderly meetings of slaves, free negroes, and mulattoes. They have also an implied power to restrain or prohibit whatever may be inconsistent with such regulations as may be necessary to prevent the introduction of contagious diseases, and for the preservation of the health of the city; whatever may be a common nuisance; whatever may injure the navigation of the Potomac and Anacostia rivers adjoining the city; and, in short, whatever may be inconsistent with the regulations which they have any express power to make. But the right to sell perfumery is not real or personal property which can be taxed as such. It is not within the list of licenses, authorized by the charter, nor is it one of the matters which may be restrained or prohibited by any express provision of the charter; nor can it injure the health of the city, or be in itself a nuisance. I think, therefore, that it cannot be prohibited.

But it is said that colored persons are a distinct class, not entitled to equal rights with the white population, and that they may be prohibited, although the whites may not. Such is not the general law of the land in regard to a right of this kind; the right to get a living by an honest, lawful, and harmless occupation. The corporation cannot make it the law of this city, unless they are authorized to do so by the charter; and I cannot find, in the charter, any such authority. I think, therefore, that neither the act of the 28th of October, 1831, nor the act of the 29th of October, 1836, so far as they prohibit or require a license for the selling of perfumery, is warranted by the charter. But if the by-law of the 28th of October, 1831, should be justified or supported by the clause of the charter authorizing the corporation "to lay and collect taxes upon the real and personal property within the said city," so far as it requires a license to be paid for, as a means of raising a revenue, yet a by-law to prohibit a certain class of citizens from exercising a lawful business or occupation, cannot be justified by the same clause of the charter; for the prohibition is not a means of raising a revenue.

The cases, in which licenses may be required, under the charter have been already enumerated, and are cases in which the public is concerned in the character of the person to be licensed; and therefore a discretion is given to the corporation to grant or refuse the license. The drivers of hackney-carriages, carts, and drays are a kind of public servants, or common carriers, in whose honesty and fidelity the public is interested, as they have the carriage of property to a large amount, and must, in a great measure, be trusted; and they derive a credit and character from their license. In the other enumerated cases the necessity or expedience of giving a discretion to the corporation is sufficiently obvious. But the corporation has no power to prohibit or restrain the exercise of a common right, unless that power be expressly given, or be necessary to the exercise of some expressly given power. But it has been suggested that the corporation derives its power, to tax a person who sells perfumery, from the clause of the charter, which authorizes them "to provide for licensing, taxing, and regulating auctions, retailers, ordinaries, and taverns, hackney-carriages," etc. The person who sells perfumery, it is said, is a "retailer," and therefore liable to be taxed and regulated, and to be prohibited from selling without a license. The word, "retailers," in the charter, as I apprehend, means, exclusively, retailers of "wine, rum, brandy, whiskey, or other distilled spirituous liquor, strong beer, or cider." These were the only retailers known in the Maryland statutes at the time of the separation of this part of the district from that state, to whom a license could be granted. They were always, colloquially, and in various statutes, called "retailers," without designating them as retailers of liquors. The licenses were granted by the county courts, and after the separation they were granted by this court, until 1804, when an amendment to the charter of Washington vested the power of granting them, within the city, exclusively to the corporation. The terms, "retailers," and "retail licenses," were as fa-

miliar here as they had been for many years in Maryland, and always applicable to retailers of liquors only.

By the Maryland act of 1784, c. 24, it was enacted, "That no person shall retail any wine, rum, brandy, whiskey, or other distilled spirituous liquor, strong beer or cider, on the western shore, without a license for that purpose obtained; and any person selling any of the articles aforesaid, under the quantity of ten gallons, shall be deemed a retailer." Here we have a clear, statutory definition of the word, "retailer." It means a person selling wine, rum, brandy, whiskey, or other distilled spirituous liquor, under the quantity of ten gallons. After having given this definition of the word "retailer," the statute, and subsequent statutes of Maryland, use the word without the additional words, "of liquors," but always in the sense of the definition given in that statute. Thus in the 26th section of the same statute of 1784, it is enacted, "that if any retailer shall keep a disorderly house," etc., the court "may suppress such retailer." By the 27th section, "that every licensed retailer shall sell only by sealed measures;" "and it shall be lawful for any justice or constable, on complaint, to enter into the house of any retailer," etc. By the 30th section, "that any person not having before had a license to retail, may, at any other than the August court, have license granted," etc. By the 31st section, "that every person applying for a license to retail, shall, at the time of granting the same, enter into recognizance," etc. By the act of 1799, c. 80, § 4, the state's agent is authorized to superintend the collection of all moneys due for "forfeited recognizances, ordinary retailers, and marriage licenses." By the act of 1799, c. 85, § 2, it is enacted, "that the mayor's court of the corporation of Georgetown, shall have the sole and exclusive power of granting ordinary and retailer's licenses within the jurisdiction of the corporation." Such being the exclusive use of the word, "retailers," in Maryland, and in this county, congress, in 1802, granted a charter to the city of Washington, in which, among other powers, they gave the corporation the power "to pass by-laws and ordinances, to provide for licensing and regulating auctions, retailers of liquors, hackney-carriages, wagons, carts and drays, and pawnbrokers within the city." This charter did not give the corporation power to license ordinary-keepers. In February, 1804, the corporation obtained an amendment of the charter, enlarging their powers, and, among others, giving them power "to license and regulate, exclusively, hackney-coaches, ordinary-keepers, retailers and ferries." Under this amended charter, the corporation passed a by-law on the 19th of July, 1804, entitled, "An act requiring annual licenses to be taken by ordinary or tavern keepers, retailers, and hawkers and peddlers." By the 3d section of this by-law it is enacted, "that all retailers of wines or spirituous liquors, other than tavern-keepers, who shall sell the same in smaller quantities than ten gallons, shall take out an annual license therefor, and for which license they shall pay, for the use of the city, the sum of eight dollars, which license shall authorize the selling of any such quantity, not less than one pint; and provided the same is not drank in the house or store of the person having such license." By the 4th section, it is enacted, that every person, so obtaining a retail license, shall give bond, etc. Here the corporation, in the title of the by-law, have used the word, "retailers," as it was used in their new charter, without the words, "of liquors," which was annexed to it in the charter of 1802; and in the body of the by-law they show what they mean by the word, "retailers," namely, those, other than tavern-keepers, who sell wines or spirituous liquors in smaller quantities than ten gallons, and not less than one pint; which is substantially the same definition as that given in the Maryland statute of 1784. And a license to do this the by-law calls "a retail license." The same by-law also authorizes a license for selling liquors in any house, other than a tavern, in smaller quantities than a pint. This is not, in the by-law, called retailing, nor the license a retail license; the word, "retailing," having acquired a technical meaning under the Maryland statute which had appropriaed it to the selling of liquors under ten gallons. This license to sell less than a pint was vulgarly called a license to sell by the small.

In the by-law of October 30, 1810, § 5, it is enacted "that all licenses for hackney-carriages, theatrical, and other public amusements; to ordinary or tavern keepers, retailers, and hawkers, peddlers and auctioneers, shall be paid for and issued, and the taxes on slaves of non-residents, and on dogs, shall be paid and entered as heretofore directed by the several acts respecting the said objects." Here again, the word, "retailers," is applicable only to retailers of wines and other liquors; for no license had ever been granted to any other description of retailers. This was six years after the power given to the corporation to license and regulate "retailers." There is no expression in the by-law limiting it to retailers of liquors. If the corporation had solicited the amendment of the charter, striking out the words, "of liquors," appended to the word "retailers," in the first charter, in order that they might license and regulate retailers of all sorts of merchandise; or if they had supposed that the omission of those words, in the amended charter, had given them that power, it is not to be believed that they would have omitted to exercise it for a period of twenty-two years, namely, from 1804 to 1826, when, for the first time, on the 7th of November, they passed a by-law by the first section of which the mayor is authorized "to

issue licenses for the purposes following, on the terms and conditions hereinafter mentioned, to wit: Porter-cellar licenses, to keep a porter-cellar or house to sell in, or barter, porter, ale, strong beer, and cider, and to carry and deliver or sell the same in bottles in this city, on the payment of a tax for each license, at the rate of fifteen dollars per annum; and that any person or persons taking out a license for selling spirituous liquors in quantities not less than a pint, be permitted to sell porter, ale, beer, and cider, by paying annually for a license, in addition to the former license, five dollars, and to sell by wholesale or retail the following descriptions of goods other than the manufacture of the United States; as dry goods, hardware, groceries, wines, liquors, medicines, perfumery, jewelry and watches, a tax for each license at the rate of ten dollars per annum." By the grammatical construction of this section, I should suppose that no license to sell dry goods, hardware, etc., by wholesale or retail, could be granted to any but a person taking out a license for selling spirituous liquors in quantities not less than a pint. But it is probable that the person who drew the bill, intended to authorize separate licenses to be granted for the sale of each of the specified kinds of goods. If so, this was the first attempt to require license for the sale of anything but liquors by a resident of the city. There had been a by-law passed on the 24th of May, 1823, requiring non-residents to obtain license to sell any goods, wares, or merchandise. It may be observed that the by-law of the 7th of November, 1826, imposes no penalty for selling the enumerated articles or any of them, without license; but on the 12th day of December, following, that defect was intended to be remedied by a by-law, enacting, "that if any retailer, or retailers of liquors, or sellers" (not retailers,) "of goods of foreign fabric, as described in the act to which this is a supplement, shall, after the 15th day of the present month of December, carry on the business of a retailer, or seller, as aforesaid, without license as aforesaid, he, she, or they, shall, on conviction of so retailing, or selling, after the said 15th day of December, without such license or licenses, forfeit and pay for each day they may so sell, the sum of twenty dollars." Here it may also be observed that the words, "retailer," and "seller," are used in contradistinction to each other. The word, "retailer," retains its original technical meaning, and is applicable only to retailers of liquors; and the word, "seller," to the seller of foreign fabrics. It is evident also that the by-law of November 7, 1826, so far as it requires a license to sell foreign fabrics, was not framed under the power given by the charter to the corporation, to license, tax, and regulate retailers, for it expressly includes those who should sell by wholesale; and the sellers of such fabrics are nowhere called retailers; nor could a power to license and tax retailers, in the most extensive sense of the word, authorize the corporation to license and tax wholesale dealers.

The by-law of the 28th of July, 1831, "to provide a revenue for the canal fund," declares that it shall be unlawful for any person to sell lumber, firewood, or coal, bricks, porter, ale, or beer, or to keep a livery-stable, or to traffic in slaves, within the limits of the corporation, without first obtaining a license therefor on which certain taxes are imposed. No one can suppose that this by-law is justified by the power to license and tax retailers. No other by-law was passed upon this subject until that of October 28, 1831, which is the by-law upon which this prosecution is founded. It is an act, entitled, "An act providing additional revenues for the corporation," and in the 1st section enacts, "that the taxes on certain licenses hereinafter named, shall be, and the same are hereby increased or fixed at the following rates per annum: For a license to keep a tavern," etc., "of forty rooms, one hundred dollars," etc. "On each license to sell or barter all kinds and quantities of spirituous liquors, wines, cordials, strong beer, and cider, sixty dollars. On each license to retail spirituous liquors and wines, in quantities not less than a pint, and to sell groceries, hardware, dry goods, and china, glass, and crockery ware, twenty dollars. On each license to sell hardware, medicines, perfumery, jewelry and watches, twenty dollars. For a license to keep a confectioner's shop, ten dollars. For a license to keep a confectioner's shop, with privilege to sell cordials, fermented and distilled liquors, sixty dollars. On each license to keep a porter-cellar, etc., twenty dollars. For a license to a non-resident to sell porter," etc., in the city, "fifty dollars. For a license to sell hats, boots and shoes, not manufactured in the city of Washington, twenty-five dollars; and for a license to sell the same, or either of them, in addition to any other license, ten dollars." And by the 3d section it is enacted, "that if any person or persons shall sell, barter, or keep, as in the first section of this act enumerated, without first obtaining a license therefor, he, she, or they, shall forfeit and pay, for each and every offence, a fine, of not less than ten nor more than fifty dollars, to be recovered and disposed of as are other fines for violations of the laws of this corporation." This by law, so far as it may seem to require a license to sell groceries, hardware, hats, boots, etc., does not appear to have been framed under the charter-power, to license, tax, and regulate "retailers;" for it uses the word, "retail," only once, and then only in reference to the sale of spirituous liquors and wines in quantities not less than a pint; and it requires a license to sell all these articles by wholesale.

From a consideration of the whole course of legislation upon this subject, from the year 1784, by the state of Maryland, by congress, and by the corporation of Washington, up to the present time, it seems to me very clear, that the word, "retailer," as used in the laws of Maryland, in the charter of Washington, and in the by-laws of the corporation, means, exclusively, a retailer of liquors, and has been so understood universally. But if it were not so, the defendant in this prosecution is not charged with retailing, nor with being a retailer of perfumery. He is simply charged with selling; and it does not appear that he did not sell by wholesale, in which case he cannot be punished under a power to punish retailers. Upon these grounds, I am clearly of opinion, that the power, given by the charter, to license, tax, and regulate retailers, does not authorize the corporation to license, tax, and regulate the sellers of other articles of merchandise than wine, rum, brandy, whiskey, or other distilled spirituous liquors, strong beer, or cider, or other intoxicating liquors. That under the power "to lay and collect taxes upon the real and personal property within the city;" or the power "to lay taxes on particular wards, parts, or sections of the city, for their particular local improvements;" or the power "to establish and erect hospitals or pest-houses, watch, and work houses, houses of corrrection, penitentiary, and other public buildings, and to lay and collect taxes for the expense thereof; the corporation has no authority to require, from any person, a license to use any lawful and harmless trade, calling or occupation. Whenever the corporation is expressly authorized by the charter to grant a license, it has a discretion to withhold it; but it has no authority to restrain or prohibit any person from the full exercise of all his rights, under the general law of the land, unless the power so to restrain or prohibit is expressly given by the charter, or necessarily results from some given express power. This is a rule applicable to all corporations acting under a charter; and to all bodies politic acting under a constitution. The powers not given are reserved. Although free colored persons have not the same political rights which are enjoyed by free white persons, yet they have the same civil rights, except so far as they are abridged by the general law of the land. Among those civil rights, is the right to exercise any lawful and harmless trade, business, or occupation; and if it be not a trade, business, or occupation, subjected by the charter to the control or discretion of the corporation, I think they have no power to prohibit them from using it.

Judgment reversed, without costs.

See, also, Hesketh v. Braddock, 3 Burrows, 1856.

CAREY, The WILLIAM. See Cases Nos. 17,688 and 17,689.

CARGO, ETC.

[Note. Cases cited under this title will be found arranged in alphabetical order under the names of the vessels.]

Case No. 2,405.

CARGO OF BRIMSTONE.

[8 Ben. 45.][1]

District Court, E. D. New York. Feb., 1875.

FREIGHT—DELIVERY—LIEN.

A vessel brought a cargo of brimstone from Palermo to New York under a charter which contained no clause binding the goods to the ship and the ship to the goods. On arrival at New York, the cargo was delivered unconditionally, and without any understanding that it should be subject to a lien for the charter-money. But, after such delivery, the owners of the ship filed a libel against the cargo to recover the amount of the charter-money, for which they claimed to have a lien enforceable against the cargo. *Held*, that the lien of the vessel on the cargo for her freight was lost by the delivery and could not be enforced.

[See note at end of case.]

In admiralty.

Thomas E. Stillman, for libellant.

R. D. Benedict and H. T. Wing, for claimant.

BENEDICT, District Judge. This is an action by Gaspar Monte, owner of the bark Castillo, to enforce a lien upon the cargo of the bark for freight alleged to have been earned under a charter party, made at Palermo, on the 7th day of October, A. D. 1870. The terms of the charter party are not in dispute, and it is admitted that it contains no clause binding the ship to the goods and the goods to the ship for the due performance of the contract. The fact is also undisputed that the cargo here proceeded against was transported in the vessel. But the libellant's right to recover is disputed upon two grounds: First, that, if freight be same due, the lien therefor has been lost by an unqualified delivery of the cargo, without any indication of an intention to claim a lien for freight. Second, that by reason of a failure to perform the stipulations of the charter in respect to the time when the vessel should be ready to receive the cargo, the charterers sustained damages exceeding the freight, which they have the right to set off by way of recoupment against the claim for freight. It is only necessary to consider the first named ground of defense, for the testimony brings the case within the ruling of the supreme court in the case of The Bags of Linseed, 1 Black [66 U. S.] 108. As in that case, so here, the cargo was delivered without any condition or qualification.

There is no evidence of any understanding, or of any local usage of the port from which an understanding can be inferred, that the

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

cargo was delivered subject to freight. In accordance with the ruling of the supreme court, it must accordingly be held that any lien which the libellant may have had for his freight has been lost by unqualified delivery of the cargo. Let the libel be dismissed with costs.

[NOTE. The lien of a carrier for freight arises from the right to retain possession until the freight is paid, and is lost by an unconditional delivery. Sears v. Wills, 1 Black (66 U. S.) 108; Duncan v. Kimball, 3 Wall. (70 U. S.) 37; One Hundred and Eighteen Sticks of Timber, Case No. 10,519; The Volunteer, Id. 16,999; Certain Logs of Mahogany, Id. 2,559; Ruggles v. Bucknor, Id. 12,115; Raymond v. Tyson, 17 How. (58 U. S.) 53; Perkins v. Hill, Case No. 10,987; Eames v. Cavaroc, Id. 4,238.]

Case No. 2,406.

CARGO OF SALT.

[4 Blatchf. 224;[1] 40 Hunt, Mer. Mag. 457.]

Circuit Court, S. D. New York. Oct. 2, 1858.

CHARTER PARTY—AUTHORITY OF AGENT TO CHANGE—FREIGHT—DEMURRAGE.

1. Where a charter-party for a voyage from New York to Gibraltar and Malaga and back, provided for the carrying of any lawful cargo, and for the payment of one-half of the freight on the discharge of the outward cargo, and of the other half on the discharge of the homeward cargo, and, there being no fruit to load with at Malaga, the vessel took a homeward cargo of salt at Gibraltar, under an arrangement made between the master and the agent of the charterers, at Malaga, that the salt should be discharged at New York in three days' time, the usual time for discharging a cargo of fruit: *Held*, that the agent at Malaga had no power to change the terms and condition of the charter-party.

2. *Held*, also, that, as the charter-party contained no provision as to the discharge of the homeward cargo other than that dispatch should be used, and as the usual time for unloading a cargo of salt at New York was fifteen days, Sundays and rainy days excepted, no right of action for the homeward freight, and no claim for demurrage of the vessel, could exist till the expiration of the fifteen days.

[3. Cited in Fourteen Horses, etc., Case No. 4,990, to the point that freight is not due until the discharge of the cargo, for until such discharge the voyage is not completed, nor is the ship's contract fully performed.]

[See The Tangier, 32 Fed. 230; Simpson v. One Hundred and Eleven Sticks of Hewn Timber, 7 Fed. 243.]

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

In admiralty. This was a libel in rem, filed in the district court, by [Freeman and others] the owners of a vessel, against her cargo of salt, to recover freight and demurrage, on its shipment from Gibraltar to New York, under a charter-party. The charter-party was entered into for a voyage from the port of New York to Gibraltar, or from New York to Gibraltar and Malaga, and back, and the owners engaged "to take and receive on board the said vessel, during the aforesaid voyage, all such lawful goods and merchandize as the said parties of the second part, or their agent, may think proper to ship." Twenty-six hundred dollars freight were to be paid if Gibraltar only was used, and twenty-seven hundred if Malaga was used; one-half to be paid upon the discharge of the outward cargo, and the other half upon the discharge of the homeward cargo. Part of the outward cargo was discharged at Gibraltar, and part at Malaga. No home cargo could be procured at Malaga, and the vessel returned to Gibraltar, and was loaded with a cargo of salt. Malaga is some 50 miles from Gibraltar. The freight on the outward cargo, according to the charter-party, was paid, and the only questions in the case were in respect to the freight at the home port, and a claim for demurrage, a dispute having arisen about the time consumed in discharging the cargo. The district court decreed for the claimants, and the libellants appealed to this court.

Welcome R. Beebe and Charles Donohue, for libellants.

Edward H. Owen, for claimants.

NELSON, Circuit Justice. It is quite apparent, on looking into the case, that this controversy has grown out of a misapprehension, on the part of the owners, of the import and effect of the charter-party, and that, had it not been for this, no difficulty would have existed in adjusting amicably all matters between the parties, connected with the charter of the vessel. The owners have assumed, from a letter of instructions to the master of the vessel by the charterers, in which a premium is offered if he should arrive in the port of New York with the first fruit, that the charter was a fruit-charter, and that the cargo of salt was substituted by an agreement with the agent of the charterers at Malaga, there being no fruit there with which to load the vessel. The master testified to this arrangement, and that it was agreed that the cargo of salt should be discharged at the port of delivery within the same time within which a cargo of fruit could be, namely, some three days. Hence, on the arrival of the vessel here, the owners claimed that the cargo should be discharged within that time. This was refused by the charterers, they claiming that the charter-party provided for the shipment of any lawful goods, and that they were entitled to the usual and customary time for unloading a cargo of salt, which was fifteen days for a cargo of the present bulk, Sundays and rainy days excepted. The owners proposed a compromise of ten days, which was refused. This dispute occasioned some delay in the vessel's reaching the dock for the discharge of her cargo. She reached the dock, however, in a few days after her arrival in port, and commenced the discharge,

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

the purchaser receiving the salt in lighters and carts, and continued discharging until, as claimed, more than the ten days had expired, when a bill for demurrage of the vessel was presented to the consignees, and payment demanded, which was refused; and thereupon the owners libelled the remaining portion of the cargo for freight and demurrage.

Now, I consider it quite clear that the charterers were not restricted to any kind of cargo; and, also, that the agent at Malaga had no power to change the terms and conditions of the charter-party; and, further, that, according to its terms, the ship was bound to bring back a cargo from either Gibraltar or Malaga, if tendered by the charterers, or their agent; and, hence, that the claim to have the cargo of salt discharged within the time customary for the discharge of a cargo of fruit, was not well founded. According to the charter-party, the home cargo was to be delivered in no other way than "dispatch to be used;" and the better opinion seems to be, upon the proofs, that these terms refer to custom house time, which is fifteen days, Sundays and rainy days excepted. When, therefore, this suit was commenced, this time not having expired, no right of action existed for the balance of the freight, that not being due, by the terms of the charter-party, till the discharge of the cargo at the home port; and there was no ground for a claim for demurrage. I agree that the master had a lien upon the cargo for the balance of the freight, and might have retained enough of it to satisfy the payment; but no right of action to recover it accrued till the owner had fulfilled his part of the contract, namely, the delivery of the goods. Abb. Shipp. (Perkins' 7th Am. Ed.) marg. p. 377, and note 2; Arthur v. The Cassius [Case No. 564].

The decree below must be affirmed.

CARGO OF SALT (FREEMAN v.). See Case No. 2,406.

CARGO OF SUGAR (U. S. v.). See Cases Nos. 14,721 and 14,722.

CARHART v. AUSTIN. See Case No. 2,288.

CARHART v. MILLER CO. See Case No. 15,776.

CARICO (U. S. v.). See Case No. 14,723.

Case No. 2,407.

CARILLO et al. v. SHOOK et al.

[8 Chi. Leg. News (1876) 258; 22 Int. Rev. Rec. 152.]

Circuit Court, S. D. New York.

COPYRIGHT—PUBLICATION AFTER FILING.

The work must be published within a reasonable time after filing the title page.

A. S. Sullivan, for complainants.

Mr. Dittenhoeffer, for defendants.

JOHNSON, Circuit Judge. In the case of Boucicault v. Hart [Case No. 1,692] Mr. Justice Hunt, in June, 1875, decided that to secure a copyright of a book, or a dramatic composition, the work must be published within a reasonable time after the filing of the title page, and that two copies must then be delivered to the librarian of congress, as required by law. Upon this application for a preliminary injunction, it is fitting that, without further inquiry or examination on my part, this decision should be followed as the law of this circuit, and I must accordingly deny the motion.

Case No. 2,408.

CARLETON v. DAVIS.

[2 Ware (Dav. 221) 225;[1] 3 N. Y. Leg. Obs. 86.]

District Court, D. Maine. April 4, 1844.

PUNISHMENT OF SEAMAN—ACTION BY, FOR ASSAULT—NECESSARY PROOF.

1. The master of a vessel has a right, in cases of necessity, to correct a negligent, disobedient, or mutinous seaman, by corporal punishment. But the punishment must be reasonable, and not inflicted with unlawful instruments.

[Cited in U. S. v. Harriman, Case No. 15,311.]

2. When a seaman prosecutes the master for an assault, and it is proved that he has been guilty of a fault which would justify some punishment, to entitle himself to damages he must show that the punishment was excessive in degree, or unlawful in its kind.

In admiralty. This was a libel for what is technically called, in the admiralty, a cause of damage. The libellant [Thomas Carleton] alleged that he shipped on board the brig Androscoggin, at Baltimore, as cook and steward, in March last, for a voyage to Portland, and that during the whole voyage he faithfully performed his duty; and that on the 17th of March, between the hours of ten and eleven o'clock at night, all hands being called on deck, as soon as he heard the call he dressed himself and went up; that when he went on deck he was seized by the captain [William V. Davis], who struck him over the head with a large piece of wood, called a belaying pin, severely wounding him and causing the blood to flow profusely from the wounds; that after striking him about a dozen blows, he called the mate and told him to kill him, the libellant, and throw him overboard; that he then again assaulted the libellant with a rope, giving him, over the head and face, a large number of blows, severely injuring him, and he prays the court to pronounce for the damages he had sustained. The answer denies that the libellant did his duty as a faithful seaman, but avers, on the contrary, that he was negligent, disobedient, and insolent; it denies that the master struck him with a piece of wood, but admits that he did strike him several times with a small rope, and pleads a justification that the libellant refused to do

[1] [Reported by Edward H. Daveis, Esq.]

his duty and made the first assault on the master.

Mr. Fox, for libellant.
Mr. Howard, for the master.

WARE, District Judge. The libel, in this case, states a grave and serious injury, and from the marks still remaining on the person of the libellant, it is evident that he actually received in the melee, one or more pretty severe wounds. If they were inflicted in the manner stated in the libel, and with the instrument that has been produced and exhibited in court, it is a case undoubtedly that not only calls for damages, but for exemplary damages. For the instrument is one that, in the hands of a vigorous man, with the exertion of even less than his whole strength, might well effect not only a severe but a fatal injury. Now, admitting the doctrine of the law, as claimed by the counsel for the respondent, that the master has the legal authority to correct and chastise a refractory, disobedient, and mutinous seaman, it is to be recollected that the law has imposed two important restrictions on this right; first, that it must be reasonable and moderate in degree, and secondly, that the punishment shall not be administered with unlawful instruments. Now, it will readily be admitted that a billet of wood eighteen inches long, and nearly as large as a man's arm, is not a proper instrument to be used in punishing a seaman. Nothing short of some personal danger to himself, from the violence of a man, could justify the master in assaulting a seaman with a deadly instrument, and such this undoubtedly would be in the hands of a man of ordinary strength. If, therefore, I was satisfied by the testimony, that the master actually assaulted the libellant with this belaying-pin, which has been brought into court, I should feel no hesitation in giving damages on this ground alone, although the same evidence might show that the seaman was in fault and deserved some correction. For I hold it a wholesome rule to be insisted upon and to be firmly upheld, that the master shall not, in punishing his men, though they may be in fault, use instruments of correction which endanger life or limb, and may produce fatal effects.

The difficulty, in this case, is in ascertaining from the evidence whether this billet of wood was used or not. It is charged by the libel, and denied by the answer. But, as no person was in sight when the affray took place, the case is left, on the conflicting allegations of the parties, each probably, as is usual in such cases, a quick witness in his own favor, very much to the conjecture of the court. Only two witnesses have been examined who could give any account of the affair, one called by the libellant and one by the respondent, and the night being very dark, neitner of them was in a position to see what took place, and from the loud whistling of the wind through the rigging, neither of them near enough to hear but very imperfectly what was said. Antonio Cook, one of the hands, was at the mainmast head, nearly over the spot where the affair took place. He says that the first he heard was the master asking Dunning, the mate, whether the cook had got on deck, and then he sung out for some one to take the helm. The next thing he heard was a number of blows, as of some one striking a man with a piece of iron or stick of wood, and he heard the captain say, 'Take that and go forward.' He heard a number of blows, and the words, 'Go forward to your duty,' several times repeated. He soon after heard Dunning sing out, 'Let go,' and immediately after heard the captain say, 'Kill him and throw him overboard.' The master, he says, spoke very loud, but he did not hear the cook's voice. Dunning, the mate, who was called by the master, says that when all hands were called, he came up and went forward to take in the sails, and that about twenty minutes or half an hour after, the captain called to him and asked whether the cook was on deck, and he answered that he was not. He then called him and again went forward to complete the taking in of the sails. About fifteen minutes after, he heard a scuffle in the after part of the ship, and heard the captain say, 'Go forward to your duty.' He then went aft and found the cook holding the captain pushed backward over a spar by the companion-way. The master called out to him to take him off. He then spoke to the cook and told him to let the captain go, and he not minding, he took hold of him, and, after pulling him three or four times, succeeded in breaking his hold. After he had taken him off, and turned to go forward again to duty, the cook went at the captain a second time, saying, 'Put it on, I want you to flog me,' and seized the master again. The mate again returned and pulled the cook off and threw him down over some hewed timber. The cook then went forward to his duty. and continued to do duty for the remainder of the voyage. This is the material part of the testimony, for though one more witness was examined, he added nothing that materially varied the case. The mate did not observe at the time that the libellant had received any material injury, and he heard no complaint from him. The testimony of Cook, connected with the fact that a severe injury was certainly inflicted on the libellant, if it stood alone and unaffected by any other evidence in the case, would certainly go far to convince one that a rude and violent attack was made upon the libellant by the master. He was not, it is true, in a situation to see the parties, or to hear but imperfectly what was said. But he heard the scuffle and blows given, and heard the captain's voice loud above the wind, telling him to take that and go forward; and the libellant came out

of the scuffle a wounded man. But then it is clear that the witness did not hear the whole. He heard nothing until the quarrel became loud and violent, and the beginning of it escaped him. Although, on the whole, the court might be inclined to believe on this evidence alone, that an unjustifiable assault was made by the master, yet it would be a conclusion to which one would come from an imperfect account of the whole affair, and, of course, a conclusion upon which the mind could not rest with entire satisfaction. But then we have the testimony of Dunning, the mate, also, to a part of the affair, which, although not necessarily in contradiction to that of Cook, gives to the case, on the whole, quite a different aspect. Dunning came to the parties while they were engaged in the scuffle, and the libellant then had the master down, and it was with considerable difficulty he succeeded in pulling him off. But it does not necessarily follow that the one who has the better of a fight at the close, is the one who provoked and began it; nor is it to be easily believed that a seaman, without some strong exciting cause, would commence an assault on the master. I do not recollect a single instance, among all the assaults and batteries that have come before me, and they have been pretty numerous, where a seaman gave the master the first blow; nor do I now remember a case where he returned the blow. Indeed, it must be a very peculiar case in which a seaman could be justified in returning a blow. The marine law is very strict on this subject. 'The mariner,' says the Consulate of the Sea, 'is bound to bear with the master if he reproves him in injurious language, and if he makes an assault upon him, he ought to fly to the prow and put himself on the side of the chains, if the master passes them he ought to fly to the other side, and if the master pursues him there, he may call witnesses and stand upon his defense.' Chapter 165. Waiving the minute and studiously exact directions contained in this article of the Consulate, in its general spirit and object it constitutes the maritime law of the present day, and is confirmed by all the most authoritative expositions of the law. Jugemens d'Oleron, art. 12; Cleirac, p. 48; Laws of Wisbuy, art. 26; Ord. de la Marine, liv. 2, tit. 7; Valin, Comm. p. 553; Emerigon, Traité des Assurances, c. 12, § 6.

It is only in very extreme cases that a seaman can be justified in turning upon the master and resisting him with force, and when he can protect himself from a dangerous assault in no other way. Nothing could be more pernicious to the police of the sea, than to admit that a seaman might, as a general rule, resist the master by force, even when inflicting undeserved punishment. It would be sure to lead to numerous scenes of violence and insubordination, and endanger all authority. The duty of a seaman, in such case, is to submit to wrong. The nature of the master's authority, which is of a quasi parental character, and the necessities of the service imperiously require it. On his return to port, he may appeal to the law for redress, and the master will be held to strict responsibility for any abuse of his authority. If he does not do this, but takes jurisdiction of his own wrongs, and seeks redress from his own hands, the courts will be slow in entertaining his complaint, and taking jurisdiction of an appeal from a wager of battle, even if originally he had just grounds of complaint. He may be in danger of impairing a good cause of action by matter ex post facto. Unfortunately, in this case, we get from the testimony but a mutilated account of detached parts of the affair, and have no account of the circumstances with which it commenced. In the absence of proof, the court cannot let itself loose into speculations on probabilities. And the complainant who asks for the interposition of the court, must make out his case. However well founded the cause of the complaint may be, if it cannot be proved, he can have no decree in his favor, for the decree must follow the allegations and the proofs. This is an infirmity that belongs to all the administration of human justice. In jurisprudence, a fact that cannot be proved is the same as a fact that does not exist. Mere probability, founded on general presumptions, however they may incline the private judgment of the man, cannot amount to that judicial proof that is required to satisfy the magistrate. It is a remark of the most profound of all the commentators of the Roman law: Quae non est plena veritas est plena falsitas, non semiveritas. Sic quae non est plena probatio plane nulla probatio est. Cujas,—cited Toull. Droit Civil, vol. 8, No. 8. And this rule, when applied to the whole merits, is certainly sound, however questionable it may be in its application to the doctrine of semi-proofs, admitted in the jurisprudence of some of the continental nations of Europe. Now, though it is sufficiently apparent that the libellant received a pretty severe wound in the scuffle, it does not appear how the wound was made. It might have been by a blow of the captain with a billet of wood, or it might have been received in the fall, when he was thrown down by the mate. But then whatever punishment may have been inflicted by the master, it was preceded by a gross fault on the part of the libellant. When called to duty, in a time of great peril, he had not answered the call, and when called a second time he came tardily. In such a case, some haste and impatience on the part of the master might well be pardoned; and if, in reproving a tardy and unwilling man, there was something of an overcharged manner, and even if the reproof was accompanied with moderate personal chastisement to hasten the movement of a loiterer, a maritime court would certainly feel inclined to look upon it with indulgence. Such is not the time,

as has been well observed, when we are to look for gentleness of manner and a measured caution in the appliances resorted to for the purpose of enforcing quick obedience. The necessities of the service demand the greatest promptitude, and the punishment of the moment may be indispensable to hasten a dilatory and unwilling seaman. 1 Boulay Paty, Droit Maritime, tit. 4, "Prolegomenes," p. 374.

Where a seaman complains against the master for an assault, and it is proved that he has been guilty of misconduct which would justify some punishment, he cannot entitle himself to a decree but by showing that the punishment was excessive in degree, or unjustifiable in kind. The master has a right to correct the disobedience of a seaman by corporal punishment, in cases where the necessities of the service call for it, and, though it should be sparingly resorted to, a court will not hold the master amenable, if he does not pass the limit of a reasonable and moderate discretion. However the truth of the fact may have been, the libellant has failed to prove that this limit has been passed.

But there is another fact proved that places the libellant in a very unfavorable light, and that is the insolent and mutinous manner in which he turned upon the master after he was first torn from him by the mate. It is in proof, that the master was at the time in a feeble condition from ill health, and the libellant had already ascertained by trial his own superiority of strength. Now this violent and criminal attack would go far, in the judgment of a maritime court, which is always disposed to uphold the just authority of the master with a steady hand, to impair a good cause of complaint. It exhibits him in the light of a man of unchastened and ungovernable passion. It also throws back some light on the obscurity of the preceding part of the affair, and justifies a suspicion at least, that he was not backward to engage in the fight in the first instance.

I pass over without remark the supposed acknowledgments of the libellant, after his arrival in this port, of the general good treatment he had experienced from the master. Seamen are often artfully surprised into such acknowledgments by the friends of the master, when it is apprehended that some controversy may arise, for the express purpose of using them in evidence. They are always a suspected kind of evidence, and are usually entitled to very little consideration. Libel dismissed.

[NOTE. Flogging on board vessels of commerce was abolished by Act Sept. 28, 1850 (9 Stat. 515; Rev. St. § 4611).]

CARLETON (POOR v.). See Case No. 11,272.

Case No. 2,409.

CARLETON v. The ROANOKE.

[N. Y. Times. Oct. 1, 1855.]

Circuit Court, S. D. New York. Sept. 28, 1853.

COLLISION—STEAM AND SAIL—LOOKOUT—SPEED OF STEAMER.

[A schooner while ascending the Elizabeth River, Va., close hauled on the starboard tack, at the rate of four knots an hour, out of the channel, on the easterly side, near the shoals, the wind south and the night dark, was run down by a descending steamer, proceeding at the rate of six knots an hour. When three or four miles apart, the schooner showed a light, which she kept hoisted until the collision. Those on the steamer saw the light, but lost sight of it, and thinking it on the western shore, ported the steamer's helm until the light was again seen, at which time the vessels were about a mile apart. *Held*, that the steamer was in fault for failing to keep a proper lookout or to slacken her speed or come to anchor after ascertaining the schooner's true position.]

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

[In admiralty. Libel by Dexter Carleton and others against the steamship Roanoake for damages sustained by collision. From a decree for libelants, the claimants appeal.]

Benedict, Scoville, and Benedict, for libelants.

Mr. Davies, for appellants.

Before NELSON, Circuit Justice.

The libel in this case was filed against the Roanoke to recover damages for a collision happening on the Elizabeth river, in the state of Virginia, on the night of the 17th of October, 1852, by which the schooner Sprightling Sea was run down and sunk. The schooner was ascending the river, close hauled on her starboard tack, on the easterly side, at the rate of some four knots an hour, out of the channel, and close to the shoals. The wind was south; the night dark. The steamer was descending the river with her three lights burning, at the rate of some six knots the hour, and was discerned by those on board the schooner three or four miles off. On discovering her, a hand was ordered to show a light, which was done by hoisting a lantern on the forward part of the schooner, and was held there until the collision. The steamer saw the light for a few moments and lost sight of it; but, as the hands on board of her concur in stating, saw it over the larboard side of the vessel, and on the western shore of the river, and in order to avoid any danger, ported helm, and sheered nearer to the eastern. Soon after this the light was again seen, but too late to avoid the collision. The misfortune was doubtless owing to a mistake of the hands on the steamer as to the position of this light. Instead of being on the western it was on the eastern side of the river. All the hands on the schooner concur in this, and they cannot be mistaken; the vessel had

not changed her course from the time the light was exhibited, and she had been running this course some time before.

The only doubt in the case is whether or not the light was exhibited early enough to warn the steamer of her danger. The night was dark, and in the absence of any light on the schooner, there would be great difficulty in charging the steamer with fault. The joint speed of the two vessels was some ten miles the hour,—a mile in six minutes. The shortest time stated by any witness on the schooner, between the showing of the light and the collision, was five or six minutes. The steamer, then, must have been about a mile distant from the schooner, and if a vigilant lookout had been kept, afforded sufficient time to have avoided her. But a stronger ground is that the steamer saw the light early enough to have taken the proper precaution. And although she lost sight of it, she was admonished that a vessel was approaching in an opposite direction; and, considering the darkness of the night, she should have slackened speed, or come to anchor until she ascertained her course or position. It is true she saw the light on the western side of the river, and took the proper steps to avoid any danger. But in this she was mistaken. The light was on the eastern side, and she must be held responsible for the error. Besides, considering the darkness of the night and the narrowness of the channel of the river navigable, she should have had a competent lookout stationed in the forward part of the vessel, whose sole business was to discern vessels approaching and give the earliest warning. It is more than probable that if this precaution had been taken the misfortune would not have occurred.

We think the decree of the court below right, and it should be affirmed.

CARL HAASTED, The (WALSH v.). See Case No. 17,113.

Case No. 2,410.

CARLISLE v. BUNDY.

[3 Wkly. Law Gaz. (1859) 297.]

Circuit Court, D. Indiana.

ENJOINING PROCEEDINGS IN STATE COURT.

[The sale of mortgaged property under a decree of foreclosure in a state court of concurrent jurisdiction will not be enjoined by a federal court at the instance of prior mortgagees who were not made parties to the proceedings in the state court.]

[In equity. Bill by George Carlisle and others, trustees, to enjoin a sale of mortgaged property directed by a decree of the state court.]

McLEAN, Circuit Justice. This bill is filed by George Carlisle, as trustee, who, with others, represents that under the law of Indiana of 1847 and 1848, the Newcastle and Richmond Railroad Company had power to negotiate loans, contract debts, and give liens on all property and effects of the company, and by a subsequent act of Jan., 1851, the company was authorized to borrow money, and issue bonds therefor, and to secure the payment thereof; to mortgage the road, income, and other property of the company, etc. That under the above and other acts of the legislature, the following mortgages were executed: (1) The Newcastle and Richmond R. R. Co., to Carlisle and Varnum, $300,000, on twenty-seven miles of the road, dated Feb. 7, 1852. (2) The Cincinnati, Logansport, and Chicago R. R. Co., to Carlisle, Hamilton and Riggs, 300,000 pounds sterling on the whole road, dated 1st April, 1853. (3) To Bundy and White, for $500,000, by the Cincinnati and Chicago R. R. On the 31st of August, 1854, the Cincinnati, Logansport and Chicago R. R. Company, by an act of the legislature of the state, consolidated with the Cincinnati and Chicago Railroad Company. In April, 1858, Geo. Carlisle filed a bill in this court, alleging that the interest had not been paid on the bonds, secured by the deed of trust to him, Riggs, and Hamilton, praying for a decree for the sale of the road and machinery, etc. In November, 1854, the consolidated company executed a deed of trust to Martin L. Bundy, conveying to him some real estate, and a number of locomotives and cars, for passengers and freight, as a security for the payment of certain debts, which the directors of the company had incurred to stock the road. The debts thus contracted by the company and others, to put the railroad in operation, are alleged to have amounted to eighty thousand dollars. And the trustee Bundy, on a failure to pay the debts as they fell due, by the company, was authorized to sell the property, specified in the deed of trust, "or so much thereof as shall become necessary to pay the debts provided for in the deed of trust."

It is averred that none of the property conveyed to Bundy was owned by the company when the deed of trust was executed to Carlisle, Riggs, and Hamilton. The cars embraced in the Bundy mortgage are alleged to have been in an unfinished state, and in the possession of the manufacturers, and had never been placed upon the road when this deed of trust was executed.

In August, 1857, Bundy commenced a suit in the Wayne circuit court of Indiana, for the purpose of recovering possession of the property conveyed to him by the deed of trust, and which, by the deed, was required to be sold, and this property, he alleged in his bill, to be in the possession of J. W. Wright & Company, who claimed it under a lease from the company, executed in October, 1857, some two years after the deed of trust to him. In this suit, Bundy did not claim a judgment against the railroad company, or against those who claimed the property as lessees, and who had possession of it; but he prayed

for a decree that the possession of the property should be given to him, that he might proceed to sell, and apply the proceeds in payment of the debts specified in the deed of trust. J. W. Wright & Company admitted they had the possession of the property, and they set up numerous defences to the suit. But Carlisle, and the other trustees associated with him, were not made parties, and it is alleged that the only point before the Indiana court in that case, in regard to the property, was the right of Bundy under the deed of trust. In their opinion, the Wayne circuit court say this suit is brought by Martin L. Bundy, the trustee, to obtain a foreclosure and order of sale upon a trust mortgage against the Cincinnati and Chicago Railroad Company—the mortgagor and Wright and others, her lessees, having in possession and use the property covered by the trust mortgage. The railroad company made default. In the further progress of the case, the court say: "Subsequently the railroad company—Bundy being one of the directors—leased the trust property mortgaged to Wright and others for five years. Before the expiration of the five years, the claims of the creditors, the beneficiaries of the trust mortgage, became due, were not paid, and the trustees, for their benefit, obtained an order for the sale of the property. The lessees pleaded the act of the trustee in participating in the lease to them as an estoppel in pais of his right to foreclose and sell the property; and the court say, we do not think the estoppel arises upon the facts." And the court in conclusion, say, the "lessees had notice, by the record of the trust mortgage, of the extent of interest possessed by the respective parties, and of the liabilities to which they might be exposed of having the property taken from them, in the contingency that the secured creditors should not be otherwise paid, and should press the collection of their claims," etc. "The result," say the court, "at which we have arrived as to the validity of the plaintiff's claim, under the trust mortgage, renders it unnecessary that we should inquire into the validity of the lease to Wright and others." An elaborate opinion was pronounced in the supreme court, to which the above cause was appealed from the circuit court of Wayne county [Wright v. Bundy, 11 Ind. 398], and on a petition for a rehearing in the supreme court the case was again elaborately considered, and the rehearing was denied [Same v. Same, Id. 409].

The mortgage or deeds of trust were issued to Carlisle & Varnum in 1852, and in 1853 to Carlisle, Hamilton and Riggs. Those issued to Bundy and White, the date is not stated. But the first, second, and third mortgage also, it is presumed, were issued prior to the Bundy mortgage, which is called the fourth mortgage. This was dated in November, 1854. In August, 1857, suit was brought on the Bundy mortgage in the Wayne circuit court. The suit by Carlisle and others on the original trust bonds was commenced in April, 1858. From this it appears that the suit on the Bundy mortgage was brought in the Wayne circuit court of Indiana, some nine months before the commencement of Carlisle's suit in this court. From the record of the Wayne circuit court, there was no appearance by Carlisle or any one else in the Bundy case, except by Wright & Company, as the lessees of the railroad company. That the Wayne circuit court of Indiana is a court of general jurisdiction is admitted, and it appears the suit in that court was prosecuted to a final decision, and that Wright & Company took an appeal to the supreme court of the state, and that on the 25th December, 1858, a final decision was given affirming the decision of the Wayne circuit court [Wright v. Bundy, supra]; and that afterwards, on a petition for a rehearing, the case was again elaborately considered and the motion was overruled [Wright v. Bundy, supra]. And it further appears the validity of the Bundy mortgage was the turning point of the decision in that case, both in the circuit and supreme courts of the state.

There is no principle better settled than that when courts having concurrent jurisdiction, the one which first exercise jurisdiction by a service of notice has possession of the case, and may decide it. It is also a well-settled principle that no court which is not vested with an appellate power can modify or reverse a decision of a court, when jurisdiction has attached. These principles are not controverted, but admitted by the counsel in the case. It is also an admitted principle, that an individual or a corporate body, though interested in a suit, if not made a party, his rights remain unaffected by the procedure. There are cases where a court, having jurisdiction of the person, may coerce him to do certain things which justice requires, though not strictly within its jurisdiction; as where a conveyance of land may be required to be made out of the state, or where an individual acts in different capacities, as representing distinct interests. Bundy, it is alleged, acts as co-trustee with White of the third mortgage; and he is sole trustee of the fourth mortgage, is plaintiff in the Wayne circuit suit, is special commissioner of that court to sell, and is co-defendant with White in the Carlisle suit to foreclose, and in that capacity has answered and filed a cross bill; and that he is defendant in the Carlisle suit to foreclose in his capacity of trustee of the fourth mortgage. In answer to these facts, in regard to the fourth or Bundy mortgage, it is enough to say, that the suit on that instrument having been first commenced in the Wayne circuit court, which exercises a concurrent jurisdiction with this court, its decision must stand on all matters properly adjudicated, unless reviewed and reversed by the appellate court of the state. It is true, in his supplemental bill, Carlisle alleges that Bundy is about to take posses-

sion of and sell the machinery embraced in the deed of trust to him; and the same machinery is covered by the deed of trust to Riggs, Hamilton and himself, and that the sale of the property would be an irreparable injury to the road. The decree in the supreme court of Indiana in favor of Bundy is in the nature of a proceeding in rem, and requires him, under the deed of trust, to sell the property, and pay the debts specified. We are bound by this decree, and it is difficult to perceive how we can in any manner interfere by an injunction without a direct conflict with the Indiana court. An injunction which shall not restrain the action of that court, will answer no purpose. It is said we may act upon the person of Bundy without interfering with the Indiana court. How this can be done is not perceived. If we say that Bundy shall not sell, and nothing short of that will effect the purpose, we nullify the action of that court. We say that he shall not do the thing which the supreme court of Indiana have commanded him to do.

If judgment at common law had been rendered for money, this court might have protected any property on which there was a prior and specific lien, from execution. But when the decree is entered for the sale of specific property, it remains in the custody of the court, and it cannot be reached by an injunction, or other proceeding, except by a court having an appellate power.

It is said that the question between Carlisle and Bundy, now pending before this court, was never directly or indirectly passed upon by the Wayne circuit court; that it is a new case, and between different parties; and that it is not proposed to disturb a single question settled by that court. And it is alleged that the relative rights of Carlisle and Bundy were not determined by the supreme court of Indiana, and could not be, as Carlisle was not a party in that suit. It must be admitted that the bill filed by Carlisle, and those associated with him, was filed in this court, primarily against the Cincinnati and Chicago Railroad Company, to enforce the payment of interest which had become due and was not paid, and, if need be, to foreclose the mortgage on the road and sell it, including its entire property; and that Carlisle filed a supplemental bill subsequently, in reference to the mortgage set up by Bundy, alleging it to be fraudulent and void. It is not denied that this Bundy mortgage purports to cover the entire property which was brought before the Wayne circuit court of Indiana, and was appealed to the supreme court of the state, which affirmed the decree of the inferior court. And the property embraced in the mortgage was ordered to be sold, by the final decree of the supreme court. And it seems to be admitted that, under the mortgage, the property will not sell for the amount of the indebtment claimed. That a subsequent incumbrancer may be made a party to a suit on a prior mortgage, may be admitted. But the question made is whether a subsequent incumbrancer, as in the case of Bundy, on a mortgage of personal property, in which the items are enumerated, and directed to be sold, by the decree of a state court, can be enjoined by a federal court. I cannot perceive how this can be done. Under the same jurisdiction, there could be no difficulty in staying the proceedings. But by this court no step can be taken which would not bring it directly in conflict with the state court. To issue an injunction against the person of Bundy, without interfering with the decision of the supreme court of Indiana, is impossible. The decree is the final action of that court, through Bundy, its trustee; and should he attempt to prevent or defeat the purposes of the decree, he would be liable to be attached and punished by the state court, and there is no power in this court to protect him. We claim only a concurrent jurisdiction with the state court; and in this case the jurisdiction of the state court attached before Carlisle filed his bill in this court. If, as above remarked, a judgment at law had been entered against the railroad company, and an execution under that judgment had been levied, and property mortgaged, the lien might be asserted in this court. But this would not call in question the validity of the decree of that court, as the levy, being the act of the officer, might be enjoined. But Carlisle, not being made a party in the act of the state court, cannot be materially affected by that decision. If he have prior liens to the Bundy mortgage, they may be enforced against the specific property, into whatsoever hands it may come. There could be no doubt as to the notice from the recorded mortgages, and the suits in this and the state courts.

In the case of Coe v. Hart [Case No. 2,942] this court held, where several passengers and other cars had been constructed and delivered to the railroad company, that the lien on subsequently acquired property attached, under the mortgage; and, again, where a bridge was constructed over the Muskingum, at Zanesville, on the Wilmington road, it was held that the constructor of the bridge might refuse to deliver the bridge to the railroad company, unless security was given on it for the balance due, and that a mortgage so given was valid. This ruling was not founded on a mechanic's lien, or any statutory provision, but on the principle of the common law that the constructor of a bridge, a locomotive, passenger cars, or any other structure for the road, there being no special contract for the payment of the work, the constructor may refuse to deliver it to the railroad company, until it shall be paid for, or the payment satisfactorily secured. But where no special lien is given on the work, and it is delivered to the railroad, the constructor can only be considered as a general creditor of the company I know no other principle on which proper protection can be afforded to

these great improvements, which have added a hundred per centum or more to the general products of our country, and to the commercial facilities afforded by them. When a sale of the road shall be indispensable, it should take place under such circumstances as to enable a court to adjust the equities between the respective parties. Mr. Carlisle may stand upon his liens, or he may, at his option, investigate the merits of the Bundy mortgage in the state court. The prayer for an injunction is refused.

CARLISLE (CARTER v.). See Case No. 2,474.

Case No. 2,411.

CARLISLE v. DAVIS et al.

[9 Ben. 18.][1]

District Court, S. D. New York. Jan. 1877.

CHATTEL MORTGAGE—FAILURE TO RENEW—RIGHTS OF MORTGAGOR'S ASSIGNEE IN BANKRUPTCY.

As against a chattel mortgage, the assignee in bankruptcy of the mortgagor cannot be heard to claim that the mortgage is invalid because it was not renewed under the statute of New York in regard to renewing chattel mortgages as against creditors and purchasers, if it was valid when the proceedings in bankruptcy were commenced.

[In equity. Bill by William T. Carlisle, assignee in bankruptcy of Henry Wilson, against Joseph M. Davis and David M. Davis.]

H. B. Philbrick, for plaintiff.

M. Laird, for defendants.

BLATCHFORD, District Judge. The burden of proof is on the plaintiff to establish affirmatively the allegations of the bill. I think the plaintiff fails to show that Joseph M. Davis violated his agreement, and fails to show that he did not transfer the good will of his business to the bankrupt, and fails to show that he caused such good will to be given to other parties, and fails to show that he induced any customer of his not to give his business to the bankrupt, and fails to show that he depreciated the business of the bankrupt, and fails to show that he was or is indebted to the bankrupt or his estate.

The note and mortgage were given May 21st, 1875. The note was due in one year. The bill in this case was filed June 10th, 1876. The point is made, that the mortgage became void because it was not properly renewed under the statute of the state of New York, within one year. But, the petition in bankruptcy was filed on the 19th of January, 1876, and, on the 2d of March, 1876, the assignment to the assignee in bankruptcy was made, conveying to him the estate and property which the bankrupt had on the 19th of January, 1876. The assignee acquired nothing more than the rights which the bankrupt had on that day, except as respects property conveyed by the bankrupt in fraud of his creditors, and except as respects property conveyed in direct contravention of the bankruptcy statute. As regards the subject matter of this suit, the assignee stands in no different position from that which the bankrupt himself would occupy if there had been no bankruptcy. The bankrupt could not be heard to claim that the mortgage is invalid as against him because it was not renewed, and the assignee occupies no better or different position. By section 5046 of the Revised Statutes, the assignee acquires the rights of action which the bankrupt had for property, and the rights which the bankrupt had to redeem property, and the like right to sue for, recover and defend property, which the bankrupt might have had if no assignment had been made. By section 5047 the assignee is given the like remedy to recover the effects of the bankrupt in his own name as the bankrupt might have had but for the assignment and the bankruptcy. In respect to the property covered by the mortgage in this case, all the right which the bankrupt had and which the assignee acquired, on the proofs in this case, was the right to hold the property subject to the mortgage and to redeem the property from the mortgage by paying the amount due on it according to its terms. An assignee in bankruptcy is not a creditor or a purchaser, within the language of the statute of New York in regard to the renewing of chattel mortgages, so as to require that a mortgage which is valid when the proceedings in bankruptcy are commenced, shall, in order to have it continue valid, as against such assignee, be renewed in the manner prescribed by such statute, after the proceedings in bankruptcy are commenced.

The bill must be dismissed, with costs to be paid out of the funds, if any, in the hands of the assignee, other than the proceeds of the mortgaged property, and the injunction heretofore granted must be dissolved.

CARLISLE (UNITED STATES v.). See Case No. 14,724.

CARLISLE BANK (KREBS v.). See Case No. 7,932.

CARLL (MAULDIN v.). See Case No. 9,307.

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

Case No. 2,412.

CARLOCK v. TAPPAN et al.

[Betts, C. C. MS. No. 1.]

Circuit Court, S. D. New York. 1843.

PATENTS FOR INVENTIONS—ACTION FOR INFRINGEMENT—PLEADING—DAMAGES.

[1. In an action for damages for the infringement of a patent, the objection that another is interested in the patent jointly with the plaintiff, by virtue of an assignment, must be taken by plea in abatement.]

[2. When the jury have determined the actual damages sustained, the court will not increase them, as authorized by the fourteenth section of the patent act of 1836, except upon satisfactory proof that plaintiff is entitled to further damages by way of protection.]

[At law. Action by Carlock against Tappan & Tappan for damages for infringement of a patent. There was a verdict for plaintiff at November term, 1841; and at April term, 1842, he moved to increase the damages assessed, under Act July 4, 1836 (5 Stat. 123), which provides that whenever, in any action for the infringement of a patent, a verdict shall be rendered for the plaintiff, "it shall be in the power of the court to render judgment for any sum above the amount found by such verdict as the actual damages sustained by the plaintiff, not exceeding three times the amount thereof."] The defendants oppose the motion, and also contend that plaintiff is not entitled to judgment.

On the trial it appeared that plaintiff was patentee of a patent for shipping stocks, granted August 9, 1831. He assigned one-half the amount to Arrowsmith, May 18, 1839, and Arrowsmith reassigned to the patentee the same one-half Jan. 30, 1838. The jury, by their verdict, found the damages for violation of the patent previous to the assignment at $120, and between that and the reassignment (1838), $1,241.76, and subsequent to July, 1838, $1,600. The plaintiff claimed he was entitled to one-half of the two first sums, and treble the amount of the total. The defendant insisted that plaintiff could not recover in his separate action for his joint interest, so long as Arrowsmith was part owner, etc.

Staples & Dana, for plaintiff.
Silliman & Mitchell, for defendant.

PER CURIAM. If the defendant intended to object that another was justly interested with the plaintiff in the patent, he should have pleaded in abatement. The rule in England and this state is well settled, that a party having a common interest may sue in a separate action, and recover his individual injuries in actions of tort. 1 Johns. 471; 6 Johns. 108; 8 Johns. 151; 6 Durn. & E. [6 Term R.] 766; 7 Durn. & E. [7 Term R.] 279; 1 Chit. Pl. 76.

On the question as to the construction of the statute of 1836, increasing the damages, THE COURT ruled, that the jury had fixed the actual damages, which could only be varied by the court on satisfactory proofs that the plaintiff ought, by way of protection or smart money, to recover further damages.

Case No. 2,413.

The CARLOTTA.

[9 Ben. 1.][1]

District Court, S. D. New York. Jan. 1877.[2]

CHARTER—BILL OF LADING — DAMAGE BY RATS — PERIL OF THE SEA — DAMAGE BY PETROLEUM—CLEANSING OF VESSEL—SALE OF GOODS TO ARRIVE.

1. The bark C. was chartered at New York by G. & A. to carry a cargo of fruit from certain ports in Spain to New York, it being understood that the vessel was then bound to Barcelona with a cargo of petroleum, and it being provided in the charter that the vessel was to be "cleaned as customary previous to loading homeward cargo." The vessel was fumigated to destroy rats before she took on board any of the return cargo, and had on board a cat and a rat-terrier, and was cleansed after the cargo of petroleum was unloaded. The master gave certain bills of lading for the return cargo, with the usual exceptions as to acts of God and dangers and perils of the sea. These bills of lading were all made to, or assigned to, the charterers. The cargo was sold by the consignees to arrive, and they obtained a full price for it. When the vessel arrived in New York, some of the cargo was found to be damaged by the gnawing of rats, and also to be impregnated with the taste and smell of petroleum. G. & A. sued the vessel under the bills of lading: *Held*, that where the owner of the vessel, notwithstanding the charter-party, enters into special contracts, through the master, in respect to the carriage and delivery of the goods, the bills of lading must be regarded as the contracts by which the rights of the parties are to be governed, so far as respects the matters provided for therein.

[See Two Hundred and Sixty Hogsheads of Molasses, Case No. 14,296; Lamb v. Parkman, Id. 8,020; Perkins v. Hill, Id. 10,987, affirming Id. 10,986; Carr v. Austin & N. W. R. Co., 14 Fed. 419.]

2. That loss or damage by rats is not an act of God, nor a danger or accident of the sea.

[See note at end of case.]

3. That the fact of damage by rats is sufficient evidence that sufficient care and skill was not exercised to rid the vessel of rats.

4. That the fact of damage by petroleum must be accepted as evidence that the vessel was not cleaned in the customary or proper manner, as required by the charter.

[See The Lizzie W. Virden, 11 Fed. 903.]

5. That where merchandise is sold to arrive, for a price based on undamaged goods, and that price has been paid in full, but it is not shown that the right of property and the right of possession were not in the vendor when the breach of contract or neglect of duty complained of occurred, the vendor can maintain an action against the carrier for damage to the goods; but where there has been a rebate of duties for loss or damage in respect of any goods as to which an allowance shall be found due in favor of the consignees, they must be charged with that sum.

[Disapproved in The Eroe, Case No. 4,521. Distinguished in same case, on appeal, Id. 4,522.]

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

[2] [Affirmed by Circuit Court. Case No. 2,413a.]

In admiralty.

Beebe, Wilcox & Hobbs, for Gomez & Arguimbau.

Benedict, Taft & Benedict, for Bliss and the Carlotta.

BLATCHFORD, District Judge. William Bliss, as owner of the bark Carlotta, filed a libel on the 13th of February, 1874, against Raphael M. Gomez and Daniel V. Arguimbau, to recover the amount due on a written charter of the bark Carlotta to the respondents. The libel alleges that the vessel performed the charter in all respects and became entitled to receive the charter money therein specified, and that $1,000 or thereabouts still remains due thereon. The charter party, which was made at New York on the 8th of August, 1873, between the agents of the owner of the vessel, then lying at New York, and the respondents, under the co-partnership name of Gomez & Arguimbau, charters the vessel to the respondents "for a voyage from two ports in Spain between Barcelona and Malaga, both inclusive, and including Ivica, to New York—charterers have privilege also of taking part cargo at Barcelona, and then using two ports to load, if required—on the terms following." Among those terms are, that the vessel shall receive on board during the voyage "a full cargo of fruit and other lawful merchandise," and that no merchandise shall be laden otherwise than for the respondents, without their consent, on pain of forfeiture of the amount of freight agreed upon; that on arrival out the captain is to report by telegraph to R. M. Gomez at Malaga, and follow his instructions in reference to the charter; that the respondents are to pay to the owner for the use of said vessel during said voyage, in cash, free of commissions, on delivery of the cargo at the port of discharge, $2,500 in United States currency; and that "it is understood that said vessel is now bound to Barcelona, with a cargo refined petroleum in bbls., whence she shall proceed immediately after discharge of outward cargo to enter upon this charter—vessel to be cleaned as customary previous to loading homeward cargo."

The answer of Gomez & Arguimbau to the libel of Bliss was filed on the 26th of March, 1875. It admits the execution and contents of the charter party, as set forth in the libel, and avers that under said charter party the respondents delivered to the master of the vessel certain merchandise in barrels, bales and bags, to be transported to the port of New York from Spain; that such merchandise was shipped and received on board of said vessel under certain bills of lading which recited that said merchandise was received in good order, and by which the master and owners of the vessel promised to deliver the same to the respondents at the port of New York in the like good order and condition as received, on payment of freight as therein provided; and that the master and employees of said vessel took so little and such bad care, in putting said cargo on board and in storing it and in attending to it while on board and while landing it, that a large part of said cargo was badly stained by petroleum or other such substance, and also impregnated by the smell arising therefrom, and thus rendered unmerchantable; and many of the bags and packages containing said merchandise, and the contents thereof, were badly eaten by rats or other vermin, and in other ways the said cargo was so badly damaged by the negligence of said master and owners that part of said cargo was wholly lost and other parts damaged to the amount altogether of at least $2,000.

On the 17th of February, 1874, Gomez & Arguimbau filed a libel against the bark Carlotta. It alleges that in November, 1873, the said bark then lying in the port of Tarragona, in Spain, Joaquin Ruis shipped on board of her 750 bags of almonds, each weighing 50 kilogrammes, and marked G. A., and 150 bags of filberts, in good order, and well conditioned, to be transported by said vessel to the port of New York, in like good order and well conditioned, and there delivered to order or assigns, he or they paying freight therefor according to charter party; that the master of said vessel gave a bill of lading therefor, dated November 5th, 1873, which was endorsed over to and held by the libellants, who were the consignees of the cargo therein named, and entitled to demand and receive the same; that in the said month of November, the said bark then lying in the port of Iviza, in Spain, Wallis & Co. shipped in good order and well conditioned, on board of her, to be transported to the port of New York, 425 bags of soft-shelled almonds, of the Fila kind, marked F, weighing gross 22,533 kilogrammes, and also 850 half bags of soft-shelled almonds of the Fila kind, weighing gross 22,533 kilogrammes, and marked G, and also 25 barrels of capers in vinegar, marked 1, and also 25 barrels of capers in vinegar, marked 3, to be carried on board of said bark to the port of New York, and there delivered in like good order and well conditioned, (the acts of God, and all and every other dangers and accidents of the seas and navigation of whatever nature and kind excepted,) unto the libellants or their assigns, they paying freight for the said goods as per charter party dated New York, August 8th, 1873; that the master of said vessel gave a bill of lading therefor, dated November 11th, 1873; that, in the month of December, 1873, the said bark then lying in the port of Malaga, R. M. Gomez shipped in good order and well conditioned, on board of her, 50 quarter casks of wine, marked R M. Gomez, 114 half boxes of oranges, marked R. M. Gomez, 324 quarter boxes of lemons, marked R. M. Gomez, 95 boxes of lemons, marked Jose

Perez, 157 bags of almonds, marked R. M. Gomez, and 1200 boxes of raisins and 200 frails of raisins, both marked R. M. Gomez, to be delivered in like good order and well conditioned at the port of New York, the dangers of the seas only excepted, unto the libellants or their assigns, they paying freight therefor as per charter; that the master of said vessel gave a bill of lading therefor, dated December 2d, 1873; that in the month of December, 1873, R. M. Gomez shipped in good order and well conditioned on board of said bark, 100 bags of shelled almonds, marked G. A., to be transported on board of said vessel from Malaga aforesaid to the port of New York, and there delivered in like good order and well conditioned, the dangers of the seas only excepted, unto the libellants or their assigns, they paying freight for the same as per charter; that the master of said vessel gave a bill of lading therefor dated December 4th, 1873; that the said bark arrived in the port of New York and the libellants demanded the delivery of said merchandise to them, but the employees of said bark took so little and such bad care, not only in attention to said vessel, but in putting said cargo on board, and in stowing it, and in the care of it while on board, and in landing it in the port of New York, and in the care of it after it was landed, that a large part of it was badly stained by petroleum or some other such substance and also impregnated by the smell arising therefrom, and the bags and contents in which said cargo was delivered were damaged by being eaten by rats, and a large part of said cargo was wholly lost to the libellants or only delivered in a damaged condition, whereby the libellants were damaged to the amount of $2,000 and upwards; and that the libellants are ready to pay said freight upon the proper delivery of said cargo. The libel prays a decree against said bark for said damages.

The answer of the owner of the bark to the last named libel denies all its allegations as to negligence and damage except the allegation that some of the bags were eaten and damaged by rats, and alleges that the libellants were the charterers of the bark under the written charter before mentioned, and that all of the said goods were put on board under said charter, and that the provisions of said charter and of the bills of lading were in all things complied with on behalf of said bark, and any loss or damage or injury to said cargo was caused by perils excepted and without any negligence or fault on the part of said bark.

1. It is set up in the answer in the in personam suit, that many of the bags and packages containing the merchandise, and the contents thereof, were badly eaten by rats or other vermin, and that such injury was the result of want of care on the part of the master and employees of the vessel. In the libel against the vessel the allegation is only of damage by rats to bags and contents of bags, through want of care on the part of the employees of the vessel. On the evidence, a claim is made for loss by rat damage, by the gnawing by rats of holes in some of the bags containing almonds in the shell, and by the eating of some of such almonds by rats, and by the loss of others of such almonds through holes gnawed in such bags by rats. It is contended on the part of the consignees that the vessel is liable for the damage by rats, because there is no exception in the charter-party or the bill of lading which can relieve the vessel from liability for such damage occurring during the voyage; that such damage is not the act of God or a peril of the sea; and that the vessel is liable in the absence of an excepting clause in the contract. For the vessel, it is contended that a carrier is not responsible for damage from natural causes against which he is unable to guard; that it is the natural tendency of rats to gnaw; that the vessel was fumigated before taking in cargo, and had on board a cat and a rat terrier; that nothing more could have been done; and that the rats were probably brought on board in the cargo.

The charter party provides that the vessel shall be in every way fitted for the voyage, and specifies fruit as a contemplated cargo. It contains no other provisions which refer to damage to cargo and no provision as to the giving of bills of lading. It is signed by both of the parties to it. Three of the four bills of lading cover almonds in the shell in bags. One of them specifies 750 bags of soft almonds in the shell, as received on board in good condition, and the master by it promises and undertakes, "God taking me in safety with the said vessel to the said port, to deliver in the same terms." The second specifies 425 bags and 850 half bags of soft-shell almonds as shipped in good order and well conditioned in and upon the vessel, and states that they are to be delivered in the like good order and well conditioned, "the acts of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers and navigation, of whatever nature and kind soever, excepted." The third specifies 157 bags of almonds, as shipped in good order and well conditioned on board the vessel, and states that they are to be delivered in the like good order and well conditioned, "the dangers of the seas only excepted."

In the case of Aymar v. Astor, 6 Cow. 267, the owners of a vessel were sued for damages sustained by the owner of goods shipped on board of it, through the destruction of them by rats. The bill of lading signed by the master stated that the goods were to be delivered in good order and well conditioned, "the dangers of the seas" excepted. At the trial, evidence was given on the question whether the vessel was prudently man-

aged for the avoiding of rats or whether the master had been negligent in that respect, but the court charged the jury that the defendants were common carriers, and liable as such for damage done, unless by the act of God, or the perils of the sea, excepted in the bill of lading, and that damage by rats was not a peril of the sea. On a writ of error the supreme court held that the master of a vessel is not responsible, like a common carrier, for all losses, except they happen by the act of God, or the enemies of the country; and that it ought to have been submitted to the jury, whether the master had used ordinary care and diligence in carrying the goods in question. This exception in favor of a carrier by water is repudiated by the same court in McArthur v. Sears, 21 Wend. 190, and the statement of the exception in Aymar v. Astor is called a "dictum." See, also, Allen v. Sewall, 2 Wend. 327.

In Laveroni v. Drury, 16 Eng. Law & Eq. 510, in 1853, cheese was shipped in a general ship, under bills of lading, whereby the master bound himself to deliver the cheese free from damage, "the act of God, the queen's enemies, fire and all and every other dangers and accidents of the seas, rivers, and navigation," etc., "excepted." The cheese was eaten and damaged by rats, on the voyage. The master had two cats on board, and it was contended by the owners of the vessel that it was for the jury to say whether the keeping of the cats relieved the defendants from the charge of negligence. The court, at the trial, held that the question was not one for the jury, and instructed the jury that damage by rats was not within the exception contained in the bills of lading, and that, if the cheese had been eaten and damaged by rats in the course of the voyage, the defendants were liable. On a motion by the defendants for a new trial the court of exchequer said: "We are of opinion that this direction was right. By the law of England, the master and owner of a general ship are common carriers for hire and responsible as such. This, according to the well-known rule, renders them liable for every damage which occurs during the voyage, except that caused by the act of God and the queen's enemies. They, however, almost universally receive goods under bills of lading signed by the master, and, in such case, the liability depends upon and is governed by the terms of the bill of lading, it being the express contract between the parties—the owner of the goods on the one hand and the master and owner of the ship on the other." As to the exception in the bills of lading, the court said: "The true question is, whether damage by rats falls within this exception, and we are clearly of opinion that it does not. The only part of the exception under which it possibly could be contended to fall, is as a danger or accident of the sea and navigation; but this, we think, includes only a danger or accident of the sea or navigation properly so called, namely, one caused by the violence of the winds and waves (a vis major) acting upon a seaworthy and substantial ship, and does not cover damage by rats, which is a kind of destruction not peculiar to the sea or navigation, or arising directly from it, but one to which such a commodity as cheese is equally liable in a warehouse on land as in a ship at sea." The court further said, that the only true rule for ascertaining with accuracy and certainty the liability of the master and owner of a general ship is, "that prima facie he is a common carrier, but that his responsibility may be either enlarged or qualified by the terms of the bill of lading, if there be one, and that the question whether the defendant is liable or not, is to be ascertained by the terms of this document, when it exists."

In the case of The Fame [Case No. 4,632], in this court, in 1861, a vessel was libelled to recover for the damages sustained by the loss of part of a cargo of coffee from Rio Janeiro, by the gnawing of the packages by rats, on the voyage. The coffee was carried under a bill of lading which excepted "the dangers and accidents of the seas and navigation." It was set up in defense that the vessel had two cats on board, and that, in view of that fact, the damage by the rats was covered by the exceptions. The court (Shipman, J.) reviewed the authorities and adopted the view that damage by rats was not a peril of the sea, but was damage arising from the negligence of the carrier, and might be prevented by due care, and was within the control of human prudence and sagacity. Independently of that view, the court was of opinion that the master of the vessel had not proved due diligence on his part, because, it being shown that Rio Janeiro was a very bad port for rats, it was not proved that he had fumigated his vessel.

In the case of The Miletus [Case No. 9,545], in the circuit court for this district, in 1866, it was held by Mr. Justice Nelson, "that damages occasioned by vermin, on board of a ship, to a cargo, in the course of a voyage, are not the result of a peril of the sea, or of any of the dangers or accidents of navigation, within an exception to that effect in a bill of lading, but are damages for which the ship and its owner are liable, as insurers of the safe conveyance of the cargo."

In Kay v. Wheeler, L. R. 2 C. P. 302, in 1867, in the exchequer chamber, on error from the common pleas, coffee was shipped under a bill of lading which excepted "the act of God, the queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers and navigation, of what nature and kind soever." The bags were gnawed by rats during the voyage and the contents were partly eaten and damaged by them. The vessel had on board during the

time she was at the place of shipment, and on leaving that place, two cats and two ferrets, and the vessel had before leaving that place been cleared of rats by a professed rat-killer, and every possible precaution was taken to keep rats out of the vessel after that. It was contended for the defendants that the injury by rats was a peril of navigation, because it was a danger which could not be provided against, as it had been shown that the defendants had used every possible means to prevent the injury to the goods. The court held that the question depended on the contract contained in the bill of lading; that the defendants had thereby bound themselves to deliver the goods in the good order and condition in which they were shipped, except in the four cases therein specified; that damage by rats was not within any one of those exceptions; that the defendants had delivered the goods in a very different condition from that in which they received them, and had, therefore, broken their contract; and that the plaintiffs were entitled to recover.

In the recent case of Nugent v. Smith, 1 C. P. Div. 19, it is laid down as the true rule, that "every shipowner or master who carries goods on board his vessel for hire, is, in the absence of express stipulation to the contrary, subject, by implication, by the common law of England, adopting the law of Rome, by reason of his acceptance of the goods to be carried, to the liability of an insurer, except as against the act of God. or the queen's enemies;" and that "it is not only such shipowners as have made themselves in all senses common carriers who are so liable, but all shipowners who carry goods for hire, whether inland, coastwise, or abroad, outward or inward."

In the present case, the shippers having, notwithstanding the charter party, accepted bills of lading for the goods and brought suit thereon, and the owner of the vessel having, notwithstanding the charter party, entered into special contracts, through the master, by means of the bills of lading, in respect to the carriage and delivery of the goods, the bills of lading must be regarded as the contracts by which the rights of the parties are to be governed, so far as respects the matters provided for therein. There is nothing in the bills of lading, in respect to the carriage and delivery of the cargo covered by them, that is inconsistent with anything in the charter party. As regards a contract in a bill of lading for the carriage and delivery of cargo covered by it, it must be regarded as settled by the case of Clark v. Barnwell, 12 How. [53 U. S.] 272, that where a bill of lading admits the shipment of cargo in good order, and binds the carrier to deliver the same in like good order, certain specified damages and accidents excepted, the carrier may be answerable for damage to the goods, although no negligence on his part be shown, unless he brings the case within a damage or accident so excepted; that, in considering whether the carrier is liable for a particular damage, the question is not whether it happened by reason of the negligence of the persons in the employ of the carrier, but whether it was occasioned by any of those causes which, either according to the general rules of law, or the particular stipulations of the parties, afford an excuse for the non-performance of the contract; and that, after damage to the goods has been established, the burden lies on the carrier, in the case of such a bill of lading, to show that such damage was occasioned by one of the perils from which he was exempted by the bill of lading. This principle is also held in Western Transp. Co. v. Downer, 11 Wall. [78 U. S.] 129. It is the same principle as that decided in Laveroni v. Drury and in Kay v. Wheeler.

In the present case the bills of lading which cover almonds in the shell in bags admit that the goods were received on board in good condition, and undertake that they shall be delivered in like good order. In two of them there are specified exceptions, but loss or damage by rats is not within any of the exceptions specified. It is not an act of God, nor is it a danger or accident of the sea. The definition of the expression "the act of God" is well given in Nugent v. Smith, supra, thus: "The damage or loss in question must have been caused directly and exclusively by such a direct and sudden and violent and irresistible act of nature as the defendant could not, by any amount of ability, foresee would happen, or, if he could foresee that it would happen, could not, by any amount of care and skill, resist, so as to prevent its effect. It lies upon the defendant to show that a damage or loss for which he would otherwise be liable is brought within this exception." It is impossible to say that no human ability could have prevented the presence of rats on the vessel, or could have rid the vessel of rats. It is alleged that the vessel had on board a cat and a rat terrier, and that she was fumigated or smoked in Barcelona before she took on board any cargo. But the cat and the terrier could have been of but little service in catching rats which were down in the hold among the cargo. As to the fumigation, the presence of rats after fumigation must be accepted as evidence that the fumigation was not so thorough and effective as to destroy all rats. The fact that no rats were seen, after the fumigation, until after the vessel left Malaga, and that they were known to be on board after she left Malaga, is not sufficient evidence that they were not on board before the fumigation, or that the fumigation was effective, or that the rats were not on board from Barcelona to Malaga, or that they came on board at Malaga. There is evidence that there were rats on board on the voyage from New York to Bar-

celona, and there is no evidence that the rats came on board in the cargo of fruit. The fact that the vessel was in the stream when she received her cargo at Barcelona and at Iviza, does not go to show that she was free from rats at Barcelona. In a word, it is not shown that the vessel could not, by any amount of care and skill, have been rid of the rats. As to perils of the sea, the eating of almonds by rats, or the gnawing of holes in bags by rats, is not a thing peculiar to the sea or to navigation, or arising directly from navigation, for rats do those things on land as well as in a vessel at sea. I think there is satisfactory evidence that the rats did damage by gnawing holes in the bags. What was the extent of the loss of and damage to bags and almonds by such gnawing is another question.

2. It is claimed that there was damage to the cargo by its contact with petroleum, and by its being impregnated with the odor of petroleum. Full notice is given in the charter party that the vessel was, at the time of the making of the charter party, bound on a voyage from New York to Barcelona, with a cargo of refined petroleum in barrels, and it is provided in the charter party that the homeward cargo may be fruit, and that the vessel is "to be cleaned as customary previous to loading homeward cargo." It is not to be presumed that Gomez & Arguimbau, persons experienced in the trade in question, would have arranged to bring home a cargo of fruit in a vessel which had carried out a cargo of petroleum in barrels, unless they had understood that a cleaning of the vessel in the customary manner, after the discharge of the cargo of petroleum, would have enabled the vessel to bring home the cargo of fruit in good order, free from stains of, or the odor of, petroleum. The evidence is very distinct that the almonds, more or less of them, were found, on their arrival here, to be impregnated with the taste and smell of petroleum, so as to lessen their value, and that such taste and smell came from the petroleum which was in the vessel. There is not, in any of the bills of lading, any exception as to petroleum damage. But the rights of the parties, so far as petroleum damage is concerned, must be governed by the provisions of the charter party as to petroleum. The effect of the provisions of the charter party is, that, the vessel being about to carry out petroleum in barrels, she shall, if "cleaned as customary" before loading the return cargo of fruit, not be liable for damage by petroleum to such return cargo; and that Gomez & Arguimbau, having notice of such carriage of petroleum, take the risk of damage to such return cargo from the petroleum, if the vessel be cleaned in the customary manner before loading such return cargo. Much testimony has been taken as to the manner in which the vessel was cleaned. But the evidence is very clear that vessels which have carried out petroleum in packages do, after being cleaned in a proper manner, bring back cargoes of such fruit as this vessel had, without the fruit being damaged by having the taste or odor of petroleum. The fact of such damage in the present case must be accepted as evidence that this vessel was not cleaned in the customary or proper manner. The master of this vessel had never carried a cargo of petroleum before, and had never seen a ship cleaned that had carried petroleum, and made inquiries of another master as to the mode of cleaning. It does not alter the case that some or all of the damage may have arisen from the sweat of the hold dropping upon the cargo. The complaint is not that the cargo was damaged by being wet or that it became musty therefrom, but that, whether the water of the sweat was the vehicle or not, the taste and odor of the petroleum were conveyed to and left with the cargo, when that would not have happened if the vessel had been properly cleaned. The sweat and the water thereof would have produced no damage if they had not been conveyers of petroleum taste and odor, and they would not have conveyed such taste and odor if the vessel had been thoroughly cleaned in the proper and customary manner. In Clark v. Barnwell [12 How. (53 U. S.) 272], the damage was mould and mildew caused by the sweat of the hold, a peril of the sea. The libellants in that case failed to show that the damage could have been prevented by the use of proper precautionary measures, or that there had been a neglect of the customary methods of prevention. But in the present case, it is established, I think, that the petroleum damage would not have occurred if the customary and proper mode of cleaning the vessel had been thoroughly used, whether the damage arose from dunnage saturated or impregnated with petroleum, or from the presence of petroleum in the bilge water, or from the conveyance of petroleum or its ingredients by the water of the sweat of the hold.

3. As to all the merchandise that is alleged to have been damaged by rats or petroleum, except the almonds not in the shell, it appears that such merchandise was sold by Gomez & Arguimbau to arrive, for a price based on undamaged goods, and that the purchasers have paid that price in full to Gomez & Arguimbau. The damage alleged in the libel filed by Gomez & Arguimbau is a damage to themselves. It is contended, for the vessel, that they cannot recover any such damage in respect to the merchandise for which they were so paid a sound price, for the reason that they have sustained no damage. While it is true that prima facie the consignee of goods under a bill of lading has the legal title to and a beneficial interest in the goods and may sue the carrier for the non-delivery thereof (Lawrence v. Minturn, 17 How. [58 U. S.] 100; McKinley v. Morrish, 21 How. [62 U. S.] 355), yet such prima

facie right of action may be displaced (Grove v. Brien, 8 How. [49 U. S.] 429; Lawrence v. Minturn, supra). In the present case the goods were the property of Gomez & Arguimbau, when shipped. They sold them to arrive, it is true, but it is not shown that the right of property and the right of possession were not in them when the breach of contract, or neglect of duty, complained of, occurred. The contract of the master in the bills of lading was with Gomez & Arguimbau, or their assigns, and it is not shown that the bills of lading were ever formally assigned or endorsed by Gomez & Arguimbau. I am of opinion, therefore, that Gomez & Arguimbau can maintain the action.

4. If any sum of money has been received either by Gomez & Arguimbau or by any purchaser from them, from the government as a rebate of duties for loss or damage in respect of any goods as to which an allowance shall be found due for loss or damage in the suit brought by Gomez & Arguimbau, they must be charged with such sum.

5. A failure on the part of the vessel to deliver some of the cargo is admitted, the cause of the failure not being due to either rats or petroleum. In the suit brought by the owner of the vessel, there will be a reference to ascertain what cargo was not delivered, and its value, and the reference will cover such goods, if any, as were not delivered because of the action of rats or petroleum, as well as those which, for any other reason, were not delivered. Such value, when ascertained, will be deducted from the amount remaining due on the charter party, and there will be a decree for the remainder.

6. In the suit brought by Gomez & Arguimbau, there will be a reference to ascertain the amount of the damage by rats or the taste or odor of petroleum, to such of the cargo as was delivered.

7. The question as to the costs in both suits is reserved.

[NOTE. On the coming of the commissioner's report, exceptions were filed thereto, and thereafter the parties, other than the vessel, appealed to the circuit court, where the conclusion of the district court as to the exceptions was sustained. See Cases Nos. 2,413a and 2,413b.

[Losses by perils of the sea include only such as are of an extraordinary nature, or arise from irresistible force or from inevitable accidents, or from some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence. The Northern Belle, Case No. 10,319, affirmed in The Northern Belle v. Robson, 9 Wall. (76 U. S.) 526. Damage to a cargo by rats is not a peril of the sea, or a danger of navigation, within those terms in a bill of lading, unless it be shown that ordinary care and diligence were used to guard against injury by rats; citing Kirkland v. The Fame, Case No. 7,845; The Isabella, Id. 7,099. Nor are damages to a cargo by cockroaches, in the course of a voyage, the result of a peril of the sea, or any of the dangers or accidents of navigation; citing Hazard v. New England Marine Ins. Co., 8 Pet. (33 U. S.) 557; The Miletus, Case No. 9,545.]

Case No. 2,413a.

The CARLOTTA.[1]

GOMEZ v. The CARLOTTA.

Circuit Court, S. D. New York. July 31, 1879.

CARRIERS—DAMAGE TO CARGO—BURDEN OF PROOF—NEEDLESS SUIT—COSTS.

[1. Where the owners of goods claim that they were damaged during a voyage by rats and by oil, and the goods have been exclusively under their control or that of their vendees after their discharge from the ship, the burden of proof is on them to show by satisfactory evidence that the goods were actually damaged on the voyage as claimed, as well as the amount of loss or injury; and they cannot complain if, by failing to furnish the evidence, or satisfactorily excuse its omission, their case is looked on to some extent with suspicion.

[2. Costs should not be allowed to parties who have needlessly commenced a suit, instead of litigating the issues raised by them in a suit then pending, and to which they were parties.]

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

[In admiralty. Libel by Raphael M. Gomez and Daniel V. Arquinbau against the bark Carlotta to recover damages for injury to cargo by reason of damage by oil and from rats. There was a reference to a commissioner to ascertain the amount of damage by rats or by the oil to such of the cargo as was delivered. See Case No. 2,413. On the coming in of the commissioner's report, exceptions were filed thereto, and thereafter an appeal was taken to the circuit court.]

Beebe, Wilcox & Hobbs, for Gomez.

Mr. Benedict, for the Carlotta.

WAITE, Circuit Justice. As the "Carlotta" has not appealed, the only questions presented here are those raised by the libellants in this case on the exceptions to the commissioner's report, and as to those, after a careful examination of all the evidence, I am entirely satisfied with the conclusions reached by the district judge. The burden of proof is on the libellants, and before they can recover they must show by satisfactory evidence that their goods were actually damaged on the voyage by rats or petroleum, and the amount of the loss or injury they have sustained from these causes. After the discharge of the cargo, they, or their vendees, had the goods within their exclusive control. They had in this way the means of securing at the time the very best evidence that could be obtained. If they have failed to produce it, and have not furnished a sufficient excuse for the omission, they cannot complain if their case is looked upon to some extent with suspicion.

There were three separate lots of the almonds, and they will be considered in their order.

1. The "Wiley, Wicks & Wing" lot. This was damaged by rats, holes having been eaten by rats in the bags. The commission-

[1] [Not previously reported.]

er has allowed only $200, while $325 is claimed. The exact extent of this injury might easily have been ascertained by inspection and count as the bags were put in store, or afterwards. Instead of that, the only evidence on which to fix the amount at $325 is a loose estimate, made by the parties to whom the goods were sold to arrive and who paid the full agreed price for a sound article on delivery. No one seems to have taken the trouble to make an actual count. Such an omission under the circumstances is, to say the least, suspicious, and I cannot but think the commissioner made an ample allowance for all the damage to this lot.

2. The Nordlinger lot. The claim here is for petroleum damage, and it is proper to remark in the outset that the first intimation to the vessel of this injury appears to have been given when the testimony was taken at the trial below, more than two years after the cargo was discharged and this litigation commenced. In the statement of claims made against the ship, under date of February 6, 1874, the only specification of damage to this lot was for 1,790 lbs. "almonds taken out." Petroleum damage was claimed only on the shelled almonds of Gomez & Arquinbau lot. Mention is made of 31 bags stained, but this is shown by the testimony of Willis, the managing clerk of the libellants, not to have reference to the Nordlinger almonds. The cartmen receipted for all that went to Nordlinger as in good order. They had been sold to arrive and paid for as a sound article on delivery, "claims for damages against the custom house and insurance companies" to belong to the purchasers. At this time it is manifest that damages by petroleum could not have been much thought of. The vessel sued to recover on its charter party, February 13, 1874, and this libel was filed for damages to the cargo, February 16th. The custom house appraisement of damages for a rebate of duties was made February 18th, and it nowhere appears from anything which then transpired that any damage by oil was considered or taken into the account. This lot was marked "C.," "F.," and "R. M. G." Only those marked "G. A." appear by the official certificates produced to have been impregnated with petroleum. In every other case where the certificate is produced damage by sea water and sweat of the vessel is noted, and nothing else. The shelled almonds and the Wiley, Wicks & Wing lot were marked "G. A.," or "G. A. The custom house appraisers' certificate as to the Nordlinger lot was not produced. The portwarden's certificate, at the times of the discharge of the cargo, makes no mention of damage by petroleum. All is attributed to sea water and rats. As to the bags marked "C.," "F.," or "R. M. G.," it said they were well stowed and dunnaged, but in one instance, "wet by sea water from leaks in water ways or sweat," and in another "stained by sea water from flowing through the ceiling." The portwarden when on the stand as a witness, testified that he discovered no damage by petroleum when the cargo was coming out.

A"

It also appears that the vessel took out a full cargo of petroleum. On her arrival at Barcelona the cargo was discharged and the hold cleaned and whitewashed. An effort was made also to get the petroleum out from between the timbers. After waiting some days, about thirty tons of ballast was put in and spread upon the bottom, and then part of the cargo of almonds and wine came on board. These almonds constituted the Wiley, Wicks & Wing lot. They were placed next to the ballast and the wine. The vessel then went to * * * when the Nordlinger lot was taken on board with some barrels of capers in vinegar. These were stowed generally on top of the cargo received at Barcelona, and were but little exposed to contact with the ceiling. The vessel then proceeded to Malaga, where the shelled almonds were put on board, and the part of the Nordlinger lot marked "R. M. G." There was besides this received there some oranges, lemons and raisins. These were generally stowed above what was taken on at Barcelona and * * *. It is thus seen that the most of the Nordlinger lot was stowed in such a way as not to be so much exposed to contact with the petroleum mixed with the bilge water, as many of the other parts of the cargo. Neither was it so much exposed to the drip of the sweat in the hold.

Against the force of all these circumstances is brought only the single fact that two fruit merchants or brokers, after this suit was commenced, went to the store of Nordlinger at the request of the libellants, and, after an examination, which I cannot but believe must have been very slight, estimated the damages to the entire lot by petroleum at $450. I am not by any means satisfied that the bags were overhauled to any considerable extent by these appraisers, and one of them in his testimony concedes that while they certified to the number of bags stained and damaged, they took the count as it was given to them by some one else. They do not give the market value of sound almonds when these arrived, neither do they give the value of them as they were found. All they say is, that they estimated the damage in a lump to the whole lot at $450. Nothing can be more unreliable as evidence than mere estimates made in such a way and under such circumstances. Loose ex parte estimates are never entitled to much consideration, and these seem to be even less to be depended on than usual. No one representing the vessel was present at the time the examination was made, and no opportunity has been given to counteract the effect of this testimony by other estimates made by other persons and under different circum-

stances. Taking all these facts together, I am led irresistably to the conclusion that the petroleum damage to this lot was rather imaginary than real, and that the district judge was right in rejecting this item of claim altogether. This makes it unnecessary to consider the right of the vessel to deduct from any damages that might have been given the amount allowed by the government for a rebate of duties on account of the damaged condition of the cargo.

3. The Gomez and Arquinbau lot. The claim here is for oil damage only. The commissioner allowed one hundred and fifty-five dollars for thirty-one bags at five dollars a bag. This I think is all the evidence shows the parties are entitled to. That was the amount claimed in the bill of damages presented to the vessel on the 6th of February on account of stained bags. The only evidence relied on for an increase of this amount is an estimate of merchants called in by the libellants more than three months after this cargo was delivered, and who made an examination similar to that just considered. This estimate is to my mind more unreliable than the other, and not entitled to any consideration. It would have been as easy to have furnished evidence in the cause which would have been entirely satisfactory if there had been any real damage, that I am led to conclude the only reason for its absence is that no such damage in fact existed.

The result is that the libellants are entitled to an allowance upon their charter money as follows:

1. Wiley, Wicks & Wing lot.....	$200
2. Gomez & Arquinbau lot.....	155
In all	$355

They are not, however, entitled to costs either in this court or below. When they commenced their suit another was pending on behalf of the vessel to recover the charter money due, in which all the questions which are here presented might have been litigated, and in which a balance will be found due after making all the deductions which are here allowed. It is clear to my mind that there would have been no litigation had it not been for the exorbitant demand made of the vessel by the libellants on the 6th of February.

A decree may be prepared finding due the libellants the sum of $355, and directing that it be applied as so much payment on the charter party as of the date the charter money fell due and became payable.

Case No. 2,413b.

The CARLOTTA.

BLISS v. GOMEZ.

Circuit Court, S. D. New York. July 31, 1879.

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

[In admiralty. The libel was filed by William Bliss, as owner of the bark Carlotta, against Raphael M. Gomez and Daniel V. Arquimbau, to recover the amount due on a charter party. There was a decree for libellant, and a reference to a commissioner to ascertain what sum should be deducted from the charter money due for failure to deliver certain cargo. See Case No. 2,413. On the coming in of the commissioner's report, exceptions were filed thereto, and thereafter an appeal was taken to the circuit court. This case was heard together with Case No. 2,413a, which see.]

WAITE, Circuit Justice. This suit is disposed of by that of Gomez v. The Carlotta [Case No. 2,413a], with which it was heard.

The libellant is entitled to a decree for	$962 41
Less	355 00
	$607 41

—With interest from February 13, 1874, at the rate of six per cent. per annum, and costs in this court and the court below.

Case No. 2,414.

The CARL SCHURZ.

[2 Flip. 330;[1] 8 Cent. Law J. 147.]

District Court, W. D. Tennessee. Jan. 27, 1879.

SALVAGE—COMPENSATION—LOSS BY DEPRECIATION IN VALUE.

1. The court will not allow the whole net proceeds in the registry as compensation to the salvor, even when his actual expenditures exceed the amount of the fund, except in cases where the owner abandons the property and neglects to reclaim it by appearance in the suit.

[See Llewellyn v. Two Anchors & Chains, Case No. 8,428; The Zealand, Id. 18,205.]

2. Where the proof showed that a sunken vessel, after being raised, was worth $1,700, but being sold pendente lite she brought only $792; and that the libellant actually expended $568.95, under circumstances which would ordinarily have justified an allowance of one-half the property, the court allowed only one-half the net proceeds in the registry.

3. A salvor must bear his share of the loss by depreciation in value. He is sub modo a joint owner, and in the absence of an express contract, he cannot recover on any theory of a debt due either by the owner or the property, with a lien to be satisfied, at all hazards, to the full extent of the proceeds in the registry.

In admiralty.

H. C. Warrinner, for libellant, cited: Post v. Jones, 19 How. [60 U. S.] 150, 161; Rutter v. The Ferris [Case No. 12,178]; 4 Abb. Nat. Dig. p. 103, pl. 104; The Zealand [Case No. 18,205]; Spencer v. The Chas. Avery [Id. 13,232]; Two Hundred Ten Barrels of Oil [Id. 14,297]; The Waterloo [Id. 17,257]; The Rising Sun [Id. 11,858]; The Jubilee, 3 Hagg. Adm. 43, note; The Bastiaan, 5 C. Rob. Adm. 323; The Wm. Hamilton, 3 Hagg. Adm. 168; Derelict Unknown, Id., note; The Susan [Case No. 13,630]; 2 Pars. Ship. & Adm. 263, 281, 310, 312.

R. Dudley Frayser, for claimants, cited: The Minnie Miller [Case No. 9,638]; Nickerson v. The John Perkins [Id. 10,252]; The Waterloo [Id. 17,257]; The Camanche, 8 Wall.

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

[75 U. S.] 448–473; Llewellyn v. Two Anchors & Chains [Case No. 8,428].

HAMMOND, District Judge. The question reserved at the hearing grows out of the following state of facts: The libellant raised the sunken vessel at an actual expenditure, as he testifies, of $568.95, for labor of hands employed by the day, hire of flats, crabs, jacks, and other tools employed in the work, and the compensation of a diver and his assistants. The vessel was not derelict, her owner and captain remaining all the time during the work with the boat. I think there is no doubt that the preponderance of the proof shows that too much time was expended by the libellant in the work, and that it could and should have been accomplished at a much less cost than the libellant incurred, but it is difficult to say from the proof at how much less it could have been done. The estimates made by the witnesses, under the circumstances they detail, are entirely unsatisfactory. It was mere guessing on their part. The proof establishes the fact that the boat, which was a very small steamboat, converted from a barge, was worth, at the time of the disaster, not more than $2,000, and that the repairs put on her after she was raised cost from $200 to $300; that is, the repairs necessary to cover the damage done by the sinking and raising, and not taking notice of the repairs which were in the nature of betterments. This would make her value in the hands of the salvor, after she was raised, not less than $1,700. When we consider the danger of a total loss from the perilous position in which the vessel was placed by the disaster, the difficulties in the use of crude appliances for performing the service which seem to have been the best that were available, the cold weather and running ice during part of the time, and the actual expenditure of money, as above stated, which is found by aggregating from the libellant's account, as he proves it, the sums paid out by him, and leaving out of view the other charges made for his own services and hire of his own tools, I think one-half of the value of the boat, which was comparatively of small value at best, not too much to be allowed as compensation to the libellant. This would be very nearly the exact amount he claims by the account which he tenders as a statement of the expenditures he made and the value of his services as estimated by himself for the purpose of aiding the court in fix'ng the allowance of salvage, if we include the charges for his own services and the use of his own tools, and are to make the allowance on the basis of value as shown by the proof in the case, say on a value of $1,700. But the libellant, having seized the vessel by process in this case, on his application, some ten or fifteen days afterwards, she was sold pendente lite, while almost imbedded in the ice, at an unfavorable time and under unfavorable circumstances, so that she only brought $792, which is the sum in the registry to answer costs and for distribution between the salvor and the owners. It is not certain that if the property had been kept in the control of the marshal until more favorable weather for a sale it would have brought any more. So far as the proof is concerned, it is all speculation, but I think it is fairly inferable from the circumstances shown by the proof that, owing to the inauspicious conditions, the vessel has been sold for much less than otherwise she would have brought.

The libellant claims that his compensation should be fixed on the value as shown by the proof and not the sale, or else that the proportion should be so increased as to give him a larger amount than one-half the net proceeds in the registry, and that, under no circumstances, should he be allowed less than his actual expenditures of money. This would exhaust the whole fund, leave nothing for the owners, and throw all the loss of the unfortunate sale on them.

I do not think the element of time between the raising and selling of the vessel is at all material. It is not probable that she would have sold for any more on the day she was raised than she did fifteen days subsequently, and, therefore, it is merely another mode of claiming on the actual value, as shown by the proof, to argue that a salvor is entitled to recover on the value at the time of the service and not on any subsequent value. For all practical purposes the date of the service and date of the sale are the same in this case.

The question remains whether the court can look beyond the fund in its hands in estimating the value of the property. If the depreciation grows out of the misconduct of the parties in possession, whether it be the owner or the salvor, I have no doubt that misconduct may enter as an element into the judgment of the court in making the allowance; but there is no misconduct here, unless it may be that the action of the libellant in pressing a sale at an unfavorable time may be so considered. There is nothing in the proof to show whether this was bad conduct or not, for it may be the expense of keeping the property, or the danger of losing it by delay, made a speedy sale a necessity. Let this be as it may, I shall treat the case as one without fault on either side in respect of the sale, because the proof does not show otherwise.

Neither do I think it just to treat the disastrous sale as the result of the failure of the owners to bond the property, as it is called. There is nothing to show that they could have given a stipulation for her value, and if there were, it is not a right the libellant has to a bond, but it is entirely optional with the owners whether they give bond or leave the property with the court. In cases where the owner abandons his property to the salvors, makes no claim, or is unreasonably long in asserting his rights,

the court may, undoubtedly, decree the whole to the libellant. The Zealand [Case No. 18,205]; Two Anchors & Chains [Id. 8,428].

It is very earnestly insisted that the element of "reward" and not entirely that of compensation, is the rule for allowance of salvage. In meritorious cases on the high seas, and perhaps there may be cases on the rivers, this element is often controling. Here we have a case of a steamboat snagged at her landing in this port, impaled upon a sunken wreck at the shore, and tied by her cables near her usual landing place. The salvor goes to her relief at the request of the captain, and after much hard work and unnecessary delay he succeeds in getting her afloat and pumping her out. It does not seem to me that it is a case calling for anything in the way of reward as understood in the admiralty courts, but if it were, it would be going to an unreasonable length to reward a salvor, however meritorious, with the whole of the property. As was said by the learned judge in The Waterloo [Case No. 17,257], this would be a return to the barbarous practice of giving the finder all he finds. I do not find any case where the court allows all the property to go to the salvor unless the owner is either unknown, or has voluntarily abandoned the claim he has to the property saved.

A salvor, in the view of the maritime law, has an interest in the property; it is called a lien, but it never goes, in the absence of a contract expressly made, upon the idea of a debt due by the owner to the salvor for services rendered, as at common law, but upon the principle that the service creates a property in the thing saved. He is, to all intents and purposes, a joint owner, and if the property is lost he must bear his share like other joint owners.

This is the governing principle here. The libellant and the owners must mutually bear their respective share of the loss in value by the sale. If the libellant has been unfortunate and has spent his time and money in saving a property not worth the expenditure he made, or if, having saved enough to compensate him, it is lost by the uncertainties of a judicial sale for partition, so to speak, it is a misfortune not uncommon to all who seek gain by adventurous speculations in values. The libellant says in his testimony that he relied entirely on his rights as a salvor. This being so he knew the risk he ran and it was his own folly to expend more money in the service than his reasonable share would have been worth under all circumstances and contingencies. He can rely neither on the common law idea of an implied contract to pay for work on and about one's property what the work is reasonably worth with a lien attached by possession for satisfaction, nor upon any notion of an implied maritime contract for the service, with a maritime lien to secure it, as in the case of repairs, or supplies furnished a needy vessel, or the like. In such a case the owner would lose all if the property did not satisfy the debt, when fairly sold. But this doctrine has no place in the maritime law of salvage. It does not proceed upon any theory of an implied obligation, either of the owner or the res, to pay a quantum meruit, nor actual expenses incurred, but rather on that of a reasonable compensation or reward, as the case may be, to one who has rescued the res from danger of total loss. If he gets the whole, the property had as well been lost entirely, so far as the owner is concerned. Smith v. The Joseph Stewart [Case No. 13,070]. I think the public policy of encouragement for such service does not, of itself, furnish sufficient support for a rule which would exclude the owner from all benefit to be derived from the service. The property is saved for him, not the public, and he cannot be said to have impliedly authorized his whole property to be exhausted in saving it, particularly where he has not abandoned it, and it is not derelict.

The property and the owner would generally be at the mercy of the salvor, if such a doctrine be established, and the temptation to so conduct the service as to absorb the whole property, very great.

After the payment of costs let the proceeds in the registry be equally divided between the libellant and the claimants.

I take pleasure in saying that Judge BROWN, of the Eastern District of Michigan, now with us, concurs in this opinion.

Case No. 2,415.

Ex parte CARLTON et al.

[5 Law Rep. 120; 1 N. Y. Leg. Obs. 292.]

Circuit Court, D. Massachusetts. June, 1842.

BANKRUPTCY—EQUITY JURISDICTION—INJUNCTION.

The district courts of the United States, sitting in bankruptcy, have general equity jurisdiction, and may grant writs of injunction, without previous notice to the adverse party.

[Cited in Re Smith, Case No. 12,994; Re Muller, Id. 9,912; Re Providence & N. Y. Steamship Co., Id. 11,451.]

This was the case of a petition in bankruptcy by Moses Carlton, of Lancaster, and Albert S. Carlton, of Boston, for an injunction. The petition stated that the petitioners were copartners in trade with Charles P. Wilder, of Newton, and Joseph A. Tilden, of Pepperill, under the firm and style of Carlton, Wilder & Co., having their place of business in Boston; that the petitioners, at a former day, had filed their petition for the purpose of having themselves and said firm declared bankrupt; that when the case of the petitioners was called in court, it was continued on motion of their counsel to enable him to submit a motion in relation thereto, but subsequently, without notice to the petitioners, or their counsel, a decree of bankruptcy was declared against the petitioners,

and not against said firm; that the petitioners were informed and believed that since their said petition was filed, and known to be filed by said Charles P. and Joseph A., they had obtained possession of portions of the property of said firm and applied them to their own private purposes; that they had endeavored to obtain other portions of the property of the firm for a like purpose; that they had offered to deliver to one John M. Hollingsworth property belonging to the firm, to pay the debt of said Hollingsworth in full; that said Charles P. and Joseph A. held drafts, notes and property of said firm, of great value, which should be appropriated under said bankruptcy, to the use and benefit of the creditors thereof. Wherefore the petitioners prayed for an injunction upon the said Charles P. and Joseph A., from disposing of any part of the property of the said firm, unless under the order of the court; and for general relief. Upon the presentation of this petition to the district judge, he certified the following question to the circuit court, namely: "Whether a writ of injunction can be granted without previous notice to the said Charles P. Wilder and Joseph A. Tilden, or their attorney."

Edward G. Loring, for petitioners.

STORY, Circuit Justice. I do not think that there is any real difficulty in the question certified; and the learned judge certified it to this court rather as a matter of general practice to be settled in cases of this sort, which are growing numerous, so that a uniform rule may prevail, than from any doubts entertained by him. The district court, sitting in bankruptcy, has general equity jurisdiction, and may summarily do whatever a court of equity may do in the ordinary course of its practice and proceedings. Now, nothing is more common than for a court of equity, in its discretion, to grant an injunction ex parte, without notice to the other side, the injunction, however, to continue only until the other party chooses to appear and contest it, and move for its dissolution. This being clearly, upon principle, the right and duty of the court and the necessity of the prompt interference of the court to prevent irreparable mischiefs being of not infrequent occurrence, there is no reason why the district court, sitting in bankruptcy, may not issue an injunction ex parte in fit cases, in its discretion, unless there be some statute provision, which limits the right, or requires a previous notice to the other party. Indeed, in cases of bankruptcy, it would seem peculiarly fit for the court so to act, for it is impossible that many exigencies should not arise, requiring the immediate interposition of the court to prevent irreparable injury or injustice; and, as the court is always open, no injury can occur to the adverse party by reason of delay, as he may forthwith move for the dissolution of the injunction, as soon as it has been served upon him.

Now, there is no statute of the United States, which imposes the slightest limitation upon the exercise of the power to issue injunctions, or requires notice thereof, unless in cases provided for by the act of congress of the 2d of March, 1793, c. 66 (chapter 22 [1 Story's Laws, 310; 1 Stat. 334, c. 22], § 5), and the act of congress of the 13th of February, 1807, c. 68 (chapter 58 [2 Story's Laws, 1043; 2 Stat. 418, c. 13]). But neither of these statutes has any application to cases in bankruptcy in the district courts, nor, indeed, to any cases except those which are pending in the circuit court in the exercise of its ordinary jurisdiction. The former act requires reasonable notice of the application for an injunction to be given to the adverse party, before the injunction is granted in causes pending in the circuit court. The latter act confers authority on the district judges to grant injunctions in like manner, upon notice, in all cases pending in the circuit court. These acts, therefore do not touch the jurisdiction of the district court in the administration of equity in bankrupt cases. And as they do not contemplate the classes of cases created by the bankrupt act of 1841 [5 Stat. 441], it is obvious that their provisions are inapplicable to it; and leave the jurisdiction to grant injunctions upon the general practice and principles which govern courts of equity. I shall therefore direct a certificate to the district court, that a writ of injunction can be granted by the district court in bankruptcy without previous notice to the adverse party.

CARLTON (BUCKLEY v.). See Case No. 2,093.

CARLTON (McGINNIS v.). See Case No. 8,799.

CARLTON (UNITED STATES v.). See Case No. 14,725.

Case No. 2,415a.

CARLWITZ v. GERMANIA FIRE INS CO.

[12 Ins. Law J. 127.]

Circuit Court, D. New Jersey. 1883.

INSURANCE — SPECIFIC PROPERTY AND AMOUNTS — WILLFUL BURNING — BURDEN AND MEASURE OF PROOF — WAIVER OF PROOF OF LOSS.

[1. Where insurance is effected in specific amounts, on specific kinds of property, the insured is only entitled to indemnity out of the particular fund intended to indemnify the particular property.]

[2. The burden of proof lies with an insurer, who defends on the ground of a willful burning, to establish the defense by the same degree of proof as is required in other civil cases. He is not required to establish the offense charged beyond a reasonable doubt.]

[See note to Case No. 773.]

[3. Where an insurer refuses to pay a loss on the ground that the policy has been canceled, the necessity of giving proof of loss according to the terms of the policy is dispensed with.]

[At law. Action upon a fire insurance policy. The court charged the jury as follows:]

Mr. Leonard, for plaintiff.
Mr. Chetman, for defendant.

NIXON, District Judge. This is an action on a policy of fire insurance, brought to recover the damages alleged to have been sustained by the plaintiff on account of a fire, which occurred in her grocery store on the morning of Oct. 31, 1880. The policy is dated on the 24th of March, 1880, and recites that, in consideration of ten dollars, the defendant company had insured the plaintiff for the amount of two thousand dollars against loss by fire for the period of one year from the date. The following facts seem to be uncontroverted: Early in the spring of 1880 the husband of the plaintiff rented of the owner a grocery store at the corner of First street and Madison, in the city of Hoboken. In addition to the storehouse, he also rented rooms in the story above for the occupancy of his family, consisting of the plaintiff and one child. In March of the same year, after the grocery store was opened, the husband and the bookkeeper of the defendant company, at its branch office in Hoboken, who was paid for soliciting policies, entered into negotiations in regard to an insurance upon the store goods, store fixtures, and the household furniture on the floor above. The terms of the policy were agreed upon, to wit, fifty cents on the one hundred dollars. It was drawn up, signed, countersigned, executed by the company and delivered to the husband on the 24th of March, 1880. He was acting as the agent of his wife, who is alleged to have been the owner of the property. The policy was issued for two thousand dollars, as follows: $1,200 on the stock of groceries in the store, $300 on the store fixtures and furniture, and $500 on the household furniture, wearing apparel and family stores. Where insurances are thus effected in specific amounts on specific kinds of property, the insured, in case of loss, can only look for indemnity to the particular fund which was intended to indemnify the particular property. Thus, I have heard of no proof of loss of household furniture, and hence the $500, which was taken to insure against loss thereon, may be dismissed from your minds in considering your verdict. The evidence also in regard to the loss from the injury to the store fixtures, embracing the counters and shelving, was very vague and unsatisfactory, but I shall refer to that further on, when I come to the question of damages.

To aid you, gentlemen, in making up your verdict, I will now briefly allude to four questions which the case presents for your consideration: The first one has reference to the origin of the fire; the second to the alleged cancellation of the policy by the company; the third to the need and the sufficiency of the proof of loss; and the fourth to the evidence in regard to the damages.

1. What was the origin of the fire? It has not been distinctly charged, but it was half suggested, that there was fraud in its origin. If any fraud existed, which can be traced to the plaintiff, she is not entitled to recover. You heard the testimony of the police officer who first observed the fire. The facts stated by him were of a character to give rise to grave suspicions; but suspicions are not sufficient. The burden of proof here is upon the defendant corporation, and it must submit to you evidence sufficient to convince you that the plaintiff had knowledge, directly or indirectly, of a willful attempt to burn the property. I do not say that you must be satisfied of this beyond a reasonable doubt, because the old doctrine has been exploded that it requires the same measure of proof, in a civil suit, to warrant the jury in finding that the party willfully burnt his property to defraud the insurance company as it did to convict on an indictment charging that offense. It is now considered a question of preponderating proof. On which side is the weight of evidence? Unless clearly against the plaintiff, it is your duty to find that the fire was accidental or its origin unknown.

2. The next question is whether the company had a right on the 24th of September, 1880, to cancel the policy? The defendant claims the right to cancel, on the ground that the annual premium due for the insurance was ten dollars; that the insured paid five dollars, and upon repeated applications rejected or refused to pay more; that he was formally notified that the company would cancel the policy at the end of six months unless the residue of the premium was paid, and that it was, in fact, canceled on the books of the company in the month of September before the fire. The testimony on this point is very conflicting. Carlwitz, the husband of the plaintiff, on the other hand, states that, whilst he was making inquiries in regard to placing an insurance upon the property, he was approached by a Mr. Niewman, the bookkeeper of the branch office of the defendant company at Hoboken, and who was in the habit, in addition to his other business, of soliciting policies for the company, and that after some negotiations, the agent agreed to issue a policy for one year in the sum of two thousand dollars for the premium of ten dollars—one half of which might be paid in cash and the remaining half in groceries from the plaintiff's store; that he paid the cash when the policy was issued, and received a receipt for $10 in full for the premium, with the understanding that he should fill an order for groceries for the value of five dollars whenever requested; that he had unfortunately lost the receipt, but that he had been willing at all times, and had frequently offered, to supply the groceries according to the contract. This statement is

denied by the witnesses of the defendant, and their denial, to some extent at least, seems to be corroborated by circumstances. It is for you to determine where the truth lies, and your verdict must be controlled by the result of your deliberations. If you believe the husband of the plaintiff, then no forfeiture or cancellation of the policy was permissible, because the plaintiff complied with her agreement respecting the payment of the premium. But, if you rather give credence to the testimony of the witnesses for the defendant upon this point, the policy was lawfully canceled on account of the nonpayment of the premium, and you must render a verdict for the defendant.

3. If you find that the policy was unlawfully canceled, you will next inquire into the sufficiency of the proof of loss. The policy requires certain formal proofs to be made by the insured after a fire, before the insurer can be called upon to pay the loss. The defendant presents these proofs here, and says they are insufficient. But, under the facts shown in the case, it is not a material question whether such proofs were offered in proper form or not. The defendant is estopped from raising the question here, inasmuch as it was not suggested before the suit was brought. The undisputed evidence is that the agent of the company, on the morning after the fire, when informed of it, refused to pay anything, upon the distinct ground that the policy had been canceled.

4. As to damages. If you hold that the defendant had no right to cancel the policy, you will then have to consider the question, what sum has the plaintiff proved to you that she ought to have for the loss which she has sustained? The burden of proof here is upon her. The amount of the insurance was $300 on the store fixtures and $1,200 on the stock of groceries. These are the maximum sums that can be awarded, however far beyond them the actual loss extended. And you can only give the amount of loss shown to your satisfaction. I have never known a case of this kind tried where the proof as to the extent of the fire and the real damage done has been left in such an unsatisfactory state. The jury cannot guess at damages. There must be evidence to enable you to form a judgment. The plaintiff, knowing very little about the stock on hand or its value, she relies solely upon the testimony of her husband. You heard his statement, and must base your verdict upon your view of its character, scope and meaning.

In this controversy, gentlemen, the plaintiff is a woman and the defendant a corporation. It is difficult for a jury not to be misled by their prejudice in such a case. Jurors are men, and have a chivalric feeling for the gentler sex. They are also apt to have more or less prejudice against corporations. The court room is no place for any such feeling. Corporations are entitled to the same justice, and to the same application of the principles of the law, as individual citizens. Indeed, a corporation is only a modern contrivance, wherein a number of persons unite their capital together for business purposes, and in all controversies respecting their rights the same law must be administered as if the stockholders, as men, were endeavoring to secure their personal rights. You will therefore look at the case impartially, and render the verdict which you would render if the issue was between man and man. This is no place for sympathy. Courts are organized and juries are summoned to mete out equal and exact justice to all, and where they fail to do this they come short of fulfilling the chief object of their organization.

Verdict for plaintiff in the sum of $400.

CARMAN (ANDREWS v.). See Case No. 371.

CARMAN (NELSON v.). See Case No. 10,103.

CARMICHAEL (CRAGIN v.). See Case No. 3,319.

CARNE (BURTIN v.). See Case No. 2,213.

Case No. 2,416.

CARNE et al. v. McLANE.

[1 Cranch, C. C. 351.][1]

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

INTEREST OF WITNESS — ACTION BY PARTNERS — NONJOINDER — EXAMINATION ON VOIR DIRE — EVIDENCE.

1. The court will not compel a witness to testify against his interest in a cause in which he is interested.

2. If all the members of a partnership are not named as plaintiffs, the defendant may avail himself of the objection upon non assumpsit.

3. What a witness says on voir dire is not evidence to the jury.

At law. Assumpsit upon a promissory note indorsed by the defendant [Archibald McLane] to the plaintiffs [Carne and Slade]. Mr. Libby objected to being sworn for the defendants, because interested as a partner with the plaintiffs; and swore upon voir dire that he was interested as a partner. The court refused to compel him to swear contrary to his interest.

The defendant's counsel then objected that the plaintiffs could not recover, because Mr. Libby, being a partner of the firm of Carne & Slade, ought to have been named.

The plaintiffs' counsel, said that the declaration of Libby upon voir dire is not evidence to the jury, and the court so decided. The defendant then offered evidence to prove that Libby was a partner, and prayed the court to instruct the jury that, if they should be satisfied, by legal evidence, that he was a partner in the house of Carne & Slade, at

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

the time of the indorsement of the note, the plaintiffs could not recover; which instruction the court gave as prayed.

CARNES (HAMILTON v.). See Case No. 5,977.

Case No. 2,417.

CARNES et al. v. MAXWELL.

[3 Blatchf. 420.][1]

Circuit Court, S. D. New York. Jan. 23, 1856.

CUSTOMS DUTIES—MISTAKE IN INVOICE—PENALTY.

1. Where the consignee of a quantity of corks, imported from France, presented, on their entry, an invoice and entry, both of which were erroneous through mistake, and not through fraud, and immediately discovered the error, and notified the collector of it, and sent to France for a correct invoice, and delivered it to the collector, and requested permission to correct the error, which was refused, and the collector imposed duties on the value as stated in the true invoice, and a penalty for undervaluation, without any appraisal of the goods: *Held*, that the penalty was illegally imposed, and could be recovered back.

2. The case of Howland v. Maxwell [Case No. 6,799] cited and approved.

[Distinguished in Harriman v. Maxwell, Case No. 6,105.]

At law. This was an action against [Hugh Maxwell] the collector of the port of New York, originally brought in the supreme court of New York, and removed into this court by the defendant, to recover back a penalty for undervaluation, paid by the plaintiffs [Nathaniel Carnes and others] upon an importation of corks from Bordeaux, in November, 1850.

John S. McCulloh, for plaintiffs.

J. Prescott Hall, for defendant.

INGERSOLL, District Judge. An invoice of the corks, in this case, was sent to the plaintiffs, who were the consignees, and was by them presented at the custom house. That invoice was an erroneous one. But the error was occasioned by mistake, and not by fraud. The entry was in conformity to the erroneous invoice, and was also erroneous. The plaintiffs immediately discovered the error, notified the officers of the customs of the same, and sent out to France for a correct invoice. A correct invoice was received by them on the 6th of January, 1851. They delivered it at the custom house, and requested permission to correct the error. The duties were imposed and paid upon the value of the corks as stated in the true invoice, and the penalty for undervaluation was demanded and paid under protest. The protest is regular. There was no appraisal on the entry before the correct invoice was produced, and there was no fraudulent undervaluation. The duties were paid, not upon the appraisal of appraisers, but upon the value set down in the correct invoice. The question is, as to the right of the collector, under the facts, to impose the penalty. Upon a similar state of facts, or upon a state of facts in all essential particulars like the facts in this case, this court, in the case of Howland v. Maxwell [Case No. 6,799], decided that the collector had no such right. That decision must govern this case; and it does not require the aid of that decision to determine that the collector had no such right.

There must be a judgment for the plaintiffs, for the amount of the penalty, with interest, to be adjusted at the custom house.

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

CARNLEY (COMSTOCK v.). See Case No. 3,081.

CARNOT (UNITED STATES v.). See Case No. 14,726.

CAROLIN (SMITH v.). See Case No. 13,020.

Case No. 2,418.

The CAROLINE.

[1 Brock. 384.][1]

Circuit Court, D. Virginia. Nov. Term, 1819.

INFORMATION FOR FORFEITURE — ENGAGING IN SLAVE TRADE — CONSTRUCTION OF STATUTE AGAINST.

1. An act of congress declares, that "no person shall build, fit, equip, load, or otherwise prepare, any ship or vessel, &c., within any port of the U. S., nor shall cause any ship, or vessel, to sail from any port of the U. S., for the purpose of carrying on any trade, or traffic in slaves, to any foreign country," and it declares that "if any ship or vessel, shall be so fitted out, as aforesaid, or shall be caused to sail, as aforesaid, such ship or vessel, &c., shall be forfeited to the U. S." And the second section, inflicts a penalty of $2,000, on any person who shall build, fit out, &c. &c., any such ship or vessel, knowing, or intending that the same shall be so employed. *Held*, that the forfeiture of the vessel is not incurred by the building of the vessel for the illegal purpose aforesaid, but only for the fitting out, or causing her to sail as aforesaid.

2. An information against the vessel, which charges, "that she was built, fitted, equiped, loaded, or otherwise prepared, &c., or caused to sail," &c., is bad for the uncertainty, as to which of the several offences is charged; and on such information, a sentence of forfeiture ought not to be pronounced.

Error to the district court of the United States for the district of Virginia.

An information was filed in the district court, charging the brig Caroline, with violating the acts of congress, made for the suppression of the slave trade. A sentence of forfeiture was pronounced in the district court, and on a writ of error to the circuit court, the following opinion, reversing the sentence of the district court, was pronounced by

[1] [Reported by John W. Brockenbrough, Esq.]

MARSHALL, Circuit Justice. The Caroline was seized, as being forfeited to the United States, for being concerned in the slave trade, in violation of the acts of 1794, and 1807, or of one of them. 1 Story's Laws, 319 [1 Stat. 347]; 2 Story's Laws, 1050 [2 Stat. 426].

The peculiar odium attached to the traffic, in which this vessel is alleged to have engaged, ought not to affect the legal questions which belong to the case.

The information charges, that the Caroline, "after the 22d day of March, 1794, was built, fitted, equipped, loaded, or otherwise prepared, within a port or place of the said United States, by a citizen, &c., for the purpose of carrying on trade, or traffic in slaves, to a foreign country," &c. There are other counts in the information; but as the observations made on this, apply to them also, it is deemed unnecessary to recite them. The charge contained in this information, is understood to be, that the Caroline was either built, fitted, equipped, loaded, or otherwise prepared, within a port or place of the United States, or that she was caused to sail from a port or place of the United States. It is not alleged, that all these acts were performed, but that some one of them, it is uncertain which, was performed. This information will be strictly and literally true, if the Caroline was either built, fitted, equipped, loaded, or otherwise prepared, within a port or place of the United States. In such a case, it is deemed essential to the validity of the judgment, that it should be such as the law will authorize the court to render, on proof of any one of the acts charged in the information. If any one of two or more acts be innocent, and the information charges that one or the other of them has been committed, it would violate the clearest principles of law, to pronounce judgment against the accused. If the law should inflict forfeiture on a vessel which should sail out of port on a certain day, and an information should charge that a vessel did sail on that day, or did not sail on it, all would concur in declaring that no sentence of forfeiture could be pronounced against such a vessel. So, if several acts be prohibited under several penalties, and on one of them, the penalty of forfeiture be inflicted, the information must charge, in explicit terms, that the particular crime to which the law has annexed forfeiture as a penalty, has been committed, or the court cannot adjudge the thing to be forfeited. If, for example, it be forbidden by statute to build, or fit, a vessel for the slave trade, and to building, or fitting, be annexed, a penalty of $2,000, but to fitting, be superadded a forfeiture of the vessel, the information must charge a "fitting" of the vessel, or the court cannot adjudge her to be forfeited. These positions seem to me to be incontestable. If this be correct, it only remains to inquire whether the statute inflicts forfeiture on each of the offences charged in the information.

The act declares that no person "shall build, fit, equip, load, or otherwise prepare any ship or vessel within any port or place of the United States, nor shall cause any ship or vessel to sail from any port or place within the same, for the purpose of carrying on any trade or traffic in slaves to any foreign country." It is perfectly clear that each of these acts is prohibited; but it is equally clear, that if the law had proceeded no farther, the vessel would not have been forfeitable for either of them. To the legislature it belongs, to define punishment as well as crime, and courts would certainly step very far beyond their province, were they to annex forfeiture to offences, to which the legislature had not annexed that penalty. In order to determine whether all, or any of the offences enumerated in the part of the act, which has been recited, be cause of forfeiture, it will be necessary to examine that part of the law which prescribes the punishment.

The law proceeds to say, "and if any ship or vessel shall be fitted out, as aforesaid, or shall be caused to sail, as aforesaid, every such ship or vessel, her tackle, furniture, apparel, and other appurtenances, shall be forfeited to the United States." The penalty of forfeiture is here annexed only to the act of "fitting out as aforesaid," that is, for traffic in slaves; or to the act of sailing, for the purpose of engaging in that traffic. It is unusual for a legislative act, when it has enumerated certain offences, to vary the language by changing the enumeration, when penalties are to be annexed to those offences, if the intention be to punish them all in the same manner. When a form of expression is used, applicable to the enumeration of several distinct offences, and a penalty is afterwards inflicted on one or more of them, leaving others out of the recital, the mind is drawn to the conclusion, that, in the opinion of the legislature, at least, the offences are distinct, and the punishment is to be different. In legislative acts, we are not accustomed to such a parsimony of words as to expect, where several offences are enumerated, that the legislature, if it means to punish them all in the same manner, will drop several of them in that part of the sentence which recites the offences to be punished, merely to avoid that expenditure of words which would be incurred by repeating the enumeration. If, then, the offences were not materially variant, it would seem to be a fair construction of such an act, to presume that the legislature supposed some distinction to exist between them. But in this case, the offences are totally different from each other. To build a vessel, and to fit out a vessel, are two distinct acts, as clearly separable from each other as any acts whatever. The terms are applied to distinct and different op-

erations. To build a vessel, is to construct her; to fit her out, is to prepare her for sea after she has been constructed, They are no more the same act, than to build a house, and to furnish a house, are the same.

I cannot admit, that the legislature ought to be considered as having omitted the word "built," in that part of the act which enumerates the offences which are cause of forfeiture, from an idea, that the word "fitted out" could apply, in this place, to a vessel "built," but not "fitted out." In addition to the well-established meaning of the words, the clause inflicting forfeiture does itself show, that in using the term "fitted out," the legislature had in contemplation, a vessel equipped for her voyage. The words are, "such ship or other vessel, her tackle, furniture, apparel, and other appurtenances, shall be forfeited to the United States." This is obviously the state of a vessel actually fitted out, but a ship may be built without "tackle, furniture, apparel, and other appurtenances." The second section inflicts a penalty of $2,000 on any person who shall build, fit out, equip, load, or otherwise prepare, or send away, any ship or vessel, knowing, or intending, that the same shall be employed in the trade, or business, prohibited by the act. On an information against the builder of a ship, not concerned in fitting her out, would it be a defence to say, that the legislature used the word "building" in the same sense with the words "fitting out?" and as he had not "fitted out," so he had not built, in the sense in which that term is used in the law. I cannot be mistaken, when I say, that no gentleman of the bar would hazard such a defence. And yet, I cannot perceive the difference between saying, that under the second section, no ship can be considered as built, unless she be fitted out, and saying, that under the third section, the words "built" and "fitted out" have the same meaning.

The plain sense of the law appears to me to be this. In the first section, various offences are enumerated, to two of which, "fitting out," and "sailing," forfeiture is annexed. In the second section, the penalty of $2,000 is inflicted on any person, who, knowingly, commits any one of these offences. As this information charges that one of several offences has been committed, and they are not, in law, each of them cause of forfeiture, I should, so far as I can trust my own judgment, be of opinion, that a sentence of forfeiture ought not to have been pronounced.[2]

Sentence of the district court reversed.

[2] Quaere, would this information have been good, if the section of the act of congress, commented on above, instead of annexing the penalty of forfeiture to two only of the offences enumerated in it, had subjected each of them to the same penalty? The offences prohibited by the act are, the building, fitting, equipping, loading, or otherwise preparing any ship, &c., or causing any ship to sail, &c.; and the information, adopting the phraseology of the law, charged that the brig Caroline "was built, fitted, equipped, loaded, or otherwise prepared, &c." As the act in question is of a highly penal character, it is apprehended that the rules of criminal pleading, in all their strictness, are applicable to proceedings under it except where those rules are founded on mere "technical niceties," "unimportant in themselves," "standing only on precedents, of which the reason cannot be discerned." See 1 Brock. 350 [U. S. v. The Little Charles, Case No. 15,612]. Those rules require, that where two or more offences are enumerated in a statute, to the commission of which, or of either of them, any given penalty is annexed, an indictment, or information founded upon the statute, if it charges more than one of those offences, must charge them conjunctively, though the law itself, in its enumeration, may have connected them by the alternative conjunction, or; and although, in point of fact, proof of any one of them will support an indictment or information. Thus, the Virginia statute against unlawful shooting, &c., affixes a penalty, when the act is done with intent to maim, disfigure, disable, or kill, yet the indictment must charge the intents conjunctively; but though all the intents be laid in the indictment, proof of any one supports the indictment. Angel v. Com., 2 Va. Cas. 231. See, also, 1 Chit. Cr. Law, 236. The English statute punishes "forging, or causing to be forged." The indictments must say, "forged and caused, &c." Williams' Case, 1 Leach, 529. So the statute says, "cut or deface;" but the indictment must charge them conjunctively. Black Act, Crown Cir. Comp. 82. "Black or otherwise disguise;" "forge, or counterfeit;" "acquittance, or receipt;" "indictment." 2 East, P. C. 923, 934. So in indictments under the Coventry act. 3 Chit. Cr. Law, 787; 1 East, P. C. 402; 1 Leach, 55.

Case No. 2,419.

The CAROLINE.

[1 Lowell, 173.][1]

District Court, D. Massachusetts. Oct., 1867.

MARITIME LIENS AGAINST FREIGHT — ADMIRALTY JURISDICTION—GARNISHMENT BY STATE COURT.

1. It is no good defence to a petition that freight may be brought into the admiralty court to answer the exigency of suits for mariners' wages and materials which are a charge on the freight, that the consignee, before the libels were filed, was summoned as trustee or garnishee of the ship-owner in a court of common law.

[See Wall v. The Royal Saxon, Case No. 17,093.]

2. The courts of common law of Massachusetts have no power to adjust maritime liens upon a fund attached under the foreign attachment law of that state, and the consequence of giving priority to such an attachment might be the destruction of the liens. The court of common law would be bound to guard against this consequence by discharging the supposed trustee, or by waiting till the liens were adjusted; and this court may proceed to adjust them, and may order the freight to be brought in for that purpose.

[Cited in Ross v Bourne, 14 Fed. 860.]

3. Such a course involves no conflict of jurisdiction, and is not inconsistent with the decisions in Taylor v. Carryl, 20 How. [61 U. S.] 583, and Freeman v. Howe, 24 How. [65 U. S.] 450.

In admiralty. Three libels were brought against the brig Caroline and her freight,

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

one for wages and two for supplies and materials, and the value of the vessel was shown to be insufficient. The Boston Gas Light Company, owners and consignees of the cargo, being required to show cause, under the 38th admiralty rule of the supreme court, why the freight should not be brought in to answer the exigency of the suit, appeared under protest, and showed that they had been summoned as trustees of the ship-owner, in the superior court of the commonwealth before the filing of the libels.

C. T. Russell, for the freighters. This court has no jurisdiction to make the order prayed for, because the money is already in the custody of a court of the state. By Gen. St. Mass. c. 142, § 21, this process is an attachment, which brings the case within the decisions of Taylor v. Carryl, 20 How. [61 U. S.] 583, and Freeman v. Howe, 24 How. [65 U. S.] 450.

H. W. Muzzey and R. R. Bishop, for the several libellants.

LOWELL, District Judge. The decision in Taylor v. Carryl [supra], as explained in Freeman v. Howe [supra], and in Buck v. Colbath, 3 Wall. [70 U. S.] 334, does not operate to defeat the paramount maritime liens, but only to delay their enforcement, because the sheriff can sell only the right of the ship-owner, subject to those liens; the practical effect of which I find to be that the sheriff usually waives his possession when libels are filed for maritime liens, because his title becomes of little or no market value. So that we have come back pretty much to the practice which prevailed before the leading case was decided. If that doctrine applies to an attachment of credits, its application in any given case may have the effect to destroy the maritime liens, because after the money has once been paid over by the freighter on due process of law, the remedy of the lien-holders will be very difficult of enforcement, to say the least. Judge Blatchford has refused to extend the rule to such a case as this; and has stated very forcibly the hardship which would follow such an application of it. The Sailor Prince [Case No. 12,218].

I have come to a like conclusion upon a consideration of the nature and effect of our foreign attachment law. By that law it is, indeed, enacted that the credits shall be considered attached, and be held to respond to the final judgment in the same manner as goods or estate when attached by the ordinary process. But in point of fact there is no possession taken by the sheriff, but merely an order served on the trustee to show cause why the judgment, when recovered, should not be satisfied out of the credits of the judgment debtor in his hands. If he answers that the credits are not due to the principal defendant, but to some one else, he must be discharged. And if he pays over to the adverse holder in the mean time, he is not in contempt, but is merely paying at his own risk, and the sheriff has nothing whatever to do about it. It follows that the fund is not really in the custody of the court, or of its officers, and that our trustee process is very different in this respect from the foreign attachment of the ship in the principal case, which was what we call in Massachusetts by the mere name of attachment. Our process does not undertake to impair obligations already existing, and if it appears that there are such obligations sufficient to exhaust the whole fund, the trustee must be discharged. True, there is a provision for permitting claimants of the fund to appear, but this is only for the purpose of protecting the trustee; there is no power to adjust and liquidate the adverse claims, and no process for their payment, but merely a course of proceeding which may bar the adverse claimant thereafter in any suit by by him against the trustee, if his claim should be disallowed. It may be maintained with much plausibility that a credit which is incumbered is not liable to attachment. The general doctrine, in Massachusetts, is that incumbered goods cannot be attached. Badlam v. Tucker, 1 Pick. 399. This rule has been modified by statute, but in a mode which carefully preserves the rights of the holder of any mortgage pledge or lien, and requires payment to be made to him within ten days after notice. Gen. St. c. 123, § 62 et seq. There are no analogous provisions for credits that are pledged or incumbered; and it seems to me that it would be the duty of the court of common law, on proof that a fund was so incumbered, to discharge the trustee. In the case at bar, if the gas company answers to the trustee process, as it is bound to do on notice, that the fund in its possession is not due to the owners but to the master, who has a lien on it for wages and disbursements, the trustee must be discharged, for the master in such a case is like a factor who has made advances on the goods consigned to him, and has a right to collect the price of them. Lewis v. Hancock, 11 Mass. 72; Richardson v. Whiting, 18 Pick. 530; Manter v. Holmes, 10 Metc. [Mass.] 402. And it can make no difference that the master is passive and the persons applying to the court are the sailors themselves, and others through whom the master derives his lien. If it should appear that the amount of the liens on the fund were not sufficient to absorb it entirely, the court of common law would perhaps have the right, if the statute under which the process is brought can be construed to extend to such a case, to charge the trustees to the extent of the surplus, but even that could not be done until the only court that has original jurisdiction of these maritime liens can adjust and liquidate them, so as to ascertain whether any thing will remain liable to the attachment, and this cannot lawfully

be done by the court of admiralty until the fund is before it. So that unless the order now prayed for can be passed, each court must forever await the action of the other. The court of admiralty, on the other hand, can adjust and marshal all the liens, including that by the attachment, and can order any surplus to be paid into the superior court, or to be held to abide its action.

Upon the question of a supposed conflict of jurisdiction, an important case in England is very much in point, where to a suit by ship-owner against freighter, for the freight money, it was held by three courts, including the highest, to be a good plea in bar, that, since action brought, the freighter had been required to pay the money into the court of admiralty, and had paid it accordingly. Place v. Potts, 8 Exch. 705, 10 Exch. 370, and 5 H. L. Cas. 383.

Ordered that the freight money be brought in

CAROLINE, The (BICKFORD v.). See Case No. 1,385.

CAROLINE, The (LEVY v.). See Case No. 8,301.

CAROLINE, The (VIRDEN v.). See Case No. 16,956.

Case No. 2,420.

The CAROLINE & CORNELIA.

[2 Ben. 105.][1]

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

ADMIRALTY PRACTICE—SECURITY FOR COSTS.

Where seamen served a few days on board a vessel in the port of New York, but did not sign shipping articles, and were paid for the time they served and were discharged, and left the vessel without objection, but libelled the vessel to recover damages for the breaking up of a voyage for which, as they alleged, they had been hired, and process was issued in their favor against the vessel without their giving security for costs, and the claimants applied for an order that they file security for costs: *Held*, that their claim was not a claim for wages, within the meaning of rule 45 of this court, and that, therefore, they must file security for costs.

[See note at end of case.]

In admiralty. This was a motion on behalf of the claimants of the schooner Caroline and Cornelia, that the libellants file security for costs, the process in their favor having issued against the vessel without their having filed such security, on the theory that they were seamen suing an American vessel for their wages. [Motion granted.]

A. Nash, for libellants.

Beebe, Dean & Donohue, for claimants.

BLATCHFORD, District Judge. By rule 44 of this court, no process in rem can be issued unless a stipulation for costs in $250 is first given by the libellant. But, by rule 45, "seamen suing in rem for wages in their own right, and for their own benefit, for services on board American vessels," are not required to give such security in the first instance, although the court may, for adequate cause, on motion, with notice to the libellant, after the arrest of the property, order the usual stipulation to be given in such case, or that the property arrested be discharged.

In the present case the libellants are seamen, and sue in rem an American vessel, but the suit is not one for wages, within the meaning of rule 45. It is a suit for compensation for special damages for the breaking up of a voyage before it began, and for an alleged breach of contract to employ them on a voyage. They never signed shipping articles. They served a few days in the port of New York, on board of the vessel, and were paid in full their wages for those days, and were then discharged, without objection on their part. They did not leave port in the vessel, or enter on any voyage on board of her. The distinction between wages and a claim for compensation for special damages, under circumstances like those in the present case, is well settled (2 Pars. Mar. Law, 573); and rule 45 confines the exception in favor of seamen to those suing in rem for wages for "services on board" an American vessel. Here the seamen were paid in full for all services on board of the vessel, and they sue now for an alleged breach of contract, because they were not allowed to render further services on board. The motion that the libellants enter into the usual stipulation under rule 44, is granted.

[NOTE. Seamen are privileged suitors in admiralty, and should not be required to give security for costs. Wicks v. Ellis, Case No. 17,614. Nonage of a seaman will not change the rule, nor will security be required of his guardian or next friend. Id. The reason for the privilege, however, is not because they are a favored class, but because they are usually unable, for various reasons, to furnish security. Polydore v. Prince, Id. 11,257; The Arctic, Id. 509a. But the security may be required if the ability to give it is proved. Wheatley v. Hotchkiss, Id. 17,483. Where the seaman has been paid off by a United States shipping commissioner, there is a presumption that his just demands have been discharged, and, if he files a libel thereafter, security may be required. The Niveto, Id. 10,279. If a seaman libels the vessel to enforce an agreement extraneous the contract for wages, his position is that of an ordinary suitor, to whom the rule as to security will apply. The Great Britain, Id. 5,736.]

Case No. 2,421.

The CAROLINE A. WHITE.

[19 Leg. Int. 181;[1] 5 Phila. 112.]

District Court, E. D. Pennsylvania. 1862.

DEMURRAGE—FREIGHT NOT EARNED—LOSS OF VESSEL.

Under a contract of affreightment containing no provision that the payment of demurrage shall depend upon the earning of freight, demur-

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

[1] [Reprinted by permission.]

rage for extra detention at an intermediate port of an entire voyage becomes absolutely due at such port, and it is recoverable though the vessel is lost in the return voyage.

[In admiralty. Libel for demurrage by the owners of the Caroline A. White.]

CADWALADER, District Judge. This is a suit for demurrage, under a charter-party for a voyage from Philadelphia to Cuba, and back to Philadelphia, New York or Boston. As to freight, the stipulations of the charter-party were, for the purposes of the case, the same, in effect, as if a single freight had been payable for the entire voyage. The vessel was to be dispatched as soon as possible, and in no event to be detained beyond fifteen days. For loading and discharging in Cuba, thirty lay days were allowed. The charter-party contained the words "demurrage, if any be incurred, twenty-five dollars per day." The vessel having been detained in Cuba more than thirty lay days, the libellants demand for this extra detention, demurrage at the stipulated rate. On the return voyage the vessel and her cargo were totally lost at sea. Therefore no freight was earned. The libellants insist that the demurrage is nevertheless due. Their demand for it is contested on the ground that the demurrage and freight, together, composed an entire compensation for the use of the vessel for the voyage, and that, as the voyage has not been performed, no part of this compensation has been earned. This objection is not sustainable, if it rests on a simple assumption that the demurrage was only a compensation to the owners of the vessel for their loss of opportunity to earn another freight. In support of the objection, a judicial dictum that "demurrage is only an extended freight," has been cited. See 4 Taunt. 52, 55. But this definition of demurrage is too narrow. Demurrage includes also compensation for the hazard of all such injuries and losses as may be caused by departure, in point of time, from the regular course of the intended voyage. Thus the compensation is not single but twofold. The dictum above mentioned may have been occasionally repeated; but judgments have also been pronounced in contested cases upon the ground that demurrage is not included in the most extended meaning of the simple word "freight." See 4 Taunt. 1; 1 Barn. & Adol. 118, 122; 4 El. & Bl. 945; 5 El. & Bl. 589. The damages for extra detention, which are payable under the name of demurrage, are usually, as in the present case, liquidated at a certain daily rate or sum. Were they not thus liquidated, their legal measure would often be questionable. Whether the extra delay had been the proximate cause, or too remote a cause, of unforeseen losses from political occurrences, from fluctuations of markets, or from periodical changes of climate, or of currents of wind or water, might become questions of almost constant recurrence. One of these questionable effects might sometimes be the loss of the vessel herself, and incidentally that of the freight for the voyage. When the rate of demurrage is liquidated, the character of the damage and of such hazards is nevertheless to be regarded. Their character would be disregarded if the recovery of the sum substituted for them were dependent upon the subsequent performance of the voyage. At a port of primary departure, a liability for demurrage may be incurred before any commencement of navigation. In another case of not unfrequent occurrence, the contract of affreightment requires the intended voyage to commence at a port where the vessel is not, and stipulates that she shall proceed thither for the purpose of performing the voyage. Under such a contract, any demurrage at this port of primary destination resembles demurrage at a port of primary departure. In either case the period of retardment is not a part of the time of navigation. See Poth. Charte Partie, art. 85. In each case the demurrage becomes absolutely due, independently of any question whether freight is afterwards earned. At a port of ultimate destination, a vessel detained with her cargo on board more than the stipulated number of lay days, or, in the absence of a stipulation, delayed beyond a reasonable time, becomes a mere substitute for a warehouse on shore. In such a case, freight is not earned until the demurrage begins to accrue. This was decided by the supreme court of Pennsylvania in a case in which the vessel and cargo were wholly lost during the lay days. But Chief Justice Tilghman gave no opinion what the law would have been if she had been detained by the hirer beyond the lay days, and the loss had happened while demurrage was accruing. 4 Bin. 299, 308. The proposition that, if detention by the hirer prevented the discharge of the cargo, the freight would have become absolutely due so soon as the demurrage began to accrue, was consistent with the decision, and with all the reasoning in support of it. The decision and reasoning are also consistent with the proposition as to demurrage, that if she had been lost with her lading while the demurrage was accruing, it would have been recoverable to the time of such loss. In the present case, the extra detention was at an intermediate port of an entire voyage. The demurrage in question may, therefore, be regarded as having, in a certain sense, accrued in the course of navigation. In this respect the case may be distinguishable from the others which have been mentioned. But, is the distinction attended with any difference which is material to the question for decision? The definition of demurrage does not essentially require that the extra detention shall have been exclusively in port. Formerly vessels intended for the trade monopolized by the British East India Company, were built under contracts by which the

owners engaged to let them to freight to that company for several voyages, upon the terms of their printed charter-parties for vessels employed in their service. Thus an exclusive employment of the vessels in it for many years, was provided for before they were built. Lord Mansfield said of the company's printed charter-party, that it was "an old instrument informal, and, by the introduction of different clauses at different times, inaccurate, and sometimes contradictory;" adding that, "like all mercantile contracts, it ought to have a liberal interpretation." 1 Doug. 277. See 1 Taunt. 463; 3 Doug. 419; 4 Doug. 28; and the forms in the English editions of Montefiore's Precedents, from which those in 4 Chit. Commer. Law, 269–317, are taken. In this instrument, the compensation payable by the company to the shipowner was described, in part as freight, and in part as demurrage, the former being a certain sum per ton for the regular period of the voyage, and the latter a certain sum per day for further detention, with no discrimination, whether the liability for either was incurred from the use or detention of the vessel in port, or at sea. It was expressly provided, that the company should not be liable for any of the sums agreed to be paid for freight, or for demurrage, unless the vessel should return to the Thames, and safely deliver her cargo to the company. This proviso was qualified in the later charter-parties by certain exceptions. Before their introduction a vessel had been chartered by the company, with an option to load her homewards within three months after her arrival in India, or to detain her there for a year longer at certain rates of demurrage. She arrived in India, and remained there in the company's employment for the fifteen months; after which the master notified them that unless they would allow demurrage, according to the rates of the charter-party, be protested against them for all damages, loss of time or other accidents. The company thereupon agreed in writing, that the owner of the vessel should be allowed demurrage, for so long a time as she should be detained in their service in India. She was detained accordingly, and while employed there in the company's service was wholly lost in a storm. In a suit by her owner against the company, the questions were, whether he was entitled to recover by reason of her not having been dispatched or laden homeward, at the expiration of the fifteen months from her arrival outward; and, if not, whether he was entitled to demurrage. After several arguments the company offered, by way of compromise, to pay the demurrage to the time of her loss, "which was accepted; after which Lord Mansfield declared the court was very clear that the plaintiffs were entitled to no more; but declined giving any other opinion." 1 W. Bl. 291. The report of the case is a little obscure. The point in doubt under the second question probably was, whether the proviso in the charter-party, placing demurrage on the same footing with freight, was applicable to demurrage accruing after the period of extra detention, to which the stipulations of the charter party had been applicable. If this was the point on which the court would not express an opinion, it may be inferred that if the charter party had contained no such proviso, there would not have been any difficulty in recovering demurrage to the time of the loss of the vessel. In that case, her loss, though it would have been fatal to the claim for freight, would not have been an obstacle to the claim for demurrage.

The case of an occasional charter party, like the present, when the extra detention has occurred at an intermediate port of an entire voyage, is more simple. The master usually receives the demurrage money there, and applies it to the expenses incurred through such detention. There is no trace, I believe, of an action, or claim, by the hirer of the vessel against her owner for the restoration of such money, on account of a subsequent loss of the vessel and cargo. Such actions have, on the contrary, been maintained where advances have been made in anticipation of freight to be earned. 4 Barn. & Ald. 582. Such advances are distinguished in the cases on the subject from freight payable in advance. The latter is due whether the voyage is afterwards performed or not. 4 Maule & S. 37. This appears to have been understood as the rule in England concerning freight, for nearly two centuries. 2 Show. 283; 3 Barn. & Adol. 450, 451. The words usually contained in the demurrage clause of a formal English charter party, seem to preclude the hirer of a vessel, who has paid the demurrage at an intermediate port from afterwards reclaiming it, if the voyage is not performed. Such demurrage is usually made payable at a certain pecuniary rate per day, for each and every day of the extra detention in port. That these words are expressive of the meaning which would be implied without them, and are not interpretable as creating a special contract, of a peculiar character, appears upon a comparison of these formal charter parties, with what are called in the notarial formularies, memorandums of charter. The memorandum of charter, which is intended to have the same effect as the more formal contract of affreightment, does not contain the words, "for each and every day," but simply ascertains the rate per day. No difference can have been intended to arise from the omission of the former words. Therefore none should be implied. This remark is perhaps important because, in the United States, memorandums of charter are constantly met with in both forms. They sometimes, after ascertaining the number of lay days, provide that "in case the vessel is longer detained," the hirer shall pay to the owner "demurrage at

the rate of" so much "per day, day by day, for every day so detained, provided such detention shall happen by default of the hirer or his agent." In other instances, as in the present case, the succinct expression demurrage at so much per day is substituted.

The legal application of a word should always be uniform unless a necessary reason for modifying its application can be shown. A contrary rule would produce uncertainties from which multiplied litigations might ensue. Demurrage understood in the sense of compensation for extra delay in a port of primary departure, incurred, as has already been said, before the commencement of navigation, must be recoverable, though the vessel should be afterwards lost. We have seen that there is no necessary reason that the demurrage, at an intermediate port, should be considered as dependent upon the subsequent earning of the freight. The fair inference from the use of the word demurrage is to the contrary. A different intention, where it exists, may be declared by an express provision of the contract of affreightment, as was done in a recent instance (1 Scott, N. R. 340), and in the charter parties of the East India Company, which have been mentioned.

The decree should therefore be for the libellants.

Case No. 2,421a.

The CAROLINE CASEY.

POUNDER v. PROCEEDS OF THE CAROLINE CASEY.

[23 Betts, D. C. MS. 141.]

District Court, S. D. New York. Nov. 6 and 13, 1858.

PRACTICE IN ADMIRALTY—OPENING DEFAULT.

[After the majority of a crew had obtained satisfaction of their claims against a vessel, in admiralty, another seaman libeled the vessel, and obtained a decree by default. On motion to confirm the master's report, the claimants moved to set aside the default, and for leave to answer, on the ground that since the filing of the libel they had discovered that libellant had contracted personally with the master, who was navigating the vessel upon "a lay." *Held*, that the default should be opened, and claimants allowed to be heard upon the merits.]

[In admiralty. Libel by John A. Pounder against the schooner Caroline Casey for wages (E. & I. H. Lewis, claimants).]

Beebe, Dean & Donohue, for claimants.

W. K. Woodman, for libellant.

BETTS, District Judge. The first of the above causes came to hearing upon an order on the libellant to show cause why the default entered therein should not be set aside, and the claimants be allowed to intervene, and answer the libel filed in the cause. The second case comes up on a motion by the libellant to confirm the report made by a commissioner under an interlocutory order in his favor. The demand of the libellant in the action is for wages earned as cook and steward upon the schooner Caroline Casey on a voyage upon the high seas, between January, 1857, and March, 1858, amounting to the sum of $66.86. The proceedings on his part were carried forward to a default, upon which a reference to a commissioner to ascertain the amount due was had, and a report was rendered finding a balance of $—— due the libellant for those services. Other members of the crew had previously instituted suit against the vessel to recover their wages on the same voyage, had obtained a decree therefor, and satisfaction of their several demands, when, as is now alleged by those interposing as claimants against this demand, it was discovered by them that the master of the vessel had possession of, and navigated her during the voyage upon a "lay," and that the crew, including the libellant, had contracted with him personally for the voyage, knowing that he was bound to pay their wages, and that the vessel and her owners were not responsible for the charge. This fact is strenuously denied by depositions on the part of the libellant, but it is not the habit of the court to dispose of the merits of a case summarily on affidavits alone, when they are in conflict in material allegations; on the contrary, it will, almost as matter of course, in such cases, exact proper issues in pleading between the parties, and the presentation of full proof, with such legal formalities as shall clothe them with the highest solemnity and sanction.

The libellant has chosen to conduct a separate action for the recovery of his wages without availing himself of the opportunity afforded him to unite his claim with that of his shipmates, under prosecutions when his suit was commenced, and the present claimants offer equitable reasons for interposing at this time a defence upon the merits to this claim, thus put forward in a distinct action. It is not charged in the libel that there was any express lien upon the vessel stipulated for by the libellant in his contract in this case. He relies upon the presumption of the maritime law that the debt carried with it the responsibility of the vessel for its satisfaction. The efficiency heretofore accorded that presumption, must perhaps be now deemed to have been greatly diminished, if not in effect abrogated, by the judgment of the supreme court of the United States in the case of Thomas v. Osborn, 19 How. [60 U. S.] 22. The decision was made by a court strongly divided upon the great feature of the case,—the operation and effect of presumptive liens, in respect to debts contracted by masters sailing vessels "in lays;" that is, under obligation to the owner, known to the creditor who deals with the master, that the master was to man and furnish the vessel. A doctrine had obtained in some of

the common law courts of the states, arising, it is believed, out of principles of local legislation, that such special management in the disposition of a vessel, relieved her actual owner from liability for debts which under the maritime law would become liens upon the vessel, unless the creditor proved that he was ignorant of such special disposition of the vessel, and gave credit in reliance upon the responsibility of her owner. 5 Pick. 422; 16 Mass. 337; 6 Pick. 335; 7 Greenl. (Me.) 261; 26 Me. 185. These authorities seem to have satisfied the judge of the United States circuit court in the Massachusetts district—Webb v. Pierce [Case No. 17,320]—that the principle pervaded the maritime law also, and his opinion was apparently adopted and approved in the circuit court of the second circuit. Mott v. Ruckman [Id. 9,881]. It is difficult to distinguish the case of a seaman claiming a lien for wages from that of material men, as both privileges spring out of a common necessity and supposed policy, and are enforced upon the strength of a mere presumption, and do not require, for support, any specific hypothecation of the vessel. It is important that the rule be considered, and its application to liability in rem, and, if it be identical in regard to ships and owners, then the claimants should be allowed opportunity to demand the judgment of the court whether the libellant has here a legal cause of action against this schooner. The legal liability of the vessel, in such instances, rests upon the same principle, whether the credit was given the master for necessities furnished in equipping the ship or in manning her. In either case the ship owner will relieve her from liability to the debt, by proof that the credit was given to the master personally, although, in respect to the wages of seamen, courts may be more astute and rigorous in demanding unequivocal evidence that the privilege of security upon the vessel was waived, than in the mere sale of merchandise for her use and service. It is not important, on this motion, to discuss minutely the principles of law which enter into the constitution of the rule. It will be time enough to ascertain what are its dubious, and what its unquestionable, ingredients and applications, when the facts appertaining to this contract are placed distinctly before the court. I think the parties in interest in the vessel are not precluded by any laches on their side from being heard on the merits of the proposed defence. I shall therefore order that the default in favor of the libellant, taken in this cause, be set aside, on payment of costs by the claimants, and their entering their appearance in the cause, according to the due course of the court, and filing forthwith their answer, and accepting notice of trial in the cause, for the ensuing term of December. And it is also further ordered that the motion in the second above entitled cause be suspended until the further order of the court therein.

Case No. 2,422.

The CAROLINE E. KELLY.

[2 Abb. (U. S.) 160;[1] 7 Phila. 570; 27 Leg. Int. 212.]

Circuit Court, E. D. Pennsylvania. June 13, 1870.

MERCHANT SEAMEN—DESERTION.

1. A seaman, by the consent, and with the assistance of the mate, but unknown to, and without the permission of the master, who was on board, left the vessel. *Held*, that the seaman was not guilty of desertion, nor liable to the forfeiture of the arrears of his wages.

2. A seaman leaving a vessel under such circumstances is discharged; and if such discharge occurs in a foreign port, he is entitled to three months' extra wages, under section 2 of the act of February 28, 1803 [2 Stat. 203], in addition to the arrears of his stipulated wages.

[Cited in Gove v. Judson, 19 Fed. 524.]

3. When the absence of a seaman from his vessel is set up to affect him prejudicially, the permission of the temporary commanding officer must be taken as giving a sanction which prevents the penalty for desertion from attaching.

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

This was a libel in rem by Patrick Doherty, a seaman on board of the brig Caroline E. Kelly, against that vessel, to recover arrears of wages, and also three months' extra wages, two-thirds thereof to be paid to himself and the other third to remain for the use of the United States, under the act of February 28, 1803, § 2, which provides that whenever a ship or vessel belonging to a citizen of the United States, shall be sold in a foreign country, and her company discharged, or when a seaman or mariner, a citizen of the United States, shall, with his own consent, be discharged in a foreign country, it shall be the duty of the master or commander to produce to the consul, vice-consul, commercial agent, or vice-commercial agent, the list of his ship's company certified as aforesaid; and to pay to such consul, vice-consul, commercial agent, or vice-commercial agent, for every seaman or mariner so discharged, being designated on such list as a citizen of the United States, three months' pay, over and above the wages which may then be due to such mariner or seaman; two-thirds thereof to be paid by such consul or commercial agent, to each seaman or mariner so discharged, upon his engagement on board of any vessel to return to the United States, and the other remaining third to be retained for the purpose of creating a fund for the payment of the passages of seamen or maimed citizens of the United States, who may be desirous of returning to the United States, and for the maintenance of American seamen who may be destitute and may be in such foreign port.

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

The district court decreed in favor of libelant, whereupon respondent [Rezin A. Robinson] appealed. [Case not reported.]

The facts which governed the decision of the case are sufficiently set forth in the opinion.

Morton P. Henry, for appellant.
George P. Rich, for respondent.[2]

McKENNAN, Circuit Judge. The decisive question in this case is one of fact, and under the direct and uncontradicted proofs, it is not of difficult solution. On January 18, 1870, the libelant shipped as seaman on the brig Caroline E. Kelly, of which the respondent is master, at the wages of twenty-five dollars per month, for a voyage from Mobile to Matanzas, Cuba, and thence to any port north of Cape Hatteras. The vessel sailed immediately, and duly reached Matanzas. While she was in the harbor of that place, the libelant's finger became painfully sore, so as measurably to unfit him for duty. Difficulties having occurred between him and the master during the voyage, and his finger growing worse, he was told by the first mate, that, by going into cold weather, he might lose his hand, and probably his life, that he ought to go to Havana and get into the hospital, and that if he wished, he, the mate, would give him an opportunity to leave the vessel, and would pay his passage to Havana. Within a day or two afterwards he was called up by the mate at a very early hour in the morning, while the master was in bed, was taken ashore in the ship's boat by the mate, accompanied to the railroad, put on the cars, and his fare paid to Havana. This occurred February 16th, and on the 18th the vessel sailed for the United States. The mate on that day made an entry in the log-book that "Pat, a seaman, had deserted." Under these circumstances, even if a proper entry of libelant's absence had been made in the log-book, it is plain that the crime of desertion is not to be imputed to him, and that the arrears of his wages were not forfeited.

Was he discharged with his own consent within the meaning of the act of congress of February 28, 1803? Although at the time the libelant left the vessel the master was aboard, yet the mate was actually in command, and was, therefore, temporarily invested with the functions of a commanding officer. The care of the ship and the government and management of the crew were necessarily within the scope of his authority, while he was potentially in charge of both. His acts are to be considered as constructively the acts of the master, pro hac vice. Whatever may be the extent of his authority, or of his accountability to his employers for an abuse of it, the seamen are subject to his direction, and his permission of an act to be done by any of them is sufficient to divest it of the character, and rescue it from the punitive consequences of a willful and insubordinate violation of duty. So far, then, as the absence of a seaman from his vessel is set up to affect him prejudicially, the permission of the temporary commanding officer must be taken as giving it an authorized sanction.

Here the libelant left the vessel, not only with the knowledge and consent, but by the distinct advice and procurement, and with the indispensable assistance of the officer in charge at the time, and was sent away to a distant place without the means of returning before the vessel sailed if he had desired to do so. Nor can the effect of these facts be averted by the respondent's alleged ignorance of the libelant's intended withdrawal, especially as he did not manifest any earnest or unequivocal disapproval of the conduct of the mate, but at once proceeded to employ another seaman, and sailed on the return voyage, without taking any steps whatever to reclaim the libelant.

Under all the evidence, in furtherance of the humane object of the act of 1803, we must hold that the libelant was discharged. This having been done in a foreign port, and with his consent, it follows that he is entitled to recover the three months' wages allowed by that act, in addition to the arrears of his stipulated wages, and the whole case was rightly decided by the learned judge of the district court. Decree accordingly.

[And now, June 13th, 1870, this case having been brought into this court by appeal by the respondent from the decree of the district court, and having been heard on the pleadings and proofs, and having been argued by the advocates of the respective parties, and due deliberation being had in the premises, it is ordered, adjudged and decreed, that the libelant, Patrick Doherty, recover from the respondent, Rezin A. Robinson, and his stipulators, for arrears and three months' wages, the sum of eighty dollars (of which sum twenty-five dollars to be paid into the registry of this court) with costs, not exceeding sixty dollars.][3]

[2] [Attorneys' names transposed in 27 Leg. Int. 212.]

Case No. 2,423.

The CAROLINE NESMITH.

[9 Adm. Rec. 122.]

District Court, S. D. Florida. Dec. 26, 1865

SALVAGE—COMPENSATION.

[In admiralty. Libel for salvage by Benjamin Baker and others against the cargo and materials of the ship Caroline Nesmith.]

Homer G. Plantz, for libellants.
W. C. Maloney, for respondent.

BOYNTON, District Judge. The saved property having been appraised at the sum of four

[3] [From 27 Leg. Int. 212.]

hundred and ten thousand five hundred and ninety-three dollars and fifty cents, except [that] the materials and stores have been sold, for the sum of two thousand one hundred and forty dollars and sixty-nine cents, ordered that after deducting the costs and charges, the libellants recover on three hundred and twelve thousand one hundred and ten dollars' worth of the saved cargo of cotton undamaged, appraised at forty-six cents per pound, ten per cent. upon the appraised value; on twenty-four thousand dollars' worth of the said cargo damaged, appraised at thirty cents per pound, twenty per cent. upon the appraised value; on seventy-four thousand four hundred and eighty-three dollars and fifty cents' worth of the said cargo, fished or dived up from the putrid water of the hold of the vessel, appraised at various rates thirty cents per pound, and upon the proceeds of the sale of the materials and stores, thirty-three and one-third per cent. of the appraised value.

[NOTE. Cited in Baker v. The Slobodna, 35 Fed. 543.]

CAROLINE V. CASEY, The (POUNDER v.). See Case No. 2,421a.

Case No. 2,424.

The CAROLUS.

[2 Curt. 69.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1854.

COLLISION—TOW AND SAIL—FAULT OF PILOT.

1. For a collision occasioned by the misconduct of a pilot, employed by the owner, not under any compulsion by statute, the vessel is liable.

[Cited in Pope v. The R. B. Forbes, Case No. 11,275; Camp v. The Marcellus, Id. 2,347; The China v. Walsh, 7 Wall. (74 U. S.) 70; The Merrimac, 14 Wall. (81 U. S.) 203.]

2. A vessel towed by a steamer is bound to take the needful precautions not to run into a small sailing vessel ahead, which has not steerage way by her sails, and is moved only by sweeps.

[Cited in Nelson v. The Goliah, Case No. 10,106; The Express, 46 Fed. 864, 865, note.]

[See Stretch v. The Margaret, 2 Fed. 255; Bissell v. The Alexander, 3 Fed. 671.]

[Appeal from the district court of the United States for the district of Massachusetts.

[In admiralty.]

E. D. Sohier, for appellant.

Mr. Scudder, contra.

Before CURTIS, Circuit Justice, and SPRAGUE, District Judge.

CURTIS, Circuit Justice. This is an appeal from a decree of the district court in a cause of collision. [Case unreported.] The facts, as they appear to me upon the proofs, are, that about three o'clock, p. m., on the seventh of December, 1853, the schooner Levant, of the burden of sixty-five tons, left the lower outside berth on the north side of the T wharf in Boston, having her mainsail and jib set and her foresail partly hoisted; and having been swung clear of the wharf, with a range line, was rowed by her sweeps, assisted slightly by a very light draft of air from the westward, in a south-easterly direction; and in the space of about ten minutes had proceeded about three hundred feet from the wharf. The ship Carolus, of the burden of five hundred and eighty-one tons, having a steam tug lashed to her larboard side, left the end of Lewis's wharf, distant five hundred and eighty-seven feet from the T wharf, soon after the Levant left the T wharf, and, towed by the tug, proceeded also in a south-easterly direction, passed inside of a schooner at anchor off the end of Commercial wharf, and in attempting to go outside of the Levant, her main yard caught the leach rope of the Levant's mainsail, slewed the Levant round into collision with the ship, stove her boat, injured her mainsail, and inflicted other damage. The Levant, at the time of the collision, had not such steerage way as to be fairly under command of her helm. The ship had steerage way and could be handled, though not with much rapidity and precision. On this state of facts it could hardly be doubted that the ship was in the wrong. Two vessels, being on the same course, the one ahead dependent on sweeps and sails, in almost a dead calm, and the other coming up with her by the aid of steam, it is clear the latter should seasonably take such measures as to avoid a collision. And the counsel for the claimant, without controverting this position, has endeavored to show that some other facts existed which relieve the ship from the imputation of negligence.

It is pleaded, that when the Carolus left her berth at Lewis's wharf, there was no obstacle in the way, except the schooner which lay at anchor off Commercial wharf; that it was then judicious and proper for the ship to go inside of that schooner; that while doing so, the Levant came suddenly out of the dock, and stood directly across the path of the Carolus; that it was then too late to go outside the schooner at anchor, and there was not depth of water to keep a course as far southerly as the ship was then steering; and that, consequently, the only thing which the Carolus could do, was to go outside of the Levant; and that this would have been successfully accomplished if the crew of the Levant had coöperated in the attempt, by putting her helm to the larboard, and her main boom to starboard, and had hauled away the jib and stopped sweeping. That they did none of these things, and to their neglect, therefore, the collision is attributable. But I am not satisfied of the correctness of these positions. In my judgment the evidence shows, that the Levant came away from the wharf some minutes before the Carolus started; that she was where she ought to have been seen and regarded by the Carolus, when the latter left Lewis's wharf; that the Levant did not come out of the dock suddenly, but in a usual and prudent man-

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

ner. And I attribute it as a fault on the part of the Carolus, that, either the Levant was not seen till after the course inside the schooner at anchor had been taken, or if seen, that the Carolus attempted a hazardous manoeuvre, which was unsuccessful and caused the damage. Nor do I find, upon the proofs, that the omission of the people of the Levant to coöperate in the movement of the Carolus was negligence. I think they had reason to believe the Carolus would keep her course and go inside of them, until it was too late to do any more than they did. It is true the pilot of the Carolus thought there was not at the moment, (an hour's flood,) depth of water to go inside; but this was not known to those on board the Levant; and has been ascertained now only by careful soundings. I think, therefore, they were not in fault.

It was pleaded in the answer, that the Carolus was under the sole charge and direction of a pilot, duly licensed to act in that capacity by the public authorities of the state of Massachusetts. If the pilot in charge of this ship had not been selected and employed by the owner, but had been received by the master in obedience to a requisition of law, enforced by a penalty, then, under the authority of Carruthers v. Sydebotham, 4 Maule & S. 77, and The Maria, 1 W. Rob. Adm. 95; The Agricola, 2 W. Rob. Adm. 10, the owners would seem not to be liable for the misconduct or mismanagement of the pilot. But in this instance the pilot has testified that he was employed by the owner of the ship; and no such case is made by the answer as would compel an owner to receive a pilot on board under the statute laws of Massachusetts. The case stands, therefore, upon the general rule of the law of the admiralty, unaffected by statute provisions; and this renders the vessel liable for a collision, attributable to the pilot's mismanagement. The case of The Neptune, 1 Dod. 467, is directly in point, and though this decision has been overruled by Sir William Robinson, in the case of The Protector, 1 W. Rob. Adm. 45, it was solely on the ground that the general admiralty laws had been superseded by an act of parliament, which had escaped the notice of Sir William Scott when he decided the case of The Neptune; and it is in terms stated, that the decision correctly declares the law as it stood before that act. The same rule, as held by courts of common law, may be found in Yates v. Brown, 8 Pick. 23, and the cases there cited. And in Smith v. Condry, 1 How. [42 U. S.] 28, it is said to be undoubtedly the law.

The result is, that the decree of the district court must be affirmed, with costs, and damages at the rate of six per centum per annum from its date.

CARONDOLET MARINE RY., ETC., CO. v. The SAM KIRKMAN. See Case No. 8,658.

Case No. 2,425.

CAROTHERS v. CHESAPEAKE & O. CANAL CO.

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

Circuit Court, District of Columbia. March Term, 1836.

CONSTRUCTION OF CONTRACT—OBJECTION TO QUANTITY OF WORK DONE AFTER TIME SPECIFIED.

Under the contract between the plaintiff and the defendant, the final estimate of the engineer, of the amount and value of the work done by the plaintiff, was to be conclusive, unless objected to within twenty days. The plaintiff, within the twenty days, objected to the estimate of the price, but not of the quantity of the work. He cannot, after the twenty days, object to the estimate of the quantity of the work done. It is conclusive between the parties.

At Law. Assumpsit [by John Carothers against the Chesapeake & Ohio Canal Company] for work and labor upon the canal.

A final estimate was made by Rodier, an engineer, and objected to by the plaintiff, within the twenty days allowed by the contract; but his objection was only to the price, not to the quantity, of the excavation. The board of directors, according to the terms of the contract, referred the estimate to Cruger, another engineer, who confirmed the estimate of Rodier. The plaintiff now complains that the quantity of excavation allowed is too small, as well as the price, and has brought his action for the difference, which he claims, both as to price and quantity.

Mr. Brent, for the plaintiff, contended that the decision of Cruger is not binding on the plaintiff, because he had not notice to attend the engineer, who was to be considered as an arbitrator, and whose award has been given ex parte.

But THE COURT overruled the objection; being of opinion that the plaintiff is, by his contract, bound by the decision of Cruger. THE COURT was also of opinion that the final estimate was equally conclusive as to extra work.

CAROTHERS (PATTON v.). See Case No. 10,833.

Case No. 2,426.

In re CAROW.

[4 N. B. R. (1871) 543 (Quarto, 178);[2] 41 How. Pr. 112.]

District Court, S. D. New York.

INSURANCE — EFFECT OF ADJUDICATION IN BANKRUPTCY — MARSHAL'S FEES — DISBURSEMENTS BY ASSIGNEE.

1. An adjudication of bankruptcy terminates the interest of the bankrupt in any policy of insurance, and the policy is thenceforth void and of no effect; but an insurance company may consent to continue their liability by the usual

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

[2] [Reprinted from 4 N. B. R. 543 (Quarto, 178), by permission.]

transfer of the policy to the register in charge of the bankruptcy proceedings, until an assignee shall have been appointed, and may also transfer said policy to the assignee when appointed. It is optional with the company to continue the risk by such transfers, or to cancel the same. The title to the property of a bankrupt, by operation of law vests in the register as register, although the property may be in the possession of the United States marshal as messenger, it is still in the possession of the court, and the register is, by the bankrupt law [14 Stat. 519], the court.

[Cited in Re Blaisdell, Case No. 1,488; Re Dole, Id. 3,965.]

2. The United States marshal and assignee are officers of the court, and must obey the orders of the register, and their necessary expenses and disbursements made by them in the protection of the property of the bankrupt's estate, must be taxed by the register and paid out of the estate.

[On certificate of John Fitch, Esq., register in bankruptcy.]

Opinion.

This cause is now pending before me. The said Carow has been duly adjudicated a bankrupt by the district court. The United States marshal, as messenger, has seized, attached, and has in his possession, under the order of this court, three ships, claims of indebtedness to the bankrupt, and other property, claimed by creditors to be the property of the estate of the bankrupt. It is satisfactorily shown to me by creditors and by the said United States marshal, that these ships are estimated to be worth from eighty to one hundred thousand dollars or more, subject to liens and incumbrances. It appears, by the schedules of the said bankrupt, that the said three ships were previously insured in various companies, and that notes of the bankrupt were given in payment of said insurance, which notes have not been paid, and are set out in said schedule as part of the indebtedness of the said bankrupt. I decide as a matter of law that the adjudication of this court, declaring the said Carow a bankrupt, ended the liability of the companies upon their policies, unless they saw fit, at the request of the register in bankruptcy or the United States marshal as messenger, in writing, to consent to continue their liability under said policies by the usual consent and transfer of said policies from the said Carow to the said register or marshal, on account of the creditors of the estate, until an assignee shall have been appointed, and then it would be optional with the companies to continue the risks by transfers to the assignee or to cancel the same. The interest of the assured in a policy ceases with any transfer thereof. An adjudication of bankruptcy by operation of law transfers the interest of the bankrupt in a policy to the register. The policy is not assignable without the consent of the company in writing. The assignment of the policy to the register to be of any benefit to the estate, must be with the consent of the company in writing, and without such consent the policy, after such adjudication, would be void and of no effect, as an assignment without consent of the company avoids the policy. Smith v. Saratoga County Mut. Fire Ins. Co., 1 Hill, 497. It is not necessary that the bankrupt should pro forma assign the policy to the register, as the register takes it by operation of law. The filing of a petition in bankruptcy at once brings the property of the insolvent into the bankruptcy court, and places it in its custody and under its protection as fully as if actually brought into the visible presence of the court. I hold it to be my duty and that I am required by law, to protect the interest of the creditors, or by an order of this court to direct the United States marshal to cause the said ships to be properly insured, in safe and responsible insurance companies, as by the bankrupt law the title of the property and estate of the bankrupt upon the adjudication and order of reference to the register, by operation of law, at once vests in the register as register; and although in the actual possession of the United States marshal as messenger, it is still in the possession of the court, and he will be protected in his obedience to its orders by the court. His expenses, disbursements, and costs are taxed and allowed by the register. Rule 5. The register has the power to order the payment of fees and expenses incurred in the proceedings out of the funds in the hands of the assignee. In re Lane [Case No. 8,042.] He may appoint a watchman to take charge of the property. In re Bogert [Id. 1,599]; In re Shafer [Id. 12,694]. He is authorized and required to receive the surrender of property and keep it safely until it can be turned over to the assignee. In re Hasbrouck [Id. 6,189]. In this case the money necessary to pay for the insurance will have to be advanced by the marshal, and be allowed to the marshal in his bill of costs, with a fair compensation for the use of it, to be allowed and taxed by the register and paid out of the proceeds of the estate. I hold it to be the duty of the register to exercise a sound discretion in regard to the direction to be given in regard to estates in bankruptcy, that all insurable property should be properly insured and properly cared for in every respect; that the register is, as it were, the guardian and protector of the property in the possession of the court, and under its control, and the marshal, as an officer of the court, is also under its control, as it was held in the case of In re Glaser [Id. 5,474], Blatchford, J., that district courts had original jurisdiction in all matters and proceedings in bankruptcy, and that that jurisdiction extends to all acts, matters, and things to be done under and in virtue of the bankruptcy. The estate surrendered is placed in the custody of the court so sitting in bankruptcy, and the officer (assignee or trustee) appointed to manage it, is accountable to the court appointing him and to that court alone. In re Barrow (In re Loeb,

Simon & Co. and In re Winter) [Id. 1,057]; In re Schnepf [Id. 12,471]; In re Bowie, [Id. 1,728]. The commencement of proceedings in bankruptcy at once transfers to the district court the jurisdiction over the bankrupt, his estate, and all parties and questions connected therewith. Jones v. Leach [Id. 7,475]; Pennington v. Sale [Id. 10,939]; In re Kingon [Id. 7,815], and the authorities there cited.

The United States marshal, as messenger, is an officer of the court, and subject to its authority and control, and must obey its orders and directions as well as such officer can, for the interests of the creditors, and also have a care that the interests of the bankrupt shall be protected, and that his property shall be so managed as to realize the largest amount attainable, both for the interest of the creditors, and that the bankrupt may, by such judicious management of his property and effects, come within the provision of the fifty per cent. clause. In order to afford the marshal, as messenger, full protection and guarantee by order of the district court from loss by reason of his advance for premiums upon the policies of insurance, I propose to grant the following order in this cause: "That the United States marshal cause to be insured the three ships now in possession under and by virtue of an order of this court, viz.: Polar Star, Tri Mountain, and Edith; that he cause to be insured the Polar Star at the sum of sixteen thousand dollars, the Tri Mountain at twenty-six thousand dollars, and the Edith at forty-five thousand dollars, or as near those sums as he can procure insurance on them respectively, in safe, solvent, and responsible insurance companies in the state of New York, upon reasonable and proper terms as to rates of insurance for the space of two months," which, as the order of this court, will afford the marshal ample protection, and at the same time secure the creditors the value of the property in case of loss, and also secure the other claimants and all those having prior liens or admiralty liens which may have become vested rights prior to the adjudication in bankruptcy. In any event the policies should be so worded as to cover the interests of all concerned. As this is a question as to the power of the register in involuntary cases to cause proper care to be taken of property, I ask the direction of the district court as to the issue of the order of the United States marshal, as the marshal desires the protection and direction of the court in this matter, there being adverse claimants of the property to be insured, and the attorneys for the bankrupt claim that the bankrupt had neither right, title, nor interest in the ships, and that this court in bankruptcy has not, by any proceedings in this cause, acquired any jurisdiction over the same. I certify the same to the court.

BLATCHFORD, District Judge. If the marshal, as messenger, has these ships in his possession and actual custody as the property of the bankrupt, it is proper they should be insured in such sums and for such time as shall seem to the register proper. In that view, and on the certificate of the register, the annexed proposed order is approved.

Case No. 2,427.

In re CARPENTER.

[1 N. B. R. 299 (Quarto, 51).][1]

District Court, S. D. New York. Feb. 12, 1868.

FAILURE OF BANKRUPT TO ATTEND EXAMINATION —CONTEMPT.

A bankrupt who fails to attend on the adjourned day of his examination before the register, by reason of sickness, cannot be punished for contempt of court.

[Cited in Re Adams, Case No. 39.]

[On certificate of John Fitch, Esq., register in bankruptcy.]

The following case involving a question of contempt was certified to the judge by Register Fitch. The register's certificate is, to say the least, curious, but it is inserted in pursuance of our custom, to make our reports full and complete.

I, John Fitch, the register in charge of this cause, certify to his honor, the district judge: That the bankrupt, Josiah Carpenter, is now under examination as a bankrupt, and has been for some time; that the bankrupt is attended by E. J. McGean and Theodore F. Sanxey, as his counsel; that the creditor is attended by B. F. Sawyer and Henry C. Sawyer; that the attorneys in this cause have evinced a most unpleasant and uncourteous feeling towards each other, and the proceedings are conducted as between each other with a bitterness of feeling not usually indulged in; that the feeling evinced on the part of the attorneys for the creditors towards the bankrupt is of the most unpleasant kind; that the bankrupt has attended in obedience to an order, and been examined to a considerable extent, and much testimony has been taken; that the examination has in part disclosed that the wife of the bankrupt has both real and personal property; that as to the question as to the wife of the bankrupt holding property separate and independent of her husband, which cannot be taken by the assignee under the bankrupt law, in the opinion of the register, neither of the attorneys are ready to present the case to the court in a manner sufficiently plain to bring up the question so that it can be certified to the judge in a clear and concise manner, and the examination is proceeding as to other points; that the last examination was had on the 4th day of February, A. D. 1868, and by consent adjourned to the 7th day of February, A. D. 1868, at eleven o'clock a. m., on account of the petitioner having to have one

[1] [Reprinted by permission.]

of his great toe-nails, which was growing into the flesh, cut out by a physician; that on the 7th day of February, 1868, the said petitioner did not attend in person, but one of his attorneys appeared for him, and produced a letter from the said petitioner, stating that he was unable to put his boot on, owing to the condition of his toe; the register adjourned the cause, on motion of petitioner's attorney, one day, to enable the petitioner to procure a certificate from his physician as to the condition of his foot; that Henry C. Sawyer, with a witness, soon after called at the office of the register and said they had been to the house of the said petitioner, and the servant told them Mr. Carpenter was out, had gone down town, or words to that effect; the register told said Sawyer to make an affidavit to that effect, and appear with it on the adjourned day. The register was of the opinion, from the appearance of the petitioner on the 4th day of February, 1868, that he was really suffering; that there must be some mistake about the matter; and that the bankrupt would not intentionally deceive the court. Accordingly, I went to the house of the petitioner, and asked for the said Carpenter. He came limping slowly down stairs. I then examined his foot, and found that the letter as to the condition of his foot was not in the least exaggerated. The nail of his great toe had been mostly cut out; that it was painful to a great degree. I examined the foot carefully, and the said Carpenter, in my opinion, told the truth, and was, in fact, as he had represented. On Saturday, February 8, 1868, at the hour of adjournment, the creditor appeared by H. C. Sawyer, and the petitioner by E. J. McGean. H. C. Sawyer proposed to file the affidavits, and asked for a certificate to the district judge, "asking for a commitment of the bankrupt for contempt." The register explained the impropriety of such an act. The said Sawyer then said he would complete his affidavit, and then left. The register told him he would hold the cause open for him to do so. Soon thereafter B. F. Sawyer, the father of H. C. Sawyer, came in, with his son and another attorney in the cause, who represents another creditor. I explained to B. F. Sawyer the condition of the bankrupt, and that it would be unsafe for him to venture out for a few days, with which statement the said B. F. Sawyer seemed perfectly satisfied; he would himself conduct the examination, in place of his son; agreed to have the cause adjourned to the 14th day of February, 1868, at twelve m., and in future there should be no more unpleasantness between himself and the petitioner's attorneys, and that he would proceed to close up the examination with as little delay as possible. The register certifies to the court, that much of the unpleasantness exhibited as between the attorneys in this cause has been caused by the severe and uncalled for remarks of the attorney (H. C. Sawyer) for the creditor, in relation to the bankrupt; that the register has checked remarks of all the attorneys as far as he could, but not having the power to commit for improper conduct on the part of an attorney, could only resort to moral force, and the examination has proceeded as well as could reasonably be expected, considering the ill-feeling between the parties. The register certifies, that the practice of allowing the petitioner counsel, under the rule in the Patterson Case, is in effect the examination of the counsel, instead of the petitioner; as in this case, the bankrupt has two good lawyers as counsel, who shape and frame nearly all of his material answers, and most tenaciously endeavor to prevent the attorneys for the creditors from obtaining answers to their questions which would show the facts sought to be proved, and hinder and delay the proceedings in the cause by objections, some of which are, but most of them are not material.

The register further certifies, that the bankrupt has shown the utmost respect and obedience to the register—I think, in each instance answering, as advised by counsel, the questions required by the register to be answered—and has attended, on the various times for examination, with all due diligence, and that the register is satisfied that the condition of his foot was a sufficient reason for non-attendance on the 7th of February, 1868, as his counsel was present. The register deems it his duty in this case to certify to the district judge, that the petitioner has been for a long time involved in many lawsuits; that the aforementioned lawyers have brought some of them, and that as between them and the bankrupt there exists an unpleasant feeling—unusually bitter; that up to the 8th day of February, 1868, the examinations have proceeded as fast as the business engagements of four lawyers would admit of; that if the proposition of B. F. Sawyer, to which the counsel for the petitioner assents, can be carried out, namely, that B. F. Sawyer act alone for the creditor, Henry Bow, instead of H. C. Sawyer, assisting him, and the petitioner appearing by one counsel, the examination can proceed harmoniously as between the said B. F. Sawyer and the attorney for the petitioner, and the examination soon be closed.

E. J. McGean and Theodore F. Sanxey, for bankrupt.

B. F. Sawyer and Henry C. Sawyer, for creditor.

BLATCHFORD, District Judge. I can perceive nothing in this case on which I am called upon to pass, except the question whether the bankrupt has done anything to warrant a proceeding against him for contempt. I decide that he has not.

The clerk will certify this decision to the register, John Fitch, Esq.

Case No. 2,428.

CARPENTER v. AMERICAN INS. CO.

[1 Story, 57.][1]

Circuit Court, D. Rhode Island. Nov. Term, 1839.

INSURANCE—MISREPRESENTATION BY AGENT.

1. A misrepresentation of a material fact, whether it be made through mistake or design, avoids a policy of insurance underwritten on the faith thereof.

2. The knowledge and consent of the principal is not necessary to make such a misrepresentation by an agent fatal to the policy.

At law. This was an action of assumpsit [by Jeremiah Carpenter] on a policy of insurance upon the Glenco Factory and machinery, underwritten by the American Insurance Company at Providence, on the faith of certain representations contained in letters written by Samuel G. Wheeler to the insurance company. At the time that the policy was underwritten, he and his brother Henry M. Wheeler were proprietors of the factory and machinery under the copartnership name of Henry M. Wheeler & Co. The policy bore date on the 12th of December, 1836, and was as follows: "The American Insurance Company &c. do insure Henry M. Wheeler & Co. against loss of damage by fire to the amount of six thousand dollars, to wit: fifteen hundred dollars on the Glenco Cotton Factory, water-wheel and fixed machinery, thirty-five hundred dollars on movable machinery, and one thousand dollars on stock contained therein. Said factory is situated in Livingston, New York. This insurance is made with reference to letters of S. G. Wheeler, dated the 14th November and 6th December, 1836, with knowledge of additional insurance on the same property by the Providence Washington Insurance Company to the amount of fifteen thousand dollars, and with the agreement, that the assured may assign this policy to Epenetus Reed," &c. The whole interest of Samuel G. Wheeler and Henry M. Wheeler was by a subsequent assignment transferred to Jeremiah Carpenter, the present plaintiff, and indorsements thereof were made on the policy, as follows: "1837, Dec. 14th. Samuel G. Wheeler by letter dated this 13th Dec. 1837, certifies, that he has transferred his interest in the Glenco Factory and machinery to Jeremiah Carpenter, and thereupon it is agreed that the within policy shall be for his benefit and not that of said Wheeler. See letter to Jeremiah Carpenter, Dec. 14th, 1837." And subsequently, "1838, May 4th. Assignment by Henry M. Wheeler and Samuel G. Wheeler of their interest in this policy to Jeremiah Carpenter. See letter to Samuel G. Wheeler, May 4th, 1838." The policy was subsequently renewed by Wheeler & Co. on the 18th December, 1837; by which renewal it was to continue in force for one year from the 12th of December, 1837; and again by Jeremiah Carpenter on December 11th, 1838, by which it was to continue in force from December 12th, 1838, to December 12th, 1839.

The letters of Samuel G. Wheeler and answer of the American Insurance Company were as follows:

"Paterson, N. J., 14th Nov., 1836. Gideon Thurston, Esq., Sec. American Ins. Co. Dear Sir,—I wish to insure $10,000 on the Glenco Cotton Factory formerly belonging to Egbert Reed & Co., my brother being the Co. and owning one half. I have recently purchased the Reed half, and my brother and myself are the entire owners. We have $15,000 insured at the Providence Washington office, where you can see a description of the property. My brother lives on the premises, and has the entire charge and superintendence of the whole works. Want the risk, say $2500 on building, water-wheel, and gearing, $6000 on machinery, and $1500 on stock, cloth, and yarns in the mill. If you will insure at the same premium the Providence Washington Co. do you can fill policy, forward it to me, 42 Pine street, New York, and draw at three days' sight for amount of premium. I wish permission given to assign the policy to Epenetus Reed. Please make it in the name of Henry M. Wheeler & Co.; this is the firm under which the business of the mill will be conducted. Your early attention and reply will much oblige your friend, Sam. G. Wheeler."

"Office of the American Ins. Co. Providence, Nov. 17th, 1836. Mr. Samuel G. Wheeler, Sir,—Yours of the 14th inst. was duly received, and at your suggestion the survey of the Glenco Cotton Factory at Providence Washington office was examined, and it was found that the whole establishment there was valued at nineteen thousand dollars, upon fifteen thousand dollars (as much as is deemed proper on such a valuation) being insured, the American Insurance Co. decline the risk which you have proposed. The company will insure on factories in New York, or almost any part of the country, and for you, or your establishment, if there have been additions to its value, or other circumstances that will render further insurance on the same proper in their opinion. Yours respectfully, Gideon Thurston, Sec'y."

"New York, 6th Dec. 1836. G. Thurston, Esq., Sec. American Ins. Co. Dear Sir,—Your favor of the 17th November I duly received. When I applied to you for insurance on the Glenco Factory, it did not occur to me that the whole works had been nearly doubled, both in machinery and buildings, since the insurance was made at Washington office. The addition to the factory building is 35 by 70, 1½ stories high; the lower part occupied as a weave-room in which is 48 looms;

[1] [Reported by William W. Story, Esq.]

the upper part will be occupied as a dressing-room. The building is now geared in the best manner, at an expense of $1500 to $2000. 20 new looms have been added since this building was erected, with all necessary machinery to make gear to keep them in full operation. I have not now the particular items of additional expenditure, but should think it would amount to fully $10,000; all the machinery is new within the last two years. Every part of the works is in perfect order, and many improvements have been made within the last year, which lessen the risk. We consider the whole works worth at least $40,000. We presume this explanation will be sufficient to warrant your office to insure for the $10,000, agreeable to my former letter; if so you will please fill policy, send it to me, and draw at sight for the premium. Respectfully, your friend, Samuel G. Wheeler."

The factory and machinery were afterwards destroyed by fire on the night of April 9th, 1839, and this action was brought to recover the insurance.

Rivers & Whipple, for plaintiff, contended, that there was no intention and misrepresentation of the facts, and that the property, at the time when the insurance was made, was in reality worth as much as was stated in the letter of Samuel G. Wheeler of the 6th of December, 1836, on the faith of which the present policy was underwritten.

Pratt & Atwell, for defendants, contended, that the insurance was obtained upon a false representation of the insured at the time the insurance was effected, and in proof, put in the following papers and documents, viz. The letter from Samuel G. Wheeler to the defendants, dated November 14th, 1836. The proposal of Egbert Reed & Co., made to the Providence Washington Insurance Co., dated in September, 1835. The letter of the defendant to Samuel G. Wheeler, dated November 17th, 1836. The letter of Samuel G. Wheeler to the defendants, dated December 6th, 1836. The insurance was made upon the faith of the representations in this last letter. The counsel for the defendants also referred the court to the particular terms of the policy, the endorsement thereon and the renewals thereof.

It was admitted by the counsel for the plaintiff, that no material addition had been made to the buildings or machinery in December, 1836, at the time this policy was effected, which was not in the proposal and insurance at the Providence Washington office, in September, 1835, and, that only about $700 worth of new or additional machinery had been added, since the insurance was effected at the American office, which the defendant contended had nothing to do with the question.

STORY, Circuit Justice, delivered the opinion of the court as follows.

We are clearly of opinion, that the policy in this case having been obtained upon a misrepresentation of the material facts, is utterly void. The original proposal for the insurance, by the letter of the 14th of November, 1836, referred the defendants to the description of the property at Providence Washington Insurance Company's office, at which it was insured for $15,000, the property being therein valued at $19,000. The defendants, after examining that policy and description, declined, by the letter of the 17th of November, to take the additional sum proposed, upon the very ground, that the sum already insured thereon was as much as was proper to be taken on such a valuation. In order to induce the defendants to take the risk, the letter of the 6th of December, 1836, represented, that since the original insurance was made, additions had been made to the factory, &c. fully equal to $10,000. Upon the faith of this statement the present policy was underwritten. It now turns out that this representation is utterly untrue, (whether by design or by mistake is not material,) and no such additions have been made since the former policy. No one can doubt the materiality of this representation; for it was the very point (the increased value) upon which the policy was underwritten. It seems to us, therefore, that this makes an end of the case; for a false representation of a material fact is, according to well settled principles, sufficient to avoid a policy of insurance underwritten on the faith thereof, whether the false representation be by mistake or by design.

It is suggested, that the misrepresentation was in fact unintentional and without any fraudulent design, and that Epenetus Reed (the mortgagee) for whose benefit the insurance was made, was entirely ignorant of the misrepresentation; and that, under such circumstances, his rights under the policy ought not to be prejudiced thereby. But this suggestion cannot avail for the plaintiff, or for Reed. The misrepresentation, made by an agent in procuring a policy, is equally fatal, whether made with the knowledge or consent of the principal, or not. The ground in each case is the same. The underwriters are deceived. They execute the policy upon the faith of statements, material to the risk, which turn out to be untrue. The mistake is, therefore, fatal to the policy, as it goes to the very essence of the contract.

The plaintiff discontinued his suit, and costs were awarded to the defendants.

CARPENTER (BARROWS v.). See Case No. 1,058.

Case No. 2,429.

CARPENTER v. BUENA VISTA COUNTY.

[5 Dill. 556.][1]

Circuit Court, D. Iowa. 1878.

COUNTY BONDS—AUTHORITY TO ISSUE—RECITALS—LEGISLATION OF IOWA—POPULAR VOTE—DEFENCES.

1. Under the legislation of Iowa, counties have the power to issue negotiable securities for borrowed money to aid in specified public improvements therein, or to meet extraordinary expenditures, if previously authorized by a vote of the people, but not otherwise.

2. Bonds, under the seal and signed by the proper officers of the county, payable to bearer, and containing a recital that they are issued pursuant to a vote of the people of the county, are presumptively valid, although the particular purpose for which the bonds were voted is not therein stated.

[See note at end of case.]

[See Nauvoo v. Ritter, 97 U. S. 391; Burleigh v. Town of Rochester, 5 Fed. 667; Thayer v. Montgomery Co., Case No. 13,870.]

On demurrer to the petition. The action is brought [by A. C. Carpenter] upon three instruments, substantially as follows: "Bond due in one year. Know all men, etc., that there is due from the county of Buena Vista to Lansing W. Lewis, or bearer, $1,000, with interest at the rate of ten per cent. per annum, payable on, etc., on surrender of annexed coupons. For the performance of all which the faith of the said county of Buena Vista is pledged. Said bond is issued in accordance with a law of the state of Iowa, and authorized by a vote of the commonwealth of the county of Buena Vista, submitted at the general election held October 9th, 1866, all the requirements of law having been complied with, and a special tax authorized by said vote to be levied from year to year for the payment of principal and interest of said bonds." Dated the 16th day of October, 1866, and alleged to be sealed with the seal of the county, signed by the president of the board of supervisors, and attested by the clerk of the county. The other bonds are the same, except one is payable in four and the other in seven years from the date thereof.

The petition alleges that the plaintiff became the owner and holder of these bonds for value and before they became due, and alleges that the county made, executed, and delivered the bonds to the said Lewis, the payee, in accordance with the recital in the bonds, setting forth that recital in haec verba, but not otherwise alleging for what purpose or consideration the same were executed. A copy of the bonds and coupons in suit is annexed to the petition as part thereof.

The county demurs to the petition on the ground that it does not appear that the officers of said county were authorized to issue the bonds, or that they were issued for a purpose authorized by law.

Under the legislation of the state, "the county judge (and since 1860 the county board of supervisors) may submit to the people of the county, at any general election, or at a special one called for that purpose, the question whether money may be borrowed to aid in the erection of public buildings; whether the county will construct or aid to construct any road or bridge which may call for extraordinary expenditure." Code 1851, § 114; Revision 1860, § 250. The next section prescribes the mode of submission. The next section is as follows: "Sec. 252 (116). When a question so submitted involves the borrowing or expenditure of money, the proposition of the question must be accompanied by a provision to levy a tax for the payment thereof, in addition to the usual taxes, and no vote adopting the question proposed will be of effect unless it adopt the tax also." By another section, the county judge (and since 1860 the board of supervisors), on being satisfied that the vote has been adopted, is to enter the proposition and result of the vote of record and to cause notice of its adoption to be published; "and from the time of entering the result of the vote in relation to borrowing or expending money, the vote and the entry thereof in the county records shall have the force and effect of an act of the general assembly." Revision, § 255 (119). Money thus raised constitutes a distinct fund. Id. § 260.

John D. Rivers, for plaintiff.
Galusha Parsons, for county.

DILLON, Circuit Judge. The bonds are negotiable in form, and purport to be under the seal of the county, and to be signed by the proper county officials. They are alleged to have been executed and delivered by the defendant, and on the demurrer it must be assumed that they are signed by the proper officers of the county, and are under its official seal. The substantial question presented by the demurrer is, whether, in an action against a county in Iowa, on bonds like those in suit, it is essential that the petition should affirmatively show, either by averment or by the recital in the instrument (which is made part of the petition), that it was issued for a specific purpose authorized by the laws of the state of Iowa, such as to construct public buildings, roads, or bridges. The question is material, because if it be necessary for the plaintiff to allege this, it would be necessary for him to prove it, and the bonds in suit would not, when produced on trial, make out a prima facie case for him.

In Iowa each county is, for specified administrative purposes, a corporation. Its affairs are managed by a board of supervisors. The supervisor system superseded what is termed the county judge system. The pow-

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

ers and duties of the county judge were devolved in 1860 upon the board of supervisors, including the authority, and the checks upon it, to borrow money and to issue obligations therefor. Starr v. Board of Sup'rs (1867) 22 Iowa, 492, 495.

In the statement of the case, the statutes of the state respecting the power of the county authorities to contract debts are given. These statutes have been construed by the supreme court of the state and of the United States, and it is judicially settled by these tribunals that the county has the power to issue negotiable bonds like those in suit for borrowed money or extraordinary expenditures, if thereto authorized by a vote of the people. Hull v. Marshall Co., 12 Iowa, 142; Lynde v. Winnebago Co., 16 Wall. [83 U. S.] 6.

These cases, in connection with Police Jury v. Britton, 15 Wall. [82 U. S.] 566, clearly lead to the conclusion that, while on the one hand there is no general power on the part of counties to issue negotiable paper which shall be free from equities in the hands of bona fide holders for value, yet there is such power in Iowa, when, for the purposes specified in the statute, its exercise is authorized by a vote of the people. The statute empowers the county authorities, on the prior sanction of a popular vote, "to borrow money" for public buildings, roads, and bridges, and this includes the incidental power to issue therefor the bonds of the county. It may be observed in passing that the duty of determining whether the vote has been adopted, and, if so, of entering it upon the records of the county, is one which the statute devolves upon the board of supervisors. Revision 1860, § 255.

The case before us, therefore, is one in which there is power given to the officers who signed and issued the bonds to do so, if thereto authorized by a previous vote, of the result of which they are by the statute made the judges. They have issued the bonds, and these are in the hands of holders for value. Those instruments recite that they "are issued in accordance with a law of the state of Iowa and authorized by a vote of the people of the county, at the general election held October 9th, 1866, all the requirements of law having been complied with, and a tax authorized by said vote to be levied from year to year for the payment of the principal and interest of said bonds." If the facts stated in the recital are true, the officers of the county had the power to issue the bonds in suit, and presumptively the recital must be taken as true. In the well known decisions of the supreme court concerning municipal bonds, the principle is established that where the power exists by legislative authority to issue negotiable securities, and the local officers, who by the statute are invested with the duty to carry out or execute this power, issue the bonds with recitals that the right to issue them exists, or has arisen, and the bonds have passed into the hands of bona fide holders for value, they are not open to the defence of consideration or fraud on the part of the officers, or non-compliance with precedent conditions to the right to exercise the power. Board of Com'rs v. Aspinwall, 21 How. [62 U. S.] 539; Moran v. Miami Co., 2 Black. [67 U. S.] 722, 724, 732; St. Joseph Township v. Rogers, 16 Wall. [83 U. S.] 644; Grand Chute v. Winegar, 15 Wall. [82 U. S.] 373; Kenicott v. Supervisors, 16 Wall. [83 U. S.] 452; Lexington v. Butler, 14 Wall. [81 U. S.] 282.

The principle of these decisions it is the duty of this court implicitly to apply to cases which fall within it. It is useless to question the principle they assert, and in this place not fitting to do so. Applying it to the pleading before us, it shows, in connection with the recitals in the bond, a prima facie liability on the part of the county.

But one possible distinction between this case and cases which have been decided by the supreme court occurs to me, and that is, that in those the bonds have usually contained a recital that they were issued under a specified act, or to pay for stock subscribed in a railway company, or, as in Lynde's Case, 16 Wall. [83 U. S.] 6, to pay for the erection of a county court-house. But the reason why the recital binds is, that it is made by the officers who are invested by the statute with the duty to decide whether the condition has been performed which authorizes the issue of the bonds. The reason applies as well to the case where the recital is in the general form here adopted as where it is more specific. Demurrer overruled.

NOTE [from original report]. After the foregoing decision was made an answer was filed, and, on demurrer thereto, the following points were ruled by Dillon and Love, JJ.: 1. In an action on a bond purporting to be issued by a county in Iowa, a plea of non est factum is a good defence. 2. Under the legislation of Iowa in respect of county bonds, a plea that a bond is invalid simply because it is not under the seal of the county, is demurrable. Ring v. Johnson Co., 6 Iowa, 265. Aliter as to ordinary county warrants. 3. A plea to an action on county bonds, that no proposition to borrow money had ever been submitted to or voted upon by the people of the county, that the board of supervisors of the county never decided that any such proposition had been carried, and never ordered any issue of bonds, and that the bonds were issued by the county clerk on his own motion and without any authority from the board, and without their knowledge, he forging to the bonds the name of the president of the board of supervisors, held, on demurrer, to present a good defence.

CARPENTER (BYRNE v.). See Case No. 2,271.

Case No. 2,430.

CARPENTER v. The EMMA JOHNSON.

[1 Cliff. 633.]

Circuit Court, D. Massachusetts. May Term, 1861.

ADMIRALTY JURISDICTION — MARITIME CONTRACT.

Admiralty has jurisdiction over a contract of affreightment between two ports in the same state, where, from the usual course of the voyage, a part of the navigation of the vessel is upon the high seas, and out of the jurisdiction of any particular state.

[Cited in The Sarah Jane, Case No. 12,349; The Leonard, Id. 8,256.]

[See note to Case No. 2,161.]

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

Admiralty appeal from a decree in a proceeding in rem by E. W. Carpenter against the schooner Emma Johnson, which was engaged in the transportation of goods between Boston and Chatham. The master undertook to carry a piano from Boston to Chatham, and deliver it there to libellant. The piano was injured on the passage, and the suit was instituted to recover damages therefor. The district court gave a decree in favor of the libellant. [Case No. 4,465.]

When the case came up to this court, the pleadings were amended, on the part of the libellant, setting forth that the schooner, at the time the contract was made, was lying at the port of Boston within the ebb and flow of the tide, and within the admiralty and maritime jurisdiction of the court; was bound over the high seas to the port of Chatham; and that the master undertook to transport the piano in the usual course of the vessel to that port. The answer alleged that the contract was for the transportation of the piano from Boston, in Massachusetts, to Chatham, in the same state, and was made and to be executed within the state, and so was not a contract within the admiralty and maritime jurisdiction of the court.

H. A. Scudder, for libellant.

The jurisdiction of the admiralty in tort depends upon the locus; in contract, upon the subject-matter. 2 Brown, Adm. 88, 90, 91, 110; Thackarey v. The Farmer [Case No. 13,852]; Menetone v. Gibbons, 3 Term R. 268.

If the contract be maritime, or to be performed upon the tide-waters, it is within the admiralty jurisdiction. Peyroux v. Howard, 7 Pet. [32 U. S.] 324; The Orleans, 11 Pet. [36 U. S.] 175; De Lovio v. Boit [Case No. 3,776]; The Draco [Id. 4,057]; 2 Pars. Mar. Law, 511.

A contract of affreightment, like any other contract for service upon the sea, is a maritime contract, and within the jurisdiction of the admiralty. 2 Brown, Adm. 86; The Spartan [Case No. 4,085]; The Rebecca [Id. 11,619]; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 392; Fland. Shipp. 290.

A merchant shipping freight or merchandise has a maritime lien upon the ship for any damage arising from the fault or neglect of the master or the insufficiency of the vessel, which lien is a subject of admiralty jurisdiction. Wells v. Osmond, 6 Mod. 238; 2 Brown, Adm. 86, 88, 98; Menetone v. Gibbons, 3 Term R. 269; The Volunteer [Case No. 16,991]; The Rebecca [supra]; The Spartan [supra]; 1 Pars. Mar. Law, 452; Ben. Adm. 154, 203; Conk. Adm. 56; Abb. Shipp. 126.

The ancient admiralty jurisdiction, as exercised in England and in the continental courts of Europe, embraced this case. Exton, 321; Wells v. Osmond, 6 Mod. 238; 2 Brown, Adm. 86, 88; De Lovio v. Boit [Case No. 3,776]; Ben. Adm. 46 et seq.

It was within the admiralty jurisdiction of the several states before and after the Declaration of Independence, and before the adoption of the federal constitution. Talbot v. Commander of Three Brigs, 1 Dall. [1 U. S.] 103; Ben. Adm. § 118 et seq.; Id. §§ 161, 165, 166; Curt. Merch. Seam. 348, 352, 372; De Lovio v. Boit [supra]; The Magnolia, 20 How. [61 U. S.] 298.

Under the constitution and laws of the United States, and the decisions of our judicial tribunals, this case is within the admiralty and maritime jurisdiction of our federal courts. Const. U. S. art. 3, § 2; Ben. Adm. 286–288; The Volunteer [supra]; The Orleans, 11 Pet. [36 U. S.] 175; The Thomas Jefferson, 10 Wheat. [23 U. S.] 428; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344, 392; De Lovio v. Boit [supra]; 21 Law Rep. 473 [The Canton, Case No. 2,388]; 1 Stat. 77.

The several states having parted with all their admiralty and maritime jurisdiction under the constitution of the United States, and having yielded the same to the federal courts, if they have no remedy here, they are barred from their original rights. The Magnolia, 20 How. [61 U. S.] 296; Const. U. S.; 1 Stat. 77.

The cases cited and relied upon by the respondents do not touch the case before the court. Gibbons v. Ogden, 9 Wheat. [22 U. S.] 194, was not a question of admiralty jurisdiction, but of the power of congress to regulate commerce. The Genesee Chief, 12 How. [53 U. S.] 443, and Nelson v. Leland, 22 How. [63 U. S.] 55, simply assert the admiralty jurisdiction over the western lakes and rivers; thus claiming an extension, and not a limitation, of the jurisdiction of the admiralty, as before understood. See Fland. Shipp. 316. Allen v. Newberry, 21 How. [62 U. S.] 244, is a mere judicial consideration and construction of the United States statute of 1845, deciding that said statute limits the admiralty jurisdiction upon the western lakes and rivers to commerce between ports in different

states. Maguire v. Card, 21 How. [62 U. S.] 248, was a suit in rem against a domestic ship for supplies, and, aside from the legal defence which existed, was decided upon the authority of Allen v. Newberry [supra], and upon the same principle.

The above cases simply assert that the act of 1845 [5 Stat. 726] is valid, and that by it admiralty jurisdiction on the western lakes and rivers is limited to commerce between ports in different states, and does not touch the jurisdiction of the admiralty upon the tide-water.

C. T. & T. H. Russel, for claimants.

The contract alleged in this case is that the respondents undertook as common carriers to safely carry a piano from Boston, Massachusetts, to Chatham, in the same state. This is a question arising under the internal commerce of Massachusetts, and is not a subject of the admiralty jurisdiction of this court. It is not alleged that the contract was by charter-party or bill of lading, but that respondents were common carriers between these two places in the same state. New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 392; Allen v. Newberry, 21 How. [62 U. S.] 244; Jackson v. The Magnolia, 20 How. [61 U. S.] 302; Maguire v. Card, 21 How. [62 U. S.] 248; 2 Pars. Mar. Law, 500, 502, 504, 510, 642.

The contracts between citizens of a state are left to the tribunals of the state, excepting only specified cases. The mere fact of the vessel passing over a part of the high seas, for a short period, did not add anything of a foreign, external, or maritime character to the contract. The Genesee Chief, 12 How. [53 U. S.] 443.

CLIFFORD, Circuit Justice. It is conceded that the usual course of the schooner during a part of her voyage was upon and over the high seas, as alleged in the amended libel, and that she pursued her usual course during the trip when the damage complained of in this case occurred to the piano. But it is insisted by the counsel of the respondents that the question of jurisdiction is unaffected by the fact that the entire navigation of the vessel was not within the waters of the state; that if the contract was made in the state, and the voyage was from a port of the state to another port in the same state, then the question of liability is one arising under the internal commerce of the state, and is not a subject of admiralty jurisdiction. On the part of the libellant the whole of this doctrine is denied, and he insists that admiralty jurisdiction in matters of contract depends entirely upon the subject-matter; that if the contract be maritime, or to be performed upon tide-waters, it is within the admiralty jurisdiction; and that a contract of affreightment, like any other contract for service upon the sea, is a maritime contract, and consequently a suit for the breach of it is within the admiralty jurisdiction. Much must depend in jurisdictional questions upon the decisions of the supreme court; and it may not be amiss to remark that, where the point has been definitively settled by that tribunal, it is the duty of this court to conform its action to their ruling as the established law. Two cases are cited by the counsel of the respondents, and chiefly relied on as showing the want of jurisdiction in this case. Allen v. Newberry, 21 How. [62 U. S.] 244; Maguire v. Card, 21 How. [62 U. S.] 248. Referring to the pleadings in the case first cited, it will be seen that the goods in question were shipped on board the vessel at the port of Two Rivers, in the state of Wisconsin, to be delivered at Milwaukee, in the same state, and the court decided that the act of congress of the 26th of February, 1845, confines the admiralty jurisdiction of the federal courts upon the lakes to matters of contract and tort arising in, upon, or concerning steamboats and other vessels employed in the business of commerce and navigation between ports and places in different states and territories upon the lakes. It does not extend, therefore, say the court, to a case where there was a shipment of goods from a port in a state to another port in the same state. But it should be observed that the rule laid down is one deduced from the previous proposition, that the act of congress had thus confined the admiralty jurisdiction as to controversies arising upon the lakes. Congress cannot create admiralty jurisdiction, because that jurisdiction is expressly granted to the federal government by the constitution of the United States; but I suppose it to be an admitted doctrine that congress may limit, or even control its exercise, by modifying or repealing existing laws, and enacting others in their place. Such jurisdiction cannot be exercised, except by courts duly constituted, and it is undoubtedly within the competency of congress to confer the power to exercise the jurisdiction upon such courts as it may see fit to establish. Exercising this right, congress has limited the jurisdiction of the federal courts, in controversies growing out of commercial transactions upon the lakes, to matters of contract and tort, arising in, upon, or concerning steamboats and other vessels employed in the business of commerce and navigation between ports and places in different states and territories bordering on those waters; but that act has no relation whatever to admiralty jurisdiction upon the high seas, or in the bays, harbors, and arms of the sea on the Atlantic coast. Dismissing that case, therefore, as one not applicable to the question before the court, I will proceed to a brief examination of the one last cited. It was a suit in rem against a steamer to recover the balance for coal furnished the steamer while lying in the port of Sacramento. She was

engaged in the business of navigation and trade in the Sacramento river exclusively, within the state of California, and of course between ports and places of the same state. Granting, for the sake of the argument, that the rule laid down in that case is applicable to the harbors, bays, and arms of the sea, still I am of the opinion that it is not an authority for the proposition maintained by the respondents, as applied to the present case, for the reason stated in the opinion of the court, that the steamer was engaged in the business of navigation and trade on the Sacramento river exclusively, within the state of California. It was a suit for supplies, to enable the steamer to navigate the purely internal waters of the state. Even supposing the rule laid down in that case was intended to be applied to the harbors, bays, and arms of the sea on the Atlantic coast, still, I must hold, until the point is otherwise decided by the supreme court, that the decision in that case has no application to a contract of affreightment, where, from the usual course of the voyage, a part of the navigation of the vessel is upon the high seas, and out of the jurisdiction of any particular state; and such, I think, must have been the views of Mr. Justice Nelson, as expressed in the case of Moore v. American Transportation Co., 24 How. [65 U. S.] 39, when he said it was the purely internal commerce and navigation of a state that is exclusively under state regulations. Great mischief would inevitably result from any rule denying admiralty jurisdiction in all cases where the place of the departure of the vessel and the place of her destination are both within the same state, when any part of the voyage is upon the high seas, for every navigator knows that in many such cases nearly the whole voyage is out of the limits of any state; and if parties, under such circumstances, can have no remedy in the admiralty courts, it is difficult to see to what tribunals they can resort for the redress of their grievances. Without pursuing the subject at this time, suffice it to say that I am clearly of the opinion that the plea to the jurisdiction of the court cannot be sustained.

CARPENTER (FIEDLER v.). See Case No. 4,759.

CARPENTER (FRAZER v.). See Case No. 5,069.

CARPENTER (HAINES v.). See Case No. 5,905.

CARPENTER (HOPKINS v.). See Case No. 6,686.

CARPENTER (INNES v.). See Case No. 7,049.

CARPENTER v. The ISLAND CITY. See Cases Nos. 7,108 and 7,109.

Case No. 2,431.

CARPENTER v. ROBINSON et al.

[1 Holmes, 67.] [1]

Circuit Court, D. Rhode Island. June, 1871.

RIGHTS OF ASSIGNOR FOR BENEFIT OF CREDITORS —DEALINGS OF ASSIGNEE WITH ESTATE — OPINION EVIDENCE.

1. The assignor of his estate in trust to distribute the proceeds thereof ratably among his creditors, upon release of their claims within a specified time, and pay over to him the balance of proceeds remaining undistributed at the end of that time, may, after expiration of the specified period, by bill in equity in which the assignee and the only unpaid creditor are made parties defendant, compel a full and exact account of the dealings of the assignee with the trust estate.

2. In order to hold a purchaser of trust property from a trustee authorized to sell, liable in equity to account for and pay the proceeds thereof to the cestui que trust, on the ground of fraudulent collusion with the trustee in the purchase, in the absence of other evidence of fraud, such inadequacy of consideration as would of itself be an indication of fraud must be proved beyond question.

[See note at end of case.]

[3. Opinions of witnesses who have knowledge of land in controversy, and of sales in its immediate vicinity, are admissible in evidence, although such witnesses may not be, strictly speaking, experts.]

[In equity. Bill by Powell H. Carpenter against Attmore Robinson and J. H. Carpenter, for an accounting.]

SHEPLEY, Circuit Judge. The complainant, on the twentieth day of December, A. D. 1858, executed to Attmore Robinson, one of the defendants, a general assignment of all his property for the benefit of his creditors. The deed of assignment authorized the assignee to take immediate possession of all the property, and "as soon as conveniently may be, by public or private sale, for the best price that can be obtained, convert all and singular the premises into money," and to collect all debts due the assignor; and, after paying the expenses of making the assignment, and of executing the trust thereby created, and compensation for his services as assignee, to appropriate the proceeds of such sale and collections, first, to reimburse the assignee for advances made to the assignor for the payment of confidential debts; secondly, to the payment, ratably in proportion to their debts, to such creditors of the assignor as should within six months from the date of the assignment execute a release of their claims; thirdly, to pay over to the assignor the shares of such creditors as did not within six months release their claims, and also any balance remaining after the payments aforesaid.

A portion of the assigned estate consisted of about seventy-five acres of land, together with a wharf, buildings, and improvements,

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

comprising, with the exception of six acres owned by the United States, the whole of an island lying in Narragansett bay, betweeen the main-land and Conanicut Island, commonly known as Dutch Island, and forming a part of the town of Jamestown, in the county of Newport, and state of Rhode Island. This estate the complainant had previously, on the first day of April, 1857, mortgaged to James H. Carpenter, one of the defendants, to secure the payment of two notes of seven hundred and fifty dollars each, payable in two and three years from date respectively; and also on the same day had mortgaged to Benjamin W. C. Carpenter, to secure the payment to the said Benjamin of the interest on the sum of three thousand five hundred dollars semi-annually during his life, and the payment to his personal representatives of the principle sum within six months after his decease. Benjamin W. C. Carpenter died in June, 1859, and bequeathed this mortgage and mortgage debt to an infant daughter of J. H. Carpenter, the defendant. On the fifth day of September, 1859, Attmore Robinson, the assignee, conveyed the Dutch Island estate to James H. Carpenter for the nominal consideration of one dollar, the incumbrances at that time amounting to between five and six thousand dollars.

On the seventeenth day of July, 1867, the complainant filed the bill in equity in this case against his assignee Attmore Robinson, and his brother J. H. Carpenter, the purchaser of the Dutch Island estate.

The complainant alleges, that the conveyance of the Dutch Island estate was without any consideration, and was made by collusion between the defendants, with intent to defraud the complainant and his estate, and to deprive him of the benefit and advantage which would have resulted from a proper disposition of the Dutch Island estate; that, as soon as he heard of the conveyance, which was a short time after the same had been executed, he earnestly protested against the same to said defendant Robinson, and he believes that the fact that said protest was made was communicated by said Robinson to said Carpenter. Complainant further states, that he was informed in the early part of the year 1863, or about that time, that negotiations had been entered into with a view to the purchase of said Dutch Island estate by the government of the United States; that, being at that time at a distance from the state of Rhode Island, and in destitute circumstances, he caused, through his friends in Rhode Island, a remonstrance to be forwarded to the authorities of the United States against the purchase; that at the same time a demand was made upon defendant Carpenter for an adjustment and settlement of defendant's claims on the premises, and a demand upon the assignee to furnish an account of his acts and doings as assignee; that Carpenter made no reply, and a written refusal to furnish any statement to complainant's counsel was received from defendant Robinson. By way of excuse for his long delay to assert his claims, he states, that since the assignment he has been in infirm health, and poor and destitute, and therefore unable to bear the expense of litigation. The complainant alleges that Dutch Island was by deed dated July 1, 1864, but not delivered and recorded until Aug. 6. 1866, finally conveyed to the United States, and that the consideration named therein, the sum of twenty-one thousand dollars, was paid to James H. Carpenter, Aug. 7, 1866. The bill alleges that all debts due from the complainant at the time of the assignment have been satisfied and discharged, and offers to pay and discharge any unsatisfied debts, if any such exist.

The prayer of the bill is for an account from the assignee of the property taken possession of by him under the assignment, and of the disposition of the same, and of the debts paid, compromised, and discharged by him, and a transfer to the complainant of any balance remaining in his hands. It further seeks for a decree that Robinson and Carpenter shall account for the rents and profits of the Dutch Island estate, and for the proceeds of the sale to the United States, and a payment to the complainant of all such profits and proceeds, after deducting the sums paid in discharge and satisfaction of the two mortgages, dated April 1, 1857.

The answers of the defendants deny the collusion and fraud charged in the bill. The defendants allege that the price for which the Dutch Island estate was sold, being the amount of the incumbrances upon it, which, they state, amounted with interest and taxes to five thousand six hundred dollars, exceeded the then value of the estate. Both defendants swear that Carpenter, after the conveyance to him, offered to sell the estate for the same price he had paid for it; to wit, one dollar over and above the incumbrances thereon. They deny that the estate cost the complainant eight thousand dollars, as alleged in the bill, but aver, on the contrary, that he paid for the land the sum of two thousand six hundred dollars, and that the improvements he put upon it were not worth more than two thousand two hundred and fifty dollars. They aver that Robinson made repeated efforts to sell the estate for the largest sum that could be realized for it; that he applied to persons living in the vicinity of the estate, and acquainted with the estate and its value, and could not find any person who would pay anything for the estate above the incumbrances thereon. The answers deny that the complainant made any protest or objection to said sale until the year 1863, at the time of the negotiations for the sale to the United States.

The assignor, by the terms of the deed of assignment, as well as by the rule of law,

being entitled to the residue of the estate after the payment of debts, the complainant is the proper party to come into a court of equity for an account and for relief against any breach of trust on the part of the assignee. After the extinguishment of the debts, the assignor becomes clothed with all the rights and powers of a cestui que trust to the same extent as the creditors before their rights were extinguished. Such a bill in equity in behalf of the assignor against an assignee who had fraudulently and improperly conveyed the trust property to another, not as a means of executing the trust, but as a means of extinguishing the reversionary interest of the assignor, was sustained by Mr. Justice Clifford. In the case of James, Adm'x v. Atlantic De Laine Co. [Case No. 7,177], in the circuit court, Rhode Island district, November term, 1867, not yet reported. Although the objection was made in that case that two debts of the complainant had not been paid, the court replied, that the rights of creditors in such a case would be protected in the decree granting relief. Cases undoubtedly may arise where the fraud of the assignee would operate exclusively to the detriment of the creditors, and where their discharges, given in ignorance of the fraud, would be inoperative. In such cases, the creditors would be necessary parties to the bill. In this case, as the only debts proved to be outstanding and unsettled appear to be due to James H. Carpenter, and he is made a party defendant, there seems to be no objection to the maintenance of this action on the ground of want of parties, as all parties in interest are before the court, and all their rights can, if necessary, be protected in the decree.

The evidence in this case clearly exhibits a want on the part of the assignee of reasonable diligence and prudence in the management of the trust estate. He does not appear to have kept any proper accounts of his doings in the execution of his trust, or to have ever declared or paid any dividend to the creditors otherwise than by compromise of their debts, without regard to their rights to a ratable proportion of the proceeds of the assets. If assignments of the description of this one are to be upheld, the conduct of the assignee in the management of the trust estate should be inspected with the severest scrutiny; and the utmost good faith should be exacted from him, not only in his dealings with the trust estate, but in his communications with the assignor and the creditors. To withhold any information from the creditors or the assignor which is in his possession, and which affects the value of the trust property, is such a fraud as would vitiate any settlement or compromise made by him with the assignor or the creditors, acting in ignorance of facts within the knowledge of their trustee.

The account annexed to the answer of the assignee is not properly stated, and the evidence in the case tends to show that there are many errors and omissions in it which require examination and correction; and there is sufficient evidence of want of reasonable care and diligence in the management of the trust estate to render it evident that there should be a reference of the case to a master, and that the defendant Robinson should be required to account anew before him.

The principal difficulty in the case grows out of the connection of J. H. Carpenter, the defendant, with the purchase from the assignee of the Dutch Island estate. The averment in the bill is, that this conveyance was made without consideration, and was the result of a combination and confederacy between Robinson and Carpenter with the intent to deprive the complainant of any benefit from the estate. Both defendants in their answer specifically deny that there was any collusion or intention to defraud the complainant, and they deny the alleged inadequacy of the consideration paid, averring, on the contrary, that the asignee made repeated efforts to sell the estate, and could not find any one who would pay any thing for it over and above the incumbrances. They aver that the incumbrances on the estate amounted to the sum of $5,600, which was the full value of the estate at the time.

To establish the charge of fraud, and overcome the answers of the defendants, it is manifest that the burden is on the complainant to establish affirmatively beyond question such an inadequacy of consideration as would be of itself an indication of fraud on the part of the assignee.

After the lapse of some years after the sale, the property was again sold to the United States for a site for fortifications, at a vastly enhanced price. But this is no criterion of its value in the market at the time of the conveyance by the assignee. There is no evidence in the case that, at that time, any one contemplated that the property would ever be needed by the government, or available for the purposes to which it was subsequently devoted. The breaking out of a great civil war awakened the government to the defenceless condition of our coasts and harbors; and when this island was selected as a site for one portion of the coast and harbor defences, the owner of it availed himself of the necessities of the case, and the necessity of using this particular site for that special purpose, to extort from the United States a price vastly in excess of any marketable value of the property. The price paid was more than double the value of the property, as estimated according to the opinions of those of the complainant's witnesses who put the highest estimate on its value at the date of the conveyance by the assignee. We must judge the acts and conduct of the parties by the state of things existing and within their knowledge at the time of the transaction in question. The subsequent discovery or development of an element of val-

ue in the property, not within the knowledge or contemplation of either of the parties to a sale, does not afford us any aid in determining the true character of the transaction, when the issue is only one of fair value and adequate consideration, depending upon marketable value at the time.

To show the value of the Dutch Island estate, at the time of the conveyance to Carpenter, the defendant, and for the purpose of proving that the agreed consideration was grossly inadequate, the complainant has introduced the evidence of four witnesses. These witnesses testify that in their opinion the property in the year 1859 was worth $10,000. But this opinion does not seem to be based upon that kind of knowledge which would qualify them to testify as expert witnesses, or give any great probative force to their opinions, if admissible. They are farmers, and competent, perhaps, to express an opinion upon the character of the soil and the productiveness of the land for farming purposes. The first one, Howland, says he has not purchased or sold land in that vicinity for himself or as agent for others. The next witness, Wilbur Hazard, says he does not know the price at which land sold in that vicinity in 1859. Cottrell, the next witness, who knows only of one sale of land in the vicinity, is not interrogated as to the market value of the land, but gives his opinion of its value for agricultural purposes. Jeremiah Hazard, being asked, "Are you familiar with the value of land in the vicinity of Dutch Island, and do you know the price at which land in that neighborhood was sold from 1857 to 1860?" answers as follows: "Somewhat so; I don't recollect the price of any land that was conveyed about that time."

The testimony of all these witnesses was objected to, as being an expression of opinions in a matter upon which they did not appear to be qualified to give an opinion. In the case of Howard v. City of Providence, 6 R. I. 514, a witness, who was a dealer in real estate for himself and others, had been acquainted with the value of real estate in the vicinity, had owned real estate near it, and had bought and acted for others in the sale of real estate in thirty or forty instances, was allowed to give his opinion as an expert as to the value of land, and the damage done to it by the location of a street through it. In New York, the evidence of farmers living in the vicinity, and who state that they are acquainted with the value of farming lands in the vicinity of the land in question, is received as to its value. Van Deusen v. Young, 29 Barb. 9; Robertson v. Knapp, 35 N. Y. 91. In Shaw v. City of Charleston, 2 Gray, 109, the court say, "It has become the well-settled law of this commonwealth, that the value of property, real or personal, when in controversy, may be proved by the testimony of witnesses personally acquainted with the subject, and who are sufficiently familiar with it to give an opinion of its value." In Whitman v. Boston & M. R. R. 7 Allen, 313, 316, the supreme court of Massachusetts, reaffirming the decision in Shaw v. City of Charleston, say, that such evidence is admitted from necessity, and is not confined strictly to experts. Wyman v. Lexington & W. C. R., 13 Metc. [Mass.] 316; Haskins v. Hamilton Ins. Co., 5 Gray, 432; Fowler v. County Commissioners, 6 Allen, 92.

The better opinion, perhaps, would not justify the exclusion of this evidence, but would authorize us to receive it, and give the opinions of the several witnesses only such weight as they are respectively entitled to, when we take into consideration their means of knowledge and their opportunities for forming a correct opinion of the market value of this property, not forgetting that the foundation upon which the admissibility of this evidence rests is some supposed superior knowledge or experience of the witness in relation to the subject-matter upon which he is permitted to give an opinion as evidence.

It does not appear that any one of the complainant's witnesses would have been willing to pay any more for the property than Carpenter paid, or that any other person was willing or desirous to pay a higher price, or that property in the vicinity of like description and value sold at that time in the market for a higher price. A large number of witnesses examined on the part of the defendant, apparently with about equal opportunities of forming a correct opinion of the value of the property at the time of the sale, estimate its value at that time at less than the amount of the incumbrances. They testify that the fact that the land was for sale was generally known, and a matter of common repute in the vicinity.

The charge of fraud as against Carpenter cannot be sustained without establishing the fact of the purchase for an inadequate consideration. His purchase cannot be considered fraudulent as against the creditors, or against the complainant, if he in good faith paid what was at the time a fair value for the property.

Both the defendants were well acquainted with the property and its value; and if the assignee sold it to J. H. Carpenter for a price less than could have been obtained for it from others, the intimate relations of the parties would go far to prove such knowledge on the part of Carpenter, as would charge the estate in his hands, and require him to account for the proceeds. But the burden of proof is on the complainant to establish this fact, by evidence sufficient to overcome the effect of the denials in the answer. This he assumes to do by the evidence of opinions as to the value. But we think, after a careful review of all the testimony in the case, that the preponderance of opinion tends to show that the value at the time of the sale did not exceed the amount of the incumbrances. To hold a party guilty of fraud in the purchase

from a trustee, in the absence of any direct evidence of fraud or collusion, upon an inference drawn from an alleged inadequacy of price, such inadequacy should be proved beyond question.

Bill dismissed as against the defendant Carpenter, and cause referred to a master for an account as against the defendant Robinson.

[NOTE. Mere inadequacy of price may be so great as to be evidence of fraud, but is not in itself a fraud for which a court will pronounce a deed to be absolutely void. Wright v. Stannard, Case No. 18,094. In Follett's Heirs v. Rose, Id. 4,900, it is said that inadequacy of consideration does not invalidate a contract unless it be so gross as to strike every one with a presumption of fraud; and, to the same effect, see Surget v. Byers, Id. 13,629. The supreme court of the United States in Eyre v. Potter, 15 How. (56 U. S.) 42, in passing upon this question, held that, while inadequacy of consideration was not of itself a distinct principle of equity, yet there may be such an unconscionableness or inadequacy in a bargain as to demonstrate such gross imposition, or some undue influence, as will justify the interference of a court of equity, but it must be such as to shock the conscience, and amount in itself to conclusive and decisive evidence of fraud.]

CARPENTER (ROSS v.). See Case No. 12,072.

CARPENTER (TAYLOR v.). See Cases Nos. 13,784 and 13,785.

CARPENTER (TUCKER v.). See Case No. 14,217.

CARPENTER (UNITED STATES v.). See Case No. 14,727.

CARPENTER (WILLIS v.). See Case No. 17,770.

CARPENTIER (COURTOIS v.). See Case No. 3,286.

CARPENTIER (UNITED STATES v.). See Case No. 14,728.

Case No. 2,432.

In re CARR.

[3 Sawy. 316;[1] 21 Int. Rev. Rec. 30.]

District Court, D. Oregon. March 27, 1875.

ALASKA, INDIAN COUNTRY — SECTION 23 OF THE ACT OF 1834 IN FORCE IN ALASKA — DETENTION OF PERSON ARRESTED IN INDIAN COUNTRY BY MILITARY AUTHORITY — ARREST BY MILITARY AUTHORITIES NOT AUTHORIZED EXCEPT UPON PROBABLE CAUSE.

1. Upon the extension of sections 20 and 21 of the Indian intercourse act of 1834 [4 Stat. 732] over the territory of Alaska by force of the act of March 3, 1873 [17 Stat. 530], said territory became, so far as the introduction and disposition of spirituous liquors therein is concerned, what is known in the law as "Indian Country," and, therefore, the military force of the United States may be employed therein for the arrest of persons who violate either of said sections.

[Cited in Waters v. Campbell, Case No. 17,264; Kie v. U. S., 27 Fed. 352.]

[See U. S. v. Stephens, 12 Fed. 52.]

2. Section 23 of said Indian intercourse act which authorizes the president to employ the military force of the United States to make arrests in the Indian country, was in force in Alaska so far as the introduction and disposition of spirituous liquors therein is concerned, from and after the extension of said sections 20 and 21 of said act over said territory.

3. No person arrested by the military authority in the Indian country for the introduction or disposition of spirituous liquors therein, contrary to law, can be lawfully detained by such authorities more than five days after such arrest before removing him for delivery to the civil authorities for trial.

[See Waters v. Campbell, Case No. 17,265.]

4. A military officer in making an arrest under said section 23 acts as an officer of the civil law, and to justify such arrest it must appear upon oath that there is probable cause, as provided in the fourth amendment to the constitution of the United States.

[Habeas corpus. Petition by John A. Carr for a writ of habeas corpus to inquire into the cause of his detention by the military authorities of the United States. The petitioner demurred to the return.]

Joseph N. Dolph and Joseph Simon, for petitioner.

Rufus Mallory, for respondent.

DEADY, District Judge. Two questions are made in support of the demurrer to the return: 1. That section 23 of the Indian intercourse act of 1834 has not been extended to Alaska, and therefore the military force cannot be employed in the apprehension of persons who may be found introducing spirituous liquors into Alaska; and, 2. That although the military force might have been employed in arresting the petitioner upon such charge, yet he could only be held in such custody five days before removal to the civil authority authorized to proceed against him according to law.

It appears from the petition and return that the petitioner, being the collector of customs at Fort Wrangel, in Alaska, was arrested by Lieutenant Dyer, of the army, in the latter part of September, 1874, upon the charge of violating section 20 of the Indian intercourse act, by introducing spirituous liquors into the country, in the month of July, without the consent of the war department; and that the petitioner was kept in custody by direction of Captain J. B. Campbell, commanding the district of Alaska, until the service of the writ herein on December 19, when he was sent in custody of Captain Jocelyn to this place, in obedience to the writ.

Section 1 of the Alaska act of July 27, 1868 (15 Stat. 240), having been amended by the act of March 3, 1873 (17 Stat. 530), so as to extend over the territory of Alaska, sections 20 and 21 of the intercourse act of 1834, said territory, so far as the introduction and disposition of spirituous liquors is concerned, became what is known as "Indian Country;" and the military force of the United States may be employed by the president for the arrest of persons found therein violating either

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

of said sections. To accomplish this result it was not necessary for congress to extend section 23 of the intercourse act by name over Alaska. By force of its own terms that section applies to any territory of the United States declared by congress, either in terms or effect, to be "Indian Country"—that is, a country in which the intercourse between the whites and Indians is regulated and restrained by special acts of congress. So soon, then, as Alaska was made "Indian Country," so far as the introduction and use of spirituous liquors is concerned, section 23 of the act which authorizes the employment of military force became applicable to it, and in force therein.

The president, by means of the proper officers, has authorized the employment of the military to make arrests in Alaska for the violation of said sections 20 and 21. If, then, there was sufficient cause to arrest the petitioner for said offense, Lieutenant Dyer was authorized to make it. Of course in so doing he was merely acting as a police officer—as a marshal or constable—for the purpose of enforcing an act of congress, and was not authorized to make the arrest unless it appeared upon oath or affirmation that there was probable cause as provided in the fourth amendment to the constitution of the United States. It is a mistake to suppose that the territory of Alaska is under military rule any more than any other part of the country, except as to the introduction of spirituous liquors and the making of arrests for violations of sections 20 and 21 aforesaid, in which case the military really act as civil officers and in subordination to the civil law.

As to the second point the demurrer is well taken. The petitioner having been detained over five days—indeed, nearly ninety—before any attempt was made to remove him for trial by the civil authorities, his detention thereafter became unlawful and unauthorized. The statute is peremptory upon the subject, and with good reason—"Provided, That no person, apprehended by military force as aforesaid, shall be detained longer than five days after the arrest and before the removal." If the removal cannot be commenced in that time the prisoner must be discharged. It was supposed by congress, as this proviso manifests, that these arrests would often be made at remote and out of the way places, where the prisoner would be comparatively helpless, without access to counsel or friends, and if the officer whose custody he was in was to be judge of when he would or conveniently could remove him to the civil authorities for trial, it might sometimes happen that the detention would be continued captiously or maliciously and the imprisonment become grossly oppressive. In Barclay v. Goodale [Case No. 972], this court, after able argument and full consideration of the premises, held that the defendant who had arrested the plaintiff under section 23 and detained him more than five days before removal, because he had no sufficient means wherewith to do otherwise, was liable for false imprisonment.

The petitioner is entitled to be discharged. I have also considered whether, upon the facts in the return, I ought now to commit the petitioner upon a charge of introducing spirituous liquors into Alaska, contrary to section 20 aforesaid. It is not alleged directly in the return that the petitioner was guilty of this offense, but only that he "was arrested for it." The evidence upon which the arrest was made is not stated in or attached to the return. I do not think the statement in the return is sufficient evidence or information to authorize a commitment by me.

The respondent then had leave to amend the return, and annex thereto, among other things, the affidavit of W. P. Wilson, taken before Lieutenant Dyer, on September 24, 1874, stating that in July he paid John A. Carr $100 for the privilege of taking a lot of liquors out of the bonded warehouse at Fort Wrangel to be taken to his own house in Wrangel, while at the same time said Carr made out a clearance of the goods to Glencora landing, British Columbia.

Objection is made that this affidavit was not made before an officer authorized to administer oaths. But it appears to have been duly taken in pursuance of paragraph 1031 of the army regulations of 1861, and upon it I will commit the petitioner to answer the charge, and fix his bail at $2,500.

Case No. 2,433.

CARR v. GALE et al.

[1 Curt. 384.][1]

Circuit Court, D. Maine. September Term, 1853.

NEW TRIAL—SURPRISE—ADDITIONAL EVIDENCE—IMPEACHING WITNESS.

1. If a party who is surprised at the trial, allows it to proceed, without making his surprise known and applying for delay, and the verdict is against him, he cannot have a new trial by reason of that surprise.

2. A new trial will not be granted because a witness, who gave a loose estimate of an amount at the trial, has since become satisfied his estimate was too large:

Nor to contradict a witness, as to a fact of no considerable importance, by negative evidence, given nearly ten years after the event testified to:

Nor to impeach a witness, or disprove a statement which did not materially affect the legal aspect of the case.

[Cited in Vose v. Mayo, Case No. 17,009.]

[At law. Action of trover by Joshua W. Carr, assignee in bankruptcy of Samuel C. Hemmenway, against Samuel C. Hemmenway, Stephen Gale, and others. There was a verdict for plaintiff, and defendants moved for a new trial.

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

[For denial of a like motion, based on other grounds, see Cases Nos. 2,444 and 2,445.]

CURTIS, Circuit Justice. This was a motion for a new trial, on account of newly-discovered evidence. A motion, grounded on other causes, was argued before the late Mr. Justice Woodbury and the Honorable Ashur Ware, District Judge, at a former term, and is reported in 3 Woodb. & M. 38 [Case No. 2,435]. That motion was overruled; but the cause assigned in this motion was not then considered, the evidence on which it rested not having been at that time taken in such a form as to be admissible. Owing to the sickness of counsel, and other causes, the motion has lain on file, and was not called up until the present term. The facts and evidence, as they appeared at the trial, are detailed in the report of the case in 3 Woodb. & M. 38 [Case No. 2,435]. Among the witnesses examined at the trial, was Joseph Bryant; and a large part of the newly-discovered evidence relates to testimony given by him. At the trial, he testified, that in 1836, he was one of the assignees of S. C. Hemmenway; and that the latter, after the assignment, in connection with his mother, abstracted some of the goods from the store, and collected some of the assigned debts, first making such entries in the ledger as would induce the assignees to believe the accounts were balanced before the assignment was made.

In cross-examination by the counsel for the defendants, who now move for a new trial, he said the amount of the goods so abstracted was somewhere between $500 and $1,000. The defendants now produce his deposition, in which he says that he did not undertake to state the amount with any precision at the time; that, being much pressed on cross-examination, to fix on some amount, he mentioned the above sums as being in his opinion correct; that he is now satisfied, from an examination of two schedules, and from other circumstances, that he fixed the sum much too high; but the schedules do not give any decisive information, nor can he now fix, with precision, upon the amount. It should be stated, that the evidence of this witness at the trial was material, only as tending with other evidence, to show that Hemmenway was not destitute of property, at the time when he took the benefit of the bankrupt act. In our judgment, this evidence, if it could properly be treated as newly-discovered, and were not open to objection on account of want of due diligence, would fall far short of being sufficient cause for a new trial. The testimony now is, that Hemmenway and his mother did abstract some goods. This general fact was all that the plaintiff gave in evidence by Bryant at the trial. The defendants, instead of leaving the statement thus general, called upon him for sums and particulars. He says he undertook to give nothing but a loose opinion as to the amount, and this may fairly be inferred where he does not appear, by the report, to have said more than "somewhere from $500 to $1,000." He has now modified that opinion. It would be exceedingly dangerous to allow such changes of mere loose estimates, brought out on cross-examinations, to lay a foundation for a new trial. Besides, it does not appear that all the information, which has caused this change of opinion in the mind of the witness, was not then in his own possession, and might not have been evoked at the trial, by proper inquiries as to the elements or data for the opinion expressed by him.

It is urged by the defendants' counsel, that their clients, not having anticipated this charge of abstracting goods, had not instructed them so as to enable them properly to investigate it. This may be true. But when they found the charge was made, and that they were not in a condition to meet it, a suggestion of surprise, backed by proper evidence of the truth of the suggestion, would have obtained delay for all needful preparation. A party cannot be allowed to wait and take his chance of a verdict in his favor, and, when it is against him, allege surprise. It is then too late. I am aware that a different rule has been held in some courts. But the reason is, that by their practice, the remedy could not be had by delaying the trial. In this court, such delay is granted; and the proper remedy here, is to apply for it, and not to wait till after verdict, and then move for a new trial.

Two depositions of the co-assignees of Bryant are also produced, which tend, in some degree, to negative altogether the charge that Hemmenway abstracted any goods, and to show, that though some were taken by his mother, they were all paid for ultimately by her, out of her dividends, under the assignment. But the defendant Hemmenway knew, at the trial, that both these persons were co-assignees with Bryant; that, from their position as such, they would be likely to have information on this subject; and if he believed himself innocent of the charge, and had not then made inquiries of them concerning their knowledge, he had sufficient reason to think they might be able to give evidence concerning it. And it cannot be considered as the use of due diligence, to suffer the trial to proceed, and after a verdict against him, proceed to make the inquiries which he might and ought to have made before. It may be added, that this evidence would be cumulative merely, if produced, and therefore, its discovery is not ground for a new trial.

The defendants have also offered two affidavits of Martin Bates and Thomas P. Cushing, two of the committee of the creditors of Hemmenway, to disprove the statement of Bryant, that he disclosed to the committee the fact that Hemmenway abstracted goods. If the object of this evidence is, as is suppos-

ed, to impeach the credibility of Bryant's evidence, it is doubtful, to say the least, whether it is entitled to this effect; because, although according to the report of the case, Bryant does speak generally of the committee, yet Mr. Tappan was a member of the committee, whose testimony is not produced: and the witness may have considered communications made to him, and designed for the committee, as made to all of them. But independent of this consideration, we could not grant a new trial merely on account of the contradiction of a witness, otherwise credible, upon a circumstance of very slight importance in the cause, and especially when that contradiction is by affidavits, taken in his absence. If he had been present, he might have reminded the witnesses of circumstances which would have shown them and not him, to be mistaken as to a fact which he testifies to positively, while they only speak negatively, and in the hurry of business may have forgotten, after the lapse of nearly ten years which intervened, in this case, between the event and their testimony.

We have thus examined, in some detail, the evidence relied on; but we do not think it strictly necessary to have done so, because there is a more general consideration, which would be decisive against granting a new trial; and that is, that if the testimony of Bryant were stricken out of the case, it would not materially vary its legal aspect, under the instructions given to the jury, the correctness of which is not in question. There were, in substance, two inquiries to be made by the jury. The first was, whether Hemmenway had carried on business under cover of Gale's name, but really on his own account, for the purpose of concealing his property from his creditors. None of the newly-discovered evidence bears on this question.

The other question was, whether the property, which was the subject of the suit, was property thus concealed. Upon this question, it was not necessary for the plaintiff to show that every part of it was bought by funds which could be traced as the property of Hemmenway. If the jury were satisfied that, by concert between Gale and Hemmenway, the latter did carry on business in the name of the former, but really on his own account, and that this pretended arrange was made to conceal Hemmenway's property, and that the goods in question were the stock of that trade, they had a right to infer that funds and profits of Hemmenway were invested in those goods; and if some were purchased on the credit of Gale, that the credit was, as between him and Hemmenway, for the sole benefit of the latter, and that, by force of the agreement between them, the goods, when purchased, were really Hemmenway's goods. In this point of view, it was of but slight importance in the cause, whether, at a certain time, and from a certain source, Hemmenway had $500, or only a less sum; and therefore it is, that, under no aspect of this evidence, do we deem it to be such as to justify the court in setting aside the verdict.

We have not observed particularly on the affidavit of Sylvester, respecting the $4,000 of assigned accounts said to have been collected by Hemmenway, because it was, very properly, admitted by the defendants' counsel at the argument, that the facts disclosed in this affidavit were within reach at the time of the trial, or might speedily have been obtained. This is manifestly so; for, so far as the affidavit states facts, they are drawn from the books of Hemmenway, which were in his possession; and whatever they contained, upon this subject, was within his personal knowledge. The motion for a new trial must be overruled, and judgment rendered on the verdict.

Case No. 2,434.

CARR v. GALE et al.

[2 Ware (Dav. 328) 330.] [1]

Circuit Court, D. Maine. Oct., 1847.

BANKRUPTCY — ACTION BY ASSIGNEE — PROOF OF TITLE—JURISDICTION OF CIRCUIT COURT — TROVER — DEMAND — POINTING OUT OBJECTION TO TESTIMONY—PROOF OF FRAUD.

1. In an action of trover against Gale and Hemenway, by the assignee of Hemenway, for the conversion of a store of goods in the possession of Hemenway, claimed by Gale as owner, and by Hemenway as the agent of Gale, and claimed by the plaintiff as part of the assets of Hemenway's bankruptcy, it was held that the circuit court had jurisdiction against Hemenway as well as Gale.

2. The district court has, under the bankrupt law [5 Stat. 445], exclusive jurisdiction of all controversies, between the assignee and the bankrupt, arising out of his bankruptcy, and depending on his quality or status, and involving his rights and immunities as a bankrupt.

3. But when the bankrupt has possession of property claimed by the assignee as part of the assets of the bankruptcy, and the bankrupt claims to hold them, not as a bankrupt but under an independent title as the agent of a third person, he is simply a person claiming an adverse interest, and the circuit court has jurisdiction.

4. The assignee, to maintain his title to sue, need prove only the decree of bankruptcy and his appointment. This is prima facie evidence of his title under the law, without producing the bankrupt's petition to be declared a bankrupt.

5. In trover, it is not necessary to prove a demand of the goods and a refusal, where there has been an actual conversion.

6. When a party objects to the testimony of a witness, part of which is admissible and part inadmissible, he is bound to point out that part to which the objection lies, or the objection will be overruled as covering too much.

7. In a case where fraud is charged, and the fraud is attempted to be proved by circumstantial evidence, facts which have no tendency to prove the frauds charged, but merely tend to create a personal prejudice against the party, are inadmissible; but if the court can see that they have any tendency to prove the fraud,

[1] [Reported by Edward H. Daveiss, Esq.]

though it be but slight, they are admissible to be submitted to the jury, who are the proper judges of their weight.

At law. This was an action of trover brought by [Joshua W.] Carr as assignee of Samuel C. Hemenway, one of the defendants, against Stephen Gale and Hemenway, for the conversion of a store of goods in Bangor. The plaintiff claimed them as part of the estate of Hemenway, which should have been surrendered to him as his assignee. The defendants claimed them as the proper goods of Gale, in the possession of Hemenway as his agent. The defendants pleaded separately the general issue, and the jury returned a verdict for the plaintiff for $5,030.45. The defendants filed a motion for setting aside the verdict, and for a new trial.

[See decision of Woodbury, Circuit Justice (Case No. 2,435), which apparently was rendered upon the same motion.]

Deblois & McCrillis, for plaintiff.
Daveis v. Rowe, for defendants.

WARE, District Judge. The first question raised by the defendants' counsel is one as to the jurisdiction of the court. It is denied that this court has jurisdiction over the case, at least as to one of the defendants, Hemenway, and that if any action can be maintained against him, this can be only in the district court. The 6th section of the bankrupt law [5 Stat. 445] gives to the district court jurisdiction over all matters and proceedings in bankruptcy in the most comprehensive terms, and this jurisdiction is declared to extend in all cases and controversies arising between the bankrupt and any creditor or creditors claiming any debt or demand under the bankruptcy, to all cases between such creditor or creditors and the assignee of the estate, and to all cases between such assignee and the bankrupt. By the 8th section, concurrent jurisdiction is given to the circuit court, with the district court, of all suits at law and in equity, which may or shall be brought by any assignee of the bankrupt against any person or persons, claiming an adverse interest, or by such person or persons against the assignee, touching any property or rights of property of said bankrupt transferable to, or vested in, the assignee. The jurisdiction of the court is then free from doubt as to Gale, as he appears claiming an adverse interest. But in carving out a portion of the jurisdiction of the district court to be exercised by the circuit concurrently with the district court, the act omits controversies between the assignee and the bankrupt, and it is therefore said that Hemenway is not bound to answer in this court. It may be admitted that the circuit court has no jurisdiction over controversies between the assignee and the bankrupt, arising out of his quality or status as a bankrupt, and dependent on that. For instance, by the 3d section of the law, all the property and rights of property of the bankrupt are, by virtue of the decree of bankruptcy, declared to be, by mere operation of law, transferred to and vested in the assignee, subject to certain exceptions. The proviso enumerates these exceptions. They are—the wearing apparel of the bankrupt and his family, and such household furniture and other necessary articles as shall be set apart for his use by the assignee subject to the decision of the court. These do not pass to the assignee. A question may arise whether a watch, or articles of personal ornament, for himself, or his wife, or children, fall within the exceptions, as wearing apparel, or other necessary articles. In re Grant [Case No. 5,693]. This would be a matter arising out of the bankruptcy, and involving his rights as a bankrupt under the bankruptcy, and if a controversy arose on the subject, would seem to be exclusively within the jurisdiction of the district court. Again, a bankrupt may acquire property after he has filed his petition, and before a decree of bankruptcy, or before his discharge, by his own industry, or by contract, inheritance, devise, or gift. And a question will arise between the bankrupt and his assignee, whether this passes to the assignee as part of the assets of the bankruptcy, or is an acquisition for the benefit of the bankrupt himself. The solution of this question involves the consideration of his rights and immunities as a bankrupt. In re Williams [Case No. 17,701]. The clause in the 6th section of the law, giving jurisdiction to the district court over cases and controversies between the assignee and the bankrupt, naturally refers to cases of this description, involving the consideration of his personal status and the rights which he may claim in his quality as a bankrupt; and as no similar language is used in the 8th section, it may be that the jurisdiction over this class of cases is exclusive. But in the present suit, Hemenway sets up no claim as a bankrupt; he insists on no right in relation to this property derived from his bankruptcy, or any way connected with it. The goods which he is charged with converting are indeed claimed by his assignee as part of his assets, but he makes no claim to them as such. His defense is that the goods were never his, but belonged to Gale, and were in his possession as the agent of Gale; and the suit is not against him as a bankrupt, but simply as a wrong-doer. I cannot see that he is any more exempted from the jurisdiction of this court than he would be if the property, the conversion of which he is charged with, had belonged to another estate. In this case he is simply a person claiming an interest adverse to the assignee.

Another ground, on which a new trial is demanded, is that the plaintiff has shown no title to claim the property, admitting that the goods belonged to Hemenway before his bankruptcy, and so constituted a part of his

assets. The plaintiff, to prove his title, offered in evidence the decree of bankruptcy and his appointment as assignee, but this, it said, is insufficient without offering the petition also. The ground of this objection is, that the district court, sitting in bankruptcy, is a court of limited and special jurisdiction, and that, as such, no presumption can be made in favor of its jurisdiction, but that this must be made to appear affirmatively by spreading before this court the whole proceedings. The decisions under the English bankrupt law and those of our own courts under the former bankrupt law, have been referred to in support of this position. The former bankrupt law was borrowed, with some alterations, from the English system (Lummus v. Fairfield, 5 Mass. 249, 250), and was widely different from the last law. It was far more complicated in its details, and operose in its modes of proceeding. Under the English system, it is necessary for the assignee to prove—1st, the commission,—2d, the petitioning creditor's debt,—3d, the trading,—4th, the act of bankruptcy,—and 5th, the assignment. Eden, Bankr. Law, 252. The 3d section of the late act seems to have been framed with a view to supersede the necessity of proving such facts. It provides that all the property and rights of property of the bankrupt, who has been declared such by a decree of the proper court, shall, by mere operation of law, from the time of such decree, be deemed to be divested out of such bankrupt and without any conveyance shall, by force of the decree, be vested in such assignee as the court shall appoint. It appears to me, from the plain words of this section, that all which is necessary for the assignee to show in the first instance, is the decree and his appointment under it. It obviously was the intention of the statute to simplify the proceedings and dispense with the cumbrous machinery of the former law. The analogies, therefore, derived from the practice under that law, apply with less force. That dispensed, in favor of the assignee, with two of the requisites of the English law, that is, proof of the trading and the act of bankruptcy, which were held to be conclusively proved by the commission. Laws U. S. 1800, c. 19, § 56. The policy of the late act was to render the proceedings still more simple, expeditious, and cheap. The assets, instead of coming to the assignee through a conveyance by commissioners, passed directly, without any form of conveyance, by operation of law. Under the voluntary branch of our law, no one of the five things required to be proved by the English law can be properly said to exist, or at least no one is essential to the proceedings. No commission of bankruptcy is issued; there is no petitioning creditor, and under the English law his petition need not be proved; no trading is necessary, and no act of bankruptcy is required, and no assignment is made. The title deed of the assignee is the decree, and it appears to me that the statute makes this prima facie evidence of the assignee's right to the property. If this title may be impeached for any irregularities in the antecedent proceedings, the burden of impeaching is thrown on the other party.

Another objection to the verdict is, that there was no evidence sufficient to support the action, there having been no proof of a demand of the goods and a refusal to deliver them, before the action was brought. The action is trover, an action of tort, but the tort consists not in the taking but the conversion. If there was an unlawful taking, this was waived by the form of the action, and the defendant is admitted to have obtained the possession lawfully, that is, by finding. A conversion must therefore be proved. If the defendant has done nothing with the goods beyond what he might do as finder, this action cannot be maintained until there has been a demand by the owner and a refusal to deliver them. A refusal is then ordinarily held to be equivalent to a conversion, because it ordinarily amounts to a denial of the owner's right. But if the refusal is justified, or excused, by any reasonable or just cause, as if it be on a fair doubt whether the person who makes the demand be the true owner, the refusal will not be equivalent to a conversion, provided the party acts in good faith, and does not intend to make any appropriation of the goods to the injury of the real owner. 1 Archb. N. P. p. 458; 2 Greenl. Ev. §§ 644, 645, and the cases cited. A demand and refusal is only one mode of proving a conversion. But a sale is a conversion, as much as an actual consumption of the goods would be. Featherstonhaugh v. Johnston, 8 Taunt. 237. A demand, then, would have been a useless and unmeaning formality.

Another reason urged for a new trial is, that certain parts of the evidence offered by the plaintiff were irrelevant and improper to be submitted to the jury. This objection relates principally to the deposition of Sylvester and the testimony of Bryant. To understand the bearing and applicability of this evidence, it will be necessary to advert to some antecedent facts. In 1836, Hemenway failed in trade and transferred a large amount of property, being his whole stock in trade, to assignees, for the benefit of such of his creditors as should become parties to the assignment and release him from his debt. Some of his creditors refused to come in under the assignment, so that, after the distribution of the estate, there remained a considerable amount of outstanding claims against him. Hemenway then left Bangor and was absent a considerable time, and returned in 1838, when he again went into business as the agent of Gale, his brother-in-law, residing in Portland. While thus engaged in business, one of his old creditors sued him and summoned Gale as his trustee. Gale was discharged on his disclosure, a

copy of which was offered in evidence in this case by the plaintiff. The ground assumed by the plaintiff was, that all this time, from 1838 to 1842, Hemenway was trading on his own capital, was in fact the owner of the goods, and that the title of attorney of Gale was a mere cover, he having no interest in the store. As proof of the good faith of the parties and that the property was in fact Gale's, evidence was offered by the defendants tending to show that Hemenway was poor and utterly destitute of property. The testimony offered by the plaintiff was to show that Hemenway had property of his own, and to overcome the presumption of good faith arising from his apparent poverty. Sylvester testified that he paid Hemenway a bill after he made his assignment, and that Hemenway stated to him that he had drawn off bills to the amount of $4,000, and balanced the accounts in his books before delivering them to his assignees, which were then due and unpaid. Bryant testified that after the books came into his hands, as one of the assignees, several persons called on him and stated that they were indebted to the estate, but that on turning to the ledger he found the accounts balanced. He also testified that after the keys to the store were delivered to him a considerable amount of goods was abstracted from the store, and that Hemenway was concerned in taking them away. From this evidence, the counsel for the plaintiff argued that Hemenway had reserved to himself, from the wreck of his fortune in 1836, a considerable sum, and that it was with this capital that he commenced business in 1838. Connecting this with the disclosure of Gale, who said that he had no interest in the store, and the further fact that, though a large business was carried on under Gale's name, he gave no attention to it, and never visited Bangor from 1838 to 1842, the plaintiff's counsel contended that the title of attorney was a mere blind to enable Hemenway, under Gale's name, to resume business for himself and set his creditors at defiance. There was other evidence besides this, from which the jury might infer that Hemenway had an interest in the store beyond that of a mere agency. If any credit was due to this evidence tending to show that he had an interest in the goods, it could not be considered immaterial to show that Hemenway had property of his own. Whether he had or had not, was a fact to be inferred altogether from circumstantial evidence. Now it is evident that circumstances of this kind may be made to bear with more or less force, according to their connection with other facts admitted or proved in the case. How far they contributed to sustain the plaintiff's case was a question for the consideration of the jury. The question now is whether the jury ought to be allowed to hear such evidence; that is, whether it had any tendency to prove the plaintiff's case. The plaintiff's case stood on the charge of a fraudulent covering of Hemenway's property to screen it from his creditors. Unless this was made out, he failed. It was, therefore, very material to show that he had property to conceal. The evidence in question went to prove this fact, by showing that he had fraudulently abstracted a portion of his assets on the occasion of a former failure in business; and that at a period not so distant but that he might reasonably be supposed to have retained a portion to recommence business in 1838. It was not, therefore, evidence that went merely to create in the minds of the jury a personal prejudice against him, but to a certain extent tended to sustain a material point in the plaintiff's case. It appears to me, therefore, that it was evidence proper to be submitted to the jury. It is said that this matter had before been submitted to arbitration, and it was contended that it was not now open to be re-examined. But that was between Hemenway and the parties to the assignment. The present plaintiff, and the creditors whom he represents, were no parties to that arbitration, and the decision of the arbiter is not binding on them. It is true that fraud is not to be presumed, but it is also true that it may be inferred from circumstances, and often can be proved in no other way.

Another objection was made to a part of the testimony of Bryant. In answer to a question of the plaintiff's counsel he stated, that several persons called on him and said that they were indebted to the store, but on turning to the books he found the accounts balanced. The defendants objected to this testimony without the production of the books. But Bryant did not testify here to the contents of the books. He was not asked who called on him, nor how many, nor what was the amount of the accounts so balanced. The fact, to which he testified, was not one which appeared in the books, but was collateral to them. It was simply that persons called on him and stated that they were indebted to the store, but when he looked into the books he found the accounts balanced. The production of the books could neither confirm nor disprove the statement of the witness. All that they would have shown was, that there were some accounts which were balanced and others which were not; but the material fact, whether there were any persons who called on him as he stated, was a fact known only to the witness himself. There is, however, one fact stated by Bryant, which, perhaps, in strictness, was not admissible without the production of the books. It is that when persons called on him and said that they were indebted to the store he looked at the ledger and found the account balanced, but that in examining the day-book he found no corresponding entries in that. No names of individuals were given and no sums mentioned, but the naked fact alone was stated. Now an inspection of the

books might have verified or disproved the fact, and for this purpose perhaps they ought to have been produced. But when the objection was made, this distinction was not noticed. The objection was general and in my opinion covered too much, and so it was properly overruled. The party objecting to the testimony of a witness, part of whose testimony is admissible and part of which is inadmissible, is bound to point out and discriminate the part to which the objection applies. If, however, the discrimination is not made, and objectionable testimony is permitted to go to the jury, the court may undoubtedly in its discretion grant a new trial for this cause. But it ought not to do it, when the testimony is of such a character as probably would not and ought not to have changed the verdict. And such I think this testimony to have been in this case.

The defendants offered the schedule annexed to Hemenway's petition in bankruptcy, to prove the property in Gale. This was objected to and ruled to be inadmissible. The defendants contend that it ought to have been admitted. It is generally true, that, in an action by the assignee, the bankrupt is a competent witness to diminish but not to increase the fund. Eden, Bankr. Law. pp. 361, 366. His interest in the surplus is an obvious reason for excluding his testimony when it goes to increase the fund, but when it goes to diminish it, he is testifying against his own interest. But the evidence here offered was the mere declaration of the bankrupt, under oath it is true, but still only his declaration, without any opportunity of the present plaintiff to cross examine him. And here the bankrupt is a party and of course he cannot give in evidence his own declaration in his own favor. But it is said that it ought to have been admitted in favor of Gale. To determine this, let us look at the posture of the case. The plaintiff proceeds on the ground that there was a fraudulent agreement between the parties to cover the property of Hemenway and keep it from his creditors under the name of Gale. And this evidence is nothing more than the declaration of one of the parties to disprove the fraud. It appears to me on this ground that it is inadmissible.

There was other testimony admitted which was objected to, as irrelevant and as having a tendency to create a prejudice against the defendants. This related to the mode of conducting the business in the store, and the contemporaneous declaration of Hemenway after the sale by Gale to Hersey. Hersey was a connection by marriage both of Hemenway and Gale, they each having married a sister of his, and he had for several months prior to the sale been employed as a clerk in the store. This testimony tended to show that Hemenway claimed and exercised the same control over the business after the sale, when, if it had been in fact what it purported to be, he was a mere clerk in the store, that he had done when carrying on the business as the agent of Gale. Now, the question at issue between the parties was whether, at the time of the sale to Hersey, the property was in Hemenway or Gale. The ground, on which the admission of this testimony was claimed, was that if it satisfied the jury that Hemenway had an interest, that is, was the owner of the goods after the sale, it threw back its light and tended to illustrate the antecedent state of things. Whether it was legally admissible for that purpose is now the question. It appeared to me that it was. In a case where fraud is charged, and the charge is to be made out by circumstantial evidence, it is not easy to draw the precise line separating those circumstances which are fairly admissible to prove the fraud from those which ought to be excluded. Evidence which has no connection with the matters in issue, but merely tending to create a personal prejudice against one of the parties, certainly should be excluded. But if it have a connection, how near that must be to render it admissible, or how remote to exclude it, is not easy to determine by any universal and exact definition. The acts of the parties near the time when the fraud is alleged to have been committed, and connected with it, seem to be properly admissible. The evidence in question was of this description. The jury might infer from it that Hersey, the apparent owner, was not the real owner; that though he was clothed with the ordinary indicia of ownership, this was but a disguise to conceal the real ownership of Hemenway. Now, as the great question is whether the goods belonged to Hemenway before the sale, if it be shown by probable evidence that they belonged to him after, and notwithstanding the sale, this is a fact that would tend, connected with other circumstances, to satisfy the mind that they were his before; and that this sale was but a continuation of that system of disguised ownership which was alleged to exist from 1838 to the time of the sale. It appeared to me at the trial that it was evidence competent to be given and not wholly irrelevant, and how far it tended to support the plaintiff's case was for the consideration of the jury.

Another decision of the court, to which exception is taken, involves rather a rule of practice than strictly of law. Hersey, the purchaser from Gale, was called as a witness by the plaintiff to prove the bill of sale, and nothing further. The defendants then claimed the right to cross-examine him to the whole cause. This was objected to by the plaintiff. It was ruled by the court that the cross-examination must be confined to the subject-matters inquired of in the direct examination; that, if the defendants wanted him as a witness, they must call him after they had opened their case to the jury, and examine him as their own witness. Subsequently he was called by the defendants and examined. The practice of courts in this respect is not

uniform. The rule in the English courts is, that if a witness is called and sworn, though he is asked but a single question, the other party has a right to cross-examine him to the whole case as a witness of the adverse party. 1 Greenl. Ev. § 445. And the same practice prevails in some of the courts in this country. In this court the rule has been different. It has been repeatedly laid down by the late Justice Story, in the terms in which the court ruled in the present case, and by the decision in Philadelphia & Trenton Railroad Co. v. Stimpson, 14 Pet. [39 U. S.] 448, it is established as a rule of practice in the courts of the United States.

After the evidence was closed, and the arguments of counsel, the counsel for the defendants asked the court to instruct the jury that the plaintiff could not maintain the action because there was no evidence of a conversion by either of the defendants. The court declined to give that instruction, but instructed the jury that if they were satisfied from the evidence that in 1838, when the letter of attorney was given by Gale to Hemenway, it was given for the purpose of enabling Hemenway to do business on his own capital and for his own benefit, and was so used, the property being in fact and in truth in Hemenway, then, by force of the statute, the property became vested in the assignee of Hemenway, and that the sale by Gale under color of this disguised title was evidence of a conversion by Gale. And secondly, that if the sale was made by an arrangement and contrivance, between Hemenway and Gale, to place the property still further beyond the reach of the assignee, it was evidence of a conversion both by Gale and Hemenway. Under these instructions the jury found a verdict for the plaintiff. It is quite certain that the court could not give the direction asked by the defendants, because, if the jury found that the property was in Hemenway, the sale was a conversion. To maintain the action of trover, the plaintiff must prove property and the right of possession. It is not necessary to prove that he has had the actual possession and that it has been disturbed by the defendant. An executor, who has never had the possession of the goods, may maintain trover for a previous conversion of the goods of his testator. 2 Greenl. Ev. § 461.

The last ground, on which the defendants asked for a new trial, is that the verdict is against the weight of evidence. There was evidence on both sides, and it was the province of the jury to determine on which side the balance inclined. By the theory of the common law, they are the exclusive judges of the weight of evidence. But it is also true when the court is satisfied that the jury, from any cause, have fallen into an error and decided against the clear preponderance of the evidence, the verdict will be set aside and the case sent to another jury. If, however, there is contradictory evidence, and the conclusion is dependent on the degree of credit given to the witnesses, or if the facts proved, or admitted, are such that different conclusions may be inferred from them, the court will not disturb the verdict, unless the jury have decided against the clear preponderance of the evidence. In this case there was but little if any conflict in the testimony, that is, the facts, proved by the testimony on one side, were not impugned by contradictory testimony on the other so as to bring them into doubt. The conflict was in the facts themselves. There is one series of facts proved by the defendants which, standing alone, lead directly, if not irresistibly, to one conclusion, but there is another series, part of which are equally well proved and which, if not controlled by any facts tending to a different conclusion, would lead directly to the opposite decision. When the verdict is to be deduced from opposite and conflicting analogies, it belongs exclusively to the jury to determine the force and value of these analogies. All that the court can do is to assist their judgment, by general observations on the nature of the evidence. It is not pretended that there were any such remarks in this case as had a tendency to preoccupy the minds of the jury by any notions adverse to the defendants. It would seem that they were rather of an opposite tendency, for one of the reasons urged for a new trial is that the verdict is against the opinion of the court. But the court has no authority to substitute its own judgment for that of the jury, when they have deliberately considered and decided the case. It is only when they have, from wantonness, or caprice, or negligence and inattention, rendered a verdict palpably erroneous, that the court will interfere. And the court will sometimes infer this want of due attention on the part of the jury, when the verdict is clearly against the weight of evidence. But to do this, when the evidence is nearly balanced, would be an encroachment on the proper province of the jury. On the whole my opinion is that judgment should be entered on the verdict. New trial refused.

[NOTE. For denial of a subsequent motion for a new trial on the ground of newly-discovered evidence, see Case No. 2,433.]

Case No. 2,435.

CARR v. GALE et al.

[3 Woodb. & M. 38.] [1]

Circuit Court, D. Maine. May, 1847.

BANKRUPTCY — ACTION BY ASSIGNEE — JURISDICTION—EVIDENCE OF CONVERSION—DECLARATIONS —NEW TRIAL—BOOKS AND PAPERS — LIABILITY OF BANKRUPT FOR TORT—RIGHTS OF ASSIGNEE.

1. An action of trover by an assignee, for property supposed to have belonged to a bank-

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

rupt, lies in the circuit court against another claiming the title, and the bankrupt aiding him.

2. Possession by the bankrupt, when his property was assigned, and a removal and sale of it, in connection with the other defendant, afterwards, is prima facie evidence of conversion.

3. The declarations of the bankrupt are competent evidence against him, in such an action.

4. Explanations and schedules attached to his petition for bankruptcy, are competent evidence for him, as a part of the petition, but should not be allowed weight in his behalf; and if they are excluded, it will be no ground for a new trial.

[Cited in Whetmore v. Murdock, Case No. 17,509.]

5. Nor is it sufficient ground for a new trial if the verdict is against the weight of evidence, provided some existed on both sides, which was contradictory, and it does not clearly appear that the verdict was given by mistake, or any wilful abuse of power.

6. Books and papers produced under a notice, must be brought in and allowed to be used by the other side, unconditionally, else parol evidence of their contents is competent.

7. Actions for property may be brought by an assignee, when it is alleged to have been conveyed fraudulently, which could not have been sustained by the bankrupt.

[Cited in Whetmore v. Murdock, Case No. 17,509.]

8. The want of property by the latter is no defence to an action against him for a tort, and he may be liable for a tort committed on what was his own property when he went into bankruptcy.

9. Property held in trust by a bankrupt passes into the control of the assignee, till another trustee is appointed.

[10. Cited in Payson v. Dietz, Case No. 10,861, to the point that state courts are not deprived of jurisdiction in ordinary common-law and equity suits simply because brought by an assignee in bankruptcy.]

(The following report of the case tried before WARE, J., was drawn up and agreed to by the counsel in the cause.)

At law. This was an action of trover [by Joshua W. Carr, assignee in bankruptcy of Samuel C. Hemmenway, against Samuel C. Hemmenway, Stephen Gale, and others], for a quantity of goods, &c., mentioned in the plaintiff's writ, which writ may be referred to. The plaintiff introduced a copy of the decree of the district court, for Maine district, sitting in bankruptcy, declaring said Hemmenway bankrupt; and also a copy of the decree of said court appointing the plaintiff the assignee, both of which may be referred to and made a part of the case.

The plaintiff then called William S. Warren, who testified that he had been intimately acquainted with the defendant, Hemmenway, for six years past, and knew him before that; that he kept a store where the same kind of goods were kept which Hemmenway kept; that the store in which the witness kept, in 1840, 1841 and 1842, was about ten rods from said Hemmenway's store; that Hemmenway traded in No. 1 Maine street, in Bangor, being the bank building, so called, from 1838 to the fall of 1842, in selling his goods, which consisted of hats, caps, furs, &c.; that during the months of April, May, June and July, he had such goods in his store in Bangor as are named in the plaintiff's writ, or of the kind and value named in the bills which he held in his hand, and which counsel agreed were the same named in the plaintiff's writ. The said bills may be referred to and are a part of the case. That, in the fall of 1842, he moved from No. 1, to No. 19, West Market place, which was the next door; that he was engaged, during the time, in selling said goods, and that he subsequently removed from this No. 19 to the opposite side of the street, and that witness never observed any apparent change in the mode or manner of his doing business. On cross-examination, he stated that Hemmenway's sign over the door, was "S. C. Hemmenway," in large letters, with the word "Agent" put in small, diminutive letters; that the whole word "Agent" was not more than three inches long, and about one half inch in width; that he kept beside the defendant one year before he discovered the word "Agent" on his sign; that he signed his name "S. C. Hemmenway, Agent," in all his business which he knew anything about. He also testified, that after his removal into the store in West Market place, the sign over the door was "Thomas Hersey;" and afterwards, the name of "William H. Hemmenway" was put up upon it. He subsequently, and after the defendant had gone through with his proof, stated that the profits on such goods as kept by Hemmenway, was twenty-five per cent., in the winter, and twenty per cent., in the summer.

John B. Norris was next called by the plaintiff, and interrogated as to the business in the store of Hemmenway & Hersey, in 1844, which was objected to by defendants, but was admitted; and he testified that he went into the store of Hemmenway & Hersey in the spring of 1844;—left about a month since. Can't state the amount of stock. In the fall of 1844, stock was $30,000. Had in their employ, last winter, about thirty men. Can't say what William H. Hemmenway was doing; not in store one-tenth of the time. Sam and Hersey had done all the business. Have seen William sell a very few articles. He bought some furs for the store, last winter. Don't know whether Hemmenway & Hersey, or Richardson, employed the men. Understood that William was a member of the firm —not from any of the partners. For a greater part of a few weeks, last winter, William was making buffalo robes.

George L. Gibson was next called, and testified that he was employed in Laban Hersey's store during the time he was in business in No. 19, about three months, till he sold out, sometime in July or August, 1844, to Jos. Bryant & Son. Groceries came from Ingalls and Hersey's, and about the city; some of the goods came from Hemmenway & Hersey's store. S. C. Hemmenway took some interest in Laban Hersey's sale, as he would in the sale of Hemmenway & Hersey's

stock. The witness was here objected to by defendants and stopped.

O. H. Ingalls was next called by the plaintiff, and he stated that Hemmenway had been engaged in trade in Bangor from the year 1838 to September A. D. 1842, when he moved into No. 19 West Market place, it being the next door, and where the witness had kept his store; that during the months of April, May, June and July of 1842, the defendant, Hemmenway, had such goods in his store, and he sold them during that time, as are mentioned in the plaintiff's writ; and witness has never seen any apparent change in his business; that the word "Agent" was upon the sign in small, diminutive letters; and that he, witness, was in the store as clerk in 1842, in September, about 30 days; that those in the store engaged in selling those goods, were Thomas Hersey, S. C. Hemmenway, and himself; that they sold about one hundred dollars a day for cash, and about one-third as many on credit. The goods sold for cash were at a profit of about 20 per cent. Hemmenway was all this time insolvent. On cross examination he stated the sign was Wm. H. Hemmenway & Hersey, in the fall of 1842. On Hemmenway's sign was the word "Agent," in small letters. That he was the agent, selling goods and doing business in that store, so far as witness knew by the word "Agent" on the sign. That the word "Agent" was three inches, and the sign eight feet long. Subsequently, and after the defendants had gone through with their testimony, he was recalled, and testified, (subject to objection,) that as well as he could judge, said Hemmenway, from the year 1835 to July, 1842, sold, on an average, $15,000 of goods per year. He did not see the word "Agent" on the sign until after one year.

The plaintiff then introduced the disclosure of Stephen Gale, as follows, viz.:—

"District Court, Western District, June Term, 1842. Am acquainted with the defendant in this suit. Said defendant is a brother-in-law of mine. Am not in any way connected in business with said Hemmenway. I gave an instrument in writing to said defendant two years ago. What sort of an instrument it was, or what powers I gave him in that instrument I do not remember. I do not know what this was given for, but said Hemmenway thought it necessary for his transactions in business, and I therefore gave him this instrument; and I have no copy of it, and have not seen this instrument since I signed it. Don't know that I gave the instrument any perusal before signing it. Might have given it a cursory reading, but I had great confidence in him, and therefore signed it. There was no consideration given me for signing said instrument, but what I did was from motives of friendship to aid him. Have never made any claim to any of the goods which said Hemmenway has in his possession since I gave the instrument above mentioned. Do not know what those goods are, and have never been in Bangor; and have no interest in, and have never taken any of the profits arising from the sale of goods which said defendant may have sold. Don't know what sales or purchases said defendant may have made; though he may have made some statements to me in relation thereto. Cannot say that he ever showed me any bills of parcels thereof. Said Hemmenway is engaged in the hatting business. I am not at all acquainted with the hatting business. I never bought any goods which he has had for him. The instrument before spoken of was given by me to said Hemmenway at his request. (Signed) Stephen Gale.

"Cumberland, ss. Personally appeared the above Stephen Gale, Esq., and made oath that the facts contained in the above disclosure, by him described, are true. Before me, Oliver G. Fessenden, Justice of the Peace. June 23, 1842."

As trustee in an action, Allen Gilman against S. C. Hemmenway and Stephen Gale, trustees, and also the writ with the record of the court to which the writ was returnable. The record to be copied and made a part of the case. The writ is to be copied and made a part of the case.

Plaintiff then called Thomas Hersey to produce and prove a bill of sale from said Gale to himself; and he was sworn and proved the paper. The defendants then claimed the right to cross-examine the witness to the whole case. The judge ruled that they could not cross-examine the witness except as to the matters to which he had testified on the direct examination, and that if he wished to examine him as a witness, to make out his own case, he must wait till after he had opened his case and call him again. And the court further ruled that the plaintiff having called the witness and examined him, could not discredit him, by any evidence tending to show that he was not a creditable witness; and the bill of sale proved by Hersey, and which may be referred to, was then put in. Plaintiff then stopped, and the counsel for each of the defendants severally moved for a non-suit.

Thomas Hersey was then recalled by the defendants, and stated the goods were in No. 1 Main street, kept by S. C. Hemmenway, as agent, when Gale came to Bangor and took possession, July 22, 1842; the schedule contains all the stock then in the store; the prices in the bill of sale are the true prices—the prices I paid. Most of the goods were taken at cost; very few, some old hats, at less than cost; some put down at more than cost; the cost, by the marks and examining the bills. I took possession and held it from time of bill of sale. Had dealt in such goods four years. I paid full market price for those. Had been in the store then as clerk nine months. The business was conducted in the name of S. C. Hemmenway,

agent of Gale; sign, "S. C. Hemmenway, Agent." There was money and accounts due at the time of sale; cash, about $900. Gale made me his agent to close the concerns. I gave Gale four notes for the stock as stated in the bill, for $4719.20. Those notes have been paid by taking up Gale's liabilities. I took possession of all the assets in the store as Gale's agent; cash, $938.52, and bills due, on which I had collected 1399.95. The cash on hand was endorsed on Sarah Shaw's note against Gale, by me, in July 23, 1842. Cash collected on bills was paid on Gale's liabilities. My notes were taken up in the same way; as fast as Gale's liabilities were taken up by me, they were handed him and endorsed on my notes. Here was put in, and sworn to by witness, a written statement of moneys paid by Hersey; the stock, money, &c., amounted to $7057.67; all that I have paid away as before stated, to discharge Gale's liabilities. There are some accounts on hand not good. No other property in my hands. All the assets of the store came into my hands. I know the fact from my position as clerk.

Plaintiff cross-examines. Bill produced is the bill of goods I purchased of Gale; don't know whether copy now shown me as such, is a copy of my deposition. Can't say whether the answer shown me was my answer or not, nor whether I made out a schedule to annex to that deposition. Was before Col. Parks to give deposition. Was questioned concerning my private business and refused to answer. I don't remember of stating that the bill of sale was lost, nor whether deposition was taken in 1842 or 1843. Was not present when S. C. Hemmenway was examined before Parks. Don't remember of stating to Ingalls that S. C. Hemmenway made $2000 per year. Gale was at Bangor, during the time of sale to me, two or three days. I was not employed as clerk by any one in particular. Stopped here (Portland) on my way down to Bangor, and had some talk with Gale about going there; no deduction has been made for my services on my notes; no settlement has been made for those services. I took what I wanted from the store; shall be twenty-five years old next month. Had less than $100 when I went to Bangor.

Defendants resume. Gale, who is an apothecary, and resides in Portland, and S. C. Hemmenway, each married a sister of mine; and Sarah Shaw is the mother of Hemmenway. I was out of business at that time. Stopped here at Portland a week. Talked with Gale. Went to Bangor; stopped eight or nine months; came here; went to Boston; came back; talked with Gale about buying. I went into the store because I was out of business. Lived in S. C. Hemmenway's family. Took from the store what I wanted for expenses; don't know how much. I was twenty-one years old at that time. S. C. Hemmenway said he should like to have me stop, he had not help enough. It was Nov. 1, 1841. I refused to answer before Gorham Parks by advice of M. L. Appleton, my counsel. My deposition was never completed. My deposition was afterwards taken before N. Hatch. Schedule was called for on that deposition. I made it in 1843, from the bill of sale I had. Wm. H. Hemmenway and I constitute the firm of Hemmenway & Hersey. (Articles put in.) Moved this stock from No. 1 Main street to No. 19 West Market square, I think in September; formed copartnership Oct. 12, 1842. I put in the firm this stock I purchased of Gale, and put in $2000 in money which I borrowed of Augustus Hemmenway. All the capital I put in was borrowed. Wm. H. Hemmenway put in, in all, $1000. Hemmenway & Hersey owe about $11,000 for borrowed money. We buy goods sometimes on credit. Our stock averages about $4500. Our stock was at the time stated at $20,000. When I said $4500 I referred to stock in No. 19 West Market square. We now keep in No. 20 Main street. S. C. Hemmenway has no interest in our firm, has put in no capital. Gale has no interest.

Power of attorney, put in by defendants, from Gale to S. C. Hemmenway, dated Oct. 13, 1838, which may be referred to.

Depositions were next made.

Augustus Hemmenway was next called by the defendants, and testified as follows: I am a brother of S. C. Hemmenway. I resided in Chili, Peru and adjoining countries, from 1828 to February, 1838, remaining in the United States nearly the whole of 1838; then went again to Chili and returned to the United States in February or March, 1840. My business residence is in New York, but a large part of my time is spent in Boston and neighborhood. Since my return from Chili I have spent the winters in Cuba. I loaned money to Gale in 1838, in September or October, immediately before I left for Chili, and took a note for the amount. The note now shown me is the same. The date is Oct. 21, 1838, and the amount $1800. It was paid August 21, 1845, with $630 interest. The loan was made at the date of the note, and to Samuel C. Hemmenway, who showed me a power of attorney from Gale to him before I made the loan. The power of attorney now shown me is the same, (the one in the case.) The loan was made as capital to carry on business in Bangor, where my brother was agent. I hold another note, dated soon after my return in 1840. The loan was made in the same way, for the same purpose; and the note for the amount ($600) was signed "S. C. Hemmenway, agent for Stephen Gale," and is now unpaid. The first mentioned note was paid by a note of Hemmenway & Hersey for $1800, and a new note signed by Gale for the interest, $630. In 1838, on my return to the states, I found S. C. Hemmenway destitute; he was a clerk in a hat store in Boston, and separate from his family. His wife and child had gone home to her father's to live. He applied to me for

assistance. I gave him money for his immediate necessities; small sums repeatedly during the eight months I was at home; but declined to set him up in business. He solicited me repeatedly to do something for him. I went to see some of his creditors who did not become parties to the assignment, and tried to purchase his debts, but found I could do nothing. I was a creditor myself to the amount of $3000 when S. C. Hemmenway failed in 1836. My agent came into the assignment, and received the dividend, about 50 per cent. I allowed my mother from four or five to eight hundred dollars a year during all the time of my absence; sent sometimes specie and sometimes drafts. I have ever since allowed her as large or larger sums. My mother has no property, to my knowledge, save what I furnished her. Hemmenway & Hersey have a permanent loan of me of $10,000 now. I loaned Hersey $2000, just after he purchased Gale's stock; and Wm. H. Hemmenway $1000, when he went into partnership with Hersey. These loans have been increased, until now it is $10,000. It has been a consideration in these loans, that S. C. Hemmenway should be employed in the store as clerk, and have a living. S. C. Hemmenway is the most competent and active business man. My motive was to secure support for him and his family. On cross-examination he testified that the note shown him, dated in 1835, and signed by S. C. Hemmenway, was for money loaned Hemmenway at that time, and was sent from Cuba in a letter; it is my hand-writing. I was worth not less than $200,000 at the time of the first loan to Gale, and am now worth $400,000. The note for $2000, of Hersey, was not collateral. The money for the $3000 loan was sent to B. Bangs. The money passed through his hands. Direct examination resumed. The first dividend of 40 per cent., and the second of 10 per cent., were paid to B. Bangs for me. Immediately after my return it was stated to me that something more might be coming, a mere trifle; and S. C. Hemmenway requested an order for it. I gave it to him as a gift. I sent a special power of attorney to Bangs when I heard of S. C. Hemmenway's failure, thinking it might be necessary. The dividends were credited by Bangs to me in account current and with account of voyage of ship "Pearl." The account was sent to me at Valparaiso.

The defendants here offered to introduce the original petition of S. C. Hemmenway to be declared a bankrupt, together with the schedule annexed; but the plaintiff objecting, the court observed that schedules were not evidence for defendants, (containing the defendants' account of this business;) that the petition was evidence; and if the plaintiff did not put in the petition, the defendants could ask the opinion of the court, when the evidence was out, or ask instructions to the jury whether the plaintiff had shown any right to sustain the suit. The defendants' counsel also introduced the notes of Mrs. Shaw, which may be referred to and are made a part of this case.

The depositions of the following witnesses were put in by the defendants, for the purpose of showing that the goods furnished the store in Bangor, from 1838 to 1842, were furnished on the credit of Gale, and may be referred to, viz.: Martin Bates, Jr.; S. W. Olney; Edward P. Porter; O. N. Towne; J. M. Sherburne; Charles A. White; Anson Dexter; W. A. Fisher; William Parkman; Isaac Lothrop; N. Carpenter; S. C. Perrin. The plaintiff introduced an execution in favor of Hastings Strickland, and a note dated July 16th, 1836, for $210, signed by S. C. Hemmenway, on which the judgment was founded. Also, a note payable to Arad. Thompson, and endorsed to Allen Gilman, which note may be referred to. S. C. Hemmenway's assignment, dated July 25th, 1836, was next introduced, and is a part of the case. Also, Samuel Sylvester's deposition (under objections), which is made a part of the case. And then called Joseph Bryant, who testified that he was one of the assignees of S. C. Hemmenway. That soon after the assignment, several individuals called upon him, and said that they owed accounts to said Hemmenway; when, on turning to the books, they appeared to be balanced by cash, without any date; and that no corresponding entries could be found on the day-book.

The defendant's counsel objected to this testimony, without the production of the books;—the books being in the defendant's possession.

The counsel for the plaintiff was then proceeding to interrogate him in relation to the abstraction of goods assigned by said Hemmenway, for the benefit of his creditors, when the counsel for the defendant, Gale, objected to the testimony, as being transactions previous to the power of attorney; and the counsel for Hemmenway objected to the testimony, as being immaterial. The counsel for the plaintiff stated his only object in introducing the testimony was to show that Hemmenway had funds of his own, to transact business, in 1838; and to rebut defendant's testimony that he was poor; and said, they did not claim this as testimony against Gale, unless they so connected Gale with Hemmenway, as to make him, by law, responsible for the declarations and acts of Hemmenway, and the court admitted the testimony. And the witness testified, that about ten days after the assignment, he went into the store where the goods assigned were stored, and found Hemmenway and his mother there. They had a large quantity of goods laid out on the counter. That he was trying to find a piece of silk which some one wished to buy; asked Hemmenway where

it was; he replied, that his mother had got it; inquired of him how he got into the store, and he replied, that he had a duplicate key. That they took, without his knowledge, several hundred dollars; that Mrs. Shaw became a party to the assignment, for the whole of her alleged claim—being about $2,300; that these goods were never paid for, nor allowed for, in any way; that it was an unpleasant affair; that Hemmenway said his mother had been stripped of all, by his failure. On cross-examination, he stated that he never made any claim on the debtors whose accounts were balanced; nor did he endeavor to compel Hemmenway, or Mrs. Shaw, to pay for the goods. That the reason was, that he had to do with a woman in tears; and that he consulted with a committee of the creditors, under whose direction he acted. That he took away, without his knowledge, from $500 to $1,000. He could now only remember some three or four articles—such as two pieces of Cashmere shawls, and some other things. That he put a new lock on the door immediately. That he made no charge of things so taken. That the amount allowed Mrs. Shaw was $2,336.29; that was allowed by arbitration.

The plaintiff then introduced the deposition of Daniel P. Wood, which was objected to, but was admitted. But no objection was made to the form of taking the deposition, it having been thus taken by agreement of counsel; and the same is made a part of this case.

S. P. Dinsmore, called by plaintiff, stated that he was here as a witness, in May last. Went down in steamer with S. C. Hemmenway; don't recollect any remarks of S. C. Hemmenway. Mr. McCrillis was talking with Smith; S. C. Hemmenway joined in the conversation. In reply to some remarks of McCrillis about Gale, he said, he (Gale,) did not care a d—n for the whole scrape; he would not quit his shop for the whole scrape.

A. S. Richmond was next called, and was objected to by the defendants, but admitted against Hemmenway; and who testified that he sold S. C. Hemmenway, for cash, six or seven years ago; don't recollect that he ever told me he was agent. Moved to Bangor last November; made a sale to Hemmenway & Hersey, last fall, of $2,700, mostly for cash; one note, rest for cash; then I talked of going to Bangor; most of my conversation was with S. C. Hemmenway. I said I hadn't means; they said they would furnish me means. S. C. Hemmenway was the principal man, so far as I was concerned or observed. I found out William was partner, in February. William spent most of his time cutting buffalo coats, till February; since then, little time. Have heard S. C. Hemmenway talk of this suit. We were riding by Allen Gilman's house; said something about Gilman's suit; he said he would fight till he spent $10,000, before he should get anything; he made $4,000 or $5,000 the year before. Cross-examined. Made my contract with Hersey & Hemmenway; considered them to be the other party; supposed S. C. Hemmenway to be a party; last conversation, when contract was closed, was in Hersey & Hemmenway's store; S. C. Hemmenway and Hersey were present. T. G. Sampson came over with me, and came into store at time; can't recollect whether William was present, or not. Hersey & Hemmenway bought the $2,700 last year; the goods were on east side, (of the Kenduskeag;) have no recollection of going with William alone; went with S. C. Hemmenway, and William, together, (to see the goods;) don't recollect that William made any offer. I resided at Winthrop all the time I traded with S. C. Hemmenway; don't know as I have (any) quarrel or difficulty (with S. C. Hemmenway.) I took advice of counsel and left their store. Direct. S. C. Hemmenway asked me what I was summoned here for. I told him that I was here to testify that they had wronged and injured me; but I didn't come here for revenge, or to gratify my feelings. Hemmenway said his situation was such that he could not be a legal partner, and that his case was as straight as a gun. Cross-examination resumed. Signed bills to S. C. Hemmenway, as agent. First, February 12th, 1842. Second, June, 1842. The bills put in may be referred to.

George Gibson was called by the plaintiff, and objected to, but was admitted against Hemmenway. Testified that S. C. Hemmenway had as much to say about sale (of Laban Hersey's stock,) as any one else. Bryant & Son came to buy; were to have it at ten per cent. Hersey & Hemmenway asked twelve. S. C. Hemmenway said it made no difference whether they sold at ten or twelve, if they had a day or two to mark up; and were marked up. S. C. Hemmenway asked me since I came here, if I did not know he acted as agent when he kept in No. 1. I told him I knew he had a tin under-sign lettered so. S. C. Hemmenway said he was not a partner, but confidential clerk (of Hersey & Hemmenway.) I told him I knew William and Hersey were in the firm of Hersey & Hemmenway. Stock of Laban Hersey was part of stock of Wellington—such goods as Hersey & Hemmenway did not keep.

C. A. Richardson testified, under objections, that he was in Hemmenway & Hersey's store five months. Can't say what part of the time William Hemmenway was there; have seen him there; not so often as the others; rather seldom. Also, that he and Hersey had some difficulty about a bench; that said Hemmenway came over to arrange it; and that he asked him if he, Hemmenway, did not sanction what Hersey done in the business of Hemmenway & Hersey. He replied: "Not by a good deal; that he was boss, or master of that concern; that his family, and not Hersey's represented the capital in that

concern." This testimony was objected to, but was admitted as against Hemmenway.

John B. Norris testified that he had been a clerk in that store (Hemmenway & Hersey's) about nine months, and until about a month since; that S. C. Hemmenway and Hersey were the principal men in that store; that William H. Hemmenway was not in there more than a tenth part of the time; that when inquiries were made there for him, S. C. Hemmenway told them that they would probably find him at Vinton & Porter's who kept a restaurater.

The defendants resumed, and called William H. Hemmenway, who testified as follows:—Hersey and I are the firm of Hemmenway & Hersey. No other person is in it. S. C. Hemmenway never had any interest in the goods, or capital. I put into the firm $1000, which I borrowed of Augustus. We had no real capital—none but borrowed. We owe, for loans of money, something rising $12,000. I am in the store every day when in town—not constantly—and have taken part in the control and direction, ever since I signed the articles of copartnership. I have no other business. I talked with Richmond, before the purchase of him; went over to see the goods, with him; examined them, and made him an offer, which he finally took. At the same time there was conversation about his coming to Bangor. On Sunday, (the other conversation spoken of,) there were present, S. C. Hemmenway, Hersey, Richmond, Sampson, and myself. I settled Mrs. Shaw's claim on the assignees, and they were allowed $337.82, for goods from the store; no other claim was made for goods so taken. S. C. Hemmenway was the agent of Gale. I was in Bangor then; often in his store. His stock, I think, would hardly average $4000; chiefly hats and caps, and in the winter, buffalo robes. It increased $1500 or $2000, gradually, during the last eighteen months, in furs, boots, &c. On an average, it would be well to sell $10,000 or $12,000 a year, on a stock of $5000. The sign was "S. C. Hemmenway, Agent." The business was conducted as Gale's, so far as I knew. Cross-examined. S. C. Hemmenway bought some furs.

Thomas Hersey re-called by defendants, who testified that since testifying before, he had examined the account, (exhibited by him,) and found an error of $100, in amount collected of O. N. Towne. His account should be $500; and $3.00 collected of Stillman Wilson. Of the money paid by him (to discharge Gale's debts), some was paid into the bank; some sent by S. C. Hemmenway; some by mail. That his sales, when O. H. Ingalls was in his store, a week or two, were not more than $60.00 per day. That the profits in store No. 1 Main Street, under S. C. Hemmenway's direction, were about $1000 or $1200 a year; average profits on sales, twelve and a half to fifteen per cent. The stock would average $4000, or a little more. Cross-examined. He said he had examined the books since his former statements. The mistake was in making up the list of accounts, not in settling.

Oliver Fessenden was called by the defendants, and testified that the disclosure of Gale was written by him from the account of Gale; that it was written in Gale's store, in Portland; that he had no counsel present; that he advised him to call on C. S. Daveis, Esq., his counsel; and he went for him twice, but not finding him, concluded to proceed; that after it was written, he read it to Gale; that Gale took it and read it, and said it was right, and signed it, and swore to it.

The assignment of 1836—the copies of Mrs. Shaw's notes, may be referred to. Also, notes to Augustus Hemmenway. Also, the records of the district court, showing that William H. Hemmenway is a discharged bankrupt. And also, the schedule of accounts referred to by Hersey.

After the testimony was closed, and before argument, Hemmenway's counsel contended to the court, that there was no evidence of conversion by his client, and asked its direction accordingly; and Gale's counsel took a similar position, and made a similar request in regard to his client.

The court instructed the jury, that if they were satisfied, that in 1838, when the power of attorney was given by Gale to Hemmenway, that Gale consented to give it, and Hemmenway to take it, with the intention that Hemmenway was to do business on his own capital, and for his own benefit, and that it was only a blind, set to deceive the public and defraud creditors, and Hemmenway did business on his own capital for himself;—that then it was evidence, and strong evidence, of fraud. Second. That if Gale sold the property to Hersey after it had vested in the assignee by the decree of bankruptcy, it was evidence of a conversion. Third. That if the property was Hemmenway's, and Gale sold it by a contrivance between him and Hemmenway, and at Hemmenway's request, to put it further beyond the reach of his assignee, it was evidence of a conversion by both Hemmenway and Gale.

The jury returned a verdict for the plaintiff, for $5,309.10.

The defendants moved for a new trial. First, because the verdict was against the weight of evidence. Second, because the judge who tried the cause made several rulings as to evidence, and gave several directions to the jury which were erroneous. They also filed a motion in arrest of judgment.

Rowe and Chas. S. Daveis, counsel for these motions, in behalf of defendants.

McCrillis and Deblois, for plaintiff, and against these motions.

WOODBURY, Circuit Justice. The questions raised in this case under the motions for

a new trial, and in arrest of judgment, are numerous; and some of them possess no little difficulty. But having been ably argued, the labor of the court in disposing of them will be much lessened.

The first ground assigned for a new trial, is, because the verdict is supposed to be against the weight of evidence. I have had occasion to examine fully on the last circuit and to deliver an opinion, laying down what seemed to me, after a full consideration, the true guides or limitations as to this ground for a new trial. See Fearing v. De Wolf, R. I. Dist., Jan., 1847 [Case No. 4,711]. See, also, 16 Me. 200; 19 Me. 402; 20 Me. 349. I see nothing in this case which can bring it within the fair exercise of the power of the court over this subject as it has been there defined. There was evidence on both sides to be weighed. Here no great preponderance existed on either side, if we look to the extraordinary disclosure and disclaimer of Gale, under oath in the trustee suit. At all events there does not appear to have been so clear a mis-trial as to evince plain mistake, or an abuse of power on the part of the jury. These are considered by me as the true tests. The cases and reasons are fully presented in Fearing v. De Wolf, to show the propriety of refusing to disturb verdicts when thus situated, merely because the judge who tried the cause may think that he would have decided differently on the matter, had he been in the jury-box, to respond to the facts, instead of being on the bench to respond to the law. But if the weight is so clearly and decidedly in favor of one party as to render it probable that a real mistake has happened, or a wanton abuse of power, it is the duty of the court not to correct the result by deciding the facts differently from a jury, but to let another jury pass upon the facts, and settle the question whether there has been either a mistake or an abuse of power. In this way clear mistakes and clear abuses can be corrected as such should be, but without the court assuming the province of the jury. They merely permit the second jury to revise the doings of the first one.

The next reason assigned for a new trial is the refusal of the judge to nonsuit the plaintiff on motion of the defendant, though against the consent of the plaintiff and after the plaintiff had furnished evidence which he deemed material, and on which he wished the jury to act. A practice has grown up in some states for courts to nonsuit plaintiffs against their consent, and after they have presented testimony which they wish the jury to consider, provided the court entertains opinions on the law unfavorable to the plaintiff. But it is not deemed sound practice in the courts of the United States; and, instead of it, the evidence is there allowed to be passed upon by the jury, whenever once admitted as competent, but under instructions to which the defendant can except if not satisfactory to him, and thus obtain all the benefit to be derived from a nonsuit with an exception made by the other side. The cases are mostly collated on this point in Folger v. The Robert G. Shaw [Case No. 4,899]. See, also, [Crane v. Morris] 6 Pet. [31 U. S.] 598, and 1 Pet. C. C. 497 [Conn v. Penn, Case No. 3,104]. The verdict, therefore, cannot be set aside on this ground.

Another reason assigned for a new trial, is the admission of improper evidence in Ward's deposition as to declarations made by Hemmenway, one of the defendants, in a quarrel with Gilman, his principal creditor. But it seems to me that those declarations of H. are competent, which tend to make himself liable in this action, where he is a party, like the admission of any other party. In that view they might properly be introduced, when had they been offered as to a remote transaction, in order to strengthen the title of the plaintiff as assignee of Hemmenway, and in a suit where H. himself was not a defendant, they probably would be inadmissible. They would then not be made at the time of the transaction. Broom, Leg. Max. 441, 442, 5 Durn. & E. [Term R.] 512; 6 East, 191; 9 Bing. 352. And hence not a part of the res gestae, and they would be in favor of his own interests as in part represented by his assignee. 9 Ves. 83; Greenl. Ev. §§ 189, 190; Eden, Bankr. Law, 361. When we consider, however, that here he is personally a defendant, attempted to be charged as a joint trespasser in respect to the property in dispute and to the injury of his creditors, the declarations assume a new aspect and are entirely competent against himself and to help render himself liable in the present suit.

The next reason for a new trial is on account of evidence, admitted in respect to alterations in Hemmenway's books, when the books themselves were in court. This objection is defective on two grounds. First. The evidence did not relate to the contents of the books, with a view to prove by parol, charges or credits existing in them in writing. But they related rather to alterations seen in them and accounts entered as balanced, when in fact they had not been, and this done so as to prevent the assignee from collecting them and to enable the bankrupt to obtain them himself of his debtors by their voluntary payment, in fraud of his own creditors. Secondly. The evidence as tending to show receipts of money by H., and means to buy this property, was competent on that ground, as a general principle; and if any of this evidence was objectionable, because relating to what was in writing, that part should have been separated and specifically resisted, and the rest allowed. For example, allowing proof of the mere receipt or collection of money by H., after his first failure, seems unobjectionable. Finally. When this whole evidence was excepted to, and notice given to produce the books, and they were not unconditionally produced, parol evidence of their contents seems of course

to be admissible. In this case, the books were in court on a notice to produce them, but were offered only on condition that the plaintiff should use them in evidence. But I am not aware of any right in a party, under a notice to produce books or other writings, to make conditions to their production The rule is absolute to bring them into court for the benefit of the other side, and to offer them so without reserve; and it is for the other side, after obtaining possession of them, to decide whether it seems expedient or not to use them as evidence. This proceeding, however, would have one effect on the other party, imperatively, or at all events, if the books were unconditionally offered. It would prevent the further use of parol evidence by him after written evidence of the same fact is produced and placed in his possession, whether he chooses to use the written or not. Were this objection stronger there is understood to be another answer to it. It seems questionable, on inquiry, whether the judge who tried the case gave any ruling on this point; or if he did, whether any exception to it was then taken, as it must be in order to be available under this motion. [Poole v. Fleeger] 11 Pet. [36 U. S.] 185–211. It is a little extraordinary, also, that the defendant himself did not use the books as he might, if they contained matter disproving what was testified to on the part of the plaintiff.

Another ruling is objected to, which excluded the defendant, Hemmenway, as a party, from putting in his own explanatory statements as to the title to the property in controversy, and which were contained in the schedule annexed to his petition. It is stated in connection with this, that the petition itself, without the schedule, was allowed to be admitted. I am inclined to think, that the whole record in the proceedings in bankruptcy was competent evidence, including the schedule annexed to the petition. 1 Mass. 67; 2 Mass. 492; 1 Story, Eq. Jur. § 160; Greenl. Ev. §§ 506, 511; 1 Story, 478 [Bright v. Boyd, Case No. 1,875]; 3 Mer. 667; [Ferguson v. Harwood] 7 Cranch [11 U. S.] 408. But, at the same time, it seems to me that the bankrupt, when a defendant in a suit, cannot be permitted to use in his favor his own declarations as to the title of property which is disputed; and that the judge ought to charge the Jury not to give weight to any such declarations in a suit like this, when obliged to be let into the case as a part of a documentary exhibit. As this view, then, would lead to the same result in respect to the verdict as the ruling at the trial did, which entirely excluded the schedule, it furnishes no sufficient ground for a new trial. See cases showing that mere technical exceptions are insufficient, if the verdict has probably not been affected by the ruling. Allen v. Blunt [Case No. 217]; Broom, Leg. Max. 156; 12 Adol. & E. 631. De minimis non curat lex. Cro. Eliz. 353.

An objection has been alluded to by some of the counsel, as to the calling of Henesey, one of the witnesses, a second time, and the effect of his cross-examination by opposing counsel, on points not questioned about on the part of the plaintiff. But, as the other counsel waive that, it is not necessary to go into an examination.

Another objection to the verdict grows out of the peculiar situation of the property in controversy, and the alleged want of title or possession, in the plaintiff, sufficient to enable him to sustain trover; the present form of action against any person. But it is to be remembered, that Hemmenway, the bankrupt, was in the actual possession of the property, in June, 1842, the time of the alleged conversion; and, also, in July, 1842, when the goods were, in fact, handed over by him to Gale, the other defendant, and placed in the charge of third persons. This possession was prima facie evidence of title in Hemmenway, as he had bought the goods —had, for some time, controlled them—and had been selling articles out of them, for several months. Standing alone, this possession would have been sufficient to enable the assignee to sustain trover against third persons. But it did not stand alone at the trial; various proofs being offered to show that the possession was had by Hemmenway, as agent for Gale. Nor was the action brought against third persons, but against the agent and principal, who set up the possession to be in behalf of himself, and not the agent; and the title, also, to be in himself. This was a permissible defence; and if it had been made out satisfactorily, would have defeated the action. While, on the contrary, if not so made out, but the jury believed the possession was, in reality, for Hemmenway himself, and the title was in him, so far as regards his creditors, the action by his assignee, was, in these respects, and, under this objection, well maintained.

The great contest before the jury was, therefore, in relation to these points; and they having returned a verdict for the plaintiff, it is conclusive—if no misdirections were given—that due possession and title existed in Hemmenway at the time of the conversion, so as to enable his assignee to protect the property against any wrong-doer. If the court gave any erroneous instructions to the jury, on this matter, they can be pointed out and corrected; but if not, the verdict, while it stands, is decisive against this objection. The instructions are embodied into the report of the case, and are understood to be not excepted to, and hence need not now be re-examined.

Next, it is argued, that H.'s interest in the goods was only as a trustee, and that property, held in trust by a bankrupt, does not pass to an assignee; so that no suit, whatever, can be brought by him. But this is not correct. It passes, though held in trust. Yet, a new trustee will usually be afterwards

appointed, and the property conveyed to him by the assignee. See on this, 6 Geo. IV. c. 16, § 79; 2 Deac. 151; 3 Mont. & A. 487; 1 Spence, Eq. Jur. 504. Here, however, the jury have found the trust in this case to have been a secret and fraudulent one; and the property really belonging to Hemmenway; and in such case, even in England, the property vests in the assignee, absolutely. So it does there, always, when the property was, by consent of the owner, in the possession and control, and disposition of the bankrupt. See cases under 21 Jas. I. c. 19; Cooper v. De Tastet, 2 Moore & S. 714; 1 Deac. 131, 166; Almy v. Wilbur [Case No. 256]. But this last may not be the true construction of our late bankrupt law; and whether it be or not, this objection must, for the other reasons, fail.

Another exception has been made, that proper evidence of a conversion was not offered. But if the jury was satisfied that the property in the goods was in Hemmenway, as principal owner, before becoming a bankrupt, and the pretence of title in Gale was fraudulent; then the removal of this property to another place, by Gale and Hemmenway, jointly, and doing this as if it belonged to Gale, as principal; and if Hemmenway, as his agent, engaged afterwards in using and selling it as Gale's property, this was a misfeasance and a conversion. If a creditor merely accompany a sheriff's officer to levy on goods, which afterwards prove to belong to another, as here, to the assignees and not to Gale, he is liable in trover, though he took neither the goods into his own custody, nor their proceeds. Menham v. Edmonson, 1 Bos. & P. 369. It is an aiding or abetting in a tort—a co-operation in a removal and use of property, over which no right to do so existed, and that is sufficient to constitute a conversion. See cases cited in Smith v. Smith [Case No. 13,109], Sept. term, 1849, Maine Dist., note.

The chief question remaining, is the motion in arrest of judgment. It resolves itself into two objections. One is, that the assignee cannot sustain proceedings like this, as to the property of the bankrupt, except in the district court sitting in bankruptcy; and the other is, that he cannot, in such a case, or, indeed in any case, sustain an action at law against the bankrupt himself. In respect to the first objection, it is manifest, that by the 6th section of the bankrupt law, the district court has jurisdiction, in a summary way, "in the nature of summary proceedings in equity," over all controversies between an "assignee and the bankrupt." 5 Stat. 440. But it is equally clear, that if the assignee chooses to resort to an action at law, rather than "proceedings in equity," against adverse claimants, the 8th section confers "concurrent jurisdiction" over it, in the circuit court. That section, indeed, goes further, and confers such concurrent jurisdiction in all suits, both "at law and in equity, which may, and shall be brought by any assignee of the bankrupt, against any person or persons claiming an adverse interest." It is not to be questioned, then, that this action well lies in this court, if the assignee elects to come here against Gale. Lucas v. Morris [Case No. 8,587]. He is, manifestly, a person claiming "an adverse interest." If these parties lived in different states, so as to give this court jurisdiction on that ground, this subject-matter might, for aught I see, be settled in it, as it might be in a state court, if the action be first brought there. And the adjudication first had, either in a bankrupt court or another, will bind as to the right of property, or a lien. Peck v. Jenness, 7 How. [48 U. S.] 612; Ex parte Christy, Justice Catron dissenting, 3 How. [44 U. S.] 292. It is within the language of the bankrupt law to sustain it in action against Hemmenway, also, if claiming "an adverse interest" as to this property, against his assignee. This he does claim, as an agent of Gale. This he attempted to aid Gale to enforce, and this made him a wrong-doer, if Gale was. It comes, then, within the spirit, as well as words, of the act giving this court jurisdiction. He sought to remove this property from the reach of his creditors. He co-operated in trying to secure the adverse claims of third persons; and he ought, therefore, in justice, as well as law, to be jointly answerable with them for damages, when the title of those third persons appears by the result of the trial to be defective.

It is important, in this view, to regard critically the data. Hemmenway was decreed a bankrupt in June, 1842; and by that, ipso facto, all his property, under the express language of the bankrupt law, passed to the assignee. The jury have found this property to have been his; yet the next month after, in July, 1842, he proceeded to aid Gale in removing this property, as belonging to Gale; and in disposing of it as Gale's, rather than the assignee's, and this to the manifest injury of his creditors; and as the jury have found, with a view to defraud them. The remaining objection to his liability is, that whatever may be the legal or equitable considerations, to charge him, when Gale is chargeable, because he acted jointly with Gale in the conversion; yet no cases can be found and no principles exist, which render a bankrupt himself liable to his own assignee in an action at law. It is true that controversies between a bankrupt and his assignee are generally settled in the bankrupt court. But, as already shown, no principle exists which should limit the jurisdiction over them to that court in all instances. As much reason exists for a concurrent jurisdiction here, over suits between them, as for such jurisdiction there, over suits between them and others. Their disputes may be as important in both principle and amount as those in other cases, and hence be as suitable for a court higher than the district court. They may, when as

here, third persons are joint defendants, with the bankrupt, be more appropriately prosecuted in the circuit court, as no reason whatever exists for forcing such third persons into the district court exclusively.

Finally, and above all other justifications for sueing here, is the circumstance that H. is not now prosecuted as "a bankrupt," in which capacity alone the district court has any peculiar jurisdiction over him, but as "a person," setting up an "adverse claim" on account of Gale; and is prosecuted here, like any other person, for a tort in his private and individual character. In England chancery often has concurrent jurisdiction with a court of bankruptcy. Meggison v. Foster, 2 Younge & C. Ch. 336. Or rather the lord chancellor has. Ex parte Lund, 6 Ves. 782. Nor is there any lack of precedent or principle to make the bankrupt liable to be prosecuted by the assignee in a court of law in appriate cases, though the instances are not numerous in the books which seem to be directly in point. But suppose the bankrupt should steal the property after it is in the actual possession of his assignee. He would doubtless be indicted in a court of law for the larceny of it as the property of the assignee, in his official capacity, for the use of the creditors. It is his in law (9 Ves. 83), and the bankrupt has no more right to take it away, clandestinely or animo furandi, than he had to do this with any other property. Again, if he seizes and converts such property to his own use, either alone or in conjunction with a third person, no principle seems to interpose to prevent his liability to the assignee in an action of trover. He is liable, personally, like any other wrong doer, and not in his capacity of bankrupt. Some error on this point has been caused by the common expression in the books, that a bankrupt is civiliter mortuus. 5 Mad. 289; 3 Mad. 158; 1 Holt, N. P. 172. But this means dead only as to the control of his old property and contracts. His assignee stands like an administrator in respect to these. But the bankrupt is still alive for other purposes in law as he is in fact. He is alive to acquire new property—alive to do and receive wrong—alive to commit trespasses or crimes—alive to be prosecuted for either, and to prosecute for either when committed on himself. Eden, Bankr. Law, 255; 7 Durn. & E. [Term R.] 391; 1 Bos. & P. 44. The following show suits at law between the assignee and the bankrupt himself in different forms, which generally were sustained, though not in all cases. Semble on leave perhaps; Benfield v. Solomons, 9 Ves. 83; 1 Hen. Bl. 437, note; Coles v. Barrow, 4 Taunt. 755; 1 Cooke, Bankr. Law (3d Ed.) 518; 1 Eden, 156; 6 Bing. 500, was to try the validity of the commission. The furniture of the bankrupt, reserved originally as well as his property acquired since, if trespassed on by the assignee, or others, must be capable of being protected by the bankrupt through ordinary suits of law. See Webb v. Ward, 7 Durn. & E. [Term R.] 296; and cases in Kitchen v. Bartsch, 7 East, 57, note; 1 Barn. & Adol. 574; 1 Esp. 140, 170; 4 Taunt. 754; 2 Rose, 277.

Another objection urged against these actions is, that a bankrupt has no property of his own to respond with in such cases. But poverty is no defence generally to actions for a tort. Beside this, property, such as furniture, &c., to the amount of $300, may be reserved to the bankrupt by the 3d section of the act. And, moreover, all his earnings and acquisitions, since the decree of his bankruptcy, belong to himself, here (Newhall's Case [Case No. 10,159]), though it is otherwise under the language of some other bankrupt laws, allowing him to acquire no property till after his discharge (1 Bos. & P. 44, and Kitchen v. Bartsch, 7 East, 53). The bankrupt is also entitled to the proceeds of his personal labor, and consequently can sue and be sued in the protection of them. 3 Bos. & P. 578. Again, it is urged, that the assignee can bring no action which the bankrupt himself could not bring. This may be true as to voluntary assignees. 7 Johns. 161; 6 Har. & J. 61; 10 Paige, 218. The 3d section of the bankrupt law gives some countenance to this view, by investing him with the power to sue concerning the effects of a bankrupt as fully as a bankrupt himself could at the time of the bankruptcy, and from this, it might be inferred, he could sue in no other case. But that inference is a non sequitur. The assignee is expressly clothed with certain powers, such as the bankrupt had, but beyond that, by force of the law vesting in him, "all the property and rights of property of every name and nature, and whether real, personal, or mixed, of every bankrupt," he may sue fraudulent grantees in order to regain property for the creditor. Though the bankrupt himself would not be allowed in such case to sue and avoid his own conveyances. See cases in Ashby v. Steere [Case No. 576]; and Leland v. The Medora [Case No. 8,237]; Winsor v. Kendall [Id. 17,886]; Wheelwright v. Jackson, 5 Taunt. 109; 1 Doug. 89, 295; 7 East, 544; 4 Burr, 2477; Bayard v. Hoffman, 4 Johns. Ch. 450; 10 Paige, 218; Frothingham v. Hayes, Merch. Mag. May, '46, 458. The assignee here, then, represents the creditors as well as the bankrupt; is an assignee by law and not a voluntary one, and acts for them and in their behalf, as far as the law permits. 2 Ves. 244; 2 Hen. Bl. 135; Eden, Bankr. Law, 213.

Having thus shown, that the bankrupt himself, if joining another person in a trespass on the property in the assignee's hands, is liable in an action at law for the tort by the assignee in behalf of the creditors, it becomes necessary to decide another question, made under this head, that this objection by the respondents comes too late, after a plea of the general issue and a trial on it. See cases on this, 1 Sumn. 578 [Wood v. Mann,

Case No. 17,952]; 2 Gall. 325 [Maissonnaire v. Keating, Case No. 8,978]; Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 450; 1 Mass. 159, 483; 3 Pick. 232; 8 Johns. 378; 19 Johns. 300; 3 Fairf. [12 Me.] 384; 16 Me. 231.

Both of these motions are overruled.

[NOTE. See decision of Ware, District Judge (Case No. 2,434), which apparently was rendered on the same motion.

[For denial of a subsequent motion for a new trial on the ground of newly-discovered evidence, see Case No. 2,433.]

Case No. 2,436.

CARR v. HILTON et al.

[1 Curt. 230.] [1]

Circuit Court, D. Maine. Sept. Term, 1852.

BANKRUPTCY—WHAT ARE ASSETS—LAND FRAUDULENTLY CONVEYED IN TRUST — LIMITATION OF ACTION BY ASSIGNEE — REPEAL OF BANKRUPT ACT—EFFECT.

1. Lands held for a bankrupt, upon a trust which resulted from the payment of the entire consideration by the bankrupt, before the bankrupt act was passed, belong to the assignee.

[Cited in Allen v. Massey, Case No. 231; Kinzie v. Winston, Id. 7,835; Re St. Helen Mill Co., Id. 12,222; Re Werner, Id. 17,416.]

2. If such trust was created to conceal the property from creditors, this might prevent a court of equity from lending its aid to the bankrupt to enforce the trust, but the assignee may enforce it, for the benefit of creditors.

[Cited in Allen v. Massey, Case No. 231; Crapo v. Kelly, 16 Wall. (83 U. S.) 638; Bailey v. Glover, 21 Wall. (88 U. S.) 348; Glenny v. Langdon, 98 U. S. 28; Tyler v. Angevine, Case No. 14,306; Re Wynne, Id. 18,117.]

3. Lands conveyed to a third person by the bankrupt, without any consideration, upon a secret parol trust in his favor, for the purpose of defrauding creditors, pass to the assignee, although the conveyances were made before the passage of the bankrupt act.

[Cited in Bradshaw v. Klein, Case No. 1,790; Pratt v. Curtis, Id. 11,375; Tiffany v. Boatman's Savings Inst., 18 Wall. (85 U. S.) 387; Cady v. Whaling, Case No. 2,285; McAlpine v. Hedges, 21 Fed. 690.]

4. Under the eighth section of the bankrupt act [5 Stat. 446] the cause of action in such a case does not accrue, until the fraud is discovered.

[Cited in Martin v. Smith, Case No. 9,164; Baldwin v. Raplee, Id. 801; Re Dole, Id. 3,965. Applied in Mattocks v. Rogers, Case No. 9,300.]

5. The repeal of the bankrupt act does not prevent an assignee from instituting suits to reduce the property of the bankrupt to possession.

[6. Cited in Rison v. Knapp, Case No. 11,861, to the point that contemplation of bankruptcy means something more than insolvency.]

[Cited in Barker v. Barker, Case No. 986; Nicholas v. Murray, Id. 10,223.]

[In equity. Bill by Joshua Wingate Carr, assignee in bankruptcy of William Smith, against Stephen Hilton et al., to reach certain alleged assets of the bankrupt. The defendant demurs to the bill.]

Mr. Stewart, for demurrer.

Allen & Warren, contra.

CURTIS, Circuit Justice. J. Wingate Carr, as assignee in bankruptcy of William Smith, has filed his bill in equity, stating that Smith was decreed a bankrupt, and the complainant appointed his assignee, in February, 1843; that the amount of debts sworn to by the bankrupt was large, while the assets disclosed by him were not sufficient to pay the charges of the bankruptcy; that at different dates, between the years 1834 and 1840, inclusive, the bankrupt being insolvent, for the purpose of concealing his property from his creditors, made sundry conveyances thereof to the defendant, and facts are stated showing that the defendant must have participated in this fraudulent intent. The bill further states that the bankrupt exchanged some property for a farm in Newport, in the district of Maine, and instead of taking the title to himself, caused the same to be conveyed to the defendant, and his brother since deceased; that the latter has conveyed his title to Henry Warren, Esquire, a counsellor of this court, who is made a party to the bill, and who is ready to perform all such orders and decrees as the court may make in the premises, such being the purpose for which he holds that title; that the title to the said farm was thus vested in the defendant and his brother, to conceal the property from the creditors of the bankrupt, but the bill does not aver that the defendant was a party to this fraud, or had knowledge that the legal title was vested in him. The bill further states that these frauds of the bankrupt were unknown to the complainant until within two years before the filing of the bill, and it details when and how the frauds were discovered by him.

The defendant has demurred to the bill, and has assigned, orally, four causes of demurrer, which must be separately considered. The first is, that these transactions, being all prior to the passage of the bankrupt act, and there being no averment that either of them was in contemplation of bankruptcy, or of the passage of a bankrupt law, no title passed to the assignee, and he cannot sustain this bill. In passing on this objection, it is necessary to distinguish the case of the Newport farm from the other transactions. The legal title to these lands was never in the bankrupt, but the whole consideration having moved from him, a trust resulted to him by operation of law, and he was the equitable owner of the lands, at the date of the decree in bankruptcy. The third section of the act (5 Stat. 442) enacted that all property and rights of property, of every name and nature, and whether real, personal, or mixed, of every bankrupt, except household furniture, &c., not exceeding in value three hundred dollars, shall, by mere

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

operation of the decree, be devested out of the bankrupt, and vested in the assignee. There can be no doubt that the equitable ownership of lands, by reason of a resulting trust, is a right of property, within the meaning of this clause. But it is argued that the section only provides that the assignee shall have the same rights, titles, powers, and authority to sue for the same that the bankrupt had before, or at the time of his being declared a bankrupt; and that the bankrupt himself could not have had the aid of a court of equity, to enforce a trust created for the purpose of defrauding his creditors. Whether a court of equity would permit the trustee to set up the fraud as a bar to a bill by the cestui que trust, it is not necessary in this case to determine. On the authority of Muckleston v. Brown, 6 Ves. 68; Ottley v. Browne, 1 Ball & B. 360; and Chaplin v. Chaplin, 3 P. Wms. 233,—I should hold the affirmative; this, however, would not rest upon any want of title in the bankrupt, but upon a very different ground, which will be presently stated. But there is a very broad distinction between a bill by the bankrupt, the author of the fraud, and one by the assignee, who seeks to recover the property, for the benefit of the very interest sought to be defrauded. The ground for refusing relief to the author of the fraud is a principle of public policy, which forbids the court to be ancillary to a plan for evading the law and depriving creditors of their just and legal rights. But where the assignee sues, the case is reversed; to grant the relief, is to act in accordance with these rights of creditors, and in opposition to the contemplated fraud, while to refuse it would be to aid in its perpetration. Lord Redesdale, in Joy v. Campbell, 1 Sch. & L. 328, held, that legatees and creditors were entitled to relief, and this distinction between the author of the fraud and one claiming through him, had previously been taken by Lord Eldon, in Muckleston v. Brown. See, also, Fairbanks v. Blackington, 9 Pick. 93; Martin v. Root, 17 Mass. 228; Holland v. Cruft, 20 Pick. 321. I am clearly of opinion, therefore, that, as respects these lands in Newport, the assignee may maintain this bill; and as the demurrer is to the whole bill, it follows that so far as respects the objection to the assignee's title, it must be overruled. But as the question concerning his title to the other lands must at some time be determined, and has been fully argued, I think it proper to express my opinion thereon. The argument against the title is, that there are no words in the act sufficient to pass to the assignee, the title to property conveyed by the bankrupt, to defraud his creditors prior to the passage of the bankrupt act. On examining the law, it will be found there are no express words in it passing to the assignee property conveyed by the bankrupt to defraud creditors, at any time, unless made in contemplation of bankruptcy, which is now settled to mean something more than insolvency. Buckingham v. McLean, 13 How. [54 U. S.] 150.

The two great objects of the bankrupt law were, the equal distribution of all the property of the debtor among those justly entitled to it, and the relief of honest debtors, who should conform to its provisions, from the burden of their debts. It is a notorious fact that the pecuniary state of the country at the time, was the great and leading inducement to the passage of the law, and that it was expected and intended to operate, as in fact it did operate, upon a vast number of cases of persons who had previously become insolvent. To hold that no property, fraudulently conveyed by any of these persons, before the date of the law, could be distributed under it, would be so much in conflict with one of its great purposes, that I should come very reluctantly to that conclusion. It does not seem to me necessary to do so. A fraudulent conveyance is no effectual conveyance, as against the interest intended to be defrauded. This interest the assignee represents, so far as respects all creditors who prove their claims. They can have no remedy which will reach property fraudulently conveyed, except through the assignee, because they can sustain no suit against the debtor. Their remedies are absorbed in the great and comprehensive remedy under the commission, by virtue of which the assignee is to collect and distribute among them, the property of their debtor to which they are justly and legally entitled. The case of the assignee is, therefore, that the lands in question are the property of the debtor, and that he prays the aid of this court to remove an apparent cloud upon the title, which, though void, interferes with the discharge of his official duty. In this view, the case is within the express terms of the third section of the act, and it is the view taken in Sands v. Codwise, 4 Johns. 536, especially by Chief Justice Spenser, and Mr. Justice Kent. In my judgment it is a sound view. See, also, Martin v. Root, 17 Mass. 228, and Holland v. Cruft, 20 Pick. 321. But here, also, it is urged, that the subsequent language of this section proves that the words, "all the property and rights of property," &c., were not intended to apply to any property which the bankrupt himself would not have had a title to recover, if he had not been decreed a bankrupt. It is not easily apparent, what was intended by this clause. Its language is, "and the assignee, so appointed, shall be vested with all the rights, titles, powers, and authorities to sell, manage, and dispose of the same, and to sue for and defend the same, as fully, to all intents and purposes, as if the same were vested in, or might be exercised by, such bankrupt, before, or at the time of his bankruptcy, declared as aforesaid." The general idea here conveyed, is, succession to the bankrupt;—though somewhat obscure, this general idea is sufficiently conveyed; but one

difficult inquiry is—succession to the rights belonging to the bankrupt, at what time? The answer of the statute is, "before or at the time of his bankruptcy;" that is, at any time before the instant when the rights and powers of the assignee became vested. I must admit the difficulty of discerning the precise meaning and effect of this clause; but I do not see that it is sufficient to control what, I think, is one of the great objects of the law. If the assignee is vested with the same powers which the bankrupt had before, or at the time of his bankruptcy, he has a right to the interposition of this court, in this case; for there was a time before the bankruptcy, when the title of the bankrupt was perfect. Yet it cannot be supposed that in a clause, the general idea of which is succession, the legislature intended to refer to any and all past rights which had at any time existed. What then is the meaning of the clause, "before, or at the time of his bankruptcy," as descriptive of the period of time to which reference is to be had, in considering what rights and powers this clause confers on the assignee? This is a question of great difficulty, and, in my judgment, the only safe means of solving it are found in the general purpose and object of the law. This general purpose requires that property, which belonged to the bankrupt, at the time of the bankruptcy, should be distributed among his creditors who prove their claims; it further requires that property, attempted to be conveyed by him to defraud those creditors, should be treated as his property; if it be treated as the property of the bankrupt, the assignee, by virtue of his title, and as the trustee of the creditors, has a right to the aid of this court in this case. Cases might occur, and may be supposed, in which the possession of the title of the bankrupt might not be, of itself, sufficient. Without more, it would not enable the assignee to sue in his own name, upon any chose in action, not negotiable, nor to maintain a real action upon a disseisin, or for a mere right of the bankrupt. In this view, it may be considered as not designed to limit, or give a construction to the preceding clause, which vests the property, but as superadding thereto some other rights and powers, which would not otherwise have attached to its ownership. This, according to the best opinion I can form, is the real purpose and effect of the clause, and in this aspect it does not interfere with the right of the plaintiff to maintain this bill. In my opinion, the property fraudulently conveyed, is to be deemed property of the bankrupt, and was, by the decree, vested in the assignee. This enables him to maintain the bill. He has no occasion to resort to the subsequent clause, for any enlargement of his powers, and the design of that clause was not to deprive the assignee, of rights which attach to the ownership of the property, in the capacity in which he holds it, but to enlarge his powers and confer rights upon him which, on the ordinary principles of law, do not belong to a mere voluntary assignee.

The next cause of demurrer is the bar, arising from the last clause of the eighth section of the bankrupt act, which is as follows: "No suit at law or in equity shall, in any case, be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years after the declaration and decree of bankruptcy, or after the cause of action shall first have accrued." The bill avers that the fraud, which is the present cause of action, was discovered within two years before the filing of the bill. Long before the statute was enacted, the same words, in other statutes of limitations, had received a construction, both in England and America, at law and in equity, and in the courts of the United States as well as in other tribunals. The cases in the English chancery are very numerous, and it is not necessary to detail them. They are collected by Mr. Lewin, in his treatise on trusts (page 616). In this country, also, there are decisions in most of the courts of the last resort, one of the earliest of which is First Massachusetts Turnpike v. Field, 3 Mass. 201, followed by Homer v. Fish, 1 Pick. 435, and Welles v. Fish, 3 Pick. 74. See, also, Sherwood v. Sutton [Case No. 12,782]; Mitchell v. Thompson [Id. 9,669]. The settled statutes of limitation do not run, in cases of fraud while it is secret. Some difference of opinion has existed, respecting the grounds for this rule; but, in my judgment, the most reasonable and sensible ground is, that, substantially, the title to avoid the transaction does not arise until the fraud is known. This is the practical and just view, and to this I assent; and hold that when the cause of action is a fraud, the action does not accrue while its cause is concealed; and this interpretation I must consider to have been within the intention of the legislature, when it used the same language, which had acquired a settled meaning to that effect. It is objected, however, that this bill does not contain any averment that the cause of action was fraudulently concealed. But it does state a case of secret fraud, and it would be difficult to distinguish this from fraudulent concealment. A secret, or what is the same thing, concealed fraud, when it is the cause of action, is a fraudulent concealment of the cause of action.

Another cause of demurrer was, that the repeal of the bankrupt law put an end to the complainant's right to sustain this bill; but it is clear the saving clause in the repealing act covers the case. The demurrer is overruled.

[NOTE. For decision dismissing the bill, see next following case, No. 2,437.]

Case No. 2,437.

CARR v. HILTON.

[1 Curt. 390.][1]

Circuit Court, D. Maine. Sept. Term, 1853.

BANKRUPTCY — ACTION BY ASSIGNEE TO INCREASE ESTATE — COMPETENCY OF CREDITOR TO TESTIFY — EVIDENCE — STATEMENT IN PRESENCE OF PARTY — LIMITATION OF ACTIONS — AVOIDANCE OF BAR — NOTICE.

1. A creditor of a bankrupt is not a competent witness for the assignee, in a suit to increase the estate.

2. Evidence that a statement was made to a court by counsel, in the presence of the complainant, who was not a party, is inadmissible.

3. To avoid the bar of the statute of limitations, the complainant must not only allege his ignorance of the fraud, but when and how it was discovered; and must offer satisfactory evidence to prove these averments.

[Cited in Moore v. Greene, Case No. 9,763; Calais Steamboat Co. v. Scudder, 2 Black (67 U. S.) 389; Badger v. Badger, Case No. 718; Martin v. Smith, Id. 9,164; Baldwin v. Raplee, Id. 801; Re Hook, Id. 6,672; Wood v. Carpenter, 101 U. S. 141; Barlow v. Arnold, 6 Fed. 354; West Portland Homestead Ass'n v. Lownsdale, 17 Fed. 207.]

4. Information, which makes it the duty of a party to make inquiry, and shows where it may be effectually made, is notice of all facts to which such inquiry might have led. But a party, thus put on inquiry, is to be allowed a reasonable time to make it, before he is affected with notice.

[Cited in Lawrence v. Dana, Case No. 8,136; Martin v. Smith, Id. 9,164; Scammon v. Cole, Id. 12,432; Jaudon v. City Bank, Id. 7,230; Hamlin v. Pettibone, Id. 5,995; Brooke v. McCracken, Id. 1,932; Pickert v. The Independence, Id. 11,124; Yancy v. Cothran, 32 Fed. 689.]

[In equity. Bill by Joshua Wingate Carr, assignee in bankruptcy of William Smith, against Stephen Hilton, to reach certain alleged assets of the bankrupt. Defendant demurred to the bill of complaint, and the demurrer was overruled. See Case No. 2,436, next preceding. Thereafter, he answered, and the case is now heard upon the merits.]

CURTIS, Circuit Justice. A demurrer to this bill was argued and overruled at the September term, 1852. It was then determined, that, as the frauds charged in the bill, though alleged to have been committed more than two years before the institution of the suit, were averred in the bill to have been discovered by the complainant within two years, the cause of action had accrued to the complainant within two years, and so was not barred by the eighth section of the bankrupt act. The defendant having answered, denying the frauds charged in the bill, has again set up this statute of limitations as a bar, and accompanied it by a denial of the averments of the bill respecting the discovery of the alleged frauds. And evidence has been offered by each party concerning the time of this discovery. Before considering that evidence, it is material to notice, that, in order to avoid the bar of the statute of limitations, the complainant must not only state that the fraud was unknown to him, till within the time allowed by the statute, but he must state when and how it was first discovered. Stearns v. Paige, 7 How. [48 U. S.] 829; Fisher v. Boody [Case No. 4,814].

Some of the evidence in this case, on both sides, is inadmissible. The deposition of Mr. Warren, who is a creditor of the bankrupt, is, for that cause, incompetent. 1 Greenl. Ev. § 392. He is interested to increase the fund, out of which he is entitled to be paid. And on the part of the respondent, those depositions which tend to prove that Mr. Warren, addressing the supreme judicial court of Maine on the hearing of a suit between one Haskell and this respondent, this complainant being then present, stated that he had informed this complainant of the alleged frauds before that suit was instituted, is also inadmissible. To affect a party by evidence that a statement was made in his presence, which he did not deny, the circumstances must be such as naturally called on him for a denial, if the statement was untrue. Otherwise, it cannot fairly be assumed that he acquiesced in the statement. Allen v. McKeen [Case No. 229]; Melen v. Andrews, 1 Moody & M. 336; Com. v. Kenney, 12 Metc. [Mass.] 235; 1 Greenl. Ev. § 197. And when a person, not a party, in a court of justice, hears a statement made by counsel to the court, he not only is not called on to deny it, but ordinarily would be silenced, if he attempted to do so. All the evidence on this subject is therefore laid out of the case, as irrelevant and incompetent. There remains only so much of the deposition of Mr. Stewart, as relates to the interview between himself and the complainant, on the twenty-fourth day of February, 1848. Mr. Stewart deposes, that, on the evening of that day, which was nearly three years before this bill was filed, he called on the complainant, to obtain from him, the office copy of his appointment as assignee in bankruptcy, to file in the suit between Haskell and Hilton. This paper is now produced, and appears to have been filed in the clerk's office on the twenty-fourth day of February, 1848; and there is no reasonable doubt, therefore, that the time of this interview is correctly fixed. He further testifies: "I found Mr. Carr apparently a cautious man, somewhat; and as I was a stranger to him, he seemed indisposed at first to let me have his appointment, without an explanation of the purpose for which I desired it. I thereupon stated to him that purpose, and the reasons for it. I gave him a history of the case from the first; its origin, the motives of the parties, &c. In doing this, I was obliged to, and did state to him the substance of the charges of the bill in that case, which were substantially the same as the charges in the present bill."

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

He then goes into some particulars concerning his statements, and adds: "I stated to him, distinctly and clearly, that Mr. Warren claimed the whole transaction to have been fraudulent as to Smith's creditors, and that his bill in equity was brought upon that ground; and that one ground relied upon in the defence was, that the suit should have been brought by him as assignee of Smith, in bankruptcy; and that he was the only party who could question the frauds, if any had been committed."

The case, then, stands thus. The complainant has offered no admissible evidence to show when and how he first discovered the alleged frauds; the defendant has offered the above evidence of notice to the complainant. If there was no evidence of notice on the part of the defendant, we should find great, if not insuperable difficulty, in holding that the bar of the statute of limitations was avoided. If it be necessary for the complainant to aver in his bill, when and how he first discovered the fraud, it is certainly incumbent on him to offer some legal evidence in support of those averments. If a communication was made to him, as he alleges in his bill, in June, 1849, he should have proved it, with all its circumstances, and show that his own conduct, in reference thereto, was such as to lead to a reasonable inference that he then first discovered the alleged fraud. But he offers no legal evidence of such a communication, and he did not file this bill until February, 1851, eighteen months after the alleged time of the discovery; and no reason is shown for the delay. But, independent of this, we are of opinion, that the deposition of Mr. Stewart shows such a notice of the alleged frauds, as caused the statute bar to begin to run, more than two years before this bill was filed.

The rule respecting notice is well settled. It is correctly laid down in Kennedy v. Green, 3 Mylne & K. 719, 721, 722: "It is the well-established principle, that whatever is notice enough to excite attention, and put the party upon his guard, and call for inquiry, is notice of every thing, to which such inquiry might have led. When a person has sufficient information to lead him to a fact he shall be deemed conversant of it." In support of this, many cases might be cited. It will be sufficient to refer to a few of them. The Ploughboy [Case No. 11,230]; Hinde v. Vattier [Id. 6,512]; Bowman v. Wathen [Id. 1,740]; Sugd. Vend. 1052, and cases there cited. Now, the complainant was told that a suit had been brought, founded on the facts alleged in this bill; that it had been prosecuted by respectable counsel; that it was then pending; that if any one could make title by reason of those facts, he alone could. This was clear, direct, and specific. It was not only enough to put the complainant on inquiry, but it referred him to the very source from whence this bill came; that is, to Mr. Warren; and informed him where he could find a particular narrative of the charges, and the evidence in support of them. It must be remembered also, that the complainant was acting in a fiduciary capacity, and that a duty was incumbent on him to make inquiry concerning property of the bankrupt, when he had authentic information that a third person was charged with concealing it, to defraud creditors.

It has been argued, that, as Mr. Stewart was the counsel of Hilton, the court ought to presume that he represented his client's case favorably, and gave Mr. Carr an impression that his client was innocent of the frauds. But Mr. Carr knew the fact that Mr. Stewart was Hilton's counsel. And if that fact requires the court to presume that Mr. Stewart's representation would naturally be favorable to his client, it required Mr. Carr to presume the same thing. But in truth, he should have acted not on any mere impressions, but on the specific and substantive facts stated to him; that the frauds had been charged in a bill filed in the supreme judicial court of Maine, by respectable counsel, whom he has now employed in this suit; that the bill was coming to a hearing, and that, in the view of the defendant's counsel, whatever title existed, belonged to him as a trustee for creditors. It was not necessary that he should then believe the frauds existed. It was enough that his attention was called to them, that he was put on his guard, and that he had sufficient information to lead him to the facts. It thus became his duty to know them; and after the lapse of sufficient time to make the necessary inquiries, he must be treated as if he had performed this duty, and did know them. Three years, wanting but twenty-three days, elapsed after this notice, before the bill was filed. Eleven months and upwards, is too much time to allow for making the necessary inquiries, considering that both the complainant and Mr. Warren lived in the city of Bangor, that the suit was pending in the county of Penobscot, and that, by an examination of the bankrupt himself, the whole matter could have been sifted to the bottom, in far less time than eleven months. Our opinion is, that the eighth section of the bankrupt act affords a complete bar in this case; and the bill, for this cause, must be dismissed.

Case No. 2,438.

CARR v. HOXIE.

[5 Mason, 60.] [1]

Circuit Court, D. Rhode Island. June Term, 1828.

DELIVERY OF DEED—ESCROW.

1. A delivery of a deed is essential to its validity. If it be delivered as an escrow on con-

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

ditions, those conditions must be complied with before it can take effect, as a deed.

[See Glover v. Chase, 11 Fed. 375; Hammond v. Hunt, Case No. 6,003.]

2. If an instrument be signed and sealed by the grantor, but is left with a third person, without any express or implied authority to deliver it to the grantee, it is not presently the deed of the grantor.

[See Younge v. Guilbeau, 3 Wall. (70 U. S.) 636; Ruckman v. Ruckman, 6 Fed. 225; Ireland v. Geraghty, 15 Fed. 35.]

Ejectment for a tract of land in West Greenwich. Plea, the general issue.

At the trial, the plaintiff [Nathan Carr] proved a title to the premises by a deed from Simon Reynolds to him, dated the 18th of July, 1826, the execution of which was established. The defendant [Joseph Hoxie] then set up a title to the premises under a prior deed from the same grantor, dated the 26th of May, 1826. The execution of this deed being disputed, a witness, Jonathan Nichols, was called by the defendant. He testified, in substance, that he was called upon by the parties to write the deed:—that he saw the grantor, Reynolds, sign and seal the same; and that Hoxie at the same time executed a deed of mortgage of the same lands to the grantor. The witness drew both deeds. The parties then had some conversation about the deeds, and about the fulfilment of certain conditions before they should be passed. They finally concluded to leave them both with him. But they did not authorize him to deliver either of them to the other upon the fulfilment of any conditions, nor did they deliver them to him for that purpose. Nor did he consider that he had any authority over the deeds. He made a memorandum at the time of the conversation between the parties, and afterwards gave a copy of it to Hoxie at his request. He supposed, that when the parties had adjusted all the conditions, and they were complied with, they would call on him together for the deeds; but that he had otherwise no authority to deliver them. There was no delivery of them in his presence. This was the whole case for the defendant.

Mr. Tillinghast, for plaintiff.

Bridgham & Whipple, for defendant.

STORY, Circuit Justice. Upon this evidence, I do not see, how the defence can be maintained. Here, there was no delivery of either instrument to Nichols, as the deed of the party, or as an escrow, to take effect upon the fulfilment of the conditions or agreements stated. Even supposing those conditions or agreements to be fulfilled, still the land will not pass, unless there has been an effectual delivery of the deeds with the assent of the parties respectively. See Degory and Roe's Case, 1 Leon. 152, Moore, 300; Wheelwright v. Wheelwright, 2 Mass. 447, 452; Johnson v. Baker, 4 Barn. & Ald. 440; Perk. Com. §§ 137, 138, 142–144; Bushell v. Pasmore, 6 Mod. 217, 218. The plaintiff is therefore entitled to recover upon the consummated title to him, subsequently made.

Verdict accordingly.

[NOTE. For another case which appears to have some connections with the subject-matter of the foregoing case, see Hoxie v. Carr, Case No. 6,802. See, also, Carr v. Hoxie, 13 Pet. (38 U. S.) 460.]

CARR (HOXIE v.). See Case No. 6,802.

Case No. 2,439.

CARR v. RICE.

[4 Blatchf. 200;[1] 1 Fish. Pat. Cas. 325.]

Circuit Court, S. D. New York. Sept. 10, 1858.

PATENTS—"BRAN-DUSTER"—VALIDITY.

1. Where, in the patent to Frost and Monroe, of February 27th, 1849, reissued March 13th, 1855, for an "improvement in machinery for separating flour from bran," containing four claims, the third claim was in these words: "The upright stationary bolt, or bolt and scourer combined, with its top or cover, or in combination with claims 1, 2 and 4, or either of them, or their equivalents, to produce like results in the flouring process:" *Held*, that such claim was bad, for uncertainty.

2. The fourth claim was one for "the use of the revolving, distributing, scouring and blowing cylinder of beaters and fans, by which the material is distributed, scoured, and the flour blown through the meshes of the bolting cloth:" *Held*, that such claim was one to a legal result, and bad on its face.

This was an action at law, for the infringement of reissued letters patent [No. 302] granted to Issachar Frost and James Monroe, March 13th, 1855, for an "improvement in machinery for separating flour from bran," commonly called a bran-duster. The plaintiff [John M. Carr] was the assignee of the patentees. The original patent [No. 6,148] was granted to them February 27th, 1849. At the trial, the plaintiff had a verdict [Case No. 2,440], and the defendant [John Rice] now moved for a new trial.

Charles M. Keller and George Gifford, for plaintiff.

Charles Tracy, for defendant.

NELSON, Circuit Justice. The plaintiff's machine consists of three essential parts: (1) An exterior cylindrical case; (2) within this, a cylindrical bolt, made of wire bolting cloth; and (3) a revolving cylinder, or scourer. There is also a cover or top to the cylindrical case, and a hole through it for the shaft of the revolving cylinder; also, a bottom on which rest the case, the bolt, and the scourer, with a hole for the other end of the shaft. There are also conductors for the discharge of the flour and bran. The claims of

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

the patentees are: (1) The horizontal bottom, when used in connection with the upright stationary (or revolving) bolt for flouring purposes; (2) the opening for the admission of a counter-current of air, through the bottom and into the bolt, and the bran spout, as described, in combination with the bottom; (3) the upright stationary bolt, or bolt and scourer combined, with its top or cover, or in combination with claims 1, 2 and 4, or either of them, or their equivalents, to produce like results in the flouring process; and (4) the use of the revolving, distributing, scouring, and blowing cylinder of beaters and fans, by which the material is distributed, scoured, and the flour blown through the meshes of the bolting cloth. It will be observed, that the patentees claim none of the component parts of the bran-duster as original or new, but limit their claims to certain combinations of the several parts making up the entire machine or instrument.

The first claim is, in few words, for the combination of the bottom with the bolt, for the use specified. The second is for the combination of the opening in the bottom for the admission of air, and the bran spout, with the bottom itself. The third claim is good for nothing, on account of its uncertainty. Nothing is claimed absolutely, as the whole is in the alternative. The claim is for the upright bolt, or bolt and scourer combined, (which?) with the top, or in combination with claims 1, 2 and 4, or either of them, or their equivalents. The fourth claim is a claim to a legal result—the use of the revolving, &c., cylinder of beaters and fans. Now, if the patentees were the inventors of this cylinder of beaters, they would, as matter of law, be entitled to the exclusive use of it, but not without. This they have not ventured to claim, and it is difficult to see how, with the implied admission that they were not its inventors, they can claim an exclusive right to the use of it.

The first and second claims are, therefore, in my judgment, the only ones that can be upheld, as the others are bad on the face of them; and, as it respects these two claims, the defendant is not chargeable with an infringement. No such combination of parts is found in his bran-duster. The elements of his combination are different. He uses a revolving bolt, and a differently constructed bottom. Both the plaintiff's and the defendant's machines are but improvements upon Ashby's, which was patented in 1846; and the defendant's is as different from the plaintiff's as his is from Ashby's.

A new trial must be granted, with costs to abide the event.

[NOTE. Patent No. 6,148 was granted to Frost & Monroe, February 27, 1849; reissued March 13, 1855 (No. 302), and February 25, 1862 (No. 1,280). For other cases involving this patent, see Swift v. Whisen, Case No. 13,700; Carr v. Rice, Id. 2,439; Burr v. Smith, Id. 2,196.

Case No. 2,440.

CARR v. RICE.

[1 Fish. Pat. Cas. 198.]

Circuit Court, S. D. New York. April, 1856.

PATENTS—NATURE OF GRANT—UTILITY—COMBINATION—SPECIFICATION—DESCRIPTION—IDENTITY—INFRINGEMENT.

1. A patent is dealt with by the courts, as a grant by the legislature, in exchange for the equivalent to be received by the public, in the free enjoyment of the patented discovery, after the inventor's exclusive privilege expires.

2. The patent grant is bestowed in consideration of something new and valuable, contributed by the patentee to the public benefit. If the subject of the grant was already open to common use, he renders no equivalent for the privileges he obtains, and fails to fulfill the vital condition upon which he was authorized to enjoy them.

[Cited in Bliss v. Brooklyn, Case No. 1,544; Hussey v. Bradley, Id. 6,946.]

[See note at end of case.]

3. It matters not how the thought is acquired or how brought into action, whether by a sudden conjecture, or chance experiment, or by the labors and investigations of a whole life; or, that it proves pre-eminently serviceable and profitable to the industry and enjoyments of life, or only to a very inconsiderable amount.

4. The law secures to the patentee the right to the use of his machine, provided it consists of a new combination, although composed of parts well known, and in common use.

5. If the patentee fails to mention, in his specification, an addition which is indispensable to the use of his machine, it is fatal to the title set up by the plaintiff. But if the machine works well without the addition, or if it be a mechanical means incident to the construction of the machine, to be brought into use in special circumstances, or only for the quickening, or making more profitable, the operation of the machine, it is not to be regarded as an indispensable part of it, and need not be described or claimed in the specification.

[Cited in Dornan v. Keefer, 49 Fed. 463.]

6. Strong resemblances in external appearances, similarity of products or operation, are not, separately, tests of the identity of the plan, or purpose of machines; nor is a superiority in products, or in operation, in one over the other, proof of an essential difference; because the slightest change of a machine, which effects a real improvement in it, may be patentable, while great apparent variations may be only disguises, under which an older discovery is attempted to be employed and appropriated.

[Cited in Rapid Service Store Ry. Co. v. Taylor, 43 Fed. 252.]

7. The defendant can not embody in his machine the patented discoveries held by the plaintiff, nor entitle himself to use them, by adding improvements, or new inventions of his own or of others thereto.

8. A person purchasing property, against the right of another, when the owner was without evidence of his title, can not hold or use it, after the evidence of his superior right is acquired by the real owner. Patent interests are not distinguishable, in this respect, from other kinds of property.

At law. This was an action on the case [by John M. Carr against John Rice] tried before Judge Betts and a jury, to recover damages for the infringement of letters patent [No. 6,148] for "improvements in ma-

chinery for separating flour from bran," granted to Issachar Frost and James Monroe, February 27, 1849, and reissued, March 13, 1855 [No. 302].

The claims of the original patent were as follows: "Having thus fully described the construction, arrangement, and operation of the several parts of our machine, we will now add that we do not mean to claim to be the original inventors of a cylinder, nor of a combined punch and reticulated cylinder, nor of a cylinder covered with strips of punched sheet-iron and strips of leather filled with tacks, such as are used in smut machines, nor the arrangement of gearing by which the machine is propelled; but we do claim to be the original and first inventors of the combination and arrangement of the external, upright, stationary, close cylindrical case B, with the internal combined punched and reticulated upright stationary scourer and bolt B^1, B^2, and revolving cylindrical scourer and blower C, constructed, arranged and operated in the manner and for the purpose herein fully set forth, by which the fine flour that usually adheres to the bran, after being subjected to the first bolting operation, is now completely separated from the bran and collected in the annular space between the cylindrical bolt and cylindrical case, from whence it descends through the segmental openings in the horizontal base, upon which the said bolt and case rest, into conducting spouts, as aforesaid, while the bran is blown from the interior of the bolt through a spout leading through the external case, as aforesaid, in the meshes of the bolting-cloth, being kept open by the pressure of air produced inside the combined cylindrical scourer and bolt, by the manner in which the oblique and radical and parallel wings are arranged on the revolving, scouring, and blowing cylinder, as above set forth.

The claims of the reissued patent were as follows: "I claim: 1st. The platform D (always at right angles with the sides of the bolt, when not made conical), or close horizontal bottom, when used in connection with upright, stationary, or revolving bolt for flouring purposes. 2d. The opening at D^5 for the admission of a counter current of air through the bottom and into the bolts and the opening and bran-spout F, as described, in combination with the platform D. 3d. The upright, stationary bolt, or bolt and scourer combined, with its closed-up top, except for air and material; as in combination with first, second, and fourth, or either of them, or their equivalents, to produce like results in the flouring process. 4th. The use of the revolving, distributing, scouring, and blowing cylinder of beaters and fans, by which the material is distributed, scoured, and the flour blown through the meshes of the bolting-cloth."

The machine was for rebolting or dusting bran which had already passed through the bolt, and it was claimed that by its use a saving was effected of from two to three barrels per hundred. On the part of the defense it was contended that the invention was void for want of novelty and utility, and that the defendant did not infringe the patent.

Charles M. Keller, for plaintiff.

Charles Tracy and S. W. Holladay, for defendant.

BETTS, District Judge. This prosecution rests upon what is termed a patent right. You are aware that, by virtue of acts of congress, individuals can have secured to them, a property in an invention. It is not necessary to examine whether such property rests in natural right, or is derived from the donation of government. It is dealt with by the courts, as a grant by the legislature, in exchange for the equivalent to be received by the public, in the free enjoyment of the patented discovery, after the inventor's exclusive privilege expires.

In the maintenance of rights of this description, and defense of prosecutions upon them, questions arise, for the determination of courts and juries, of a complicated, and oftentimes, embarrassing character. We are brought to consider subjects not familiar to common experience; for few understand the theory and science, or scarcely the practical application of mechanical arts. The points raised in these investigations are complicated and intricate in their nature, and embarrassing, to persons most skilled in them, to understand clearly.

After the maturest study, courts are frequently perplexed in determining the just bearing and effects of the facts, upon which they are to decide in this class of cases, and this embarrassment must necessarily be shared by jurors.

The cardinal principle upon which patent laws rest is, that an individual is only entitled to appropriate to his exclusive control, that which he has, by his original invention, or discovery, first made known, and rendered useful. Accordingly to determine his exclusive title, it is necessary to ascertain what was before known to the public, and whether what he assumes to be his, is really made so, by being distinct from any thing before publicly used in that condition, and applicable to like purposes, and is rendered, by means of his invention, useful.

This always presents questions of great difficulty, both upon the point of utility, and more particularly as to how far public knowledge and experience have already reached, in respect to the discovery claimed.

These points are to be determined by a careful comparison of the description given by the patentees of their discovery, with the proofs of what had been described in books; because the law gives no effect to a patent for things worthless in themselves, or which the community could have used without the aid of the patentees. In this connection, it

will be borne in mind, that a patent can not be supported by proof that the invention was new to the patentees themselves, but the evidence must be satisfactory that they were actually the first, and original discoverers, of the thing patented. Their title is in no wise strengthened if their invention be proved to have been made at great expense of time, research, and money, even if they honestly believed it original with themselves, if in the end it is made to appear that others had previously known and used it. However ingenious the contrivance may be, and wonderful the processes performed by it, and puzzling to the mind to comprehend its arrangement, still, if, in the result, it turns out that neither the whole instrument, nor the combination of its parts, nor the results obtained by it, was first devised and adapted to practical purposes by the patentees, their patent can not stand.

Another indispensable prerequisite to the validity of a patent grant is that the patentees draw up and describe what is called a specification of their discovery, and file it in the patent office, setting forth and specifying the particulars of their invention plainly, and clearly; so that mechanics skilled in that branch of business, can construct the patented discovery from that description. The jury will bear in mind that the plaintiff establishes no right of action, unless it appears, upon the whole evidence in the case, that the patentees were really the original and first discoverers of the patented invention; that it is useful by producing some new manufacture, or some benefit by the method of manufacture, covered by the claim. None of these particulars less than the whole will sustain it.

It is manifest that these inquiries demand your judgment upon points exceedingly nice and intricate in their character, upon which, you perceive, witnesses of integrity, skill, and experience, have expressed widely differing opinions.

This action relates to an alleged discovery of a machine for separating flour from bran, after the same has passed through the usual bolting process. The patentees, in their specification, claim a discovery which introduces a valuable improvement into that branch of manufacture. The first question under the issue before you will be, What is the specific invention claimed by the plaintiff, or by the patentees? although the consideration of its utility may well be connected with that point.

The law does not require the patentees to prove their discovery to be useful to any eminent or large degree. It is sufficient if it produces an improved article, at less cost, or with more expedition, than other known methods; that renders the discovery useful, within the meaning of the patent laws.

The machine constructed and patented, and now the subject of this action, is familiarly called a bran-duster, and is represented and claimed by the patentees to be an improvement in "machinery for separating flour from bran." Its purpose and use is, to separate the remaining particles of flour which adhere to the bran, after the same has passed through the ordinary bolting process. The allegation and claim is, that this discovery secures that end more cheaply and perfectly than was before done, and effects a large saving of flour by freeing the flour from the bran, to which it adheres after passing through the ordinary bolts, and which would otherwise pass off with the feed.

The patentees do not claim to have invented a new machine, but to have contrived a new arrangement and combination of known parts of machinery, so as to produce, by its operation, a more beneficial result. The plan of construction and combination is set forth in the specification, and in the claims, with which that concludes.

The most noted parts are, an outer wooden case, which forms the exterior covering of the machine; an interior case of wire-gauze, tin, or other metal, perforated with holes, similar to an ordinary sifter, or sieve, forming a bolting cylinder, with both ends closed up, except for air and material—(in the model, this is stationary, although it is claimed, either stationary, or revolving, when thus used for flouring purposes)—and an upright cylinder of beaters and fans, having a distributing head, or table on its top, within the interior case or bolting cylinder. This cylinder is covered with strips of leather, having tacks, or nails without heads, projecting from the surface outward near to the sifter, and also with little wings of tin, or other substances, and of sufficient strength to bear the pressure of the air, so as to act as fans, when the cylinder is revolving rapidly.

Air is admitted freely through an aperture for the admission of the feed near the hopper, and some is also received through openings at its base, at the center, or at the discharge hole for the bran. The material or offal to be operated upon is received from the bolt (after the ordinary process of bolting is completed), and passed thence on to the head of the solid cylinder, and distributed by its centrifugal action equally around the periphery, and down the sides, and thus thrown out into the body of the case, and against the sifter inclosing it.

The solid cylinder is made to rotate with high speed, and, by aid of its appliances and velocity, a rapid circulation of air is created within the sifting case, and in that manner it is claimed, the flour and bran are suspended, and subjected to the double action of the beating, or whipping of the tacks, or pins attached to the cylinder, and the currents of air—the latter driving the flour against and through the sieve-covering—and the bran, by its gravity, falling to the bottom of the case. Arrangements are also proposed for removing the flour and bran from the machine, where they severally fall, by means of

spouts—the bran on the floor of the inside case, and the flour outside of the sifter.

The theory of the plan of operating is, by the combination of the machinery, in swift motion, to loosen the flour which adheres to the bran, when it is delivered out of the ordinary bolt, and to propel the flour through the sifter, by force of the currents of air alone, while the bran drops to the floor and through a hole in the bottom, by its gravity, and by that action to produce a complete separation of the flour and bran, cheaply, expeditiously, and with an important saving of flour.

The features of the plan are thus sufficiently stated, without seeking to be critically exact in all the details of the machine, to enable the jury, on the evidence, to determine whether the contrivance is worked out by a new and useful combination of its parts.

The law secures the patentees the right to the use of their machine, provided it consists of a new combination, although composed of parts well known, and in common use. Indeed, it is not to be expected, in this era of the mechanical arts, that a machine original, in all the instrumentalities it employs, can be produced.

To make their title good, the patentees must describe, fully and clearly, their whole invention, and the method of using it. If anything material, in respect to its construction or working, is omitted in their specification, they lose all claim to the exclusive use of their discovery.

It is admitted, on both sides, that the model, on the table before you, presents a true picture or representation of the discovery claimed by the patentees, in all its essential parts. Its plan and combinations have been substantially pointed out to you already; and it is for you to determine, upon consideration of the whole of the evidence, whether the invention is new and useful.

It is, however, proper to observe that the patentees need not specify the kind of power to be employed, or the method of applying it in working the machine. No particular mechanical means to those ends are claimed in the discovery, and they are accordingly at liberty to use any known to mechanics skilled in machinery of this character, and not requiring invention to prepare or apply them.

It is urged, that the description of the machine is vitally defective, in not pointing out the application of a knocker, or rapper to it, without which it can not be worked to any advantage, and which is, in fact, applied by the patentees to those they use or vend.

The office of the rapper is, from time to time, to strike the upper end of the sifter-cylinder, with force sufficient to jar, or shake off the flour adhering to its outer face—and so clogging the meshes, or perforations, as to prevent its being blown through, by the currents of air within. If the patentees always use that addition, and it is indispensable to the usefulness of the machine, their failing to mention it in their specification, is fatal to the title set up by the plaintiff. There is, however, conflicting evidence on this point, and the facts involved in the objection, are for the jury alone to decide. If the duster works well without that addition, or if it be a mechanical means incident to the construction of a duster, or bolters, to be brought into use in special circumstances, or only for the quickening, or making more profitable, the operation of the machines, it is not to be regarded as an indispensable part of it, and need not be described, and claimed in the specification.

The main point of controversy in the case has been upon the novelty of the invention, claimed by the patent. This is always the ground of difficulty for discoverers to support themselves upon. The invention must be real with them. If it has been previously in public use, or can be found described in substance, in printed publications, it is public property, and the law does not permit it to be appropriated, by means of a patent grant, to individuals. The patentees may be ignorant of such facts; but the law charges them with knowledge of them, and treats their claim to an exclusive property in their discovery as fraudulent and void.

The law rests upon sound principles of equity and honesty in that respect. The patent grant is bestowed in consideration of something new and valuable contributed by the patentees, to the public benefit. If the subject of the grant was already open to common use, they render no equivalent for the privileges they obtain, and fail to fulfill the vital condition upon which they were authorized to enjoy them.

But it is a misapprehension to suppose, there must be proof of high merit in the invention to establish a patent right. The discovery may be the merest casualty. It matters not how the thought is acquired, or how brought into action, whether by a sudden conjecture, or chance experiment, or by the labors and investigations of their whole lives, or that it proves pre-eminently serviceable and profitable to the industry and enjoyments of life, or only to a very inconsiderable amount.

To show that the machine is not new and original with the patentees, a publication has been referred to, which was printed many years previously, in the Repertory of Arts, describing, with drawings, a patent issued to Ashby, in England, for improvements in flour-dressing machines (designed to separate flour from bran as a first bolter). A model, prepared in conformity with that description, has also been brought before you, and proved, by experts, to represent the plan of Ashby's invention.

The question of fact for the jury to decide, upon the evidence, is, whether the plaintiff's machine contained substantially the principle, and the like means for carrying it out, with what is embodied, in Ashby's contrivance. If it does, and nothing more, then this

patent is void, whether that machine ever went into use or not. The difference to the eye is palpable and great, and a similarity in substance is only made out on theoretical notions, or the idea of mathematical equivalents—as for instance, that the ends of arms projecting, at equal distances, from a central shaft in Ashby's plan may, in a mathematical sense, be taken for the periphery of a wheel, or the circumference of a cylinder; but if a description of that arrangement, laid before a mechanic skilled in building machines, would not enable him, without invention, to build a cylinder nearly filling a sifting-case, it would not amount to that kind of public notice and knowledge, which could interfere with this after patent. It is submitted to your judgment, upon that proof, whether such a description as Ashby's would instruct these patentees to employ the solid cylinder in their machines, and render their construction a piracy of that plan. But admitting that a shaft, with arms having fans or brushes at their ends, to act as beaters, to create currents of air throught the sifter, in Ashby's plan, would be an equivalent for the solid cylinder used by these patentees, it is to be observed that Ashby's plan has no distributing head or table, for the offal to fall upon, at the top, to be distributed by aid of guides thereon, or by centrifugal action, equally to the inner periphery of the bolting cylinder. This is claimed to be one of the essentials of this patent, and the jury are to judge whether this arrangement is not a new and important invention, in the uses and working of the machine in question.

Other differences in this instrument, from Ashby's, are pointed out by the evidence; particularly that the ends of his bolting cylinder are left entirely open, so that the currents of air produced by the brushes or fans, in rapid motion, can not be controlled, or prevented from escaping end-ways, carrying with them the materials of flour and bran; thus counteracting the purpose, in the plaintiff's machine, which is intended, by its close bottom and top, in connection with the wire-cloth bolt, to form a fan-case, managing the air, and by it, forcing out the flour through the sides of the sifter; while in Ashby's, the brushes in actual contact seem to be the important agency for driving the flour through the sieve-sides, by the act of brushing, instead of blowing. All these particulars, making differences of action, of purpose, or construction, will be considered by the jury in determining whether the plaintiff's machine is substantially borrowed from Ashby's.

A patent granted May 16, 1846, by the U. S. patent office, to Henry Straub, for a smut machine was also put in evidence by the defendant, to prove a want of novelty in the Frost and Monroe patent. You have heard it read, and seen a model, with the drawings representing it fully and in detail. You have also heard the opinions of experts upon both sides, regarding its construction, its purpose, and mode of operation. And whether the Straub patent contains the substantial combinations, or can be so arranged as to perform the same functions (without invention) as the plaintiff's, is a question of fact for the jury, upon the evidence, to decide.

It is often a point of great perplexity to determine the identity or dissimilarity of mechanical contrivances. Inventions are rarely introduced, claiming entire machines. Old and familiar instrumentalities are brought into new combinations, or comparatively small additions are made to what is in common use; and new results or advantages are sought for under the altered structure, by aid of means, often the equivalents of those they are substituted for; so that the identity, or essential differences of patented contrivances, compared with others before in use, are particulars upon which men of experience, skill, and sound judgment, are very likely to hold differing opinions.

Strong resemblances in external appearances, similarity of products or operation, are not, separately, tests of the identity of the plan, construction, or purpose of machines; nor is a superiority in products, or in operation, in one over the other, proof of an essential difference; because the slightest change of a machine, which effects a real improvement in it, may be patentable, while great apparent variations, may be only disguises, under which an older discovery is attempted to be employed and appropriated. The jury will accordingly bear in mind, that the title of the plaintiff does not depend, either upon the degree of improvement in this manufacture, produced by their machine, or in seeming distinctions from others before known, in the form, or dimensions, or positions of its parts, or in the materials of which it is constructed.

The experts who have analyzed Ashby's, Straub's, and the plaintiff's machines, give, in their testimony, strongly conflicting opinions respecting the essential similarity and dissimilarity of the same. It is the province and duty of the jury—although, perhaps, less skilled in the science of mechanics—to weigh that evidence, and determine its reliability and force, according to their understanding and judgment of the subject.

It is not enough for the plaintiff to establish the validity of the patent; he must also prove that the defendant has included some essential part of the discovery in his machine, and is using it in violation of his right, before he can be disturbed by this action.

The defense to the charge of infringement is, that the defendant's machine is a new invention of Benton; and that those parts and combinations in it which resemble the plaintiff's, are common to theirs, to Ashby's, and Straub's machines, before adverted to, and other machines which were used before

the discovery of plaintiff's; and that the plaintiff's will not work advantageously without the knockers, which the patentees make and use with it, but do not describe in their specification. It seems furthermore considered by the defendant that he has a right to run his machine, because it is better than the plaintiff's, in the cheapness, expedition, and quality of the work done by it.

The rules of law, applicable to all these grounds of defense, are perfectly plain and indisputable. The plaintiff has no monopoly of the art of separating bran from flour by machinery. This art is open to be exercised by everybody. The defendant can not be molested in the use of his own, or Benton's invention, or of any other machine, out of the plaintiff's patent, employed for that purpose. He is, moreover, entitled to make any useful improvement he may discover, and secure it as his own property, by patent, and add it to machines in public use.

But the limitation to his right is equally plain. He can not embody in such machines the patented discoveries held by the plaintiff, nor entitle himself to use them, by adding improvements, nor new inventions of his own or of others, thereto.

Although the improvement discovered by the defendant or Benton may constitute the main value and desirableness of the plaintiff's machine, he can not claim the enjoyment of it, without the authority of the plaintiff. But the defendant is not guilty of an infringement of the plaintiff's patent, by copying any part of that machine into his own, provided the same thing, under substantially the same combinations, is found in Ashby's machine, or any other one in use previous to the patent in question; nor does he infringe, by taking separate parts of the plaintiff's combinations—when consisting of several particulars—if he takes less than the whole; but variations merely colorable in that respect, will not protect the defendant in such use.

The patentee is bound to describe, in his specification, every part of his discovery, and the whole method of constructing it, which is important to its practical and useful employment as a duster. If a knocker to act with it when in operation, is of that character, and is used and vended by him with the machine, for either of these causes, the present patent will be void, for omitting that claim or notice

So, also, it is contended by the defense that some particulars respecting the discharge of the bran and flour from the table or bottom of the machine, set forth in the machine as part of its new combination, are wholly changed or deviated from, in its working, so as to render the one used essentially different from that described; and this objection, if satisfactorily supported by proof, will defeat the plaintiff's action.

The facts, then, are to be carefully examined, to determine whether either branch of the defense is made out. It is wholly matter of evidence, of which the jury are exclusively judges. Their judgment will be formed upon a close consideration of the testimony of the witnesses on both sides, and by inspection of drawings, models, and descriptions of the various machines, in proof, with a view to the purpose for which they were respectively constructed, and their modes of operation.

You will perceive, from these suggestions, that the main points, touching the validity of the patent, rest on the question, whether the contrivance patented was borrowed from the instructions or suggestions of others to the patentees, or from machines before used for like purposes; or whether it is the invention of the patentees, and is so described that it can be built by a competent machinist, and is useful.

So, also, as to the defendant's machine—whether he has employed in its construction only what was known before the plaintiff's was patented; or whether it includes no more than a portion of the various particulars composing the combination of the plaintiff's.

The testimony of the respectable and intelligent experts who have been examined, is entitled to great consideration, and can not have failed to impart much useful information, in respect to the principles and operations of the two machines before you. The laws of mechanics become a highly essential rule of evidence, and decision, in questions turning upon inquiries into the purpose, action, and effect of mechanical contrivances. They often supply the surest test of the novelty, and utility of machines, and of their coincidence with, or diversity from, one another. It is evidence worthy the careful regard of the jury in this case, especially as it is given with the advantage of being applied to the machines themselves, in presence of the court and jury.

Very little need be said by the court on the subject of damages. The only precise rule furnished by the law is, that the patentees are entitled, when a verdict is given in their favor, to recover the actual damage they have sustained by the infringement of their patent. No legal measure being furnished, by which that amount can be ascertained, the subject is left to the sound sense and judgment of the jury. There can be rarely occasion for vindictive damages; because, almost invariably, the infringement arises out of some colorable claim of right, by the party sued. Computations have been given in evidence of the quantity of flour manufactured by the defendant on his duster, and of the profits saved to him, by the use of what is claimed to be the plaintiff's patent right. This is all a fair subject for consideration; but it is hardly to be relied upon, as fixing, with any certainty, either the quantity of work done, or its value; but it is a particular to be fairly considered by the jury, in fixing the amount of injury sustained

by the plaintiff, by any unlawful use of the invention secured to him by the patent.

The point is made in behalf of the defendant—in diminution, if not entire discharge of damages—that when he set up his machine, it was not covered by the plaintiff's patent. This suit is upon a reissue of the patent originally granted. The patentees, finding their specification was not sufficiently explicit to secure them the whole of their invention, surrendered their patent to the patent office, and had granted them a reissue, with an amended specification, embracing their entire discovery. Before that was done, the defendant's machine was put up; and as, at that time, he was not liable to an action, therefore it is insisted, he can not be made so, by a subsequent alteration of the specification and patent, without his consent.

This defense can not prevail, if it be found by the jury that the patentees were the inventors of all that is claimed under the reissued patent, and only failed reaping the benefit of their invention for the want of the perfect description of it, in their first patent, which is now supplied them, in the amended and reissued one. They and their assignees became the owners of the discovery, with a perfect title, and the defendant is answerable for any unlicensed use of the machine since that time. A person purchasing property, against the right of another, when the owner was without evidence of his title, can not hold or use it, after the evidence of his superior right is acquired by the real owner. Patent interests are not distinguishable, in this respect, from other kinds of property.

The jury will observe, from these instructions, that the controlling questions of fact, for their decision in this cause, are: Was the invention claimed in the patent a new and useful one? Were the patentees the first and original discoverers of the thing patented? Have they so described their discovery, in their specification, that a competent machinist can make the patented machine from that description? Did the patentees claim, in their specification, more than they had actually invented? or did they omit to state in it, the whole of their invention, and such parts as are necessary to its usefulness? Does the defendant's machine violate the plaintiff's rights, to his injury?

In determining this last inquiry, the jury are to ascertain whether the defendant's machine is constructed and worked upon substantially the same principles, and to the same results, with that of the plaintiff; or whether its construction, combination, action, or purpose be substantially different; whether the difference in the two machines be only formal, or consist in improvements in the defendant's upon the plaintiff's; or are they the original discovery of Benton or the defendant, and render his machine distinct from the plaintiff's.

The instructions before given will have sufficiently pointed out to the jury the application of the law to the various facts submitted to their inquiry, according to their findings upon these facts.

The jury found a verdict for the plaintiff, with $270.06 damages.

[NOTE. Thereafter defendant moved for a new trial, which was granted. See next preceding case, No. 2,439. Patent No. 6,168 was granted to Frost & Monroe, February 27, 1849; reissued March 13, 1855 (No. 302), and February 25, 1862 (No. 1,280). For other cases involving this patent, see note to next preceding case, No. 2,439.

[As to what constitutes novelty within the laws relating to patents, see Forbush v. Cook, Case No. 4,931; Wayne v. Holmes, Id. 17,303; Clark Patent Steam & Fire Regulator Co. v. Copeland, Id. 2,866; Adams v. Edwards, Id. 53; Milligan & Higgins Glue Co. v. Upton, 97 U. S. 3, affirming Case No. 9,607; Matthews v. Skates, Id. 9,291; Wintermute v. Redington, Id. 17,896; Hayes v. Sulsor, Id. 6,271; Wood v. Packer, 17 Fed. 650; Judson v. Moore, Case No. 7,569; Bedford v. Hunt, Id. 1,217; Earle v. Sawyer, Id. 4,247. It is not sufficient that a new result is produced. Leroy v. Tatham, 14 How. (55 U. S.) 156, 178. A known result produced by new means is insufficient. Smith v. Nichols, 21 Wall. (88 U. S.) 112, affirming Case No. 13,084.]

Case No. 2,440a.

CARR v. TWEEDY.

[Hempst. 287.] [1]

Superior Court, D. Arkansas. July, 1835.

CERTIORARI—WHEN WRIT WILL ISSUE.

A writ of certiorari cannot issue from the superior court, for the purpose of bringing up a case from the county court for adjudication, and such case should be determined in the circuit court.

Before JOHNSON and YELL, Judges.

OPINION OF THE COURT. This cause is brought here by certiorari, directing the clerk of the county court of Conway to certify to the superior court at the July term, 1835, the record and proceedings in the above cause. At the April term, 1835, of the circuit court, judgment was obtained against James Carr and others, to the amount of $2,458, for failing to settle with the court as executors of the last will and testament of John Tucker, deceased, from which judgment no appeal was prayed, and this certiorari was brought to set aside the judgment and proceedings in the county court. The defendant moves to dismiss this certiorari, because this court has no jurisdiction in the cause. If the act of 1829 (Ter. Dig. 157), organizing the county courts, gives the privilege of appeal, it still must be brought up in the way pointed out by the statute; it would be error to bring an appeal directly from the county court to this court, the circuit courts alone having jurisdiction of appeal from justices of the peace. Ter. Dig. 122, 157. Prior to the act of 1828 (Ter. Dig. 537), this court had concurrent original juris-

[1] [Reported by Samuel H. Hempstead, Esq.]

diction with the circuit courts in all civil matters. Since the passage of that act, the superior court is made an appellate court alone, with some few exceptions, and this is a case believed not to be within this rule. The act declares, "That the superior court of this territory, in all cases at law and equity, shall be exclusively an appellate court, and shall not have original jurisdiction in any civil cause, unless such as may arise under the laws of the United States." The writ of certiorari is an original writ, and cannot therefore be returned to this court. There is an intermediate jurisdiction clothed with the power to hear and determine all original proceedings, and also vested with appellate power to hear and determine all matters of litigation arising in the inferior courts. That court, then, being vested with both original and appellate jurisdiction, would in any event be the proper tribunal to hear and determine this cause. If an appeal is allowed, then, it should have been returned to the circuit court, and if it be an original writ, that court alone has jurisdiction. It was error to bring it up to this court. Certiorari dismissed.

CARR (UNITED STATES v.). See Cases Nos. 14,729–14,732.

CARR (WOOD v.). See Case No. 17,940.

Case No. 2,441.

CARRAHER v. BRENNAN et al.

[7 Biss. 497; 5 Cent. Law J. 114; 9 Chi. Leg. News, 363; 4 Law & Eq. Rep. 159; 23 Int. Rev. Rec. 248.] [1]

Circuit Court, N. D. Illinois. July, 1877.[2]

CAUSES FOR REMOVAL TO FEDERAL COURTS.

1. In the removal of a cause from a state to a federal court, the whole suit must be removed; a fragment of a suit cannot come to the federal court for trial, because a party interested in that fragment, or some single issue, is a citizen of another state from that of the plaintiff.

2. A removal of a cause from the state to the federal court will only be allowed when the controversy is so completely a controversy between residents or citizens of different states, that its termination will settle the whole suit.

[Cited in Donohoe v. Mariposa Land Co., Case No. 3,989; Thompson v. Dixon, 28 Fed. 6.]

3. It is not enough that citizens of different states are interested in the same issue or controversy, but they must have such an interest that when the question to which they are parties is settled, the suit is thereby determined; otherwise the right of removal is not given.

[Cited in First Presbyterian Soc. v. Goodrich Transp. Co., 7 Fed. 261.]

[See note at end of case.]

In equity. This was a motion to remand this suit to the superior court of Cook county, from whence it was removed to this court. This suit was originally brought in the superior court under what is known as the "Burnt Records Act" of this state, for the purpose of perfecting and establishing title to the lands described in the bill. The bill alleges that the complainant is the owner in fee of certain lands described in the bill, and that the defendants Brennan, Forsythe, Asahel Gage, Henry H. Gage and Portia Gage, also claim title in fee under certain deeds therein referred to. Defendants, John Forsythe, H. H. Gage and Asahel Gage, answered the bill, and each claimed title to the land in question as against the complainant, by specific conveyances which they set up, which were in fact tax titles. The defendant, Portia Gage, before answer, appeared and filed her petition, stating that she was a citizen of the state of New Jersey, and that the complainant is and was a citizen of the state of Illinois; and that in said suit there is a controversy which is wholly between said complainant and herself, and which can be fully determined as between them, and prayed a removal of the suit to this court. The superior court ordered the cause to be removed as prayed; and since such removal said Portia Gage has answered the said bill, setting up title to the land under a conveyance from Asahel Gage to herself.

James E. Munroe, for complainant.

A. N. Gage and Beam & Cooke, for petitioner.

BLODGETT, District Judge. The statute under which this suit was brought provides, in substance, that in all counties where the records of land titles have been destroyed, the claimant or owner of lands in fee, or of any interest in them, may file a petition to establish title. The statute requires that all persons owning or claiming an estate in fee, all persons in possession, or all persons to whom the lands shall have been conveyed, and the deed of conveyance recorded after the destruction of the record, shall be made defendants to the suit; and all other persons may be made parties by the name and designation of "whom it may concern." Any person interested may come in and set up his title and have his rights to the land adjudicated the same as if he had been made a party by name; and after the court has entered a decree determining who is the owner under the pleadings and proofs, the decree is final unless appealed from within one year. On the hearing of such case the court is to determine and decree in whom the title to the land is vested, whether in the petitioner or in other parties to the suit; that is to say, the court must upon the issues made in this case, determine and decree whether the petitioner has title to the land as against Forsythe, H. H. Gage, Asahel Gage and Portia Gage; and also whether

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 5 Cent. Law J. 114, and 4 Law & Eq. Rep. 159, contain only partial reports.]

[2] [Affirmed in Gage v. Carraher, 25 U. S. (Lawy. Ed.) 989.]

Forsythe has title as against the petitioner or any other of the parties claiming title; and so the title of each defendant as against the petitioner, and each of the other defendants must be passed upon and determined by the court.

The second section of the act of March 3, 1875 [18 Stat. 470], provides for the removal of cases from the state to the federal courts.

By the first clause the right of removal is given when the suit arises under the constitution or laws of the United States, or treaties made under its authority, or suits in which the United States is a plaintiff or petitioner, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state, claiming lands under grants of different states, or a controversy between citizens of a state and foreign citizens or subjects; and the second clause provides that when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then one or more of the plaintiffs or defendants actually interested in such controversy, may remove said suit to the United States court for the proper district.

The only authority for the removal of this case to the federal courts must be found in the last clause, which I have just referred to. The defendant, Portia Gage, alleges in her petition for removal, that there is a controversy in the case wholly between the complainant and herself, which is not strictly true, because the controversy is between herself and the complainant, and all the other defendants; and she does not state that all the other defendants are citizens of a different state from herself.

It was held by this court in City of Chicago v. Gage [Case No. 2,664], and has also been held in Stapleton v. Reynolds [Id. 13,303], by Judge Swing, of the southern Ohio district, that the whole suit must be removed; that a fragment of a suit cannot come to this court for trial, because a party interested in that fragment, or some single issue, is a citizen of another state from that of the plaintiff. And it seems to me that the suit must be wholly between citizens of different states as necessary and material parties in order to give the right of removal. It is not enough that citizens of different states must be interested in the same issue or question, or controversy, which arises in the course of the case; but they must have such an interest that when the question to which they are parties is settled, the suit is thereby determined, or the right of removal is not given.

Is this such a suit? There is a controversy, to be sure, between the plaintiff and Mrs. Gage, who has removed this case to this court; but the determination of that controversy will not determine the suit; the court must still determine her rights as against all the other defendants, and must also determine the title to the property as between all the other defendants, and each other as against the plaintiff.

Suppose we hold that Mrs. Gage has not title, either as against the plaintiff or either of the other defendants, the controversy in this case is not thereby determined, but we have still to settle the title as between the other parties. The scope and purpose of this act of congress, it seems to me, must be to allow simply a removal to the federal courts when the controversy was so completely a controversy between residents or citizens of different states that the determination of that controversy settled the whole suit.

The legislature of this state, in its wisdom, has provided for the bringing of this kind of suit; it is an exceptional and an extraordinary form of action, and only arises in the case of a catastrophe like that which has happened in this county by the destruction of all its land records. Necessarily, almost, there will be parties residing in various states, who may have directly or indirectly some interest in the title which the party seeks to establish; and is this court to assume that every non-resident who happens to be brought in, or to have an interest in a proceeding of this kind, can remove his part of that controversy to the federal court and have it settled there? And if he does, what is the court then to do, when it has settled the controversy as between the parties so removed—the non-resident so removed and the other claimants to the property? It seems to us that congress could not have intended that this result should follow in this class of cases. So, too, in an infinite number of chancery suits which are brought. A party foreclosing a mortgage in the state courts finds upon the record a judgment in favor of a non-resident creditor, he makes that creditor a party; the controversy, as far as that party is concerned, is only between the judgment creditor and the mortgagee, which does not dispose of the whole case, because, after all, the main object of the suit was to foreclose the mortgage, and the controversy initiated by the suit was between the mortgagor and the mortgagee, or the holder of the mortgage. So that it seems to us that there can be no doubt but that, in these cases, where a non-resident is merely incidentally or partially interested, he cannot remove the case, and ought not to be allowed to.

This case is interesting only, because it is the first one of this character which has come before us, and we are of opinion that this case certainly does not make such a case as entitles the party to a removal.

I do not wish to be understood, however, as saying that a case may not be made that would entitle a non-resident to a removal, but what a non-resident may have such an interest as that the determination of his or

her interest may determine the whole suit or controversy, in which event the right of a removal would undoubtedly exist. I only intend to say that this case is not made out, and that in a general way we do not think that a mere incidental party who is brought in to contest the title under the burnt records act, is entitled to a removal because he is a non-resident.

The case will be remanded to the superior court.

An appeal was prayed and allowed to the supreme court of the United States.

NOTE [from original report]. As to the right of removal from the state to the federal courts, consult also: Illinois v. Chicago & A. R. Co. [Case No. 7,006]; City of Chicago v. Gage [Id. 2,664]; Scott v. Clinton & S. R. Co. [Id. 12,527]; Kingsbury v. Kingsbury [Id. 7,817]; Gaughan v. Northwestern Fertilizing Co. [Id. 5,272]; Akerly v. Vilas [Id. 120]; Boggs v. Willard [Id. 1,603]; In re Cromie [Id. 3,405]; Toucey v. Bowen [Id. 14,107]; Hough v. Western Transp. Co. [Id. 6,724].

[NOTE. The defendant Portia Gage appealed to the supreme court, where the order remanding the cause was affirmed, on the authority of the Removal Cases, 100 U. S. 457. The opinion was delivered by Mr. Chief Justice Waite, and is as follows: "Carraher occupies one side of the controversy about which the suit is brought (that is to say, the title to the property in question), and Portia Gage, Henry H. Gage, and John Forsythe are citizens of the same state with Carraher. There is no controversy in the suit which is wholly between citizens of different states, and which can be fully determined as between them." Gage v. Carraher, 25 U. S. (Lawy. Ed.) 989.]

Case No. 2,441a.

CARRICK v. HOOPER.

Circuit Court, D. Maryland. Jan. 7, 1878.

[Cited in Alcott v. Young, Case No. 149. Nowhere reported; opinion not now accessible.]

Case No. 2,442.

CARRICO v. KIRBY.

[3 Cranch, C. C. 594.] [1]

Circuit Court, District of Columbia. May, 1829.

WILLS—RIGHTS OF CONTESTANT.

Upon an issue, from the orphans' court, devisavit vel non, the party contesting the will has the right to open and close the argument to the jury.

This point was so ruled by THE COURT, (nem. con.) on the authority of Dunlop v. Peter [Case No. 4,168], in this court, at ——— term, not reported.

Verdict in support of the will.

CARRICO (UNITED STATES v.). See Cases Nos. 14,733 and 14,734.

CARRIE, The. See Cases Nos. 398–402.

CARRIE BROOKS, The (REYLEY v.). See Case No. 11,718.

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

Case No. 2,443.

In re CARRIER et al.

[13 N. B. R. 208; [1] 23 Pittsb. Leg. J. 57.]

District Court, W. D. Pennsylvania. Nov. 29, 1875.

BANKRUPTCY—AMENDMENT OF JUNE 22, 1874.

An adjudication entered on the 22d day of June, 1874, may be set aside on the motion of the debtor, if the provisions of the act passed on that day were not complied with.

[See In re Williams, Case No. 17,700.]

Petition of Andrew F. Baum for a revocation of the adjudication and a dismissal of the bankruptcy proceedings.

On the 11th day of June, 1874, John Heath, a creditor of the firm of Carrier & Baum, filed a petition in the district court of the United States for the western district of Pennsylvania, for the adjudication of the said firm of Carrier & Baum in bankruptcy. The petition was regular and properly verified under the act of March 2d, 1867 [14 Stat. 523]. A rule to show cause was issued and duly served, and on the 22d day of June, A. D. 1874, no answer having been filed, the court adjudged said firm bankrupts, according to the prayer of the petition filed on the 11th of June. On the 15th day of May, 1875, Andrew F. Baum presented a petition to the court setting out the passage of the amendment of June 22, 1874 [18 Stat. 181], and alleging that the requisite proportions of the creditors of the firm had not joined in the petition, as required by the amendment to the bankrupt act, and asking that the adjudication be set aside and the proceedings dismissed. The order of adjudication was made about ten o'clock in the morning of the 22d day of June, 1874. The question discussed by counsel during the argument was, whether the act went into effect from the first hour of the day of its approval, or from the actual time of the signing by the president.

McCANDLESS, District Judge. The adjudication set aside, and the creditors have leave to proceed under the amendment to the bankrupt act of June 22, 1874 [18 Stat. 181].

Case No. 2,444.

CARRIGAN v. The CHARLES PITMAN.

[1 Wall. Jr. 307.] [2]

Circuit Court, E. D. Pennsylvania. April 14, 1849.

PRACTICE—APPEAL FROM THE ADMIRALTY.

When an admiralty case comes into this court on an appeal from the district court, either side —by the practice of the 3d circuit—is at liberty to take new evidence. But generally speaking, where the decree of the district court is reversed, because it was given on a different

[1] [Reprinted from 13 N. B. R. 208, by permission].

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

state of facts from that presented to this court, the party succeeding here does not have costs.

[Cited in The Margaret v. The Connestoga, Case No. 9,070.]

[See Gonzales v. Minor, Case No. 5,530.]

[See note at end of case.]

Appeal from the district court of the United States.

The district court had given a judgment in admiralty against the schooner Charles Pitman [case not reported], from which there was an appeal to this court.

Mr. Raybold, for libellant, now moved to take certain testimony on one of the points, upon which the district judge had decided the case; a point, it appeared, which had not been much adverted to by counsel below.

St. G. T. Campbell, on the other side, suggested that the course was irregular; this court taking cognizance of appeals strictly as an appellate court. Act Sept. 24, 1789, § 21 [1 Stat. 83]. Dyott's Case, 2 Watts & S. 564, declares that the duty of such a court is to correct the errour of an inferior tribunal, which being supposed to have examined the case thoroughly, cannot with propriety be said to have erred, when on the evidence given its decision was perfectly right. The court there remark: "We cannot examine the case de novo, without overwhelming the court with business; and in many cases, unless this be done, and the cause be reheard in toto, we run the risk of doing more injustice than we prevent, by determining a cause on an apparent state of facts, which the opposite party has had no opportunity to explain or rebut." The remark applies to this court: and the practice will prove particularly hard in admiralty cases, where a party finding that no case, or an insufficient one, has been made on the other side, dismissed his witnesses who go to sea, and cannot again be found. There ought at least to be shewn a special necessity, and a reason why the testimony was not taken below.

GRIER, Circuit Justice. The practice at this bar having been for many years to proceed de novo in the testimony, I hardly feel at liberty now to change it; though I have rather grumbled in one or two cases; where parties finding out from the opinion of the district judge where their case pinched, have taken new testimony here to help them out of their difficulty; and have thus presented so different a case to me, that I have reversed my Brother Kane's decisions, when they were perfectly right, upon the facts presented to him. But under such circumstances I have allowed no costs to the party succeeding, and generally speaking, should think this rule to be but equitable. Rule allowed.

[NOTE. An appeal in the admiralty is in nature of a new trial, in which the court does not enter into the mere consideration of the propriety of the decision of the judge below, upon the evidence before him, but affords an opportunity to the appellant to present his case with the best possible aspect that new allegations or new evidence can afford it. Rose v. Himely, Case No. 12,045; Anonymous, Id. 444; The Boston, Id. 1,673; The Sarah Ann, Id. 12,342. In Anonymous, supra, Mr. Justice Story states that the principle of allowing amendments and new matter upon an appeal in an admiralty cause is well settled, and that the true ground of the practice is that the proceedings are considered de novo in the appellate jurisdiction, but that the new proof should be confined to the new allegations, and no proof allowed to contradict the original testimony upon points in contestation in the court below. The Boston, supra; Cushman v. Ryan, Case No. 3,515. In the case last cited, Mr. Justice Story held that if new evidence is offered, which might fairly have been introduced in the court below, by the exercise of reasonable diligence, it should be treated as being of far less value than it would have been under other circumstances, especially if it goes to the very gist of the matters put in controversy by the libel and answer, since it may be justly imputed to the laches of the party, and is open to the suspicion of being framed to meet the new exigencies of the case. And in Coffin v. Jenkins, Case No. 2,948, the same justice further stated, on this point, that the court ought, in all cases, to be very cautious in admitting any new matters, either of allegation or of defense, where the facts on which they rest are not new, or newly discovered, but were perfectly known at or before the hearing in the district court.]

CARRIGO (UNITED STATES v.). See Case No. 14,735.

CARRILLO (UNITED STATES v.). See Case Nos. 14,736 and 14,737.

Case No. 2,445.

CARRINGTON v. The ANN C. PRATT.

[10 N. Y. Leg. Obs. 193.] [1]

District Court, D. Maine. July Term, 1852.

BOTTOMRY—FRAUD—BOND GOOD IN PART—MATE—QUALIFICATIONS—DEVOLUTION OF COMMAND.

1. A bottomry bond, made for a larger sum than is due, for the purpose of being used to defraud underwriters is void, and no remedy can be had upon it, although no fraud was intended against the owners of the vessel.

[Cited in The Grapeshot v. Wallerstein, 9 Wall. (76 U. S.) 135.]

2. The rule of the admiralty, which holds that a bond may be good for a part and bad for a part, does not apply to the one made for the purpose of defrauding the insurers. But a fraudulent bond will not necessarily vitiate the consideration so far as it is meritorious. For so much the creditor may recover by process in rem, on the hypothecation implied by law.

3. When the master is separated from the ship by death or other casualty the mate succeeds to the command as heres necessarius. The possibility of this command being devolved on him is a contingency contemplated by his engagement, and he engages for a competent degree of skill in seamanship and navigation for the management of the ship on the happening of this event. He is also entitled to the ordinary

[1] [Reversed by the circuit court in The Ann C. Pratt, Case No. 409; decree of the circuit court affirmed by supreme court in Carrington v. The Ann C. Pratt, 18 How. (59 U. S.) 63.]

presumption in his favor, that he acted with fidelity and ordinary skill until the contrary is proved.

The brig Ann C. Pratt sailed from Frankfort Nov. 7, 1850, on a voyage to the Western Islands, and thence to such foreign port or ports as the master should determine. On her outward passage she encountered heavy gales, squalls, and had fresh breezes during the whole time. She labored badly and leaked from the commencement of the voyage, although she had been overhauled, and was supposed to be thoroughly repaired, so that three days after sailing, it was found necessary to lighten her by throwing over nearly the whole of her deck load. She arrived at Terceira on the 29 of November. Here she discharged part of her cargo and took part of another. From Terceira she sailed for St. Michael, Dec. 30, and made land the next day, but by a continued series of gales, squalls and bad weather, they were prevented from making a harbor till the 11th of January, when the vessel was brought to anchor and moored at Villa Franche, an open roadstead. She lay there till the 13th, when, the captain being ashore, the brig was struck by a heavy squall, which drove her from her moorings, with the loss of all her cables and anchors except part of her best bower chain. The squall struck her from the N. W., but soon veered round to the W. S. W., driving her directly on shore, so that the hands on board, to save themselves from being driven on the rocks were obliged to stand off. On the same day in the afternoon as is stated in the depositions of Airey, and M'Donald, the second mate, there was a consultation of the crew to consider what was best to be done. The crew on board at this time consisted of the second mate, two able seamen, one of whom, Hurris, was sick below, two ordinary seamen, one a Portuguese, who spoke English very imperfectly, and two boys, one only of whom spoke English, and the cook. With the exception of Airey and the second mate, the other members of the ship's company say that they knew of no consultation of the crew. If there was any, it must have been very informal, and though Airey and M'Donald both say that the opinion of the crew was in favor of proceeding to St. Thomas, which was the port that the master had determined to proceed to next, instead of attempting to return to St. Michael or bearing away for an eastern port, it is evident that Airey in doing this, must have been governed by his own opinion in concurrence with that of the second mate. On her passage for three or four days, the brig leaked badly till she took the trade winds, and from that time she made her voyage without difficulty, and arrived at St. Thomas the 6th of February. Here Airey called on the American consul, and had, under his warrant, a survey. In a written report the surveyors stated the repairs that in their opinion were required to make her seaworthy. Three master shipwrights, the only persons in the place who undertook such business, were applied to for proposals or tenders for making the repairs ordered by the surveyors, and the contract was made with Pland, whose offer was the most favorable. The money for making the repairs, and to meet the other necessary charges for supplies while she was under repairs, and for fitting her for her return voyage, beyond what the master had on board and the proceeds of the sale of the cargo, was advanced by the libellant, Nehemiah Carrington, under an agreement with Airey on the security of a bottomry bond; and a bill of exchange drawn for the sum claimed, on the payment of which the bond was to be held satisfied and cancelled. The bill having been protested, this suit was commenced on the bond.

Rowe & Bartlett, for libellant.
Willis & Fessenden, for respondents.

WARE, District Judge. Several objections have been made to the libellant's right to recover in this case. In the first place it is said that it was the duty of Airey when he was blown off by the gale, to have returned to St. Michael's and restored the command of the vessel to the master, and that there was nothing in the state of the weather that rendered this impracticable. But whatever fault may have been committed by Airey in this part of his conduct, whether an error of judgment or a delinquency of a graver character, it cannot affect the libellant. The vessel came into St. Thomas in distress. It is certain that repairs were needed. There was a regular survey by competent surveyors, appointed by the American consul, and there is nothing in the evidence to impeach the fairness and honesty of the surveyors. The libellant knew nothing of the causes which brought her there, without her master and without her papers, except what he could learn from Airey and the crew, and their account sufficiently explained the fact. On the separation of the master from the vessel by death or casualty, the mate succeeds to his authority as heres necessarius; the law imposes on him the duties and responsibilities, and clothes him with the authority of master. This substitution is a contingency that is contemplated by his engagement, which cannot be declined by him but by a default of duty. Arriving at St. Thomas as he did, he had all the authority to order necessary repairs, and to make all contracts for that purpose that he would have had, if he had been originally appointed master. The circumstances under which he arrived, it may be said, ought to suggest caution and prudence, and to awaken the vigilance of those who dealt with him, but his authority was the same as would have been that of the original master. Airey, who was now the acting master, not having the control of means adequate to meet the

cost of repairs, and being unable to obtain them on the personal credit of the owners, was authorized to borrow on the credit of the vessel. But it is said that this authority, having its origin in necessity, is limited to the cost of such repairs as are indispensably necessary to enable the ship to proceed on her voyage; that the repairs ordered exceeded that necessity, and that beyond this the master has no authority to charge the owners by a resort to the onerous expedient of a bottomry bond. And it is argued that beyond this there was a want of prudence and a wasteful extravagance in making the repairs that were made.

This argument presents itself with a double aspect—First, as it touches the rights of the lender; and secondly, as it questions the discretion and good faith of the master. As it affects the bottomry creditor, the answer appears to me to be very obvious. All that is required of the lender in such cases, is to be assured that an unprovided necessity exists, and that the means cannot be obtained on the personal credit of the owners. If the money is then advanced in good faith, without collusion with the master for the purpose of fraud, the lender is not bound to see to its application. Emerig. Tracts à la Grosse, c. 4, § 7; Dig. 14, 1, 1, 59; The Jane, 1 Dod. 465. If the sum advanced is somewhat more than is strictly necessary, unless the lender's suspicions are justly awakened by gross and manifest extravagance, his claim under his bond will not be impaired. For when a case of apparent necessity exists, the law does not impose on him the responsibility of determining the extent of repairs required. The lender, says Emerigon, is justified in relying on the honesty of the master; and besides, if he were required to decide on the nature and necessity of repairs, it would be requisite for him to be an expert in the business,—il faut être du métier.

As relates to the master the arguments apply with more force. His authority to borrow money on bottomry is strictly limited to the necessities of the ship; and in order to justify himself to the owners, he must show the extent of the necessity. But then the question will return, what in the sense of the law are necessary repairs? The text-writers on this subject merely use the words necessary repairs, without proceeding to describe, except in very vague and general terms, what they are. In what sense then is the word necessary used in this connection? Is it, in the strict sense, repairs that are indispensable to enable the vessel to proceed on her voyage, or is it, in a more loose sense, such as are proper, fit and suitable under the circumstances? This question was raised and very fully considered by the circuit court, in the case of The Fortitude [Case No. 4,953], and the conclusion to which the court arrived, after a very elaborate examination of the theoretical writers as well as the judicial decisions on the subject, was that the word necessary was used in the latter sense, as including what was proper and suitable under the circumstances. The same doctrine in substance was held by Lord Tenterden, in the case of Webster v. Teekamp, 4 Barn. & Ald. 354.

The proper test to determine what in the sense of the law are necessary repairs, is found by inquiring what a prudent owner, having a proper regard to the safety of the property at risk, and the security of the lives of the crew, would do if he were present. In this case the repairs ordered by the master were only such as were recommended by the surveyors in their report, and this, it appears to me, is sufficient to exonerate the master from any imputation of bad faith.

But the most difficult objection to be overcome is the charge of meditated fraud; not on the owners of the vessel, but on the underwriters. To enable the owners to perpetrate the fraud, two sets of papers and accounts were made up by the libellant, one for the owners, by which the matter was to be settled and the payment made. This account made the whole cost of the repairs to be $4,460.83. Deducting $310.60 for cash received of the master; $216.85, the avails of the sale of the cargo; $250, discounted by Pland, the contractor, who made the repairs, —left $3,683.38 as the amount actually advanced by the libellant; and adding the maritime premium, $193.87, it amounts to $3,877.25. For this sum a bill of exchange was drawn by Airey on Seth Pratt, the father of the master and owner, he having been left at St. Michael, and not expected to return in season to meet the bill. Together with the bill a written agreement was sent, by which the libellants agreed to discount the maritime interest, and to take $3,683.38 in satisfaction of the bond, provided the bill was duly honored and the payment duly made. With these papers another package of accounts and papers was sent, for the use of the owners in adjusting and settling the loss with the underwriters. These accounts showed the cost of the repairs to amount to $4,712.57, and after deducting $216.85, the sum received from the sale of the remains of the cargo, but without any deduction for the cash received of the master or the discount of the contractor, left the amount advanced by Carrington $4,591.42, and for this sum the bond was executed, which, with the addition of the maritime premium, amounts to $5,050.56. The reason given by Carrington, in his letter to Seth Pratt, to whom the papers were sent, for preparing this duplicate set of accounts, is, that it was "done to protect your son's interest; for doubtless you are aware that there are many charges, attending vessels similarly circumstanced as the Ann C. Pratt, which the insurers and underwriters will not admit; consequently owners of vessels have to protect their interests and make up their accounts in such a form as their officers

will admit of." After this explanation of the fabricated papers and accounts, he proceeds to say: "The other package of papers relate to the owners and in the account current, which will be there found, the facts and original charges are those set forth, showing the balance due to us to be only $3,877.25, and for which amount Capt. Airey has given us a draft on you, and we have an agreement with him, as we do have with all others, who favor us with their business similarly circumstanced, that we are to relinquish the 10 per cent. maritime premium which persons making advances on vessels exact." The calm self-possession and air of frankness with which all this is disclosed would lead one to suppose that such practices belonged to the ordinary usages and common business habits of the place; and I feel a secret persuasion that I might do injustice to Messrs. Carrington & Co. to impute to them a greater looseness of mercantile morality than is customary in such transactions in that community, or perhaps in other commercial places, under like circumstances. But I feel bound to say that I cannot view such practices, even if sanctioned to some extent by custom, in the same light in which the interested parties appear to contemplate them, and I trust that I shall be doing no disservice to the general interests of commerce by suggesting that they cannot be tolerated in a court of justice. The letter of Carrington shows that the bond was executed for a larger sum than was due, and that false accounts were fabricated to support the bond and to enable the owners to extort from the underwriters a larger sum than by their contract they were bound to pay.

It being apparent that the bond is tainted with fraud can an action be maintained upon it? In the admiralty a bond may be good for a part and bad for a part. If demands are mixed up in it for which the creditor is not entitled to claim maritime interest, as for money which had been previously advanced on the personal credit of the owner, with other advances for which he had stipulated for this security, this will not vitiate the bond in toto. He may recover upon it so much of the consideration as is good, and it will be rejected for the residue. The Aurora, 1 Wheat. [14 U. S.] 96; The Hero, 2 Dod. 146; The Packet [Case No. 10,654]. But I am not aware that this equitable indulgence has ever been extended to a fraudulent bond. From the language of Lord Stowell, in the case of The Tartar, 1 Hagg. Adm. 14, I infer the contrary. "This court," he says, "proceeding on principles of general equity, does not hold that a bottomry, bad in part, necessarily vitiates the rest." But he immediately adds, "It may be invalidated by a case of fraud and ill conduct of the party; and if such a charge could be established, then indeed this bond would share the fate of the other unprofitable transactions connected with this vessel." A plain intimation that a bond tainted by fraud is even in the admiralty a totally void instrument. The fraud to which Lord Stowell alludes is undoubtedly a fraud on the owners, and in the present case, as all the facts were disclosed and explained, no fraud was attempted or intended on them. But in its original concoction, it was intended to operate as a fraud on the underwriters, who were ultimately to bear the loss; and in morals it certainly makes no difference, and ought to make none in law, whether the fraud was intended to affect the primary or the ultimate party who was to suffer by the loss. But even if the usurers are to be considered as third persons and strangers to the transaction, a bond is sometimes, even by the rigid rules of the common law, held to be void when it is intended to operate as a fraud on a third person, though it may be perfectly fair and unimpeachable between the parties. Such was the case of Boynton v. Hubbard, 7 Mass. 112. That action was on a post obit bond, and though the jury found that the transaction was fair and free from fraud between the parties, judgment was arrested, and the bond held to be void on principles of public policy applicable to such transactions, because it operated as a fraud on third persons. And it appears to me that such a bond as this, framed with a view of practising a fraud on underwriters, ought to be held void, though as between the immediate parties there is no fraud. It is easy for parties in foreign countries to make up accounts and find vouchers to sustain exaggerated losses, and it is difficult for underwriters to detect the fraud that is concealed under fabricated papers. They are obliged to increase their premiums on fair and honest ship owners to cover risks of this kind. And it seems to me when a bottomry creditor lends himself to a transaction of this kind, though he may not derive any direct profit from it himself, that a proper regard to the best interests of fair and honest trade as well as a due respect for commercial morality requires that the bond should be held to be void, and the creditor left to seek such other remedy for the amount justly due as his case admits. Under these views of the subject, I must pronounce against the bond. If I have come to a wrong conclusion, I am happy that my opinion is open to be reviewed by a higher court. But though the bond be void, this does not of necessity vitiate the consideration for which it was given, so far as it was meritorious. For repairs and supplies furnished the law gives a lien on the vessel without any instrument of hypothecation, which the creditor may enforce by process in rem. The counsel for the libellant has amended his libel by filing an allegation to meet this posture of the case, founded on the consideration, in which he claims the actual amount advanced for the repairs and supplies. This I have no doubt of his right to recover. In the account current which is

supported by regular vouchers, this appears to be $3,683.38. But this being awarded on the hypothecation implied by law, does not carry maritime interest.

[NOTE. The claimant, Leonard B. Pratt, appealed to the circuit court, where the decree herein was reversed, and the libel dismissed. See The Ann C. Pratt, Case No. 409. The libellant then appealed to the supreme court, where the circuit court decree was affirmed. See Carrington v. The Ann C. Pratt, 18 How. (59 U. S.) 63. For the grounds of affirmation, see note to The Ann C. Pratt, supra.

[The case of Arey v. The Ann C. Pratt, for wages, was heard and decided at the same time, and is reported with this case in 10 N. Y. Leg. Obs., at page 199. See Case No. 113a.]

Case No. 2,446.

CARRINGTON et al. v. BRENTS et al.

[1 McLean, 167.] [1]

Circuit Court, D. Kentucky. May Term, 1832.[2]

STATUTE OF FRAUDS — SUIT AGAINST INFANT—NOTICE—SPECIFIC PERFORMANCE—APPEARANCE.

1. A parol contract in Virginia, in 1787, for land in Kentucky, where the consideration was paid, was not void by the statute of frauds.

[See note at end of case.]

2. The courts of Virginia sanctioned the contract and decreed a conveyance, the vendor being a resident of that state.

[See note at end of case.]

3. In a suit against an infant, a notice should be served on him, and a guardian ad litem appointed by the court.

[Cited in O'Hara v. McConnell, 93 U. S. 152; Woolridge v. McKenna, 8 Fed. 669.]

4. But so far as the proceeding is only considered as having been examined by the party, and afforded notice of the title asserted, it is not important that the proceeding should be strictly regular.

5. That which puts the party on enquiry, is notice; but, in this case the notice is admitted.

[See note at end of case.]

6. A decree in Virginia cannot operate on the title to land in Kentucky. But having jurisdiction of the person, the court may enforce its decree. The statute of frauds in Kentucky, cannot operate on a contract made before the adoption of the statute.

7. A voluntary appearance after the revival of a suit, is a waiver of process. The doctrine of lis pendens applies only where the court has jurisdiction over the thing.

[In equity. Bill by Sarah Carrington and others, heirs of George Carrington, against William Caldwell, Isaac Caldwell and Samuel Brents.]

Mr. Wickliffe, for complainants. Mr. Munroe, for defendants.

OPINION OF THE COURT. This bill has been filed to obtain a legal title to certain tracts of land claimed by the defendants. The complainants allege that at October term, 1817, in the county court of Halifax county, in the state of Virginia, Sarah Carrington, the complainant, as devisee of her husband, George Carrington, obtained a final decree against John R. Williams, heir at law of John Williams, deceased, for a conveyance of all the interest which was vested in him, as heir at law, to John Williams, for all the military lands held by him in the state of Kentucky. That the following tracts were embraced by this decree, to wit: one survey of a thousand acres in the county of Adair, near the town of Columbia, number 158. Three hundred and fifty acres on Beaver creek, in the county of Warren, No. 155. Five hundred acres situated on the same creek, No. 227. One thousand acres south of the Tennessee river, near the Iron banks, and one other thousand acres adjoining the lands of Gerault. For the title of these tracts of land the complainant states, her testator, in May, 1803, in the same court, obtained a decree against the said John R. Williams, who was then an infant, and that his guardian should make the conveyance. That in virtue of said decree, John B. Scott, as guardian, transferred to her testator the title to said lands. That afterwards, on the 18th March, 1820, John R. Williams having arrived at full age, executed deeds in due form for the above tracts of land. The bill further states, that after Williams had arrived at full age, he took an appeal from the decree above stated, to the superior court of chancery, which affirmed the decree of the inferior court. That with a full knowledge of the complainants' claim, the defendants purchased the lands above described of John R. Williams, and received from him such conveyance as he was able to make for the same; and that for a part of the land the legal title is vested in the defendants, and for a part they hold an apparent equitable title. And the complainants pray that the proper officer may be enjoined from issuing patents for the lands unpatented, and that the court would decree a conveyance of all title to the above lands, both legal and equitable, which may be vested in the defendants, to the complainants.

William Caldwell, in his answer, states that he purchased the thousand acres of land charged in the bill as lying in Adair county, from John R. Williams, for a full consideration, and received an assignment of the plat and certificate, and that on the 12th September, 1816, he obtained a patent for the same. He admits that before he made this purchase, he had been informed of the claim set up by the complainant for the land, but alleged that on enquiry, he believed it was not valid, as the contract existed only in parol, and could not, therefore, be enforced. He states that in the year 1818, he, Samuel Brents and Isaac Caldwell, purchased from John R. Williams the two thousand acre tracts of land named in the bill, west of the Tennessee river, and paid for

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

[2] [Affirmed in Caldwell v. Carrington, 9 Pet. (34 U. S.) 86.]

them or agreed to pay a valuable consideration; and he denies that he had any other notice of the claim of the complainants, except as above stated. And he alleges that the deed from John R. Williams stated in the bill, was obtained by the complainants through fraud and oppression, by imprisoning the said Williams under the decree of the court referred to.

Isaac Caldwell, in his separate answer, admits the purchase of the two thousand acre tracts, in connection with Brents and William Caldwell, for which he paid or agreed to pay a valuable and adequate consideration. That before he made the purchase, he examined the decree against Williams, entered by the county court of Halifax in 1803; and on taking the advice of several counsellors, he was induced to make the purchase, under the full belief that the decree could not operate upon the title, or prevent the defendant, Williams, from making a valid conveyance of his right. He alleges that the deed set up by the complainants, was not made by Williams under the decree obtained against him, but was obtained from him fraudulently, through the procurement of the complainants.

In his answer, Samuel Brents states, that in August, 1815, and 5th January, 1818, he entered into contracts with Williams for eight hundred and fifty acres of the land in controversy, for which he paid a valuable consideration, and of which he is now in possession. He admits that in company with his co-defendants, he purchased the two thousand acres described. That before his purchases he had notice of the claim of Carrington; but as he considered it to be under an illegal and void contract, he did not regard it, nor the proceedings of the Virginia court referred to; as that court could give no decree which could operate on the lands in the state of Kentucky. All the defendants deny that any binding contract was ever made by John Williams, the ancestor of John R. Williams, for the sale of the lands in controversy to Carrington; and also deny that the decrees in Virginia, under the circumstances, embarrass their title; and they set up as a bar to the complainants' claim, the statute of frauds and perjuries.

In support of the bill, several records of the proceedings of the county court of Halifax, and of the superior court of chancery for the Lynchburg district, are read in evidence. The first one contains a proceeding in chancery before the county court of Halifax, in which the testator of the complainants was plaintiff, and John R. Williams, by his guardian was made defendant, and a final decree was entered against the defendant, that he should transfer by his guardian, to the complainant, the right descended to him from his ancestor, to the lands in dispute. The second shows a proceeding in chancery by Sarah Carrington, the devisee of her husband George, deceased, setting forth the original contract against John R. Williams, heir at law of his father, John Williams. In this second bill a reference is made to the first suit and the proceedings therein are made a part of the second suit. To this bill, the defendant having arrived at full age, filed his answer, and at October term, 1817, on a hearing of the bill, answer examinations of witnesses; and also the bill answer examinations of witnesses, in the former cause, a final decree was entered "that the defendant should forthwith assign to the plaintiff, in a proper and legal manner, the survey and other title papers in the original bill mentioned, so as to enable the plaintiff to obtain patents in her own name for the lands in the bill mentioned."

From this decree an appeal was taken to the superior court of chancery for the Lynchburg district, and the 19th May, 1818, the decree of the inferior court. was in all things affirmed. On the 19th October, 1819, the complainant again filed her bill in the superior court of chancery for the Lynchburg district, setting forth that during the pendency of the former suit, the defendant John R. Williams had obtained patents for the land embraced by the decree, and on demand refused to convey the title to the complainant, etc. And at term 1820, the court decreed that the defendant "do by proper deeds, convey to the plaintiff in fee simple, the several tracts of land in the bill mentioned, with warranty against himself and his heirs, and all persons claiming under him." In pursuance of this decree, Williams executed a conveyance the 18th March, 1820.

The contract between Williams and William Caldwell, for one thousand acres in Adair county, is in evidence, and bears date the 30th August, 1815. In this agreement there is the following condition: "And the said Williams agrees that said Caldwell shall not be bound to pay any further part of the consideration aforesaid, except what is this day paid, until he, the said Williams, shall settle the dispute between himself and the heirs and representatives of George Carrington, deceased, concerning the title of said land, and shall procure a clear title to the said land in his own name, and transfer the same to the said Caldwell, as set forth in the agreement." On the same day Williams entered into a written agreement by which he bound himself, whenever called on, if the claim of the said Carrington is not settled and removed from the land, to take such step for the security of the said William Caldwell, as himself and his agent may think best; as it is the fair understanding of the contract, that in case the said land should be taken from the said Caldwell, his heirs, etc., that the purchase money with interest is to be refunded."

The agreement between Williams, William and Isaac Caldwell, and Samuel Brents, bears date the 6th January, 1818; and in

which Williams bound himself "to use due diligence in having extinguished and quieted the claims of George Carrington's heirs, etc., and the consideration was to be paid so soon as the above claims should be extinguished, and the said Williams was able to make a good title." In May, 1817, Isaac Caldwell wrote a letter to John R. Williams, from which it appears he had arrived from Virginia a short time before, and that while there he made arrangements for the further prosecution of the suit against Williams, with the view of reversing the decree; and in a postscript he says: "Use all diligence in your power to push the cause to a speedy and successful termination, that you may get your money, and we all rest in peace." On the 7th November following, Caldwell again wrote to Williams, urging him to prosecute an appeal, or writ of error to reverse the decree against him, and expressing a decided opinion that it was erroneous; and he advises Williams by no means to execute the decree. That if he should avoid doing this, he might secure to himself almost a fortune, whereas, if he were to execute the decree he would be answerable for the money he had received.

The will of George Carrington, duly authenticated, is exhibited in evidence, by the complainant, from which it appears that the complainant is his sole devisee. Sarah Carrington, the complainant, died after Isaac Caldwell filed his answer, and he has not answered the bill of revivor, which was filed by her legal representatives. No subpoena seems to have been served upon him, but publication has been made as a substitute for the process. It is objected that this proceeding is irregular and that the bill, as against Isaac Caldwell, must be dismissed. No rule of practice, it is contended, has authorized such a procedure, nor is it authorized by any statute of the state, if such statute could regulate the practice of this court. The object in giving notice to a defendant of the revival of a suit is to procure his appearance. If after the filing of the bill of revivor there be a voluntary appearance, the object is attained; and it would seem not to be essential that process should be served on him to compel him to do that which he has already done. No new facts are alleged in the bill of revivor, as it regards the merits of the controversy, and if in any such case the answer of the defendant be necessary, it can only be so to controvert the right of those in whose name the bill of revivor is filed. In this case the devisees of Sarah Carrington are identified by legal proof, and the defendant Isaac Caldwell appears by his counsel, and the whole merits of the case are investigated. It would seem therefore that the purposes of justice are answered, and by no possibility can any injury result to the defendant by considering his voluntary appearance as a waiver of process under the bill of revivor.

An objection is urged against the right to a decree on this bill, on the ground that the defendants claim under distinct titles and therefore they cannot be united in one suit. This would be a fatal objection if it were not obviated by a statutory provision of this state. Under this statute the complainant may file his bill against several defendants, though they claim under distinct titles, and have no common interest in the land in controversy. The right of the complainants to a decree is mainly rested upon the proceedings in chancery, and the deed which was executed by Williams under those proceedings. No attempt is made to establish the original contract between George Carrington and John Williams, by proof beyond what was before the chancery courts in Virginia, and which is certified in the records used in evidence. By this evidence the original contract was made in 1787 or 1788. Paul Carrington, the father of George, owned a tract of land in the county of Halifax, Virginia, called "Dry Branch," containing five hundred and ninety-six acres; the whole of which, at the close of the revolutionary war he gave to his son George, put him in possession, delivered to him the title papers and directed him to prepare a deed. In 1787 or 1788, Paul Carrington, at the instance of his son George, conveyed the above land to John Williams; in exchange for his military lands in Kentucky. Williams afterwards sold the Dry Branch tract to Camp for four hundred pounds. This was the original contract, as is satisfactorily proved by the evidence. In behalf of the defendants it is contended, that the doctrine of lis pendens has no application in the present case. That although the defendants may have had notice of the pendency and determination of the first suit, brought by Carrington in Halifax county, it can have no effect to prejudice their rights subsequently acquired. This suit, it is alleged, was a nullity, as it was brought against John R. Williams, while he was an infant, and no guardian ad litem was appointed, to defend the suit. That his mother who filed an answer as his guardian was not authorized to defend, not having been appointed for that purpose by the court; and that she was substituted for John B. Scott, who also answered, and against whom the decree was entered. That as it does not appear that he was the guardian of the defendant or authorized to appear for him, by appointment of the court, both the decree which was entered in the case and the consequent transfer by him, of the plats and certificates for the land in controversy are void; and had no effect to prejudice the right of the infant, or to charge the defendants who afterwards purchased, with notice.

It does not appear that in the above suit, process was served on the infant, nor that the guardian ad litem was appointed by the court, and for these omissions or errors in the proceedings the decree might be reversed,

by an appellate court; but when the decree is used as matter of evidence, it cannot be disregarded or treated as a nullity. Much may be presumed in favor of the proceedings of a court, regularly constituted and which exercises a general jurisdiction; and especially after the lapse of many years. But this point does not seem to be material in the present enquiry. Whether the proceedings in the first suit were perfectly regular or not; whether they were erroneous or not, cannot be important, as the proceeding and the evidence which were examined by the defendants or might have been examined by them, as they had notice, in fact, of the pendency of the suit, and of the decree, was a sufficient notice of the equity asserted in the suit and sanctioned by the decree.

The doctrine of lis pendens does not apply in the case. To make the pendency of a suit notice, so as to affect the conscience of a purchaser, it is essential that the court have jurisdiction over the thing. 4 Fonbl. b. 2, c. 6, § 3, note n; Sorrell v. Carpenter, 2 P. Wms. 482; Worsley v. Earl of Scarborough, 3 Atk. 392; Bishop of Winchester v. Paine, 11 Ves. 194; Murray v. Ballou, 1 Johns. Ch. 566. But in this case the courts in Virginia could make no order or decree which could operate upon the land in Kentucky. Having jurisdiction over the person of the defendant, they might well investigate the subject matter of the contract, but they could only reach the title to the land through the personal act of the defendant.

That the defendants had notice of the complainants' title is admitted in their answers, and it is also shown by the terms of the contracts for the land. In one purchase the whole of the consideration was reserved, and in another the greater part of it, until the final adjustment of this claim. And John R. Williams binds himself to return, with interest, the part of the purchase money, which he received, provided he should not be able to make a good title. These facts settle the question of notice. It was not only sufficient to put the defendants on enquiry, but they have guarded their interests by withholding the purchase money, and by an express obligation on the part of Williams, he is to refund, with interest, the money received. That part of the consideration paid, must be considered as having been paid, on the personal responsibility of Williams, on his failing to make a good title. The letters of Isaac Caldwell also show this fact.

But the main ground on which the right of the complainants is resisted is, that the contract was not reduced to writing, and it being for the sale of real estate, it is void by the statute of frauds. The statute of frauds of Kentucky, is relied on, but as this contract was made long before the state of Kentucky was organized, it is clear that no statute passed or adopted by Kentucky can operate upon the contract, if valid at the time it was made. That the contract was valid in Virginia is established by the judicial sanction which has been given to it. It has not only been sanctioned by the decree of the county court of Halifax, but by the superior court of chancery for the district; and a deed has been executed by Williams, which conforms to the laws of Kentucky, under the final decree. The original contract on the part of George Carrington was executed, by conveying to the ancestor of John R. Williams, the land in Virginia, which was given in exchange for the land in Kentucky named in the bill, and according to the well established rule in Virginia, took the contract out of the statute of frauds. It was not only in part performed by Carrington, but fully executed; so that it did not come within the statute by the rule established in England or in Virginia. And though a different rule be established in Kentucky, it can only operate on contracts made after the enactment of the Kentucky statute. It is therefore clear, whether the complainants proceed upon the original contract, as proved in the original records from Virginia; or on the decree of the superior court of chancery, in the Lynchburg district, as fixing the right of the complainants, that they are equally entitled to the aid of this court.

The facts of the case, connected with the action of the courts of chancery in Virginia, and the notice to the defendants, present a case for relief clear of all difficulty. The court will, therefore, decree that the defendants convey all their title and interest to the land in controversy, to the complainants.

This case was removed to the supreme court by an appeal, and the above decree was affirmed. 9 Pet. [34 U. S.] 86.

[NOTE. Defendants appealed to the supreme court of the United States, which affirmed the decree of the circuit court, upon the grounds, as set forth in the opinion of Mr. Chief Justice Marshall, that the exchange by John Williams of his military land for the Dry Branch tract was fully established by the testimony; that the complete execution of the contract on the part of George Carrington by conveying the Dry Branch tract to the vendee of John Williams supplied in law the want of a memorandum in writing, and that such construction of the statute of frauds by the courts of Virginia at the time the contract was made, the land then being within that state, formed the law of the contract, and the change of the law afterwards made in Kentucky could not affect the validity of the contract; and, furthermore, that the proof unequivocally showed that defendants had received notice of the contract made by Carrington with John Williams, and that, having, with the exception of Brents, purchased equitable titles, were bound to notice prior equities. Caldwell v. Carrington, 9 Pet. (34 U. S.) 86.]

Case No. 2,447.

CARRINGTON v. FLORIDA R. CO. et al.

[9 Blatchf. 467.] [1]

Circuit Court, E. D. New York. March 4, 1872.

REMOVAL—MOTION TO REMAND AFTER ISSUE JOINED.

An action was removed into this court, from a state court, as against two of the defendants, under the act of July 27, 1866 (14 Stat. 306). After the record of removal was filed in this court, the plaintiff pleaded anew, setting up, in his bill, the removal of the cause. After issue, the plaintiff moved to remand the cause to the state court, on the ground that it was not within the act. *Held*, that it was too late for the plaintiff to ask that the cause be remanded, on motion.

[See Davies v. Lathrop, 13 Fed. 565.]

[In equity. Bill by Daniel N. Carrington against the Florida Railroad Company and Albert A. Drake. The cause was removed from the state court by defendants, and plaintiff now moves to remand the same.]

John L. Hill, for plaintiff.

Edward N. Dickerson, for defendants.

BENEDICT, District Judge. This action was originally commenced in the supreme court of the state of New York, and is now upon the docket of this court, by virtue of proceedings taken to remove it, as against two of the defendants, from the state court to this court, in pursuance of the act of congress of July 27, 1866 (14 Stat. 306). It now comes before the court upon a motion made by the plaintiff to remand the cause to the state court, upon the ground that it is of such a nature as not to be within the scope of the act of 1866, it being, however, admitted, that the defendants are citizens of another state.

It appears to me a sufficient answer to this motion to say, that it is made to appear, that, after the record of removal was filed in this court, the plaintiff pleaded anew in this court, and, in his bill, set up the removal of the cause into this court, as having been effected by the proceedings taken by these defendants, without any suggestion that the case was not removed, and properly so. The case is now at issue in this court, upon the plaintiff's bill filed here, and the answer and demurrer of the defendants; and it is too late now for the plaintiff to ask that the cause be remanded, on motion. The motion to remand is denied.

[NOTE. For the denial of a subsequent motion to dissolve an injunction granted by the state court, see next following case, No. 2,448.]

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

Case No. 2,448.

CARRINGTON v. FLORIDA R. CO. et al.

[9 Blatchf. 468.] [1]

Circuit Court, E. D. New York. March 5, 1872.

REMOVAL OF CAUSES — INJUNCTION PREVIOUSLY GRANTED BY STATE COURT — MOTION TO DISSOLVE.

Before the removal of a cause into this court, from a state court, as against two of the defendants, under the act of July 27, 1866 (14 Stat. 306), an injunction was granted in it, by the state court, on a full hearing, on notice, against such defendants. After the removal, they moved, in this court, to dissolve the injunction, on the same papers on which it was granted. *Held*, that leave to make such motion must be applied for and obtained, before it could be made.

[In equity. Bill by Daniel N. Carrington against the Florida Railroad Company and Albert A. Drake. Defendants move to dissolve an injunction granted by the state court. For denial of prior motion to remand the cause to the state court, see Case No. 2,447, next preceding.]

John L. Hill, for plaintiff.

Edward N. Dickerson, for defendants.

BENEDICT, District Judge. This action was originally commenced in the supreme court of the state of New York. While the cause was before the state court, all the defendants having appeared therein, a motion for an injunction was made on the part of the plaintiff, which was opposed, on affidavits, by the defendants, and, after hearing all parties, the state court granted the injunction asked for by the plaintiff. Shortly after the decision of the state court upon the motion for an injunction, two of the defendants, who are citizens of another state, took proceedings under the act of congress of July 27, 1866 (14 Stat. 306), to have the cause, as to such defendants, removed into this court. By virtue of such proceedings, a record of removal was filed in this court, and the appearance of the said two defendants was here entered, whereupon the plaintiff pleaded anew in this court, in order to conform the proceedings to the chancery practice of the court. In this stage of the case, the defendants now move, in this court, to dissolve the injunction granted by the state court, and such motion is made upon the same papers upon which the injunction was granted by the state court.

I entertain no doubt of the power of this court, in a cause duly removed from the state court, to dissolve an injunction granted in the cause while it was in the state court. But I am of the opinion that, where it is

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

desired to make a motion like the present, which is, in effect, an application for a re-argument of the motion made before the state court, leave to make such application should be first applied for and obtained.

The motion to dissolve the injunction is, therefore, denied, upon the ground that no leave to make the same had been previously obtained.

Case No. 2,449.

CARRINGTON v. FORD et al.

[4 Cranch, C. C. 231.] [1]

Circuit Court, District of Columbia. May Term, 1832.

PLEADING AND PROOF—VARIANCE—AMENDMENT—DISCHARGE OF BAIL.

1. A note signed "Ford & Chapman" (they being partners and joint contractors), and payable to the plaintiff, was held not to be admissible evidence to support an averment that the note was made by the defendants, their own handwriting being thereto subscribed (not charging them as partners), and payable to the plaintiff, "or order."

2. Bail will not be discharged, upon leave to amend the declaration, unless the amendment charges a cause of action different from that upon which bail was given.

3. An amendment conforming the declaration to the cause of action upon which bail was given will not authorize a discharge of the bail.

At law. The declaration charged that the defendants, not charging them as partners, made their promissory note, their own proper hand being thereto signed, and thereby, one day after date thereof, promised to pay to the plaintiff, "or order," $74.93 for value received by them. The note produced in evidence was signed "Ford & Chapman," in the handwriting of Chapman only; and was not payable to the plaintiff, "or order," as charged in the declaration.

Mr. Redin, for defendants, objected that the note was not signed by the defendants nor payable to the plaintiff, "or order."

THE COURT thought both objections fatal; but permitted the plaintiff to amend his declaration on payment of the costs of this term.

Mr. Redin then moved the court to exonerate the bail, and cited Wilson's Adm'r v. Berry [Case No. 17,791], in this court at May term, 1826; Hyer & Burdett v. Smith [Id. 6,979], at May term, 1829; 1 Chit. Pl. 246; Kerr v. Sheriff, 2 Bos. & P. 358; and Wilks v. Adcock, 8 Term R. 27.

Without the amendment the plaintiff would be nonsuited and the bail discharged. The note was filed before bail was given.

THE COURT (MORSELL, Circuit Judge, contra) refused to discharge the bail.

CRANCH, Chief Judge, said, that the reason for discharging bail, upon amending the declaration, is, that it would be unjust to charge the bail upon a cause of action different from that upon which the bail was originally given; or where the amendment is of a defect existing at the time of entering bail and which would have defeated the plaintiff's action, but for such amendment. In the present case, the amendment prayed is to make the declaration conform to the original cause of action filed in court at the time of ruling bail and before the declaration was filed; not to cause a variance.

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

CARRINGTON, The (HANNAH v.). See Case No. 6,029.

CARRINGTON (McKAY v.). See Case No. 8,841.

Case No. 2,450.

CARRINGTON v. STIMSON.

[1 Curt. 437.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1853.

DEPOSITIONS—NOTICE OF TAKING—SERVICE ON ADVERSE PARTY.

The judiciary act, § 30 [1 Stat. 88], requires personal service on the adverse party, of the notice of taking a deposition; and service, by leaving a copy at his place of abode, is not sufficient.

[See Buddicum v. Kirk, 3 Cranch (7 U. S.) 293.]

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

This was an appeal by the libellant from a decree of the district court [case not reported] in a cause of personal damage.

CURTIS, Circuit Justice. There is a preliminary question in this case, concerning the admissibility of the deposition of William A. Dahl. The commissioner certifies, that "the adverse party was notified, as appears by the notice hereto appended, but was not present." The notice to the respondent is in the usual form, and the officer's return thereon states that he served the notice "by leaving a copy of the same on board the bark Weybopel, lying at Constitution wharf, in Boston, where I was informed the within-named Stimson lodged." It was objected, that this was not proof of the notice required by law; and I am of that opinion. The deposition was taken under the thirtieth section of the judiciary act (1 Stat. 88), which contains the following proviso: "Provided that a notification from the magistrate before whom the deposition is to be taken, to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, be first made out and served on the adverse party or his attorney, as either may be nearest, if either is within one hundred miles of the place of caption," etc. The authority to take deposi-

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

tions under this act, has always been construed strictly. Bell v. Morrison, 1 Pet. [26 U. S.] 351; Patapsco Ins. Co. v. Southgate, 5 Pet. [30 U. S.] 604. It must appear that every requisite has been complied with. One requisite is service of a notice on the adverse party, or his attorney, if either be within one hundred miles. This must be construed to require personal service; no substituted service, by leaving the copy at his dwelling-house or usual place of abode, being authorized by the act. Consequently, the service in this case was insufficient to authorize the taking of the deposition. There is also another objection to this notice, not mentioned at the bar. The notice contains the names of two other persons, but not of the witness whose deposition was taken. I have, therefore, excluded this deposition.

THE COURT then examined the evidence; and upon the same principles stated in the case of Barnett v. Luther [Case No. 1,025], affirmed the decree of the district court.

Case No. 2,451.

The CARROLL.

[1 Ben. 286.][1]

District Court, S. D. New York. July, 1867.

COLLISION IN CHESAPEAKE BAY — STEAMER AND SCHOONER MEETING—DUTY OF STEAMER — EVIDENCE.

1. Where a steamer and schooner meeting each other in Chesapeake bay, the schooner bound down the bay with a free wind, but, as she claimed, holding her course, and her course being to westward of that of the steamer, and the steamer, as the vessels approached, put her wheel hard aport and stopped and backed, but a collision occurred: *Held*, that it is the duty of steamers to give way to sailing vessels with a free wind, as well as those close hauled.

2. The vessels having seen each other several miles apart, the collision could only have occurred by gross fault on the part of one or both vessels.

3. The claim of the steamer that she stopped and backed when the schooner was nearly a mile off, bordered on absurdity.

4. Her claim that the schooner when nearly a mile to the westward of the steamer, and nearly abreast of her, suddenly starboarded and went to the eastward to cross the steamer's bows, was also unreasonable. The court was therefore compelled to discard the steamer's theory and accept that of the schooner, which was simple and consistent with one exception.

[Cited in The Excelsior, 12 Fed. 204.]

5. If the schooner was to the westward, and changed her course, as alleged by the steamer, then the order to stop and back the steamer was an error, and that on the other hand, if the schooner was nearly ahead, then the steamer should have starboarded instead of putting her helm hard aport.

6. Very little reliance could be placed upon the testimony of a witness who had contradicted himself on cross-examination, whether the discrepancies arose from forgetfulness, disingenuousness or dulness.

In admiralty. This was a suit by Wesley Egbert, master and part owner of the schooner Elijah Shedden, to recover the damages sustained by her in a collision with the steamer Carroll belonging to the Baltimore & Ohio Railroad Co., which occurred on the evening of the 21st of December, 1865. At about half-past seven o'clock that evening, the schooner was bound down Chesapeake bay, before a free wind with her sails wing and wing, at a speed of four or five miles an hour. When off, or a little above the Rappahanoc, she discovered a light which proved to be that of the steamer Carroll, bound up the bay. The vessels were then several miles apart and sailing on nearly opposite and parallel courses. They continued to approach each other until a collision took place, the steamer striking the schooner on her starboard side about twelve feet forward of her taffrail, and the latter sunk in five or six minutes. The weather was clear with a moderately fresh breeze. The steamer also discovered the schooner several miles off.

Three witnesses were examined by the libelants, and they substantially agreed in saying that they first discovered the bright light of the steamer two or two and a half points on their starboard bow, and as it drew nearer they discovered her green light; that the schooner continued her course without change, while the steamer approached, and, when two or three hundred yards from the schooner, suddenly ported her wheel, showing her red light, and struck the schooner as already stated; that the only movement attempted on the schooner was made by her captain after he saw the steamer had changed her course and was coming into the schooner, when he seized the wheel and attempted to throw it astarboard, but that it was too late; that the light of the steamer when first seen was four or five miles off, and that from that time to the collision was twelve or fifteen minutes. These witnesses insisted that from the time they first discovered the Carroll's light, down to the time she changed her course, she was to starboard of the course of the schooner.

On the part of the steamer there were examined, Lennan, her master, Fuller, the second mate, who was on the bridge, Thompson, a seaman, who was with him, and Peters, another seaman. Their claim was, that the schooner's light was seen a little on the steamer's port bow, whereupon the steamer's helm was put aport a little to show her red light; that the vessels then kept on till the schooner was from half a mile to a mile distant when it was discovered that the schooner had changed her course by starboarding her wheel, whereupon the captain of the steamer gave the order at once to put the wheel hard aport, and to

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

stop and back, but the collision was then inevitable. The reason given by the captain of the steamer, for porting and backing at this time was to stop her way, and throw her bow to port, so as to let the schooner cross his bow if she could; that the action of her propeller, backing on a port helm has the effect to throw her bow to port, while backing on a starboard helm brings her bow to starboard.

Beebe, Dean & Donohue, for libellants.
John H. Platt, for compiainants.

SHIPMAN, District Judge. After setting forth the testimony of the witnesses at some length, and saying that as the vessels saw each other when several miles apart, no collision could have occurred without great fault on one or both sides, proceeded as follows:

On one point the testimony of the witness Thompson, is confused and inconsistent. He repeats the statement that the steamer was stopped and backed as soon as the order to hard aport was given, which was when the vessels were a mile apart as near as he can judge. On the cross-examination he distinctly states that the steamer was not stopped and backed until a considerable portion of this mile had been run over, and that they were very close when this order was given. Very little reliance can be placed upon testimony of this character, whether such glaring discrepancies arise from forgetfulness, disingenuousness or dullness.

The impression derived from reading the first part of Peters' testimony is that the first order to port and then steady, was given when the schooner's green light was discovered, when, as he thinks, she was three-quarters of a mile or a mile from the steamer, and that the latter after falling off a point ran some little time before the order to hard a-port was given. But in the subsequent part of his statement he proceeds upon the idea that the first order to port was given when the schooner's light was first discovered, about four miles off. He says, however, that the order to stop and back was given immediately on the order to hard a-port. Captain Lennan, and Fuller, the second mate, confirm him on this point, and the former agrees that at that time the vessels were half or three-quarters of a mile apart; that is, on a diagonal line drawn from one to the other.

None of the witnesses for the claimants charge the schooner with changing her course from the time she was discovered till she had reached this point about three-quarters of a mile off from the steamer, when she showed her green light, and the steamer put her wheel hard a-port, and rang to stop and back.

Assuming, then, that the first change charged on the schooner was made as stated by the claimants' witnesses, let us see what must have been the relative positions of the vessels. They all agree in placing the schooner well to the westward or port of the track of the steamer when the former was discovered. They agree that no change took place till she had approached within about a mile. As they were both sailing on nearly parallel courses then, and the steamer immediately ported a point, and held that course, diverging from the track of the schooner for three or four minutes, it follows that the schooner, when she changed her course, must have been over a mile, or at least a full mile, to the westward of the steamer's course; in other words, she must have been off to the westward at least five points on the steamer's port bow, and drawing down abeam of her. Now if the schooner's helm had been put hard a-starboard at this point, giving her a course at right angles to that of the steamer, and the latter had kept on, it is very doubtful if a collision could have taken place. The Carroll was making greater speed than the schooner, and would in all probability have reached and passed the point of intersection before the schooner reached it. The distance the vessels had to travel was about equal. But it is not necessary to apply this test, for it is clear on the evidence in behalf of the Carroll, that, whatever change she then made, she did not hard a-starboard, thus approaching the steamer's track at right angles. This is plain from the fact insisted on that the steamer, as soon as the schooner changed, reversed her engine, and soon lost headway. Yet the schooner came down and struck the steamer's bows. It follows irresistibly that the schooner, from the point where her alleged change of direction took place, must have sailed on a diagonal line to the steamer's track; and had the latter kept her course, even without any change, she would have clearly passed the point of intersection before the schooner got there. Such a change of the schooner involved no risk of collision. Had the steamer kept on, the schooner would have passed under her stern with safety. On the Carroll's own showing, all she did to avert the collision was, when she saw the schooner coming toward her, to stop in her track and let the latter run down to her, and this she did when the schooner was three-quarters of a mile or a mile off! Viewing the evidence for the Carroll in any light in which I have been able to place it, I fail to see that it furnishes a satisfactory explanation of the collision, or one which either disproves that given by the schooner or vindicates the steamer. The theory of the latter is an impossible one, and the assertion that she stopped and backed when the schooner was nearly a mile off borders on absurdity. Equally unreasonable is the claim that the schooner, when off nearly a mile to the westward of the track of the steamer, and nearly down to her, suddenly starboarded and went to the eastward to cross her bows. The court is therefore compelled to

discard the theory offered by the Carroll, and accept that of the schooner, which is simple and consistent, except that part of it which places the course of the steamer considerably to the westward of the track of the schooner.

It is useless to speculate on the subject, but it looks very much, in view of the evidence as a whole, as if these vessels approached each other nearly head and head for several miles, without any apprehension of danger, when the steamer, on discovering the schooner's green light, suddenly put her wheel hard a-port, under some mistake as to the relative positions of the vessels. This view of the courses of the vessels and their relative positions is strengthened by the statement of Thompson, who says that when he first discovered the schooner's red light, she bore nearly north, as he thinks; and by Peters, who states that when he saw the schooner's green light he thinks he saw her red light also. These two statements are consistent with the claim that the schooner made no change in her course. Whether the steamer was misled by some one of the numerous lights, which one of her witnesses says were ahead before she came up near the schooner, or whether the order to hard to port was inadvertently given on suddenly discovering that the schooner was near, it is impossible to say; but it is clear that if the schooner was to the westward, in the position assigned her by the steamer, when the former made her alleged change of course, then the order to hard a-port was correct; but the order to stop and back was an error, for had she kept on hard a-port, she would have cleared the schooner with perfect ease. If, on the other hand, the schooner's green light was nearly ahead, or a little on the Carroll's port bow, then the latter should have starboarded, for, according to the Carroll's own evidence, the schooner was nearly a mile distant, running on a starboard helm. The vessels would have then passed each to the left of the other.

But, as already intimated, the court is compelled to accept the theory of the libellant's witnesses, especially as to the course and management of the schooner; and as she did not, according to their statement, change her course, the steamer must be held in fault. It was her duty to take early measures and clear the schooner. It is now settled by the courts of this country that it is the duty of steamers to give way to sailing vessels with a free wind, as well as those close hauled.

Let a decree be entered for the libellant, with an order of reference to a commissioner to compute the damages.

[NOTE. For hearing on exceptions by the respondents to the commissioner's report, see Egbert v. Baltimore & O. R. Co., Case No. 4,305.]

CARROLL (ANTHONY v.). See Case No. 487.

Case No. 2,452.

CARROLL v. DOWSON.

[5 Cranch, C. C. 514.] [1]

Circuit Court, District of Columbia. Nov. Term, 1838.

CONVEYANCE BY GRANTOR OUT OF POSSESSION.

A sale made by a trustee under a decree of the court will not pass the title of land in the actual adverse possession of a third person at the time of the decree.

At law.

Ejectment [by Richard Roe ex dem. Daniel Carroll, and of the Bank of Washington against Alfred R. Dowson] for lot No. 9, in the square No. 687, in the city of Washington. The plaintiff claimed under a demise from the Bank of Washington, and also from Daniel Carroll, of Duddington. The plaintiff gave in evidence, 1. A certificate of the original division of the square between the public and Mr. Carroll, by which the lot No. 9 was allotted to him. 2. A decree of this court, in the cause of G. Coombe v. D. Carroll, of D., for a sale of the lot, and a sale by the trustee to the Bank of Washington. The defendant showed that he was, at that time, in actual possession of the lot, holding it adversely to Mr. Carroll, who has received the whole purchase money due by the defendant for the lot. There had been no notice to Dawson to quit.

Mr. Marbury, for plaintiff.

Mr. Jones, for defendant.

THE COURT (nem. con.) was of opinion, that as the defendant held an actual adverse possession at the time of the decree for a transfer of the legal title from Mr. Carroll to the Bank of Washington, neither the demise by Mr. Carroll, nor that by the bank was a valid demise. The plaintiff became nonsuit.

Case No. 2,453.

CARROLL v. FINNAGAN et al.

[1 Cranch. C. C. 234.] [1]

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

LANDLORD AND TENANT—USE AND OCCUPATION—MEASURE OF DAMAGES.

It seems, that in an action for use and occupation, the plaintiff can recover only for the time of the actual occupation, although there be a parol lease for a whole year at a certain rent, and the tenant voluntarily quits the premises during the year. The parol demise is only evidence, in such an action, of the rate at which the defendant is to be charged for the time of actual occupation.

Case, for use and occupation. A parol demise for a year from 1st November, 1802, at six hundred dollars per annum was proved. Defendants [Finnagan and Waters] quitted

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

the house in February, 1803, because the chimneys smoked, so that their lodgers had determined to leave them.

Mason, for plaintiff, contended for the whole year's rent.

THE COURT (FITZHUGH, Circuit Judge, absent) were inclined to be of opinion that under this form of action the defendants were liable only for the time they actually occupied the house; and the statute 11 Geo. II. c. 19, § 14, only made the parol demise admissible as evidence of the rate at which the defendants should be charged for the time of actual occupation: The words of the statute being that: "Where the agreement is not by deed, it shall be lawful for the landlord to recover a reasonable satisfaction for the lands, etc., held or occupied by the defendant in an action on the case, for the use and occupation of what was held or enjoyed. And if in evidence on the trial of such action any parol demise, or any agreement (not being by deed) whereon a certain rent was reserved shall appear, the plaintiff in such action shall not therefore be nonsuited, but may make use thereof as an evidence of the quantum of the damages to be recovered." Verdict for the plaintiff, $290 only.

Case No. 2,454.

CARROLL v. GAMBRILL et al.

[1 MacA. Pat. Cas. 581.]

Circuit Court, District of Columbia. Sept. 1858.

PATENTS—CLAIM OF PRIOR INVENTION—ESTOPPEL—PUBLIC POLICY—ABANDONMENT—SALES PRIOR TO APPLICATION.

[1. One who recommends an invention to others, distributes circulars inviting inspection, and disclaims all interest therein or claim thereto, is thereafter precluded, on grounds of public policy, from claiming a priority of invention.]

[2. Such a claim would be likewise barred, within the principles of the patent laws, on the ground of abandonment.]

[3. Ignorance of the patentability of the invention would not aid him if the importance of the improvement was obvious and apparent from observation of its operation.]

[4. Section 7 of the patent act of 1839 (5 Stat. 354), providing that a patent shall be invalid where sales were made more than two years prior to the application therefor, refers to sales by the applicant or those claiming under him, and not to sales made by persons claiming prior invention.]

[Appeal from the commissioner of patents.]

[On interference. Controversy between David Carroll and H. N. Gambrill and S. F. Burgee as to priority of the invention for which letters patent No. 18,124, for self-stripping cotton cards, were issued to Gambrill and Burgee, September 1, 1857. The commissioner of patents decided against the claim of Carroll, and from that decision he appeals.]

Munn & Co., for appellant.

A. B. Stoughton, for appellees.

MORSELL, Circuit Judge. The invention claimed in this case, it is conceded, is the same for which a patent issued to the said H. N. Gambrill and S. F. Burgee, dated the 1st of September, 1857 (No. 18,124). The issue in this case involves the question whether the said David Carroll has a right to have a patent therefor by reason of priority. He dates his invention in August, 1856. The appellees show theirs to be in November of the same year; and that in the December next following they filed their caveat in the patent office. The parties took their proof according to the rules of said office, and thereupon (after hearing the parties) the commissioner decided against the claim of the said David Carroll, which decision, with the reasons of appeal, evidence, and all the original papers, has been duly laid before me on this appeal. The said parties appeared; and having laid before me their respective written arguments, the case was submitted; upon a careful examination whereof the ground upon which my opinion will be placed will be the evidence relating to the conduct of the appellant in connection with his own declarations and admissions or confessions. It will be unnecessary, therefore, to take a particular notice of any other parts of the reasons of appeal or of the report of the commissioner.

In November, 1856, the appellees' machine, with the new feature constituting the invention, the subject of controversy in this case, was put up and worked in their mill, situated about the distance of a mile from that of appellant's. During that time, and for some time before, there was a constant intercourse between the parties and their workmen, or some of them. They (the appellees) filed their caveat 22d December, 1856. In the following March they applied for their patent, which was allowed, but not then delivered, but was issued the 1st September, 1857. On the 1st June, 1857, the appellees issued their printed circular, inviting manufacturers to visit the Atlantic Delaine Mills, Providence, Rhode Island, to witness the operation of a section of said appellees' patented self-stripping cotton cards then in operation. In further description, the circular says: "These machines are very simple in their construction, and require much less care to operate them than cards constructed in the ordinary way; they require no labor, except what is necessary to supply them with material; will do as much work and of as good quality as four of the common kind of cards of corresponding width," &c., giving a further description. Some time before the middle of June, Mr. Carroll, having gone on to Providence, Rhode Island, visited said mills (the Atlantic Delaine), where the said card containing said new feature was in operation, (being the same claimed in this case as his

invention,) distributed some of the said circulars, and commended the said card in very high terms. Being questioned whether he was interested, declared that he had no interest therein. He laid no claim to it as his invention. And so, in traveling throughout the manufacturing districts of the North, the witnesses prove he distributed the said printed circulars recommending to manufacturers to visit Providence and see Gambrill and Burgee's machines at the delaine mills, assuring them that they would not regret it; and to those who desired to know whether he was interested, constantly declared that he was not, which facts are proven by a number of witnesses, as will appear by reference to the proceedings, but most conclusively so by the letter of Mr. Carroll to H. N. Gambrill, dated 10th June, 1857, in which, among other things, he says he went to Willimantic; there (he says) "I found Jillson," etc. "I gave him your circular, and said all to him I could in favor of your card." From thence he went to Haden's and gave Haden a circular, and told him he (Carroll) was not interested in the card. When at Palmer, he told Mr. Brown that he ought to have "your [meaning Gambrill and Burgee's] card built." And so to Mr. Haden, he called it "your card." This is the very thing now in issue. (See the letter itself, an exhibit in the proceedings.) This conclusion, from these facts, it appears to me, shuts up Mr. Carroll from all claim for a patent for said invention. The rule of law which I take to be applicable is, that in a case like this, where admissions are made to induce others to act upon them, such admissions do not operate merely as presumptive evidence of the actual truth of the facts, which must give way to positive proof of the contrary, but precludes and, as it were, estops the party on grounds of policy. I think it is a bar also upon the principles of patent law, upon the ground of abandonment. This, I understand, would be conceded if the case would not fall within the exception or saving contained in one of the provisions of the act of congress of 1839 [5 Stat. 354], § 7. This exception, I think, would not apply to the case, being intended only for cases where the sale or license, &c., has been made by the applicant for a patent, or those claiming under him. This is not one of that class of cases.

The explanation offered as a defense—namely, ignorance—I do not think sustained. As to the fact of the feature, or the thing forming a part of the card as an important improvement, especially to a man skilled in such devices, it must have been plain and obvious; more especially is it to be reasonably supposed, as he was recommending the card as something new, and the invention said to be a simple one. But if not from the card itself, as stated in the circular, yet surely it must have been apparent to him when he saw it in operation. As to his not knowing whether it was patentable or not, the rule is that ignorance of the law does not excuse, especially in a matter of such little complication.

My opinion is that the decision of the commissioner is correct, and ought to be affirmed.

CARROLL (GRAMMER v.). See Case No. 5,681.

Case No. 2,455.

CARROLL et al. v. The LEATHERS.

[1 Newb. 432.][1]

District Court, E. D. Louisiana. May, 1853.[2]

ADMIRALTY — RELEASE OF LIBELED VESSEL ON STIPULATION—RIGHTS OF SURETY — OF LIENORS —MATERIALS AND SUPPLIES—SUBROGATION.

1. Where a surety on a bond or stipulation given in the admiralty, pays the money in accordance with the decree of the court, he is entitled to be subrogated to the rights of the original libelants; but he cannot be paid by preference out of the proceeds of the boat which has been sold under his execution, while there are liens already existing.

[Cited in The Madgie, 31 Fed. 928; Roberts v. The Huntsville, Case No. 11,904.]

2. The moment the boat was released upon a stipulation, from the custody of the law, she was also released from the lien in favor of the original libelants, and they could only have recourse upon the stipulation. The boat was at liberty to go where she might think proper, and quoad the claim of the original libelants, was at liberty to contract de novo, debts which might operate as liens in admiralty or under the local law.

3. The claimants of a boat libeled for salvage, upon giving a stipulation for her release from the custody of the law, take her cum onere, subject to pre-existing liabilities.

4. The surety on a stipulation who has paid money for his principal, can only be regarded as an ordinary creditor of the principal, upon whose personal credit he relied when he bound himself for the payment of the obligation. His right to be paid out of the proceeds of a boat which has been sold under his execution, must be regarded as subordinate to the claims of the interveners who have established their liens.

5. It is the surety's own fault if he fails to exact of his principal a separate stipulation to indemnify him against loss; and although the rules in admiralty are silent with regard to this form of stipulation, yet as a familiar and well established part of the civil law and general admiralty practice, the court would not hesitate upon the application of the surety to direct it to be given.

6. When supplies are furnished to a vessel in her home port, the validity of the liens must be determined by the local law; but when they have been furnished in a foreign port, or in the port of a state other than the one to which the vessel belongs, the liens are to be regarded as admiralty liens, which are unaffected by any limitations of the local law.

[Cited in The General Tompkins, 9 Fed. 621; The Rapid Transit, 11 Fed. 332.]

7. If A. hold a lien against a vessel for materials furnished, and the master request B. to

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

[2] [Affirmed by the circuit court (case not reported).]

pay the account of A., the lien originally held by the latter is not by such payment transferred to B., and he has no right of action in rem in the admiralty.

[In admiralty. Libel by D. R. Carroll, against the steamboat T. P. Leathers, R. W. Adams, and Relf and Villarubia, interveners.]

Durant & Hornor, for libelant Carroll.

Benjamin, Micou & Finney, for Relf and Villarubia, interveners.

McCALEB, District Judge. In the case of Montgomery v. The T. P. Leathers [Case No. 9,736], this court awarded a salvage compensation of $15,000, free from all costs and charges; and for this sum together with costs, making an aggregate amount of $15,334.60, an execution issued against the principal and surety on the bond, which was given by the claimants when they obtained the release of the boat from the custody of the law. The present libelant as surety, was compelled to pay into court the whole sum demanded under the execution, and upon the motion of his proctors was subrogated by an order of court to all the rights of the original libelants. He then applied for and obtained an execution against his co-sureties and the owners of the boat, which was levied upon to satisfy that proportion of the amount awarded to the original libelants, and due from her.

It is proper that I should state that the judgment in favor of the salvors, as it was entered by the clerk, so far as it gives a lien upon the boat, goes further than the law or the practice of the court will authorize. As soon as the stipulation was filed by claimants, and the boat released from custody, the lien in favor of the libelants was discharged. But as that judgment can only conclude those who were parties to the original suit, the clerical error committed in entering it upon the record, cannot be permitted to affect the interests of those engaged in the present controversy. The proper remedy, after the boat was released, was upon the bond or stipulation; and the record shows that this remedy was regularly pursued. Having paid the money as surety, D. R. Carroll could at once claim to be subrogated to the rights of the original libelants. This part of the proceedings, has been strongly attacked by the proctor of one of the intervening parties who asks to be paid in preference to the surety on the bond. It is contended that no such right of subrogation accrued to the surety, and that the sale of the boat under his execution was totally irregular. If this be so, then the intervener is in the act of asserting a claim by preference, to the proceeds of a sale, which he himself contends was made without the authority of law. But the order of subrogation was regular, and fully authorized by the jurisprudence of the admiralty tribunals, which are governed on this subject, not, as the proctor has contended, by the principles and rules which are administered in courts of equity, but by the well recognized doctrines of the civil law code. "The practice of the court," says Judge Ware, in Lane v. Townshend [Case No. 8,054], "is the law of the court, and in the absence of any authoritative decisions showing what that is on a particular point, we must resort to the general rules of admiralty practice, and the principles of that jurisprudence from which it is derived."

By the act of congress of 1789 [1 Stat. 93, § 2], regulating the practice of the courts, the forms and modes of proceeding in causes of admiralty and maritime jurisdiction, are directed to be "according to the course of the civil law;" and in that of 1792 [1 Stat. 276, § 2] they are ordered to be "according to the principles, rules and usages of the courts of admiralty as contradistinguished from courts of common law;" subject to such alterations as courts in their discretion should deem it expedient to make. The sections quoted by the learned proctor from 1 Story, Eq. Jur. (section 4996, etc.) show clearly the rules of the chancery courts; but in the same volume, section 500, we have presented to us in language not to be misunderstood, the far more liberal and comprehensive doctrine which pervades the Roman law in reference to this subject. Not only is the surety by that law entitled in such cases to the benefit of all the collateral securities taken by the creditor; but he is also entitled to be substituted as to the very debt itself, to the creditor, by way of cession or assignment. And upon payment of the debt by the surety, the debt is in favor of the surety, treated not so much as paid as sold; not as extinguished, but as transferred with all its obligatory force against the principal. After quoting at length from the Digest of Justinian the provisions of the Roman law, which support this view of the subject, Mr. Justice Story says: "We have here the doctrine distinctly put, the objection to it stated, and the ground upon which its solution depends, affirmed. The reasoning may seem a little artificial; but it has a deep foundation in natural justice. The same doctrine stands in substance approved in all the countries which derive their jurisprudence from the civil law." 1 Story, Eq. Jur. § 500; Dig. lib. 46, tit. 1, l. 17, 36; Poth. Pand. lib. 46, tit. 1, n. 46; 1 Dom. B. 3, tit. 1, § 3, arts. 6, 7. The Louisiana Code (article 2157) declares that "subrogation takes place of right for the benefit of him who, being bound with others or for others, for the payment of the debt, had an interest in discharging it."

Thus far then I have no hesitation in saying that the proceeding on behalf of the subrogated surety was regular and proper. But

the question now to be determined is, can he be paid by preference out of the proceeds of the boat sold under his execution while there are liens already existing? After a very full examination of the questions discussed at the bar, I am of opinion that no such preference can be allowed. The order of subrogation gave him all the rights of the original libelants. But the moment the boat was released upon bond, she was also released from the lien in favor of the salvors, and they could only have recourse upon the bond. The boat was at liberty to go where she might think proper, and quoad the claim for salvage was perfectly free to contract obligations which would subject her de novo to liens in admiralty or to privileges under the laws of the state. Even as to liens existing prior to the filing of the libel for salvage, the claimants, upon giving a stipulation for her release from the custody of the law, received her, cum onere, subject to all such pre-existing liabilities. Conk. Adm. 770, 771; Ben. Adm. §§ 497, 447; 2 Mason, 57 [U. S. v. Sixteen Packages, Case No. 16,303]. The surety, therefore, can only be regarded in the light of an ordinary creditor of his principal, upon whose personal credit he relied, when he bound himself for the payment of the bond. His right to be paid out of the proceeds of the boat which has been sold under his execution, must be regarded as subordinate to the claims of the interveners, who have established their liens. If any injury shall eventually accrue to him in this case, the court can only express regret at its inability to relieve him. It is his own fault if he has failed to exact of his principal a separate stipulation to indemnify him against all loss. And although the rules are silent with regard to this form of stipulation, yet as a familiar and well established part of the civil law and general admiralty practice, the court would not have hesitated, upon his application, to direct it to be given. Conk. Adm. 462, 463. He has the same right to proceed against the boat which has been seized and sold in this case, as against any other property belonging to his principal; but it is the right of an ordinary, and not of a privileged creditor holding a lien.

I shall now proceed to consider the different claims of the intervening libelants. In reference to supplies, it is only necessary to state as a general principle, that where they have been furnished in the home port of the vessel, the validity of the liens must be determined by the local law. But where they have been furnished in a foreign port, or in the port of another state than the one to which the vessel belongs, the liens are to be regarded as admiralty liens which are unaffected by any limitations of the local law. The home port of this boat is Memphis in the state of Tennessee. The local law of that state (St. 1833, c. 35, § 1) gives a lien on steamboats for any debt contracted by the master, owner, agent or consignee, for any work done or materials or articles furnished for or towards the building, repairing, fitting, furnishing or equipping the same, and for wages due to the hands, provided suit shall be commenced therefor within three months from the time the work is finished, or materials, or articles are furnished, or the wages fall due. The supplies furnished in the port of Memphis will be tested by this law. Those furnished in the port of New Orleans, will be regarded as falling within the principles of the general maritime law. The lien they give is unaffected by the limitations of the local law as to the time within which the action is to be brought.

One of the claims asserted by Relf & Co., has been resisted upon the ground that it was for money not actually loaned to the master for the necessities of the vessel, but paid to Filkins and others for materials furnished and repairs done upon her by the authority of the master. The evidence shows that the account of Filkins and others was settled by Relf & Co., at the request of the master; and it is difficult to draw a distinction between a claim for money so paid and one arising from a direct loan to the master for the specific purposes to which the money was really appropriated. In either case, it would seem to be an advance of money for the necessities of the boat, made at the request of the agent legally authorized to contract for the materials and repairs. But the question arises, upon what principle of the maritime law can this court authorize the payment of the claim? It is money advanced for the necessities of a vessel in a foreign port, and the lender has failed to acquire a lien by taking a bottomry bond. The fair presumption then is, that he made the advance upon the personal credit of the master and owners. If the claim be grounded upon the law of the state, it must appear, that the money was lent to the master for the necessities of the boat during the last voyage. There is no evidence to show that the claim falls within the particular provision of the Code (article 3204, No. 7), which must be construed strictly. The court has no authority to substitute Relf & Co., in the place of Filkins and others, to whom the money was paid, so far as to transfer to them the lien which the latter held against the boat. I feel compelled, therefore, to reject this claim, and leave the interveners, Relf & Co., to their remedy against the master and owners. Harper v. New Brig [Case No. 6,090]. The claims will now be referred to Robert M. Lusher as commissioner in admiralty, to be arranged in accordance with this opinion, and to be presented in the form of a report which will serve as the basis of a final decree.

NOTE [from original report]. This decree was, on appeal to the circuit court, affirmed by Mr. Justice Campbell.

CARROLL (LE ROY v.). See Case No. 8,266.

Case No. 2,456.

CARROLL v. PERRY et al.

[4 McLean, 25.] [1]

Circuit Court, D. Michigan. June Term, 1845.

TAXATION — UNPATENTED LANDS — FEDERAL RESTRICTIONS—JURISDICTION AS TO ACTS OF STATE OFFICERS—POWER OF FEDERAL COURTS.

1. Lands purchased of the United States and paid for, though not patented, may be taxed by a state.

[Cited in Pacific Coast Mining & Milling Co. v. Spargo, 16 Fed. 350; Hamilton v. Southern Nev. Gold & Silver Min. Co., 33 Fed. 566.]

[See note at end of case.]

2. Property of every description, under the jurisdiction of a state, is subject to taxation.

3. On the exercise of this power, the federal government can interpose no restriction.

4. Stock of the United States is not taxable, as to tax it would be a tax on the means of the government.

5. The judiciary of the federal government can not, it would seem, exercise a revisory jurisdiction over the state officers, in the performance of their duty. But, if their acts be illegal, there is a remedy in the courts of the Union, as well as in courts of the state.

6. The judiciary, in the investigation of tax titles, can always exercise the necessary power to procure the records of the state, or certified copies therefrom, to show the proceedings in the sale of land for taxes.

[In equity. Bill by Charles H. Carroll against the treasurer of Monroe county.]

Mr. Romeyn, for complainant.

Wing, McClelland & Backus, for defendants

OPINION OF THE COURT. This is an application for an injunction, to restrain the treasurer of the county of Monroe, in this state, from granting deeds or other conveyances of the real estate and premises described in the bill, belonging to the complainant, sold by the defendant, Perry, as treasurer of said county, for the taxes of the year 1837, on the ground—1st. That the fee simple in the lands described in the bill was, at the time of the assessment of said taxes, for the year 1837, in the United States, and not subject to taxation. 2d. That the proceedings of the respective officers making said assessment were irregular, defective, oppressive and void. 3d. That the said treasurer denied to the complainant's agent and attorney, access to the books and proceedings of said officers, showing the manner in which the assessments were made.

It is admitted, as insisted on by the complainant, that courts of equity will, in many cases, exercise a concurrent jurisdiction with courts of law; although such courts may adopt equitable principles. [City of Washington v. Pratt] 8 Wheat. [21 U. S.] 681; 2 Swanst. 580; [Armstrong v. Athens Co.] 16 Pet. [41 U. S.] 282; 5 Pet. Cond. R. 759, 752. A court of chancery has jurisdiction to set aside a conveyance which is a cloud upon the complainant's title; and may also interpose to prevent the giving of a conveyance, under the pretense of right, which would operate to embarrass the title to real estate. 5 Paige, 501; 2 Paige, 282; 2 Story, Eq. Jur. 8-17; 17 Ves. 243. And the principle is also admitted that chancery may interpose by injunction to prevent an irremediable injury to real estate. This does not mean a mischief which shall destroy its value; but one which shall materially affect its value or use, and which, when done, cannot be repaired by an action for damages. Burnet v. Cincinnati, 3 Ohio, 87; 17 Ves. 110; 6 Johns. Ch. 497; 6 Paige, 88.

But what is the ground on which this application for an injunction is founded? It is assumed, that at the time the land was assessed for taxation, the fee was in the United States, and that, consequently, it was not liable to taxation. This position cannot be admitted. It imposes a limitation on state power, which does not come within the delegated powers of the federal government. In the admission of several of the western states into the Union, a compact was entered into, that the lands sold by the United States, within such states, should not be taxed until after the expiration of five years from the time of the sale. But no such compact is applicable to the case before us. The question arises on the point, whether a state has power to tax land, after it has been purchased and paid for by its citizens, before the emanation of the patent from the general government. To say that this has been done by perhaps all the western states, in which such lands have been situated, would not be conclusive, but it would afford strong evidence of what the law is. The taxing power of a state may reach everything within a state, which can be denominated property. It may be made to embrace all equitable credits, of whatever description they may be. No state, however, can tax the stock of the United States, held by its citizens, as that would tax the means of the general government. In the Virginia military lands in Ohio, lying between the Scioto and Little Miami rivers, the state has uniformly taxed entries and surveys, before the patent was issued. And the same thing has been done of lands purchased under the acts of congress.

The act of Michigan authorizes a tax on land not patented, where it has been entered and paid for. As evidence of this, the land offices were required to be examined, and a list made, by the assessor, of lands sold. The language of the act is general, and embraces such land. In law, land purchased and paid for, is considered as real estate, and descends to the heirs, and not to the executors and administrators. The principle contended for by the complainant, would materially affect the revenue of the state of Michigan. From the large amount of land sales, the patents are some years behind the sales; and if the land

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

sold, could not be taxed until the title issued, it would postpone a considerable portion of the revenue of the state, while the owner of the land is in possession of it, and exercising his rights over it. There is also an insuperable objection to the revision by this court, in this form, of the irregularities of the state officers complained of. If the state had no jurisdiction, as in the case of Osborn v. Bank of U. S., 9 Wheat. [22 U. S.] 738, this court might interpose. But in this case the court think the right of the state to tax the land is clear, and the question is, whether in such a case the federal courts can interpose and arrest the proceedings of the state officers in imposing and collecting its revenue. To say the least, such an interposition would be very embarrassing to state action, in a matter vital to its prosperity. But, in addition to this consideration, there is no imperious necessity which calls for such interference. If the law shall be disregarded, in divesting the title of the complainant, the conveyance will be held inoperative by the state as well as the federal tribunals. The question has been well settled, that to convey a good title under a tax sale, the law must be complied with, in all its essential requisites. This, then, will give an adequate remedy to the complainant, should the irregularities stated, have occurred, or be likely to occur.

And as to the third ground taken, "that the treasurer refused to permit an inspection of the books, to ascertain how the assessments had been made," whenever it shall become necessary to investigate such procedure judicially, means will be afforded to bring before the court all the evidence material in the case. Upon the whole, the bill is dismissed at the costs of the complainant.

[NOTE. In Carroll v. Safford, 3 How. (44 U. S.) 441, Mr. Justice McLean, in delivering the opinion of the supreme court, on the question of the taxability of unpatented lands for which the purchase price had been paid, said: "When the land was purchased and paid for, it was no longer the property of the United States, but of the purchaser. He held for it a final certificate, which could no more be canceled by the United States than a patent. * * * It is said the fee is not in the purchaser, but in the United States, until the patent shall be issued. This is so, technically, at law, but not in equity. The land in the hands of the purchaser is real estate, descends to his heirs, and does not go to his executors or administrators. In every legal and equitable aspect it is considered as belonging to the realty." And see the opinion by the same justice in Astrom v. Hammond, Case No. 596. In Kansas Pac. R. Co. v. Prescott, 16 Wall. (83 U. S.) 603, Mr. Justice Miller, in delivering the opinion, says: "While we recognize the doctrine heretofore laid down by this court that lands sold by the United States may be taxed before they have parted with the legal title by issuing a patent, it is to be understood as applicable to cases where the right to the patent is complete, and the equitable title is fully vested in the party without anything more to be paid, or any act to be done going to the foundation of his right."]

CARROLL (TINGEY v.). See Case No. 14,956.

Case No. 2,457.

CARROLL v. WATKINS.

[1 Abb. (U. S.) 474;[1] 2 Chi. Leg. News, 257.]

District Court, S. D. Mississippi. May Term, 1870.

LIEN OF JUDGMENT—EFFECT OF STATE STATUTES.

1. The effect of a judgment of a United States court, as a lien upon the lands of defendant, cannot be restricted by state statutes, or by the construction placed by the state courts upon such statutes.

2. A state statute requiring judgments to be enrolled in the county in which the lands to be affected lie, before they can become liens on real property, has no effect upon the lien of a judgment of a court of the United States. Such judgment becomes a lien on lands throughout the district in which it is recovered.

[Cited in U. S. v. Humphreys, Case No. 15,422.]

[See note at end of case.]

Hearing upon a bill in equity. This bill was filed by Messrs. Carroll & Hay against Watkins, as assignee in bankruptcy of J. B. Moore and others, to enforce their claim to priority of payment out of the assets in the assignee's hands. Carroll & Hay were commission merchants in New Orleans, and obtained judgment in the circuit court of the United States, sitting in the southern district of Mississippi, against Moore, who was formerly in business as a retail merchant. This judgment was never enrolled in the county in which Moore resided, and in which the property involved in this litigation was situated. After the rendition of this judgment, other creditors of Moore obtained judgments against him in the state court holden within Scott county, the county where Moore's residence and property was; and these judgments were duly enrolled pursuant to a law of the state prescribing that no judgment shall be a lien on lands unless enrolled in the county in which they lie. Soon after these judgments were perfected, Moore filed his petition in bankruptcy, and was declared a bankrupt. The defendant Watkins was appointed his assignee. Lands of Moore lying in Scott county were surrendered to him, and were sold by him under a decree of the district court in bankruptcy. Carroll & Hay then filed this bill or petition against the defendant Watkins, originally, claiming priority in payment out of the proceeds of the lands, on the ground that the judgment of the United States circuit court in their favor was a lien upon the lands in question. By agreement of parties, the other creditors, upon judgments recovered in the state court, applied to be and were admitted defendants. They claimed that the judgment in favor of Carroll & Hay never became a lien, because it was never enrolled in the county; and that their judgments, which were so enrolled, were liens, and were

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

entitled to priority of payment, although junior in date.

William Yerger, for complainants.
A. Y. Harper, for rival creditors.

HILL, District Judge. This is a bill filed by the complainants against Watkins, assignee of Moore, praying that the lands surrendered by Moore shall be sold, and the proceeds applied to the payment of their judgment against Moore, recovered in the circuit court of the United States for said district. The other defendants filed their petitions, praying to be made parties to this cause; and that said lands be sold and the proceeds applied to the payment of their judgments, obtained in the circuit court of this state for the county of Scott. The judgment of complainants was obtained prior to those of the defendants—the creditors in the judgments in Scott circuit court—but was not enrolled in the county of Scott, where the land is situated. The judgments in the Scott circuit court were duly enrolled in said county before Moore filed his petition to be declared a bankrupt.

The only question presented for decision is, whether or not the judgment of complainants, not being enrolled, constituted a lien on the lands described in the pleadings; if so, their judgment, being prior in date, must first be satisfied; and the residue, if any, applied to the payment of the judgments obtained in the Scott circuit court.

This is one of those vexed questions which occasionally arise between the national and state tribunals, and in which each claims the enforcement of rights emanating under the constitution and laws of the power of its own creation. In this state this conflict commenced with the case of Hamer v. Tarpley, 9 Smedes & M. 310, and continued by the case of Bonaffee v. Fisk, 13 Smedes & M. 682, and Brown v. Bacon, 27 Miss. 589; and in the supreme court of the United States, in the case of Massingill v. Downs, 7 How. [48 U. S.] 760.

Were it conceded that the lien of judgments rendered in the federal courts depends upon the legislation of the state, or the construction given to it by the courts of the state, the controversy would be at an end. The judgment of complainants would have no effect as a lien upon the lands of the bankrupt, there being no evidence that an execution was ever issued and placed in the hands of the marshal to be levied. For in addition to the repeated decisions of the high court of errors and appeals of the state, the legislature, by the provisions of the Code of 1857, p. 525, art. 262, declare in express terms, that no judgment or decree rendered in any court of the United States, shall be a lien upon, or bind any property of the defendants situated out of the county in which said judgment or decree is rendered, until the plaintiff shall file in the office of the clerk of the circuit court of the county in which the property may be situated, an abstract of such judgment or decree, certified by the clerk of the court in which the same was rendered, containing the names of the parties to such judgment or decree, its amount, and the amount appearing to have been paid, if any, &c.

Then in article 263 of the same chapter, and on the same page, it is further provided that no judgment or decree rendered in any court of the United States shall be a lien upon or bind the property of the defendants in the county in which the judgment is rendered, unless the abstract of the judgment is filed and enrolled as provided in article 262. Thus it is seen that so far as the legislative will of the state and the judicial mind of the highest tribunal of the state can settle the quesion, it has been unmistakably done.

The same result would follow if this question were to be governed by section 34 of the judiciary act of 1789 [1 Stat. 92], which provides that "the laws of the several states, except where the constitution, treaties, or statutes of the United States, shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."

Having given the statutes and decisions of the courts of the state on this question, the next point of inquiry is to ascertain what is the law of the United States on this question, as settled by the courts thereof.

The only case decided by the supreme court of the United States, arising in this state, is the case of Massingill v. Downs, 7 How. [48 U. S.] 760. In that case the judgment claimed as a lien was obtained in the circuit court of the United States for the southern district, on the first Monday in November, 1839, before the passage of the abstract act, as it was called, of 1841. This act restricted the judgment liens to cases in which an abstract of the judgment should be filed in the office of the clerk of the circuit court of the county in which the property was situated, and making its provisions apply to all cases in which judgments had already been rendered, unless the abstract should be filed on or before July 1, 1841. The main question decided was, did that act destroy or make void the lien created by the judgment rendered before its passage? The court held that it did not. The judge, in delivering the opinion of the court, states that the lien, if not an effect of the judgment, was inseparably connected with it, whether the lien was created by the execution and judgment or the statute; and in either case where the right has attached in the courts of the United States, a state has no power, by legislation or otherwise, to modify or impair it. It is true that Justice McLean, in delivering the opinion of the court, does say "that the point certified does not require us to consider whether the law

can operate on a judgment being entered subsequent to its date;" but the whole reasoning given in the opinion goes to show that, had the question arisen on a subsequent judgment, the result would have been the same. The judgment lien in that case was held to grow out of the process act of 1828, that that act was not controlled by section 34 of the judiciary act of 1789. The process act of 1828 remains unchanged in the southern district of Mississippi. There has been no act of congress changing it, nor has there been any rule of court changing or in any way modifying it. The act of the legislature of this state, passed in 1834, making all judgments liens from their rendition, was in force when the process act of 1828 was passed by congress.

The opinion of the court further states "that the circuit courts of the United States exercise jurisdiction co-extensive with their respective districts, and it has never been supposed that by the process act of May 19, 1828 [4 Stat. 278],—which adopted the process and modes of proceeding in the state courts,—the jurisdiction of the circuit courts was restricted. The process and modes of proceeding in the state courts were adopted by congress in reference to the jurisdiction of the circuit courts, and not with the view of limiting those courts."

In those states where the judgment or the execution of a state court creates a lien only within the county in which the judgment is entered, it has not been doubted that a similar proceeding in the circuit court of the United States would create a lien to the extent of its jurisdiction. This has been the practical construction of the power of the courts of the United States, whether the lien was held to be created by the issuing of process, or by express statute. Any other construction would materially affect, and, in some degree, subvert the judicial power of the Union. It would place suitors in the state courts in a much better condition than those in the federal courts. That the decisions of the supreme court of the United States give to judgments rendered in the federal courts a lien upon the property of the defendant whenever situated in the district in this state without enrollment, is admitted, in the opinion of the court, in the case of Brown v. Bacon, 27 Miss. 589. That the state legislature can pass no law binding on the courts of the United States, or giving effect to, or changing the judgments or decrees rendered therein, was distinctly settled by the supreme court of the United States as early as 1825. In the very able opinion of Chief Justice Marshall, in the case of Wayman v. Southard, 10 Wheat. [23 U. S.] 1, the chief justice, in delivering the opinion of the court, uses this strong and pointed language: "That it has not an independent existence in the state legislature is, we think, one of those political axioms, an attempt to demonstrate which would be a waste of argument not to be excused." The proposition has not been advanced by counsel in this case, and will probably never be advanced. Its utter inadmissibility will at once be presented to the mind, if we imagine an act of the state legislature for the direct and sole purpose of regulating proceedings in the courts of the Union, or of their officers, in executing their judgments. No gentleman, we believe, will be so extravagant as to maintain the efficiency of such an act. It seems not much less extravagant to maintain that the practice of the federal courts and the conduct of their officers, can be indirectly regulated by state legislatures by an act professing to regulate the proceedings of the state courts, and the conduct of the officers who execute the process of those courts. It is a general rule that what cannot be done directly from defect of power, cannot be done indirectly."

In the case of Bank of U. S. v. Halstead, 10 Wheat. [23 U. S.] 51, it is held that the act of the assembly of Kentucky, which prohibits the sale of property taken under executions, for less than three-fourths its appraised value, without the consent of the owner, does not apply to a venditioni exponas issued out of the circuit court of the United States for Kentucky. The question again came before the supreme court in 1862, in the case of Ward v. Chamberlain, 2 Black [67 U. S.] 430, in which it is held that, under the process act of 1828, a decree of the district court of the United States, sitting in admiralty in the state of Ohio, is a lien upon the lands of the defendants. Justice Clifford, in delivering the opinion of the court, gives the following as the settled rules of that court: "That the states have no authority to control or regulate the proceedings in the courts of the United States, except so far as the state process acts are adopted by congress, or by the courts of the United States, under the authority of congress."

Other decisions made by the supreme court of the United States, bearing upon the question, might be cited, but it would extend this opinion to too great a length.

Almost the identical questions now presented came before the United States circuit court for the district of Indiana, at the May term, 1840. In that case the judgment, which was the foundation of the plaintiff's action of ejectment, was obtained at December term, 1827, of said court; no copy of the judgment was filed with the clerk of the county in which the real estate was situated, as required by the laws of Indiana. The defendant claimed title, under the sheriff's deed, upon a junior judgment in the state court of the county in which the real estate was situated, which, it was admitted, was a lien only as against plaintiff's title from the marshal under his judgment. Justice McLean, in delivering the opinion of the court, held that, by force of the process act of 1828, a

lien was created by the defendant's judgment, without any statute directly conferring it. That the act of 1831, of that state, limiting the liens of judgments to those rendered in the county in which the judgment was rendered, or in which a copy of the judgment was filed, could not annul or impair the lien created by the plaintiff's judgment, under and by force of the process act of 1828, and that the jurisdiction of the federal courts is co-extensive with the limits of the state of Indiana, and consequently the liens of its judgments extend throughout the state. From a careful examination of the decisions of the courts of the United States, I am satisfied that the holding is, that judgments or decrees rendered in the courts of the United States become liens on the property of the defendant situated in the district in which the judgment or decree is rendered, subject only to prior liens thereon, from the date of the rendition, without reference to any law of the state not adopted by congress, or the courts of the United States, under congressional authority.

I am further satisfied that such ruling is correct, upon principle, and whether satisfied of the correctness of the principle, or not, it being so settled by the supreme court of the United States, it is my duty to adopt it; and, so holding, must declare the complainants entitled to a prior lien on the lands stated in the bill, which will be sold as other lands under the rules of this court in like cases, and the proceeds, so far as necessary, applied, first, to the payment of complainant's judgment; and then, if any surplus shall remain, to the judgments obtained in the circuit courts of Scott county in their order of priority.

Decree accordingly.

[NOTE. Judgments of the federal courts need not be recorded or docketed in accordance with the state law. U. S. v. Humphreys, Cases Nos. 15,422 and 16,242; Cropsey v. Crandall, Case No. 3,418. And see Massingill v. Downs, 7 How. (48 U. S.) 760; Williams v. Benedict, 8 How. (49 U. S.) 107. And compare Konnig v. Bayard, Case No. 7,924.]

Case No. 2,458.

CARROLL v. WHITCROFT.

[1 Cranch, C. C. 609.] [1]

Circuit Court, District of Columbia. Dec. Term, 1809.

REPLEVIN—GOODS DISTRAINED FOR PUBLIC DUES—MUNICIPAL TAXES.

The act of Maryland, 1785, c. 34, which forbids the replevin of goods distrained for public dues, is not applicable to the corporation taxes of the city of Washington.

At law. Replevin of personal property distrained for taxes due to the city of Washington.

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

Mr. Caldwell and Mr. Key, for defendant, objected that by the act of Maryland, 1785, c. 34, and 1790, c. 53, goods distrained for taxes cannot be replevied, and moved to quash the writ of replevin. The question is whether the law of Maryland is applicable to taxes imposed by the corporation of Washington on its inhabitants. They are within the same reason. In the case of Tayloe v. Varden [Case No. 13,771], at the last term of the court, the law of Maryland respecting sales for taxes was considered by both sides as in force.

Mr. Law and Mr. Jones, contrà. The act of Maryland of 1785, applies only to the state taxes of Maryland, and applies only to collectors of such taxes. It does not apply to county taxes; à fortiori not to corporation taxes. It applies only to collectors of arrearages of state taxes. So also the act of 1790. By the act of 1786, c. 12, the commissioners are to hear complaints of abuse of the power of distress. The act of Maryland did not apply to the corporation taxes of Baltimore or Annapolis.

F. S. Key, in reply. The law does not apply to the city of Annapolis. There never was a state tax in Maryland. The only taxes are county taxes, laid, and the collectors appointed by the levy court. The law applies to county collectors, and with the same reason to the city of Annapolis.

THE COURT (nem. con.) was of opinion that the act of Maryland did not apply to taxes laid by the corporation of Washington; and refused to quash the replevin.

CARROLL, The (WINNE v.). See Case No. 17,876a.

CARRONI, The (SEAVER v.). See Case No. 12,593.

CARRUTH (SNOW v.). See Case No. 13,144.

Case No. 2,459.

Ex parte CARSON.

[4 Hughes, 215.]

Circuit Court, D. Maryland. Nov. 24, 1873.

REVENUE OFFICER—PROSECUTION IN STATE COURT FOR ACT DONE UNDER COLOR OF FEDERAL LAWS—PETITION FOR HABEAS CORPUS—SUFFICIENCY.

[1. Section 3 of the act of March 2, 1833 (4 Stat. 633), providing for the removal of suits or prosecutions commenced in a state court against an officer of the United States, is not applicable to criminal indictments.]

[2. Where an internal revenue officer is confined under an indictment in the state courts for an offense alleged by him to have been committed under color of the laws of the United States, a petition by him for a writ of habeas corpus should be under the seventh section of the act authorizing the granting of the writ in such a case.]

[3. The burden of proof is on the petitioner to show justification for the act under the seventh section, and this he must fully and affirmatively do before the court can take jurisdiction to discharge him.]

[A prosecution for murder, in the criminal court of Baltimore city, was commenced against George M. Carson, customs inspector for the Baltimore district; and on November 6, 1873, he filed a petition for a writ of habeas corpus, and for removal of the cause to the circuit court. The petition set forth that he was an officer of the United States, and that the offense with which he stood charged was done under color of the revenue laws of the United States, within the meaning of the act of March 2, 1833, § 3; 4 Stat. 633.

[There was a motion to dismiss the petition and remand the cause for want of jurisdiction.]

A. Stirling, Jr., Dist. Atty., for petitioner.
A. Geo. Knott, for state of Maryland.

BOND, Circuit Judge. We are of the opinion after consideration of the arguments presented in this cause that the third section of the act of congress of 1833, under which this petition is filed, is not applicable to criminal indictments. We are of opinion that the petitioner must file his petition under the seventh section of the act, alleging the fact that the act for which he is prosecuted and indicted was done in his capacity as an officer of the United States, and in pursuance of his duty as such, and in execution of the power with which he was clothed. Upon consideration of such petition, and proof of the facts alleged, the court would discharge the party, and, if satisfied the facts were not proven as alleged, would remand the prisoner to the state court for trial. This petition is not filed under the seventh, but under the third, section of the act of 1833; and, as we are of the opinion that this section applies only to civil causes, it must be dismissed and the cause remanded.

[A second petition, filed January 7, 1874, sought relief under the seventh section of the act of March 2, 1833. A writ of habeas corpus was granted, and on the return thereof the following opinion was delivered:]

BOND, Circuit Judge. From a consideration of the facts and the arguments of counsel in this case, while I am of opinion that the homicide for which this petitioner is in custody was accidental, yet, as the burden of proof in support of the facts alleged in his petition is upon the prisoner to show that justification which is contemplated by the seventh section of the act of 1833, I cannot satisfy myself that he has fully and affirmatively done so. This he must do before I have jurisdiction to discharge him, and I can only therefore now dismiss the petition.

Case No. 2,460.

In re CARSON.

[5 Ben. 277;[1] 5 N. B. R. 290.]

District Court, S. D. New York. July, 1871.

BANKRUPTCY—CREDITOR BROUGHT IN AFTER FIRST MEETING—ASSIGNEE.

Where, after an assignee has been appointed, a creditor is added by an amendment of the bankrupt's schedules, no new meeting of creditors or choice of assignee is necessary. The creditor, when brought in, should be notified of the proceedings, and may petition the court for a removal of the assignee chosen if he has cause to do so.

[On certificate of register in bankruptcy.]

In this case an assignee was chosen on the 3d of March, 1871, and an assignment was executed on the 10th of March. On the 4th of April [James Carson] the bankrupt prayed leave to amend his schedules by adding the name of a creditor. Leave was granted, and on the 19th of April an amended schedule was filed. The register, on request of the bankrupt, certified to the court the question whether it became necessary to have a new meeting of creditors for the choice of an assignee. The register gave it as his opinion that it was not necessary to have a new meeting, or a new choice of assignee; that the creditor should be notified of the proceedings, and notified to prove his claim, if he desired; and that if he proved his claim he would have the right to petition the court for the removal of the assignee, if he desired.

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

Case No. 2,461.

In re CARSON et al.

[2 N. B. R. 107 (Quarto, 41).][2]

District Court, S. D. New York. Sept. 22, 1868.

BANKRUPTCY — EXAMINATION OF BANKRUPT AS TO HIS PROPERTY.

1. Questions 67, 99, 229, 264, 265, 267, 268, 272, 273 and 274 are proper and relevant. Question 41 improper and irrelevant.

[2. Cited in Re Dole, Case No. 3,965, to the point that, on an examination in bankruptcy, questions are proper which may elicit answers tending to show that the bankrupt owned or had an interest in property at the time the petition was filed.]

[On certificate of register in bankruptcy.]

The undersigned register in bankruptcy having in charge the proceedings in this bankruptcy, hereby certifies that Melvin Hard, one of the bankrupts above named, was examined on oath, before the undersigned, and that his examination is set forth

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

[2] [Reprinted by permission.]

in his deposition hereto annexed; and that in the course of said examination the questions arose which are stated in said examination; which questions are hereby, at the request of the parties, certified to the honorable, the judge of the district court of the United States for the southern district of New York for his decision thereon. Isaac Dayton, Register.

Examination of George W. Carson and Melvin G. Hard, the bankrupts above named, taken pursuant to an order made in this bankruptcy court.

Melvin G. Hard, one of the bankrupts, appeared in person and by Mr. Boardman, his counsel.

The examining creditors appeared by Mr. Winslow. The witness, having testified that certain property belonged to his wife, was asked: 40. Q. Have either you or your wife ever talked of selling it? A. I don't know what she has talked about; I have not. 41. Q. Have you ever heard her speak of it? Objected to by counsel for the bankrupt. Answer insisted upon. Bankrupt declines to answer the question. Witness, having further testified as to the transfer of the property, was asked: 67. Q. Did your wife keep a bank account at that time? Objected to. Answer insisted upon. A. I decline to answer that question. The witness, having spoken of a horse and wagon being kept at a certain stable, was asked: 99. Q. Where were the horse and wagon taken to from that stable? Objected to. Answer insisted upon. The bankrupt declines to answer. The witness, having testified about the purchase of some lots, was asked: 229. Q. Did you recommend the purchases? Objected to. The bankrupt declines to answer. Witness, having testified that his brother carried on the paper business, was asked the following questions: 264. Q. How long has he carried on the paper business in Beekman street. Objected to. The bankrupt declines to answer. 265. Q. Is he the successor of Carson & Hard? Objected to. Answer insisted upon. The bankrupt declines to answer. 266. Q. What became of your business when you failed? A. It went into the hands of the assignees, William Binns and Samuel Bates. 267. Q. What did they do with it? Objected to. Answer insisted upon. The bankrupt declines to answer. 268. Q. Did they turn it over to A. P. Hard, and if so, when? Objected to. Answer insisted upon. The bankrupt declines to answer. 269. Q. Who, if any one, is the managing agent for A. P. Hard in New York? A. I act for him. 270. Q. How long have you acted for him? A. I could not say positive; six or seven years. 271. Q. Ever since he has had possession of that store? A. Yes. 272. Q. When was he in New York last? Objected to. Answer insisted upon. The bankrupt declined to answer. 273. Q. How frequently has A. P. Hard been in New York since he has carried on this business? Objected to. Answer insisted upon. The bankrupt declined to answer. 274. Q. State about what is the value of the stock in this business? Objected to. Answer insisted upon. The bankrupt declined to answer.

By Isaac Dayton, Register:

A statement of the opinion of the [register] as to the relevancy of the various questions in respect to which objections were taken, is given in the case of each objection as it arose in the course of the examination. The objection to the 41st question, does not in the judgment of the [register] admit of any discussion. As to the 67th question, the [register] is unable to perceive that it comes within the scope of the examination provided for by the 26th section of the bankrupt act, to inquire whether the "wife of a bankrupt kept a bank account." With respect to the 99th question, the opinion of the [register] is, that there is not anything disclosed by the examination thus far of the bankrupt to make it of any consequence to what place the horse and wagon were taken from the stable mentioned. The 264th question being objected to, nothing having appeared to show that the bankrupt was concerned in the business, carried on by A. P. Hard, it was immaterial how long he had carried on that business. But when by the 265th question, the bankrupt was asked whether A. P. Hard, was the successor of Cardon & Hard, this might relate to "the disposal of his property," by the bankrupt, and in the judgment of the [register] was within the scope of the statute. In the opinion of the [register] the bankrupt having testified that the business went into the hands of the assignees, the bankrupt cannot be called upon to answer what they did with it, or whether they turned it over to A. P. Hard, as inquired of him by questions 267 and 268. On the facts thus far disclosed, there is not in the opinion of the [register] any foundation laid for the inquiries made by questions 272, 273 and 274.

BLATCHFORD, District Judge. I think that question 41 is improper, and that questions 67, 99, 229, 264, 265, 267, 268, 272, 273 and 274 are proper.

CARSON (ARMSTRONG v.). See Case No. 543.

Case No 2,461a.

CARSON v. BLAZER.

[Cited in Fisher v. Carter, Case No. 4,815. This is a state case, and is reported in 2 Bin. (Pa.) 475.]

Case No. 2,462.

CARSON v. BOUDINOT.

[2 Wash. C. C. 33.][1]

Circuit Court, D. Pennsylvania. April Term, 1807.

MECHANICS' LIENS—RIGHTS OF LIENORS — EJECTMENT BY EQUITABLE OWNER—GROUND RENT.

1. Ejectment for the recovery of a building which had been purchased by the plaintiff at a sale made by the sheriff, under a lien, entered according to the act of assembly of Pennsylvania securing to mechanics and others the value of materials furnished for the erection of houses, &c.

2. A mechanic who has erected a building on the ground of another, under an agreement with the owner to convey the same on ground rent, becomes the equitable owner of the building, and within the provisions of the act of assembly.

3. A purchaser at a sheriff's sale, under a judgment for the lien, entered according to the law of Pennsylvania, of the equitable ownership, cannot maintain ejectment against the proprietor of the lot of ground on which the building stands.

[Cited in Cooper v. Galbraith, Case No. 3,193.]

[See note at end of case.]

The defendant entered into a contract with one Bartlet, for building three houses on lots belonging to the defendant in Philadelphia; during the building of which the defendant was to advance a certain sum. One of the houses was to be the defendant's, and the other two Bartlet's, upon a certain ground rent; and after the buildings were completed, the defendant was to convey to Bartlet. Bartlet purchased a quantity of the iron work used in the building of the houses, from the lessor of the plaintiff; which not having been paid for, the plaintiff obtained a judgment against him for the amount, and sued out an execution, upon which these houses, or one of them, was levied on, and sold to the lessor of the plaintiff, and was regularly conveyed to him by the sheriff. This ejectment was brought to recover possession of this property, under an act of assembly of Pennsylvania, in 1803; which declares, that every house thereafter built in the city of Philadelphia, or the liberties thereof, shall be subject to the payment, of the debts contracted by the owner or owners thereof for or by reason of any work done, or materials found and provided, by any brickmaker, &c., [enumerating the different workmen,] or by any other person employed in furnishing materials for the erecting such house, before any other lien, which originated subsequent to the commencement of said house; but if such house should not sell for a sum sufficient to pay all the demands for work and materials, the same shall be averaged, and the creditors paid in proportion; and it provides that no such debt shall remain a lien longer than two years from the commencement of the building, unless an action for the recovery thereof be instituted, or a claim filed within six months after performing the work, or furnishing the materials, in the office of the prothonotary of the county where the houses lie.

Wallace, for the defendant, moved to nonsuit the plaintiff, upon the ground that Bartlet was not the owner, the legal estate being in defendant; and consequently the materials were not furnished to the owner.

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

BY THE COURT. Bartlet was entitled to the equitable estate under the agreement with the defendant, and might be as much the owner as if he had been the legal owner. If not the equitable owner, he was authorized to make the building, and might bind the defendant, who was owner.

To this last observation Wallace replied, that if Bartlet was the agent only, then the suit of the plaintiff to establish his demand should have been brought against defendant, instead of Bartlet.

THE COURT, however, on the first point, refused to nonsuit the plaintiff.

Wallace then moved for a nonsuit upon another point; viz. that Bartlet having only an equitable estate, the plaintiff could buy no other kind of estate under the sheriff's sale; and on such a title he could not maintain ejectment in this court.

BY THE COURT. Upon this ground the plaintiff must be called. Upon the lien alone it is admitted an ejectment will not lie. The plaintiff then must rely on the sheriff's deed. But that deed could convey no other or greater estate than Bartlet had, which was merely an equitable one; and such an estate is not sufficient to maintain an ejectment in this court.

The plaintiff suffered a nonsuit.

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

Case No. 2,463.

CARSON v. GORDEN.

[Brunner, Col. Cas. 208;[1] 1 Cooke, 149.]

Circuit Court, D. Tennessee. 1812.

LAND—APPROPRIATION OF—WHAT CONSTITUTES.

An actual settlement and survey is necessary to constitute an appropriation of land.

The plaintiff produced in evidence an entry made upon a military warrant, the 10th day of May, 1809; a survey of the entry made the 9th day of August, 1809, and a grant thereon, dated the 8th day of January, 1811, covering the land in controversy. The defendant's was an occupant-claim, under

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

the law of 1807; to support which, he produced a survey dated the 2d day of September, 1808; an entry made in pursuance of the survey, on the 1st day of December, 1810 [and a grant thereon, dated the 3d day of Dec., 1810].[2] It was admitted that the defendant lived within the bounds of both the claims; and that on the 12th day of September, 1807, he was seated on and in actual possession of the land in dispute.

Upon the trial, two questions were agitated—1. As the entry of the plaintiff was older than either the grant or entry of the defendant, whether the defendant's previous survey and right of occupancy had so appropriated the land that it could not be entered. 2. Whether the legislature of Tennessee had authority to pass the law of 1807, giving a preference to occcupants, as against claims founded upon military warrants.

The land lies within the military reservation.

Mr. Dickinson, for plaintiff.

Mr. Whiteside, for defendant.

M'NAIRY, District Judge (absent TODD, Circuit Justice). For the purpose of showing that the legislature of Tenneesee were unauthorized to pass the occupant law of 1807, the counsel for the lessors of the plaintiff have relied upon the cession act, which contains these words: "The lands laid off, or directed to be laid off, by any act or acts of the general assembly of this state, for the officers and soldiers thereof, their heirs and assigns respectively, shall be and enure to the use and benefit of said officers, their heirs and assigns respectively." Hayw. Rev. 165. It is contended that this clause in the cession act, connected with the compact between this state and North Carolina, prohibited this state from passing the act of 1807. The compact before alluded to authorizes the state of Tennessee to issue grants in such cases only as could have been done by North Carolina under the cession act. The compact also declares that in entering and obtaining titles to lands, no preference shall be given to the citizens of Tennessee over the citizens of any other state, claiming under North Carolina; "nor shall any occupancy or possession give preference in entering and obtaining titles, so as to injure or take away the right of any person claiming by entry, grant, or otherwise, under North Carolina."

The law of 1807 provides, that it shall be lawful for any person, who was seated on any vacant and ungranted land, on the 12th day of September, 1807, to have a preference for the term of two years to enter the same, provided such person caused it to be surveyed within nine months after the passing of the act, which was on the 2d day of December, in that year. I do not believe that the reservation of the land, in this section of country, can be considered alone as an appropriation. The lands still remain vacant, until the application of a warrant to some particular spot. The holder of a warrant has only a floating claim, and cannot be considered as having an appropriation, unless he goes on to designate by survey, etc., the locality of the particular tract he wishes to affix his warrant to. Under this view of the case I cannot but believe that the state of Tennessee had a right to pass the law in question.

The next question which occurs is, whether the survey and right of preference of the defendant so appropriated the land as to render it not liable to be entered by the plaintiff's military warrant. The entry laws, under which the plaintiff's entry was made, only authorize the entering of vacant and unappropriated land. When an actual settlement has been made in pursuance of the act of 1807, and the enterer has gone on to make a survey, I do not consider the land as being vacant, within the true sense and meaning of the entry laws. I am therefore of opinion that although the plaintiff has produced an entry, older in date than the entry of the defendant, yet as the defendant's right of preference existed, and his survey was made when the plaintiff had only a warrant, not located anywhere, the land was from thence no longer vacant, and consequently not subject to be entered by the plaintiff. Whether the entry of the plaintiff, under those circumstances, can be declared void in a court of law is perhaps doubtful. I am inclined to think it cannot. But this is not made a question in the cause. It seems to be admitted that if in any court this would be the result, a verdict at law may pass against him

Verdict for the defendant.

[2] [From 1 Cooke, 149.]

Case No. 2,464.

CARSON v. JENNINGS.

[1 Wash. C. C. 129.][1]

Circuit Court, D. Pennsylvania. April Term, 1804.[2]

ADMIRALTY JURISDICTION OF THE DISTRICT COURT —LACHES.

1. The district court of Pennsylvania, exercising admiralty jurisdiction, cannot proceed against a captor, into whose hands the proceeds of the capture have never arrived; the same being in the hands of the officer of another court, in another state.

2. A court of admiralty can only proceed in rem, against the thing itself; or quasi in rem, against the proceeds thereof.

3. The execution of the sentence of a superior court, can only be by a court of admiralty hav-

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

[2] [Reversing an unreported decree of the district court. Decree of the circuit court affirmed by supreme court in Jennings v. Carson, 4 Cranch (8 U. S.) 2.]

ing the thing, which is ordered to be restored, within its power.

4. The captured, who has omitted to enforce a decree of a superior court, reversing the decree of a court of admiralty; cannot claim, as damages, the loss he may have sustained, by a depreciation of the funds in which the proceeds of the capture may be invested. He should have applied to the court below, to enforce the decree of the court of appeals; and, omitting so to do, the loss will fall upon him.

[Cited in Baker v. Biddle, Case No. 764.]

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

In admiralty. This was an appeal from the district court of Pennsylvania. A libel was filed in that court, by William Downing Jennings, late owner and proprietor of the sloop George, and her cargo; against Joseph Carson, one of the owners of the privateer, called the Addition. The original and supplemental libels state; that the George, with her cargo, being the property of the libellant, was, some time in August, 1778, on the high seas, captured, as prize, by the Addition, Moses Griffin, commander; was carried into New Jersey, where she was libelled, in the court of admiralty, and condemned; but, upon an appeal to the court of appeals, in prize causes, that sentence was reversed. The libel, in this cause, contains no specific prayer whatever; but Carson was arrested, and a monition was served on Griffin, the commander of the privateer. Carson, after pleading to the jurisdiction of the court, that this is not a prize court; and, that the jurisdiction of all questions of prize, as to vessels captured during the war, and carried into New Jersey, and the execution of all decrees arising therein, belonged to the court of admiralty of that state, and not to this court; and, further, that the other part owners should be made parties; answered: that, by the sentence of the court of admiralty of New Jersey, given 31st October, 1778, the George and her cargo were condemned as prize, and ordered to be sold, and the proceeds thereof paid over to the owners of the privateer; but, that no part of the proceeds ever was received by the owners, but remained, in money, ever since in the hands of the marshal of the court. Carson, after filing his answer, died; and the suit was revived against his executors; who plead to the jurisdiction of the court to hold plea of a tort, supposed to be committed by their testator. The district court overruled the plea to the jurisdiction of the court, objecting to its competency to determine on prize causes; and as to the question of the legality, equity, and propriety of the court's interference in the present suit, and all other questions, save that to the jurisdiction, the court dismissed the libel. [Case No. 7,281.] This decree was affirmed in the circuit court of Pennsylvania [unreported]; but, upon a writ of error, the supreme court reversed those decrees, so far as they decreed, that the district court had not jurisdiction to carry into effect, the decree of the court of appeals; and the cause was remanded to the district court;—the defendant in error being at liberty to contend, as matter of defence, on the merits, or to the form of proceeding, that the libel should first have been filed in the district court of New Jersey; but not to make the decision of the judges, on that point, a ground of exception to the jurisdiction of the district court of Pennsylvania. The cause, afterwards coming on in the district court, a decree was pronounced in favour of the libellants, for 33,910 dollars and 75 cents, and costs; being the amount, in specie, of the moneys paid to the marshal of New Jersey, according to the continental scale of depreciation, as established in that state; and interest thereon from the date of the decree of the court of admiralty, until two months after the reversal, and from the time of commencing this suit in the district court, to the final decree. [Case unreported.]

WASHINGTON, Circuit Justice. In the argument of this cause, many points were raised, and debated at considerable length. But, as it may be decided upon its real merits, I shall avoid giving any opinion upon the preliminary points. Whether the district court of this state can, under any circumstances, enforce against the owners of the privateer, residing here, the sentence of the old court of appeals, directed to the court of admiralty of New Jersey; the proceeds of the prize being then, and always afterwards, in the hands of the marshal of that court, under its order; and no part thereof having ever come to the possession of the owners of the privateer; is a great question, which it is not, perhaps, absolutely necessary to decide at this time. But, I shall not conceal the opinion I at present entertain, that the district court of this state cannot, in such a case, grant relief against the person of the owner. Prize causes are always in rem, against the vessel and cargo, or one of them; or quasi in rem against the proceeds, wherever they are. But, when the object of the libel is to execute the decree of the court, the proceedings of the court are limited by the decree, to be enforced against the thing directed to be restored.

I shall now consider the case upon its merits; and the question will be, whether, under the peculiar circumstances attending this, the appellees are entitled to relief against the owners of the privateer. At the threshold, we are at once struck with the antiquity of the demand. The sentence of the court of appeals was pronounced on the 23d of December, 1780, ordering restitution of the George, and her cargo, but without damages; and directing the admiralty court of New Jersey to issue all proper process for executing that sentence. The cause appears to have slept from that period until the year 1790; when it revived, in the form

of a libel, for the value of the vessel and cargo; filed in the district court of Pennsylvania, against the owner of the privateer, and afterwards against the present appellants, his executors. The privateer, and her cargo, had been sold under an order of the court of admiralty of New Jersey, in the year 1778, and the proceeds remained in the hands of the marshal; or, at least, they were never called out by any order of that court. It was fairly asked by the appellants' counsel, why this delay had taken place? and, if no substantial injury had resulted to the appellants by the delay; it might have been well answered, that it was unimportant to account for it. But, the counsel for the appellees have endeavored to account for it, in a manner by no means satisfactory to me. They say, that the states of Pennsylvania and New Hampshire, denied the right of the old court of appeals to take cognizance, by way of appeal, of the decrees of the courts of admiralty of these states. Admit the fact; yet, it does not appear that this point was ever controverted by the state of New Jersey. It is true, that the representatives of that state in congress, voted against the exercise of this right, in the case of the sloop Active; but that vote was overruled by a majority of congress; and, I presume, the vote of the majority was submitted to. But, if the objection I am now considering, be attached to the substantial merits of the case, it is incumbent on the party who would repel it, to show, by clear proof, that an attempt had been made, to have the sentence of the court of appeals executed, by the admiralty court of New Jersey; or, that such an attempt would have been ineffectual. This is not stated in the record, and has only been mentioned in argument. I do not notice the objection with a view to a bar of the remedy, from length of time; but does it materially affect the interest and rights of the appellees? What would have been the situation of Carson, if an application had been made to the admiralty court of New Jersey, to execute the sentence of the court of appeals, as soon as it could have been done? Most clearly, the former would have directed the marshal to pay over the proceeds of the vessel and cargo, then remaining in his hands, to the appellees. If the money for which the vessel and cargo had been sold, had, in the meantime, been diminished in value by depreciation, could that court have gone into any calculations to ascertain the loss; and to fix it upon the shoulders of the captors? I think, clearly not. By what rule could they have graduated the scale of depreciation? Congress had established none at that time; nor do I know that the state of New Jersey had. The loss had resulted from the circumstances of the revolution; which it would have been as invidious, as it would have been mischievous and unpatriotic, for a court of justice to have admitted, as the consequences of depreciation. Besides, the duty of the court of admiralty was to execute the sentence of the court of appeals; not to new model, and totally to vary it, by decreeing damages, or, an additional sum, in nature of damages, against the captors; which the court of appeals, knowing of the sale, and consequently of the depreciation, had not thought proper to award.

The loss, then, by depreciation, took place either before the sentence of reversal, or afterwards. If before, it was a loss which the appellees must have borne; if they had, as it was their duty to do, applied to the court of admiralty, to carry the sentence of the court of appeals into execution. If so, can they by any act or omission of their own, shift the loss from their own shoulders to those of the appellants, who had no control over their actions? If the loss by depreciation happened afterwards, then the argument against the appellees is still stronger; because they might have obtained the money, of its then value at least; and it would be monstrous to contend, that they could claim all the subsequent loss from the captors, by neglecting to do what they not only might, but what it was their duty to have prevented. If a loss must be sustained by one of these parties, does it consist with the principles of equity, or even strict justice, that he who has caused it, shall fix it upon another; who neither caused it, nor had it in his power to have prevented it? For, it is to be remarked, that it was in the power of the appellees, at any time after the sentence of the court of appeals, to have compelled the payment of the proceeds of vessel and cargo; but the appellants could exercise no power whatever over the subject. It is therefore of no consequence, at what period the loss by depreciation took place. When I consider the object of this libel, as being to enforce execution of the sentence of the court of appeals; I view it in a light most favorable to the strict right of the appellees. The case is too entirely destitute of equity, to stand upon the ground of an original claim for damages.

Upon the whole, I am of opinion, that the decree of the district court should be reversed, and the libel dismissed with costs.

NOTE [from original report]. [From this decree libelants appealed, and] in February 1807, this decree was affirmed in the supreme court. [Jennings v. Carson] 4 Cranch [8 U. S.] 2. The supreme court of the United States determined, in this case; 1. That the district courts of the United States, as courts of admiralty jurisdiction, have authority to enforce a decree of the federal court of appeals. 2. The district courts of the United States, are courts of admiralty; and, as no law has regulated their practice, they proceed according to the general rules of the admiralty.

CARSON (JENNINGS v.). See Case No. 7,281.

Case No. 2,465.

CARSON et al. v. MARINE INS. CO.

[2 Wash. C. C. 468.][1]

Circuit Court, D. Pennsylvania. Jan., 1811.

MARINE INSURANCE—TOTAL LOSS—RULE OF VALUE—OPEN POLICY—VALUED POLICY.

1. In case of a total loss, the insurer loses precisely as much as the property insured was worth at the time and place of shipping it, the expenses of lading included. What the property cost the assured, is not the rule of value, in adjusting the loss; but what it was worth, or would sell for, when shipped.

2. The invoice price is not a proper test of value.

[See note at end of case.]

3. In a valued policy, both the assurers and assured agree; and therefore the assured is excused from proving, at the trial, the amount of loss.

4. The rule for fixing the value of a vessel which has been lost, and which has been insured in an open policy, is to take the sum she was worth at the time of her departure, including certain expenses.

This was an agreed case, in which the only question submitted to the court was, whether, in case of a total loss of goods insured in an open policy, the invoice price, agreeing with the first cost, shall be taken as fixing the value, or, the current market price of similar goods at the time and place of shipping them; the latter being about 25 per cent. lower than the former.

Chauncey, for plaintiffs, relied upon the following cases: 2 Marsh. 620; Parker, 104, 406; 3 Caines, 43, 47; 1 Johns. Cas. 120.

Binney and Hopkinson [for defendants] relied on the case of Snell v. Delaware Ins. Co. [Case No. 13,137], considering, that there is no difference between an insurance on ship and cargo, in this respect; and they argued upon the unreasonableness of the opposite doctrine.

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

WASHINGTON, Circuit Justice. It being admitted that there is no direct authority or custom in relation to a case precisely like the present it must be decided upon an attentive consideration of the nature of the contract of insurance. What is it? An agreement by the insurer, in consideration of a certain reward, to stand in the shoes of the insured, and to indemnify him for any loss which may happen to the thing insured, from certain perils enumerated in the policy. This is effected by paying him, in money, the value of the property at risk, with the expenses incurred in putting it on board, duties, &c. Suppose the property to be destroyed within an hour after the risk has commenced—and the time makes no difference in the principle—what does the owner lose? Precisely as much as it was worth, or would have commanded in market at the time and place it was shipped, including expenses, and no more. If the property cost him less than it was worth when shipped, he loses as well the first cost as the increased value, for which he is entitled to claim an indemnity from the insurer. If it cost him more, he loses the difference between the first cost and the diminished value when the property was shipped; but for this difference, he can have no claim for indemnity under the contract, because the loss did not result from any of the perils against which an indemnity was stipulated, but from an unprofitable speculation, anterior to, and unconnected with the contract. Those who have contended for the value at the first port of discharge, have had much more reason on their side than the law of insurance, as understood in most countries, has sanctioned; for they have fairly argued, that the owner has lost, by a peril insured against all that would have been gained by a successful termination of the voyage beyond the value of the property at the port where it was shipped. But this test of value is rejected, and perhaps rightly so, for the reasons assigned in the books. But it is impossible that the first cost can ever furnish a just rule of indemnity, where it exceeds or falls short of the actual value of the property when it is put at risk.

The invoice price, which was contended for on behalf of the plaintiffs, is liable to all the objections which exist against the prime cost—and to an additional one, which in the opinion of the court, cannot be surmounted. It furnishes no rule of indemnity, in any case where it exceeds, or is less than the market value of the article; if the former, the insured is more than indemnified, by receiving more than it was worth; if the latter, which it is presumed will seldom, if ever happen, his indemnity would be in part only. But the strong ground of objection to this rule for appreciating the value of the property at risk, is, that it substantially destroys all distinction between valued and open policies, and this too in the face of one of the best established rules of evidence. It makes a private document, created by one party to the contract evidence against the other, as to a fact which it is essential for the former to prove in the ordinary way. In the case of a valued policy, the insured is relieved from the necessity of proving the amount of his loss, because both parties have agreed that the property at risk was worth so much. But, to bind the insurer by the arbitrary value fixed in the invoice, is to subject him to ex parte evidence, furnished by his opponent in the cause, without his agreement, and even without his knowledge of its contents when the contract was entered into. And as it rarely happens, if ever, that an invoice does not

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

accompany the cargo, it would follow, that all policies would in fact be valued; with this difference only, that what has hitherto been understood as valued policies, means nothing more than such as are valued by both parties, whereas open policies would be valued by one of the parties only. If neither the prime cost, nor the invoice price, can furnish a correct rule for estimating the value of the plaintiffs' indemnity, will both together answer the purpose? If they differ, neither can be admitted, if the preceding course of reasoning be right. If they agree, then the contention for a choice is merely a dispute about terms. But if either or both vary from the real value of the property insured, and consequently furnish no just rule of indemnity, then it is impossible that their agreement can furnish any. Marshall has strangely embarrassed this subject, by using as synonymous, terms which are substantially different. "In England," he observes, "the loss is estimated according to the prime cost—that is, the invoice price." If they should happen to be the same, or must always be so, it was unnecessary to multiply words, in order to inform us that either might be taken. If they differ, which they frequently may do, then the two expressions cannot mean the same thing; and he has omitted to state, in such a case, which is to govern. He is much more intelligible, when he states, that "the first price of a thing does not always afford a sure criterion to ascertain its true value, because it might have been bought very dear, or very cheap. The circumstances of time and place cause a continual variation in the price of things." Roccus is express upon the subject: "Where the contract," he observes, "is simply to pay the value of the goods in case of loss, the time of entering into the obligation is to be considered; and according to the then existing value, should the estimate be made. Thus," he adds, "the damage sustained by the assured in case of loss, is not considered a source of profit." The French rule seems to be the same; though in a valued policy, the insured is allowed to add the increased value between the prime cost and the market price. As to the rule of ascertaining the value of a ship, it is agreed on all hands, that the sum she was worth at the time of her departure, including certain expenses, is to govern; and the court can perceive no reason for establishing this rule, which does not apply to the case of goods.

Upon the whole, it is the decided opinion of the court, that judgment in this case must be rendered according to the market price of the property insured, at the time and place of exportation.

[NOTE. Mr. Justice Washington, in Snell v. Delaware Ins. Co., Case No. 13,137, instructed the jury, in substance, as follows: While the prime or invoice cost may in most cases furnish prima facie a very proper criterion of value, it is not conclusive. The actual value which may vary from the invoice or prime cost should be ascertained and determined, and, when so ascertained, will form the measure of damage which the assured is entitled to recover on an open policy.]

Case No. 2,466.

CARSON v. ROBERTSON et al.

[Chase, 475;[1] 2 Am. Law T. Rep. U. S. Cts. 116.]

Circuit Court, D. South Carolina. Aug., 1869.[2]

NECESSARY PARTIES—WHO ARE — OBJECTION FOR WANT OF, WHEN SHOULD BE TAKEN.

1. The objection of the want of parties may be taken at any time in the progress of a cause, even in the appellate court.

2. It will be disregarded whenever taken, if it appears that the parties are not necessary, or if although convenient and under some circumstances necessary, they can not be made without depriving the court of jurisdiction.

3. On the other hand if it appears that no final decree can be made without material prejudice to the interests of parties not before the court, the court will not proceed without them, even though such parties are beyond the reach of its process, or can not be made without ousting the jurisdiction.

4. In applying these rules, however, the courts of the United States are always careful to see, that no citizen of a state, other than that in which the defendants reside, shall invoke their jurisdiction in vain, unless it is obviously impossible to protect the interests of the absent parties in their decrees.

5. They will strain a point in favor of the constitutional right of citizens of the United States to sue the citizens of the other states in the courts of the United States. It is a right too clear and too important to be lightly disregarded.

6. One of a firm of several partners purchased, with the firm funds, land, substantially for the firm, but the conveyance was taken in his name and that of one of the other members in trust, for whatever use those two, or the survivor of them, might declare, and until then to the use of all the partners. These two made a mortgage upon the land, to secure a sum of money to a third. In a suit to vacate the whole transaction by the parties who owned the land before its sale, *held*, that the partner who had actively managed the affairs, being one of those to whom the conveyance was made, was the only necessary party, the other parties being non-resident.

In August, 1856, W. A. Carson died in South Carolina, leaving a large amount of property, real and personal, in that state. By his will he appointed the defendants, Alexander Robertson and John F. Blacklock, executors thereof, directed them to sell, with small exceptions, all his property as soon as and upon the terms they deemed judicious, to pay his debts out of the proceeds, to divide the balance of the proceeds into three equal parts, and to hold in trust one-third part for his son, William Carson, another third part for his son, James Petigru Carson; and the remaining third part for his widow [Caroline Carson], the complainant, during her life,

[1] [Reported by Bradley T. Johnson, Esq., and here reprinted by permission.]

[2] [Reversed in Robertson v. Carson, 19 Wall. (86 U. S.) 94.]

and after her death for his two sons. Both executors qualified; about the beginning of 1857 had sold all the property, paid the debts, divided the proceeds into three equal parts, and became the joint holders in trust of one such part for each of the three said legatees. For William Carson they held a bond of E. N. Ball, the defendant, for nine thousand dollars, and one-third of another bond of E. N. Ball for four thousand dollars; for J. P. Carson, a bond of E. N. Ball for nine thousand dollars, and one-third of the said bond of E. N. Ball for four thousand dollars; for the complainant a bond of E. N. Ball for nine thousand dollars, and one-third of the said bond of E. N. Ball for four thousand dollars. The said bonds, executed to the executors, and amounting in the aggregate to thirty-one thousand dollars, were secured by E. N. Ball's mortgage to the two executors, of Dean Hall plantation, which was the testator's property, and had been sold to E. N. Ball for fifty thousand dollars. These bonds and the mortgage were given to the executors to secure the unpaid portion of the purchase money of Dean Hall. Both executors joined in the conveyance to E. N. Ball. The executors also held for each legatee a joint and several bond of E. N. Ball, and the defendant, W. J. Ball, for eleven thousand dollars, each bond being executed to both executors.

Since the early part of 1861, the complainant has resided in New York, and William Carson in Europe or New York. Mr. Blacklock was in Europe during the whole period of the war. In March, 1863, the defendant, McBurney, entered into a treaty with E. N. Ball for the purchase of Dean Hall for one hundred thousand dollars of Confederate treasury notes, and advanced in his own name, or for those he represented, a certain amount of those notes to E. N. Ball, to enable him to get his said bonds and mortgage satisfied by Robertson. Robertson was the only one of the trustees then in the Confederacy. The complainant and William Carson were beyond the limits of the Confederacy, and had no communication with Robertson after the outbreak of the war. William and James P. Carson were both under age. Mr. Blacklock was abroad, and could not be consulted. Mr. Robertson acceded to the proposition of E. N. Ball, and for an amount of the Confederate notes of the nominal value of the bonds and mortgage, surrendered them, and entered satisfaction on the mortgage. The market value of the mortgage bonds was much greater than their nominal value in Confederate notes. These notes could not have been used at the time by either the complainant or William Carson. E. N. Ball, in pursuance of his treaty, subsequently, viz., in April, 1863, conveyed Dean Hall to McBurney and his nominees. McBurney had notice that the bonds and the mortgage of Dean Hall were in the name of both Robertson and Blacklock, and that they held them in a fiduciary character. The complainant always repudiated the transaction. When the sons came of age, they did so. Mr. Blacklock also repudiated it.

The bill alleged the insolvency of Robertson and Blacklock, and the fact was not specially denied in their answers: The defendant McBurney set up by way of defense the following state of facts: In March, 1863, after some negotiations looking to that result, E. N. Ball sold said tract and conveyed it to McBurney and A. L. Gillespie. The land was paid for out of the partnership funds, the firm being composed of McBurney, Gillespie, Hyatt, Hazeltine, and McGhan. The land was conveyed to the first two, and to the survivor, and to the heirs and assigns of such survivor forever, but to and for such uses as those two or the survivor of them should appoint by deed, and until such appointment, to the use of the different members of the firm, naming them. On May 31, Hyatt sold his interest in the firm to the other partners, and took their bond for forty thousand dollars for it, and McBurney and Gillespie executed a deed in the nature of a mortgage upon said tract, to secure it, but before this mortgage was executed Hyatt released all his interest in the land to the other partners. At the time this suit was instituted, Hyatt was a citizen of New York; Hazeltine was resident in England; Gillespie, after the filing of the bill, removed to New York to live, and Ball, before filing the bill, was a non-resident, and had become bankrupt.

Magrath & Lowndes, for complainant.—The complainant relied on the following principles:

I. The courts of the United States are exceptionally liberal in dealing with the question of parties. Hallett v. Hallett, 2 Paige, 17; Mallow v. Hinde, 12 Wheat. [25 U. S.] 198; Eberly v. Moore, 24 How. [65 U. S.] 158.

II. In pursuance of this policy the courts of the United States hold that where a party not before the court is not an inhabitant of or found within the district where the suit is brought, the court will proceed without such party, unless he is an indispensable party, or one whose rights are necessarily affected by the decree.

The sources of this rule are: 1. The act of 1839. 1 Brightly, 15. 2. The 22d and 47th rules in equity. See Shields v. Barrow, 17 How. [58 U. S.] 149, and cases there collected; Payne v. Hook, 7 Wall. [74 U. S.] 431.

I. Robertson & Blacklock, being co-trustees, the act of Robertson, who alone satisfied the mortgages, and whose act in so doing has been repudiated by Blacklock, did not discharge the mortgages in equity, even if it did at law, and the cestui que trust is in the same position as if no act affecting the mortgage had been done. It is assumed here (what will be shown later in this argument) that when Robertson entered satisfaction up-

on Ball's mortgage, Robertson & Blacklock held the mortgage as trustees. The language of the will of W. A. Carson plainly made them joint-trustees. Whether, at law, the act of Robertson discharged the mortgage, is very doubtful. There is no case in South Carolina sustaining such a discharge. In England the legal title would clearly not have passed. Even since the act of 1791 (5 Stat. 169), there has been so far a legal estate in the mortgagee, that he can recover the land after condition broken against any one but the mortgagor in possession (Mitchell v. Bogan, 11 Rich. Law, 688), and that a release to him of the equity of redemption vests in him the legal title (5 Stat. 311). The act of 1791 is to be construed strictly, and not as destroying any of the incidents of the mortgagee's estate, save those in conflict with the purpose of the act. Such is the spirit of the statute just cited. There is no ground for saying that the method of satisfying mortgages is affected by the act of 1791. The interest of the mortgagee is at least of as high a character as the interest of the holders of a chattel real, in which there is an estate, and of which the title can not pass by the act of one of two or more holders. 2 Kent, Comm. (Ed. 1851) 211, note. But whether or not there was a discharge of Ball's mortgage at law, it was not discharged in equity. Both of the joint-trustees must have concurred in the satisfaction entered. "Where the administration of the trust is vested in co-trustees, they all form, as it were, one collective trustee, and, therefore, must execute the duties of the office in their joint capacity." Lewin, Trusts, 297. "Where stock is standing in the name of the several co-trustees, any one may receive the dividends, though all must join in the sale of the coupons; and where they are co-trustees of lands, any one of them may receive the rents, though all must concur in conveyance." Id. 299. "As a general rule, trustees must all join in any sale, lease, or other disposition of the trust property, and also in receipt for money payable to them in respect of their office." Hill, Trustees, 307. "If a trustee refuses to join, it is not competent for the others to proceed without him, but the administration of the trust devolves upon the court." Lewin, Trusts, 298. "Where an account is opened at a banker's, in the name of two or more trustees, it is in their power to require that the checks should be signed by all or any one or more of their number. In strictness it is the duty of trustees to require that the check should bear the joint signature of all the trustees." Hill, Trustees, 308. "Where there is a trust for sale, the receipt must be signed by all the trustees who have undertaken to act. And where a power is given to trustees to discharge the purchaser from seeing to the application of the purchase money, the receipt must be signed even by a trustee who has parted with the estate by a conveyance to his co-trustee, for a transfer of the estate at law carries not along with it the confidence in equity." Lewin, Trusts, 448. "A trustee who has once acted in or accepted a trust, and has not been properly discharged from it, must join with the other trustees in the receipts to purchasers or other persons requiring a discharge for the payment of trust money. And it is immaterial that he has parted with the possession of the legal estate." Hill, Trustees, 307; Sugd. Vend. 50. "If the court is of the opinion that the trust was joint, then the execution is imperfect, and the court will refuse to enforce it." Mayrant v. Guignard, 3 Strob. Eq. 128. Such being the law, what is the state of facts to which it is to be applied? Robertson and Blacklock were named co-executors and co-trustees by Mr. Carson's will. They joined in the conveyance to Ball. Ball's bond and mortgage were to them jointly. In the absence of Mr. Blacklock in Europe, and in a time of war, when intercourse with Europe was precarious, McBurney and E. M. Ball, ignoring Mr. Blacklock entirely, negotiate with Robertson alone, deliver the consideration of the discharge to him alone, and get only his satisfaction on the mortgage. The right which the cestui que trust has to the benefit of the concurrence of two trustees in any act of such importance to her is ignored. Mr. Blacklock does nothing which amounts to acquiescence in the conduct of his co-trustee, and now, before the court, repudiates the transaction. Under these circumstances, the discharge of the mortgages and bonds is not such as equity will respect. The purchaser took with full notice of the trust and the breach of it, and against him equity will enforce the mortgage, either at the suit of the other trustee (Lewin, Trusts, 317) or of the cestui que trust. It is no answer to say that the bonds were paid, and the security is, therefore, discharged as a legal consequence of payment. There is no payment set up, but simply an exchange for Confederate treasury notes. The power given by Mr. Carson's will to one executor was given in the event that only one qualified. Both Robertson and Blacklock having qualified, no question arises under that clause of the will.

II. The act of Robertson was in other respects in breach of his trust, and the purchaser, who not only had full notice of the trust, but assisted in the breach of it, can not hold the estate against the cestui que trust. It is necessary to determine the relation in which Robertson, or Robertson and Blacklock, stood to the estate, and to apply the rules by which equity measures their conduct in that relation.

1. It is submitted that they were trustees; that as such trustees they possessed no special powers, but only the general powers attaching to trustees; that as such trustees it was a breach of trust in them, or either of

them, to release the mortgages of Ball without payment of the bonds they secured. Robertson and Blacklock were named in the will of W. A. Carson both executors and trustees. What is the rule to determine the capacity in which they were acting at the time in question? "Where the right of receiving a fund as guardian, and the duty of paying it as trustee unite in the same person, the law presumes a performance of the duty, and without further proof a surety of the person as guardian is liable." Gray v. Brown, 1 Rich. Law, 351. "When the right to receive and the duty to pay absolutely concur, there can be no election." Id. 363. "Where an administrator has in his hands the balance of an estate, and is afterwards appointed the guardian of infants entitled to the estate, he will be chargeable as guardian." O'Neall v. Herbert, McMul. Eq. 495. "A debt due by an administrator to his intestate's estate is assets in his hands; and if the administrator of an estate becomes also the administrator of one of the distributees, his liability for the distributive share of the latter in the estate of the former attaches upon his second administration." Schnell v. Schroder, Bailey, Eq. 328. See, also, Taylor v. Deblois [Case No. 13,790]. When a fund is given to a person upon certain trusts and he is appointed executor, as soon as he has severed the legacy from the general assets and appropriated it to the specific purpose, he dismisses the character of executor and assumes that of trustee. Phillipo v. Munnings, 2 Mylne & C. 309; Byrchall v. Bradford, 6 Madd. 13, 235; Ex parte Dover, 5 Sim. 500; Hill, Trustees, 237, 364; Lewin, Trusts, 246.

Robertson and Blacklock had, at the time of the sale to McBurney, and long before, performed all their duties as executors of Mr. Carson's will, and the legal presumption that they had transferred the assets to themselves, as trustees, attached. Mr. Robertson says, in his answer, that towards the close of the year 1856 and the beginning of 1857, the executors sold out the entire estate of W. A. Carson, and paid the debts due by him, and held the balance in trust for the purposes of the will. Again, he states in his answer that they held distinct portions of the balance for the several legatees. Mr. Blacklock confirms this statement. In the ordinary's account, filed with the bill, they name themselves trustees. Those accounts show that the estate had been completely settled. It will be difficult for the defendants to show any purpose for which the estate of the executors should be held to have existed in 1863. The onus of rebutting the presumption of law as to the extinguishment of that estate lies upon the defendant. In all the cases cited, the presumption was upheld against third parties. But it is not necessary to resort in this case to the presumption of law; the testator indicates the event that is to mark the termination of the office of executor; he directs the residue of the purchase money to be divided into three parts and held in trust. Robertson says the division into three parts had taken place about the beginning of 1857. As such trustees, no special powers were given to them by the will of Mr. Carson, the language of which is, "I order and direct my executors to sell," &c. "I authorize and empower my executors or qualified executor to invest and re-invest," &c. The power of sale was exhausted on the sale to Ball, through which the defendants make their title. Why is the expression "qualified" used in giving the power to the executor, if he was meant to use it in his character of trustee? Robertson and Blacklock being then trustees without special powers, what was their authority? The bond of Ball was a contract to pay money, either as interest or principal, and the trustees had no other power in respect to it but to receive money by way of interest and principal whenever either was due. They could exercise no proprietary power over the bond (Lewin, Trusts, 512), e. g., they could not accept something else than money in accord and satisfaction of it. A court might have given them such authority, but Mr. Robertson did not seek its aid. In the case of trustees for sale, there can be no conveyance without the payment of the money. Id. 431. "A trustee will not be allowed to exercise his legal powers to the prejudice of his cestui que trust, and a release by the trustee without any consideration would, unquestionably, be set aside in equity, although the party released had no notice of the trust. And the case for relief would, of course, be still stronger, if the party released had actual notice of the trust." Hill, Trustees, 503. The Confederate treasury notes delivered to Robertson by Ball were not money, and Ball's act was not payment of the bond. It is not necessary to trouble the court with many authorities on that point. The securities which are the subject of this suit are dated January 8, 1857, and March 2, 1857, and are for the payment of dollars. "It is quite clear that a contract to pay dollars, made between citizens of any state of the Union which maintains its constitutional relations with the national government, is a contract to pay lawful money of the United States, and cannot be modified or explained by parol evidence." Thorington v. Smith, 8 Wall. [75 U. S.] 13. "Prior to February 25, 1862, all contracts for the payment of money, not expressly stipulating otherwise, were, in legal effect and universal understanding, contracts for the payment of coin; and, under the constitution, the parties to such contract are respectively entitled to demand and bound to pay the sum due, according to their terms in coin." Hepburn v. Griswold, Id. 604. See, also, the decisions of the courts of South Carolina since the war that Confederate treasury notes are not money. Austin v. Kinsman, 13 Rich. Eq. 259; Mayer v. Mordecai [1 S. C. (N. S.) 383].

2. But assuming that the powers in respect to investment, given by the will of

Mr. Carson, belonged to Robertson and Blacklock in their character of trustees, they exercised those powers in breach of their trust—first, in calling in Ball's mortgage; second, in exchanging it for Confederate treasury notes. The acceptance of these notes by Robertson, in lieu of money, was, as we have shown, a purely voluntary act, and was, therefore, equivalent to a calling in of the mortgage. Money outstanding upon good mortgage security, an executor is not called upon to realize until it be wanted in the course of administration. Orr v. Newton, 2 Cox, 274; Howe v. Earl of Dartmouth, 7 Ves. 137; 1 White & T. Lead. Cas. Eq. p. 444, note. It is not the duty of trustees to call in money invested on good real security where no risk is apparent. Hill, Trustees, 381; Sadler v. Turner, 8 Ves. 621. It has been decided that even an express power to vary the securities does not authorize changes made without any apparent object or any prospect of benefiting the trust estate. Brice v. Stokes, 11 Ves. 324. Our case of Mayer v. Mordecai [supra], seems to rule the same principle. In these cases, except the last, it was held a breach of trust to receive payment of securities. A fortiori an exchange of one security for another would be bad in like circumstances. It is doubtful whether the trustees had any power in equity to exchange one security for another. The language of the will is, "I authorize and empower my executors, or qualified executor, to invest and re-invest the purchase money of my estate, so as aforesaid to be held in trust by them, in such public or private securities or stocks as they may deem best." The words "invest" and "re-invest," have reference only to money, and the testator here uses them in connection with the word money. He means to authorize his trustees to change money, coming into their hands from time to time during the continuance of their trust, into other kinds of property. But such was not Robertson's act; he did not get the money due upon his security and invest it; if he had, the purchasers of the trust property would not have been made parties to this suit, but in excess of his authority he made an exchange of his security for another. But if the act of Robertson was a breach of trust because premature, and because in excess of his authority, it was likewise such because of the character of the security, viz., Confederate treasury notes, he received in satisfaction of Ball's mortgage. It is proposed to show: a. That discretionary powers of investment by trustees are subject in equity to certain restrictions. b. That on general principles they do not extend to investments in such securities as Confederate treasury notes. c. That the precise point is "res judicata."

(a.) "If there be a trust to invest at discretion on 'some good or sufficient' security, or 'at discretion,' the court will not allow the trustees to exercise any discretion as to the nature of the security, but will decide upon the goodness or sufficiency of the security by its own rules." Hill, Trustees, 495. "A power of sale, or of varying trust securities, though to a certain extent discretionary, must not be exercised in an arbitrary or mischievous manner." Id. A trust to invest, at the trustee's discretion, will not authorize a loan of trust money on personal security. Pocock v. Reddington, 5 Ves. 794. Where trustees are empowered to lend "on such securities as they should approve," they are bound to make inquiries, and exercise a sound discretion whether the securities are of sufficient value. Stretton v. Ashmall, 3 Drew. 10. Where money is to be converted "into government funds or other good securities," neither South sea stock nor bank stock will be good investment. Trafford v. Boehm, 3 Atk. 444. In Spear v. Spear, 9 Rich. Eq. 184, it is said that a more strict rule is applied to trustees by appointment than such as give bond. And in this case, the great rule laid down is to place the property in a state of security. In it the court also intimates what are proper securities. 1. Public; 2. Bonds, secured by liens on real estate; 3. Bonds of third persons, with proper sureties.

(b.) Confederate treasury notes are clearly not within the principle of these cases. By the very terms of the contract of which they are the evidence, their payment depends upon a contingency. The doubtful character of the contracts of an unrecognized government, had been the subject of frequent comment in the courts of England and of this country. Thompson v. Powles, 2 Sim. 194; Taylor v. Barclay, Id. 214; Bire v. Thompson, cited Id. 222; Jones v. Garcia Del Rio, 1 Turn. & R. 297; Gelston v. Hoyt, 3 Wheat. [16 U. S.] 303; Rose v. Himely, 4 Cranch [8 U. S.] 241. The supreme court of the United States, through Chief Justice Chase, described their character accurately in Thorington v. Smith, 8 Wall. [75 U. S.] 11: "As contracts in themselves, except in the contingency of successful revolution, these notes were nullities: for except in that event there could be no payer. They bore this character upon their face, for they were made payable only 'after the ratification of a treaty of peace between the Confederate States and the United States of America.'" In the last case on this subject, the supreme court of this state says: "The bond was secured by a mortgage of real estate, according to the testimony, in May, 1862. When the first payment in Confederate money was accepted, such property was worth, in that currency, about fifty per cent. more than it would have brought in gold before the war, and in May, 1863, it was worth three times as much." Mayer v. Mordecai [supra]. The sale of Dean Hall, to the defendant McBur-

ney, for one hundred thousand dollars in Confederate treasury notes, is itself sufficient proof of the appreciation in the value of the mortgage.

(c.) It has been expressly held that the receipt of Confederate treasury notes, by a trustee, is a breach of trust. See Mayer v. Mordecai [supra]; Fitzsimons v. Fitzsimons [1 S. C. (N. S.) 400]; Sanders v. Rogers [Id. 452]; Dunn v. Dunn [Id. 350].

(3.) It remains to consider the liability of the purchasers in this case from the trustees. We have shown that the trustees committed a breach of trust in parting with the mortgage. It is admitted by the answers that the purchasers had full notice of the trust, and that the defendant McBurney advanced to Elias N. Ball the Confederate treasury notes to enable him, in breach of his trust, to satisfy the mortgage held by the trustees and to convey Dean Hall. "Where a party purchases trust property, knowing it to be such, from the trustee, in violation of the objects of the trust, courts of equity force the trust upon the conscience of the guilty party and compel him to perform it." "An abuse of trust can confer no rights on the party abusing it, or on those who claim in privity with him." 2 Story, Eq. Jur. (Ed. 1861) 487, 489. "The doctrine . . is strictly applicable to every purchaser whose title comes into his hands affected with such notice." Id. 390. "If a purchaser have notice of any claim or incumbrance, his conscience is affected, and a court will then not only refuse to interfere in his favor, but will assist the claimant or incumbrancer in establishing his claims against him: his having given a consideration will not avail him; for, as Lord Hardwicke observes, he throws away his money voluntarily and of his own free will. And it may be laid down as a general rule that a purchaser with notice is bound in equity to the same extent, and in the same manner as the person was of whom he purchased. . . . If he buy with notice of the trust, although for a valuable consideration, he must convey the estate to the uses of the settlement." 3 Sugd. Vend. c. 22, § 2. "If the alienee be a purchaser of the estate (i. e. of an estate subject to a trust) at its full value, then if he take, with notice of the trust, he is (subject to the protection afforded by the statute of limitations) bound to the same extent, and in the same manner as the person of whom he purchased; . . . and the rule applies not only to the case of a trust properly so called, but to purchasers with notice of any equitable incumbrance as of a covenant or agreement affecting the estate or a lien for purchase money. . . . A purchaser without notice, from a purchaser with, is not liable for his own bona fides is a good defense in itself and the mala fides of the vendor ought not to invalidate it." Lewin, Trusts, 725. "A purchaser from a trustee, though for a valuable consideration, will be bound by the trust in the same manner, and to the same extent, as the trustee, if the purchase be made with notice of the trust." Hill, Trustees, 509. "Where a purchaser with notice from a trustee conveys, for valuable consideration, to another person who has no notice of the trust, the estate will not be affected with notice in the hands of the second purchaser." Id. 516. "A purchase for valuable consideration without notice will not be a complete defense in a court of equity, unless the purchaser has clothed himself with the legal estate." Id. 517. See, also, 2 Spence, Eq. Jur. 192. The principles cited from the text-books, are sustained by a mass of authority both in England and in this country. Wigg v. Wigg, 1 Atk. 382; Mead v. Lord Orrery, 3 Atk. 238; Mackreth v. Symmons, 15 Ves. 350; Willoughby v. Willoughby, 1 Term R. 771; Bovey v. Smith, 1 Vern. 149; Daniels v. Davison, 16 Ves. 249. "It is a clearly established principle in equity jurisprudence that whenever the trustee has been guilty of a breach of the trust, and has transferred the property, by sale or otherwise, to any third person, the cestui que trust has the full right to follow such property into the hands of such third person, unless he stands in the predicament of a bona fide purchaser for a valuable consideration without notice. . . . The right or option of the cestui que trust is one which positively and exclusively belongs to him." Oliver v. Pratt, 3 How. [44 U. S.] 333. "Wherever the purchaser is affected with notice of the facts which in law constitute the breach of trust, the sale is void as to him; and a mere general denial of all knowledge of fraud will not avail him if the transaction is such as a court of equity will not sanction." Wormley v. Wormley, 8 Wheat. [21 U. S.] 421. In this case, the equity was enforced against the purchaser from the trustee's vendee; and relief was sought and granted both against the trustee and the purchaser. In the case of Caldwell v. Carrington, 9 Pet. [34 U. S.] 86, the same equity was enforced against purchasers for valuable consideration. In that case, the person from whom the purchase was made, and who committed the breach of trust, was not a party to the suit, "because not an inhabitant of the state" (i. e. where the suit was brought). In Boone v. Chiles, 10 Pet. [35 U. S.] 212, the doctrine is explicitly stated. The rule has been recognized, and constantly enforced by the courts of South Carolina. "One purchasing land, to which another has an equitable title, with notice of the equity, takes subject to the equity, and is bound to convey in like manner as the person from whom he purchased." Massey v. McIlwain, 2 Hill, Eq. 421; James v. Bremar, 2 Desaus. Eq. 560; Moragne v. Du Cercueil, 4 Desaus. Eq. 256; Williams v. Hollingsworth, 1 Strob. Eq. 103; Bush v. Bush, 3 Strob. Eq. 131. A purchaser, for valuable consideration, with notice, will not

be protected. O'Neal v. Cothran, 4 Desaus. Eq. 553; Blake v. Jones, Bailey, Eq. 141. The doctrine is recognized in Cummings v. Coleman, 7 Rich. Eq. 509; in Ellis v. Woods, 9 Rich. Eq. 19; in Fretwell v. Neal (1859) 11 Rich. Eq. 559.

These cases show that the principle has always been enforced by the courts of South Carolina without question. Where the application of the rule was resisted, it was because of the facts of the particular case. As to the wisdom of this acknowledged principle of equity jurisdiction, there can be but one opinion. It is beyond question the most important rule which equity enforces for the protection of cestuis que trustent. Indeed, it may be said that equity could not adequately protect them in the absence of the doctrine. If the trustee's sense of duty, and his personal responsibility, were the sole guarantees which cestuis que trustent possessed for the proper preservation of their property, an equitable estate would be a precarious species of property. It is to protect them at once against the trustee's misconduct, and his inability to make indemnity, that equity has given them a two-fold remedy, viz., against the trustee and against his vendee. Nor is it hard upon the latter that, with full notice of the fact that he is dealing with a trustee, he should be held to take nothing by any act of the latter which is a breach of his duty. Without the rule, to deal with an unworthy trustee would become profitable. This case is a fair illustration of the wisdom of the rule, for, in view of the insolvency of the trustees, the complainant will be deprived of her property, and will be practically without remedy, unless she has it against the purchaser. The principle that a purchaser for value of a non-negotiable chose in action, is affected with equities of which he has no notice, and of which by no amount of care, he could obtain knowledge, is harsh in comparison with that now contended for; yet it is enforced without question. The defendants, McBurney, E. N. Ball and W. J. Ball, claim, through the will of W. A. Carson, and have, therefore, in law, notice of that will and its contents. "The purchaser is supposed to have knowledge of the instrument under which the party with whom he contracts as executor, trustee, or appointee, derives his powers." Story, Eq. Jur. § 400. "If a person should purchase an estate from the owner, knowing it to be in the possession of tenants, he is bound to inquire into the estate which these tenants have, and therefore he is affected with notice of all the facts as to their estates." Taylor v. Stibbert, 2 Ves. Jr. 440; Daniels v. Davison, 16 Ves. 249; Smith v. Low, 1 Atk. 489. Registration of a conveyance, required by law to be registered, is notice to all the world. Story, Eq. Jur. § 403. Wills and executors' accounts are, by law, required to be registered in South Carolina. 11 Stat. 48.

The defendants, McBurney and W. J. Ball, admit by their answers, actual notice of the fact that Robertson and Blacklock were dealing in the character of executors. In respect to W. J. Ball, it is to be observed that he is not in the position of a purchaser for value at all, no consideration having moved from him for the discharge of his bond. He is discharged only if the act of E. N. Ball discharges him, and he can be in no better position than E. N. Ball. It is difficult to suggest any argument against the liability of the latter. The peculiar circumstances of this case strengthens the equity against the purchaser. A state of war existed. The only adult cestui que trust and one of the infant cestuis que trustent were in that part of the United States loyal to the government. The trustee, the purchaser, and an infant cestui que trust were in the Confederacy. One effect of the war was to render intercourse between the trustee and two cestuis que trustent, at least extremely difficult and precarious. It moreover made that intercourse criminal. Chancellor Kent, Griswold v. Waddington, 16 Johns. 483. The Confederate treasury notes were not only useless to the two absent cestuis que trustent, but it was unlawful for them to deal with them at all. The state of the country in which the purchaser resided enhanced, as a trust security, the value of the mortgage, which has, at all times been a favorite security of courts of equity. It is submitted that all these facts were equivalent to an actual, positive notice to the purchaser that the absent cestuis que trustent disproved of the action of the trustee, and affect his conscience in equity. It is hardly matter of doubt that if the complainant's demand were made against a citizen of a state which did not form part of the late Confederacy, and were made in a court of that state, it would be sustained. A purchaser from a trustee in a state not of the Confederacy, making his purchase with Confederate treasury notes, would scarcely be protected. To hold that on the same facts the complainant cannot recover against a citizen of South Carolina, is to establish a strange discrimination in favor of the citizens of states which formed part of the Confederacy.

In Texas v. White [7 Wall. (74 U. S.) 700], the supreme court of the United States held expressly that the laws of the United States were in force throughout the Confederacy during the war. But in Mayer v. Mordecai [supra], lately decided by the supreme court of South Carolina, a very different rule from that contended for was laid down. "Although the trustee is not discharged from liability to account for the three bonds, yet the mortgages as against the original debtors can not be set up as of force. The legal title to the bonds was in them, and with the investment of the proceeds they had no concern. If, according to the ruling in this state, the vendee is not bound to see to the applica-

tion of the purchase money (Lining v. Peyton, 2 Desaus. Eq. 375; Laurens v. Lucas, 6 Rich. Eq. 222), or a mortgagee under the order of the court that the money is appropriated to the purpose for which the mortgage was taken (Spencer v. Bank of the State, Bailey, Eq. 468); much less can a debtor who makes satisfaction to the creditor, in a manner acceptable and agreed by him, in the form of actual payment, be held to such requisition." Mr. Justice Inglis, in Austin v. Kinsman, 13 Rich. Eq. 265, says, "a creditor, though entitled to demand payment in lawful money, may waive his right and accept any substitute he pleases, and his voluntary acceptance of such substitute as payment makes it so." "If the satisfaction of the bonds was the result of a fraud between the creditors and the trustee, or produced by an improper combination, to the prejudice of the cestui que trust, or if the debtor knew of the intended misapplication of the proceeds by the trustee, and, in any way, wrongfully facilitated the accomplishment of that design, the instruments would be set up as existing and binding, but no such proof has been made in this case. On the contrary, as to the two principal bonds, the trustee required the payment. There was no medium of circulation but Confederate currency. But so far from doing so he sought payment in it. There is no testimony showing any willful combination on the part of White, Kerr & Goldsmith, with the trustee, which would justify an interference to hold them responsible for the act for which alone he should respond." The present case can be clearly distinguished from that just cited: First. In the latter case, there was one trustee, and "the legal title was in him." It is, to say the least, extremely doubtful whether in this case the legal title was passed by the act of the single trustee of law. Second. The authorities before cited put beyond a doubt that in equity there was an imperfect release of the mortgage in this case, a fact which does not appear at all in Mayer v. Mordecai, and which is of great importance. Third. In Mayer v. Mordecai the trustee made a demand for payment; in this case he did not. The statement of McBurney is, that he and the mortgagor made a treaty for the purchase of Dean Hall, and made an advance to him of Confederate treasury notes to enable him to satisfy the mortgage. Was this not "a wrongful facilitating," or improper combination in the sense of the ruling in Mayer v. Mordecai. Fourth. So much of the reasoning in Mayer v. Mordecai as is derived from the principle, that in this state the purchaser from a trustee is not bound to see to the proper disposition of the purchase money, has no application to this case. The equity which does bind the purchaser in that respect, is a much harder rule in favor of cestuis que trustent, than the one now under consideration. If there had been payment of money to Robertson, the complainant would have no case. The contention is that there was no payment. The ruling in Mayer v. Mordecai, that a creditor may accept in satisfaction of his debt something else than money, is not denied. While that proposition is perfectly true at law, the court entirely ignores what it had demonstrated and ruled in the previous part of the opinion, viz., that in equity such acceptance was a breach of trust. There was in that case an actual decree against the trustee for the breach of trust. To say that the purchaser has only to look to the legal title, is to destroy the jurisdiction of equity as between cestuis que trustent and third parties. Under such a ruling, a trustee to sell with consent of a cestui que trust, may without that consent make a good title to a purchaser who has full notice of the limitation of his power. The ruling was moreover entirely unnecessary for the protection of the purchaser from the trustee in that case, inasmuch as it was held that he would not be liable unless there was a fraud on his part or improper combination with the trustee to the prejudice of the cestui que trust. It is difficult to see how the conduct of the purchaser in this case can be held to be other than a fraud in the sense of a court of equity, and an "improper combination" with the trustee "to the prejudice of the cestui que trust," within the language of the rule as laid down in Mayer v. Mordecai. That the court did not apply its own rule in Mayer v. Mordecai, is no reason against its application now. It is obvious that the rule is itself in conflict with the whole current of decisions in the courts of England, of the United States, and of South Carolina, in all of which not the fraud of the purchaser, but his knowledge of the trust has been the ground of relief against him, granted to the injured cestui que trust. In the cases where purchases, for valuable consideration, have been set aside, there could be no question of actual fraud, nor does that question arise in the cases before suggested, where a sale by a trustee to sell with consent is set aside if the sale is made without consent, although the complete legal title passed by the sale. How far, then, is this decision of the state court, denying to a suitor a measure of relief thoroughly recognized in all courts of equity, to bind this court?

The 34th section, Act 1789, provides "that the laws of the several states, except where the constitution, treaties, or statutes of the United States, shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States where they apply." The act of May, 1792 (1 Stat. 92), provides that the modes of proceeding in suits at equity shall be "according to the principles, rules, and usages which belong to courts of equity as contradistinguished from courts of common law." Under these statutes it has been uniformly held, since the establishment of the government, that the courts of the United States administer equity according to the gen-

eral principles of English equity jurisprudence. "As the courts of the Union have a chancery jurisdiction in every state, and the judiciary act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction must be the same in Massachusetts as in other states." Per Marshall, C. J., U. S. v. Howland, 4 Wheat. [17 U. S.] 116; also, Robinson v. Campbell, 3 Wheat. [16 U. S.] 222. The settled doctrine of this court is, that the remedies in equity are to be administered, not according to the state practice, but according to the practice of courts of equity in the parent country, as contradistinguished from courts of law." Per Story, J., Boyle v. Zacharie, 6 Pet. [31 U. S.] 658; also, Livingston v. Story, 9 Pet. [34 U. S.] 632. "The language of this section (section 34, Act 1789), can not, upon any fair construction, be extended beyond civil cases at common law, as contradistinguished from suits in equity." Per Taney, C. J., U. S. v. Reid, 12 How. [53 U. S.] 363. "This court, and other courts of the United States, had repeatedly decided that the equity jurisdiction of the courts of the United States is independent of the local law of any state, and is the same in nature and extent as the equity jurisdiction of England, from which it is derived." Dodge v. Woolsey, 18 How. [59 U. S.] 347. "The equity jurisdiction of the federal courts is the same in all the courts. . . . It is the same in nature and extent as the jurisdiction of England." Barber v. Barber, 21 How. [62 U. S.] 592. "The equity jurisdiction and remedies conferred by the constitution and statutes of the United States can not be limited or restrained by state legislation, and are uniform throughout the states of the Union. Hence the circuit court, for any district embracing a particular state, will have jurisdiction of an equity proceeding against an administrator (if, according to the received principles of equity, a case for equitable relief is stated), notwithstanding that by a peculiar structure of the state probate system, such a proceeding could not be maintained in any court of the state." [Payne v. Hook] Dec., 1868, 7 Wall. [74 U. S.] 425. "It is very clear that no law of a state can force an alien or a citizen of another state, to forego a remedy which would otherwise exist in equity, under the constitution and laws of the United States." Cropper v. Coburn [Case No. 3,416]. See, also, Fletcher v. Morey [Id. 4,864]; Gordon v. Hobart [Id. 5,609]; Sawyer v. Oakman [Id. 12,402]. It is to be observed that Mayer v. Mordecai was decided since the filing of the bill in this case, at which time the equity now denied was plainly a part of the equity system in South Carolina. In the case of Livingstone v. Jordan [Id. 8,415]; tried in this court, June term, 1868, before Chase, Ch. J. and Bryan, J., the plaintiff was allowed to recover lands held by the defendant, under a conveyance made by the order of the court of equity of the state of South Carolina in 1862. It is submitted that the parties whose non-joinder is here objected are not indispensable.

III. Where the joinder of a party would oust the jurisdiction of the court, a court of the United States would be particularly disposed to construe the rules of practice so as to dispense with such party. West v. Randall [Case No. 17,424]; Shields v. Barrow, supra; Payne v. Hook, supra.

CHASE, Circuit Justice. In this case the only question is as to parties, and we are called upon to meet it at the threshold. The objection of the want of parties may be taken at any time in the progress of a cause, and even in the appellate court. The objection will be disregarded whenever taken, if it appears that the parties are not necessary, or if, although convenient and under some circumstances necessary, they can not be made without depriving the court of jurisdiction. On the other hand, when it appears that no final decree can be made without material prejudice to the interests of parties not before the court; the court will not proceed without them, even though such parties are beyond the reach of its process, or can not be made without ousting the jurisdiction. These are general rules, and they apply to courts of the United States as fully as to the courts of the states. In administering these rules, however, the courts of the United States are always careful to see that no citizen of a state, other than that in which the defendants reside, shall invoke their jurisdiction in vain, unless it is obviously impossible to protect the interest of the absent parties in their decrees. The only question here, is whether there is any such obvious impossibility in this case. It is objected, in the first place, that the partners of the defendant, McBurney, are indispensable parties. But it is plain upon the bill and answer that in all the transactions which form the subject of litigation, Mr. McBurney represented the firm, and we perceive no good reason why he may not be held to represent them in this suit. Most of these partners can come in and become parties to the bill, if they desire to do so. If they do not, it will be because they think their interests already adequately represented.

The court will not regard the absence of parties where interests are competently represented as an obstacle to doing justice by a decree between the parties actually before it.

The other objection is, that Elias N. Ball, though named as a party in the bill, has not been served with process. It is the same objection as the others, namely, want of an indispensable party. This gentleman, it seems, bought the property in litigation of the executors of Wm. A. Carson. He gave his bond, secured by mortgage upon the property, for the purchase money; subsequently, dur-

ing the war, he sold to McBurney, and by arrangement between himself, McBurney, and the executors, McBurney paid the amount due the executors upon the bond in Confederate notes, and they thereupon surrendered the bond and discharged the mortgages. Subsequently, and since the war, Ball, it seems, has gone into bankruptcy. Under these circumstances we do not perceive that Ball is a necessary party. It does not appear that either he or his assignee in bankruptcy have any interests which will be prejudiced by a decree. At all events, as it seems to us, a decree may be made so as to do complete justice between parties before the court, and at the same time protect any rights which he or his assignee may appear to have. We can not regard him, therefore, as a necessary party.

We do not express this opinion without some hesitation, but our best judgment is, that it will receive the highest sanction, should the case go to the supreme court.

Whether this be so or not, it would be a positive wrong in this court to turn from its doors a suitor from another state seeking a remedy against citizens in this state, and thus deny to her a right secured by the constitution, upon a doubtful question in reference to parties. We would follow rather the example of Judge Story, that great light of equity jurisprudence, and strain a point in favor of the constitutional right of citizens of the several states to sue the citizens of other states in the courts of the United States. It is a right too clear and too important to be lightly disregarded.

We shall therefore overrule the objection on account of want of parties, and continue the case for answer. It is no small satisfaction to know that any error we may now fall into will be corrected by a higher court.

[NOTE. Defendant appealed to the supreme court, which reversed the decree of the circuit court, assigning as grounds for such reversal (Mr. Justice Swayne delivering the opinion) that E. N. Ball was a necessary and indispensable party, and should have been brought in, inasmuch as the bill failed to aver his insolvency, or to show any reason why he should not or could not be brought before the court, and also because W. J. Ball, his surety, had objected to his absence, and alleged that he represented the debt to be paid, and therefore was entitled to have him present to assist in maintaining this defense, or, in the event of failure of the defense, to assist in taking an account that the decree might conclusively fix the liability of E. N. to W. J., should the latter be compelled to pay the debt. Furthermore, the court held that as the bill charged fraud and conspiracy, and that E. N. was a party thereto, his vendees were entitled to his aid to make their defense; and the court further assigned as a ground for reversal that Gillespie, as one of the grantees of E. N. Ball, who had not, so far as it appeared, parted with the legal title acquired by him, was an indispensable party to the determination of the case. Robertson v. Carson, 19 Wall. (86 U. S.) 94.]

CARSON (THOMPSON v.). See Case No. 13,948.

Case No. 2,467.

CARSTAEDT v. UNITED STATES CORSET CO.

[13 Blatchf. 119; 2 Ban. & A. 119; 9 O. G. 151; Merw. Pat. Inv. 217.] [1]

Circuit Court, S. D. New York. Sept. 10, 1875.

PATENTS—"TAKE-UP MECHANISM FOR LOOMS"—VALIDITY—INFRINGEMENT.

1. The first and third claims of reissued letters patent granted to Hugo Carstaedt, November 19th, 1872, for an "improvement in take-up mechanism for looms for weaving irregular fabrics," the original patent having been granted to him March 30th, 1869, namely, "(1.) The two rolls B and C, continuously rotating at a suitable distance apart, and the series of sectional rollers or wheels D, mounted and operated so as to be pressed wedgewise between them when the take-up is to act, all substantially as and for the purpose herein set forth; (3.) A series of needles, k, k, in combination with a take-up composed of rollers or wheels D, arranged to take up at intervals on parts of the work, and to liberate other parts, substantially as and for the purpose herein specified," are not infringed by a mechanism in which the take-up is not effected by rollers divided in sections, and in which, although the effect of the take-up is sectional, such effect is due not to the sectional action of the take-up but to the action of the lay.

2. The second claim of said patent, namely, "(2.) The needles or points, k, k, fixed on a stationary bar K, and arranged, as specified, so that the fabric, being drawn by the take-up proper, is continuously carried across the needles, to be received by their points and to be arrested when a reverse movement of any part of said fabric is commenced, substantially as herein set forth," is not limited to the sectional take-up described in the patent, nor does it extend to every take-up, regular or irregular, but it embraces the combination of the needle-bar with any take-up mechanism for weaving irregular fabrics. Thus construed, said second claim is not void for want of novelty. A change of position of the needle-bar, as involving invention, considered.

[In equity. Bill by Hugo Carstaedt against the United States Corset Company to enjoin infringement of letters patent No. 88,365 (reissue No. 5,150).]

John Van Santvoord, for plaintiff.
George Gifford, for defendants.

SHIPMAN, District Judge. The patent which is alleged to have been infringed by the defendants was granted to the complainant on March 30th, 1869, for an "improvement in take-up mechanism for looms for weaving irregular fabrics," and was reissued on November 19th, 1872. The patented machine was designed especially for the weaving of corsets. In weaving articles of irregular size, it is necessary to give greater fullness to one side or portion of the woven article, than is given to another portion. The cloth, notwithstanding this irregularity,

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. Merw. Pat. Inv. 217, contains only a partial report.]

is woven in one piece, so that "sometimes the weaving proceeds regularly across the whole width of the fabric," and sometimes irregularly across an increasing part of the width. The mechanism which "takes up" or carries along the woven cloth must be so constructed that the irregularly woven cloth shall be taken up, while the remainder of the cloth shall be kept stationary, and the edge of the entire width be kept in a straight line. One practical difficulty in accomplishing this result by the mechanism which was in use prior to the complainant's invention, arose from the fact that the cloth, having been beaten up by the reed, and taken up by the rollers, slipped out of them again when the lay was receding, because, in consequence of the fullness of a part of the cloth, the tension of the take-up upon the fabric was irregular, and the take-up mechanism "drew" unevenly. The complainant's improvement consisted, in the language of his specification, of a "sectional take-up, composed of two rolls, continuously rotating at a suitable distance apart, and a series of sectional rollers mounted and operated so as to be pressed, wedgewise, between the two first-named rolls, when the take-up is to act; also, in a series of needles, or points, arranged upon a stationary bar, in such relation to the take-up rollers that the fabric is continually carried across said needles, to be received by their points, and to be arrested when a reverse motion of any part of the fabric is commenced; further, in the combination of a series of needles with a take-up composed of rollers or wheels D, arranged to take up, at intervals, on parts of the work, and to liberate other parts, so that, as the fabric, or any part thereof, is carried in by the take-up, it is withdrawn from the needles, but the needles prevent the fabric, or any part thereof, from moving back." The mechanism is clearly described in the specification, as follows: "B and C are rollers, continuously but slowly rotated by gearing, as indicated. The woven fabric, represented by m, is led under each of these, and between them and short rollers or wheels, which are peculiarly mounted below. The cloth is taken up or drawn forward by being pinched between the wheels D and the rollers B, C, and the former are pressed up, so as to take hold of the cloth firmly, or are let down so as to liberate it, according as the work requires. When all the wheels D are pressed up, the woven fabric is taken up uniformly over its whole breadth. When the rollers D, on one side of the cloth, are pressed up, and the rollers D, on the other side, are allowed to remain depressed, the cloth will be taken up only on the side where the cloth is pinched. * * * K is a cross-bar, immediately behind the roller C, and provided with a series of needles k, in its lower edge, which catch in the goods, and prevent its being drawn back under any circumstances when the take-up mechanism releases it." The claims of the patent are as follows: "(1) The two rollers, B and C, continuously rotating at a suitable distance apart, and the series of sectional rollers or wheels D, mounted and operated so as to be pressed wedgewise between them when the take-up is to act, all substantially as and for the purpose herein set forth; (2) the needles or points k, k, fixed on a stationary bar K, and arranged, as specified, so that the fabric, being drawn by the take-up proper, is continuously carried across the needles, to be received by their points, and to be arrested when a reverse movement of any part of said fabric is commenced, substantially as herein set forth; (3) a series of needles, k, k, in combination with a take-up composed of rollers or wheels, D, arranged to take up at intervals on parts of the work, and to liberate other parts, substantially as and for the purpose herein specified." The fourth claim has no relation to the present suit.

The defendants' mechanism is also a take-up mechanism which is adapted to irregular fabrics, but is not "sectional" in its character. A sectional take-up is one which takes up the cloth "only on some parts of the fabric, while the rest remains unmoved; that is, the rolls which are used to take up the cloth are divided in sections, and can be used independently of each other." The defendants' take-up consists of an endless sheet or sheets of rubber pressing the fabric against a roller. The pressure is regulated by set screws. All parts of the roller at all times bear with equal pressure against the whole width of the fabric. The effect of the take-up is sectional, but that effect is due not to the sectional action of the take-up, but to the action of the lay. The needle-bar of the defendants, in its construction and mode of operation, and in the effect which it produces, is substantially like the complainant's needle-bar. It has the same position in the loom with relation to the take-up, and is designed to accomplish, and does accomplish, the same result.

From this description of the two machines, it is obvious that the defendants' mechanism does not infringe the first or third claims of this patent. The defendants' take-up is materially unlike the corresponding part of the plaintiff's machine, and their needle-bar is not in combination with the sectional rollers or wheels which are described in the plaintiff's patent.

The material question in this case is, whether the defendants' needle-bar is an infringement of the second claim, and the answer to this question depends upon the construction which shall be given to that claim. If the "take-up proper" is the patented take-up, then the second claim is not infringed. On the other hand, if the claim

is to be construed as a claim for a combination of the needle-bar with any mechanism for taking up woven fabrics, whether regular or irregular, then, if the claim is not void for uncertainty and vagueness, it is void for want of novelty; for, as will be remarked more particularly hereafter, needle-bars in combination with take-ups upon looms for weaving regular fabrics have long been known. It will be observed, that, while the patentee describes his take-up as sectional in its character, and claims that the particular device which he has invented is a patentable improvement, yet, it is manifest that he did not intend to limit his second claim to a combination of his needle-bar with his improved take-up, or with a sectional take-up. After describing the needle-bar, he states that "the working part of the loom, as well as the take-up, may be of any approved character," and, also, "for the purpose of operating the take-up, if a sectional take-up is used, I prefer the mechanism represented." These portions of the specification forbid a construction which should confide the patentee to a combination of the needle-bar with his own take-up. Such a construction would make the second and third claims identical, and would prevent the patentee from reaping the benefit of a part of the invention which he actually made, for his invention originally consisted of a needle-bar in combination with the take-up which was in use at the time of his experiments.

The claim should also be considered in connection with the subject-matter of the invention. The improvement did not consist in a take-up upon every kind of looms, but in mechanism which was especially adapted to the weaving of irregular fabrics. To that kind of weaving and to such improvements therein that irregular fabrics might be woven mechanically, it is evident that the attention of the inventor was exclusively directed. I am, therefore, of opinion, that the take-up which is mentioned in the second claim does not mean every kind of take-up, or the take-up in every kind of looms, but refers only to take-ups which are designed or adapted to the weaving of irregular fabrics.

The remaining question is, whether or not the second claim of the patent, as thus considered, covers what was well known at the time of the invention by the patentee. A needle-bar is an old device, and has long been used upon hand corset looms. When so used, the needles hold the woven cloth, which is lifted by the weaver as the cloth is woven, is straightened by hand, and replaced upon the needles. This simple device is merely to hold the cloth firmly in its place while the new cloth is being woven, and does not anticipate a needle-bar working automatically, in connection with an automatic take-up. The device which is described in the patent of August 2d, 1853, to Joseph A. Scofield, and which is called "a spur jaw temple." is, in fact, a stationary needle-bar for holding the ends of regularly woven cloth, so as to present an even width to the lay. The pins or needles were so inclined "as to allow the cloth to be drawn over the tops of said pins as the lay beats up, and, from their inclination, preventing the cloth from receding during the backward movement of the lay." The unpatented devices which are described by the witnesses James Leggett, William H. Lord and A. J. Crossley were stationary needle-bars made of card clothing, or of brass pins, and were designed to hold the edge of the cloth even throughout its whole width, and to prevent the cloth from receding towards the lay, and from contracting in width. These devices were used in regular weaving only. No irregular weaving was ever attempted to be done by their aid, and it is not shown that, if the attempt had been made, it would probably have been successful.

A needle-bar in combination with a take-up, upon a loom for the weaving of irregular fabrics, performs the same general office which a needle-bar performs in a loom for regular weaving, that is, the fabric is received and arrested by the needle-bar when a reverse movement of the fabric has commenced; but, in the weaving of irregular fabrics, a difficulty is to be overcome in addition to the one which is experienced in regular weaving, and which additional difficulty requires that the needle-bar should be placed in a certain relation or position with reference to the take-up. If the take-up mechanism is not near to the place where the weaving is performed, the cloth being more full in some parts of the fabric than in others, and the take-up not having a firm hold upon the cloth, "the cloth wrinkles and doubles itself towards the centre," and is taken up irregularly. This difficulty is not experienced to the same extent in the weaving of regular fabrics, which are of the same width throughout, and upon which there is an even tension of the take-up throughout the entire width of the cloth. In order to obviate this fault, the take-up must be placed as close as possible to the needle-bar, which must also be placed as near as may be to the fell of the cloth. The complainant's needle-bar is placed in this relation to the cloth and to the take-up, and, by means of such position, it is enabled to accomplish a result which had previously been unattained in corset weaving, viz., the arresting of the fabric when it is released from the tension of the take-up, and so holding the cloth that it is prevented from doubling up in the centre, and, by this result, the mechanical weaving of irregular fabrics is now successfully practiced. The combination which produces this new and useful result is not simply a combination of the old needle-bar and the take-up, but the position of the needle-bar and its relation to the take-up and

to the edge of the cloth has been so changed, that a new combination of devices has been, in fact, created, and the new combination has accomplished a new and useful result, which was "not attained by the action of the old devices," as they were arranged with relation to each other prior to the date of the plaintiff's invention. Hailes v. Van Wormer [Case No. 5,904]; Marsh v. Dodge & Stevenson Manuf'g Co. [Id. 9,115].

It is said that this change of position of the needle-bar required no inventive skill, but could have been made by any person conversant with loom mechanism. It is noticeable, that, while the complainant's patent and the patent to James Lyall for the devices which the defendants are using, both attribute importance to the position of the take-up mechanism with reference to the place where the weaving is done, the latter patent stating that "it is important that the point of tension from the take-up device should be as near to the reeds, at the extreme movement, as possible," yet, prior to the plaintiff's invention, corset weaving was not successfully practiced upon the looms which were then in use, and favorable results were only obtained after the complainant's needle-bar was applied to the existing looms. [See, also, Knox v. Murtha Case No. 7,911].[2] In view of the previous state of the art, it can hardly be doubted that the retaining device has materially assisted in overcoming the obstacles which interfered with the success of irregular weaving, and that the accomplishment of this result is due to the labor and skill of the complainant.

It is strongly contended by the defendants that the complainant's needle-bar is antedated by the needle-bar which is described in the French patent, dated October 2d, 1846, to Messrs. Bender, Baudier and Madame Gobert. The devices mentioned in the patent, and exhibited in the drawings, are somewhat complicated, but the needle-bar, which, in one part of the specification, is styled a rotary bar, seems to have been either a rotary bar, or a fixed bar attached to a movable traction box or traction slide, and not, in any proper sense of the word, a stationary bar. It did not, therefore, anticipate the bar of the complainant's patent.

As the patent of William P. Brown and his knowledge and use of the plaintiff's invention were not set up or referred to in the answer, the testimony in regard to the Brown take-up was not considered.

Let there be a decree for an injunction against the use of the needle-bar, and for an account, with costs.

[NOTE. For proceedings to punish an officer of defendant for violation of the injunction granted in accordance with the decree herein, see next following case, No. 2,468.]

[2] [From Merw. Pat. Inv. 217.]

Case No. 2,468.

CARSTAEDT v. UNITED STATES CORSET CO.

[13 Blatchf. 371;[1] 2 Ban. & A. 331; 10 O. G. 3.]

Circuit Court, S. D. New York. June 6, 1876.

PATENTS — "TAKE-UP MECHANISM FOR LOOMS"—INFRINGEMENT—VIOLATION OF INJUNCTION.

1. The second claim of reissued letters patent granted to Hugo Carsteadt, November 19th, 1872, for an "improvement in take-up mechanism for looms for weaving irregular fabrics," namely: "The needles or points k, k, fixed in a stationary bar, and arranged as specified, so that the fabric, being drawn by the take-up proper, is continually carried across the needles, to be received by their points, and to be arrested when a reverse movement of any part of said fabric is commenced, substantially as herein set forth," is infringed by a mechanism wherein, instead of needles fixed in a stationary bar, there are small independent needle rollers, mounted on a fixed shaft, each roller rotating in the direction of the cloth when the cloth moves forward, but being prevented from moving backward when the tension of the take-up is relaxed, and then becoming stationary, and arresting the fabric and preventing it from being drawn back. Although the new arrangement may be better, and may perform an additional service, it yet performs the same office as the patented device, by the same mechanical means.

2. Where a party was convicted of a contempt in violating an injunction, but it appeared that he acted under competent advice, and had no intention of disobeying the order of the court, no fine was imposed, but he was ordered to pay the costs of the application and of the affidavits.

[In equity. Bill by Hugo Carstaedt to restrain infringement of letters patent No. 88,365, reissued and numbered 5,150. An injunction was granted (see Case No. 2,467); and plaintiff now moves to attach James Lyall, one of the officers of the defendant company, as for a contempt in violating said injunction.]

John Van Santvoord, for plaintiff.

George Gifford, for defendant.

SHIPMAN, District Judge. This court passed a decree on September 10th, 1875 [Case No. 2,467], enjoining the United States Corset Company from further infringement of the second claim of re-issued letters patent granted to the plaintiff on November 19th, 1872, for an "improvement in take-up mechanism for looms for weaving irregular fabrics." The plaintiff has now brought a motion for an attachment against James Lyall, one of the officers of said company, for violating the injunction which was issued upon said decree.

The portion of the patented improvement which is referred to in the second claim consists, as stated in the specification, "in a series of needles or points arranged upon

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

a stationary bar, in such relation to the take-up rollers, that the fabric is continually carried across said needles, to be received by their points, and to be arrested when a reverse motion of any part of the fabric is commenced." The mechanism is thus described: "K is a cross-bar immediately behind the roller C, and provided with a series of needles, k, k, in its lower edge, which catch in the goods and prevent its being drawn backwards under any circumstances, when the take-up mechanism releases it." The second claim is for "the needles or points k, k, fixed in a stationary bar, K, and arranged as specified, so that the fabric, being drawn by the take-up proper, is continually carried across the needles, to be received by their points, and to be arrested when a reverse movement of any part of said fabric is commenced, substantially as herein set forth." The result of this improvement, which it is said in the opinion of the court upon the final hearing, was "the arresting of the fabric when it is released from the tension of the take-up, and so holding the cloth that it is prevented from doubling up in the centre," was previously unattained in corset weaving.

The defendants have modified their needle-bar, since the injunction was issued, so that it now consists of a number of small independent needle rollers, mounted upon a fixed shaft, which runs across the width of the cloth, in the same position and relation to the take-up which the shaft had before. Each of these rollers rotates forward towards the take-up, or in the direction of the cloth, when the cloth is being moved forward and taken up by the take-up mechanism, but the rollers are prevented from moving backward, when the reed recedes and the tension of the take-up is relaxed, by a ratchet and pawl applied to each roller. Each roller then becomes stationary, arrests the fabric when a reverse movement has commenced, and prevents the cloth from being drawn back when the take-up mechanism has released it. When the reed moves forward and delivers its blow, the cloth is easily pulled over the rotating rollers by the take-up; when the reed goes backward, the rollers are fastened by the ratchet and pawl, become stationary, catch the cloth upon the needle points, and hold it so that it will not double up. It is contended, that such a needle-bar is not a stationary bar and, therefore, is not embraced within the second claim of the patent. It is a rotating bar when a stationary bar is not needed, but, when one is needed, it is the same stationary bar which was previously upon both plaintiff's and defendants' machines, and accomplishes the same practical result, that of arresting and holding the cloth. The needle points of the former needle-bar were inclined towards the take-up, so that, when the cloth was moving forward, it was carried across the needles, and, when it was released from the take-up, the cloth was arrested upon the needle points. The new roller of the defendants, when it is rotating in one direction, permits the cloth to go forward without detention, but, when a reverse action commences, the roller immediately becomes stationary, and the needle points catch and hold the cloth precisely as the old stationary bar accomplished the result. Neither bar assists the take-up mechanism in pulling forward or taking up the cloth, in any material degree, and the roller of the defendants becomes a stationary bar whenever stability is required.

The rotating character of the new needle-bar is said to be an improvement upon the plaintiff's fixed bar. I think that this is true, and that the revolution of the roller with the forward movement of the cloth avoids any danger of the cloth being caught upon the needle points, as it is drawn forward. But, the fact that the new bar is a better one than the plaintiff's, or even performs a service which the plaintiff's bar does not perform, does not prevent the new device from being an infringement; it performs the same office which the old device performed, by the same mechanical means. An infringing device is not protected by the fact that, although the device "was an equivalent of the patented device, in all its functions, and in its construction and mode of operation, yet, by other or additional features, it possessed other and further useful functions. Such a device would, perhaps, be an improvement upon the patented device, but must be, nevertheless, deemed an appropriation of the former." Sarven v. Hall [Case No. 12,369].

My conclusion is, that the new needle-bar is an ingenious attempt to escape from the second claim of the patent, and that the motion of the plaintiff must be granted. As the defendant acted under competent advice, and had no intention of disobeying the order of the court, no fine is imposed, but he is ordered to pay the costs of the application and of the affidavits.

Case No. 2,469.

In re CARSTENS.

[14 Blatchf. 117;[1] 15 N. B. R. 250.]

Circuit Court, S. D. New York. Jan. 27, 1877.

FEES OF REGISTER IN BANKRUPTCY.

Under general order No. 30, of the general orders in bankruptcy, adopted by the supreme court, April 12th, 1875, no fees can be allowed

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

to a register, except such as are provided for by general order No. 30, even for services rendered before such general order was adopted.

Isaiah T. Williams, the register, in pro. per.

Thomas H. Barowsky (H. G. Atwater, of counsel), opposed.

JOHNSON, Circuit Judge. This case is brought here by Register Williams, to review a decision of the district court in regard to his fees and compensation and other charges in this case, of which he was in charge as register. The services in question were rendered before the adoption by the supreme court of the United States of the general orders in bankruptcy, adopted April 12th, 1875. The district judge held that general order No. 30 left him no discretionary power to allow anything but the charges provided for in that order; and, as those in question were not thus provided for, he excluded them. In so deciding he followed his own determination in Re Johnston [Case No. 7,421], where the various provisions of the statutes bearing upon the question are collected and considered. That case related to the fees of the marshal, but there is no substantial distinction in this respect between the marshal and the register. In re Gies [Id. 5,407] arose in the eastern district of Michigan, and related to the fees of attorneys. Judge Brown held that he must be governed by the new general orders, in the allowance or disallowance of fees for services rendered before those orders were adopted. In my opinion, general order No. 30 requires that construction. In regard to the register the provision is: "The following and no other fees shall be allowed to the register." Then follows the detail of allowable charges, which does not include those in question in this case. The last clause of this general order provides for the taxation of the bills of the clerk, marshal and register. Each of them is to file a statement of fees, including prospective fees for final distribution, which must exhibit by items each service and the fee charged for it. The clerk must tax each fee bill, allowing none but such as are provided for by those rules, which taxation is conclusive, unless altered by the court. There is no foundation for the idea that the court can make any other taxation than such as the clerk ought to have made. There was, therefore, no legal right to award to the register the amounts which have been disallowed by the district court.

The order of the district court must be affirmed, but without costs against the register, in this court.

CARTACHO (UNITED STATES v.). See Case No. 14,738.

CARTER, Ex parte. See Cases Nos. 8,981 and 17,488–17,491.

Case No. 2,470.

In re CARTER.

[3 Biss. 195; 6 N. B. R. 299; 4 Chi. Leg. News, 187; 3 Leg. Op. 221; 6 Am. Law Rev. 755.] [1]

District Court, D. Indiana. March, 1872.

BANKRUPTCY—SUSPENDING PAYMENT OF COMMERCIAL PAPER.

When a man enters the commercial community he assumes all the responsibilities attaching to his calling, and is bound to take care of his commercial paper, whether made before or after he commenced business, and whether given in connection with his business or not. Therefore, if his commercial paper, given before, but falling due after he engaged in business, is allowed to remain unpaid for fourteen days after maturity, he can be adjudged a bankrupt.

In bankruptcy. This was a petition in bankruptcy filed by the Hydraulic Woolen Mill Company, of Columbus, Indiana, against William Carter, of the same place, alleging three distinct acts of bankruptcy: First—That Carter sold and delivered to David Aiken personal property to the value of six hundred dollars, receiving a credit for that amount upon a debt due from him to Aiken, he, Carter, being at the time insolvent, and intending by the payment to give Aiken a preference. Second—That Carter, being insolvent, and intending to give Francis J. Crump an unlawful preference, transferred to him, in payment of a debt, the promissory note of Harvey Daily for one thousand dollars. Third—That Carter, being a merchant, trader and manufacturer, suspended payment of his commercial paper, and had not resumed payment within a period of fourteen days; the said paper being Carter's promissory note for seven hundred dollars, made at Columbus, Indiana, on the 17th day of June, 1870, payable in one hundred and eighty days, to the order of the Hydraulic Woolen Mill Co., at the bank of McEwen & Sons, in the said city of Columbus.

McDonald, Butler & McDonald, for creditor.

Porter, Harrison & Hines, for bankrupt.

GRESHAM, District Judge. I think the testimony shows that at the time of the sale and delivery of the personal property to Aiken, and of the transfer of the Daily note to Crump, Carter was insolvent; but it is not so clear that in these acts he intended preferences in favor of Aiken and Crump. The question is embarrassing, and I shall not undertake to dispose of it. It ceases to be important, inasmuch as Carter must be adjudged a bankrupt on the third ground specified in the petition.

Promissory notes payable to order or bearer, in a bank in this state, are by the statutes of Indiana placed on the footing of inland bills of exchange. The note described in the

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 6 Am. Law Rev. 755, contains only a partial report.]

third ground of bankruptcy in the petition and put in evidence, is therefore Carter's commercial paper. At the time the note was executed he was not in business; he was neither merchant, trader, nor manufacturer, but at the time the note fell due, and the obligation to redeem his promise to pay matured, he was the owner of a large flouring mill, and engaged in buying wheat, and in manufacturing and selling flour. The precise question thus presented has never been passed upon by the courts, and is one of great importance to the commercial community.

It is argued with much force and earnestness by counsel for respondent, that the note is not commercial paper within the meaning of clause nine, section thirty-nine of the bankrupt act, because, when executed, Carter did not belong to any of the classes designated in that clause, and did not therefore pledge himself to commercial promptness in its payment. I am referred to the cases In re Nickodemus [Case No. 10,254]; In re McDermott, Patent Bolt Manuf'g Co. [Id. 8,750]; Davis v. Armstrong [Id. 3,624]; Innes v. Carpenter [Id. 7,049]; and In re Lowenstein [Id. 8,574],—in support of the position that the statute, in naming commercial paper, means paper given by a merchant, trader, manufacturer, etc., in the direct course of his business. The authorities upon this point are not uniform, and I am left therefore free to follow those which seem best supported by reason.

The language of the statute is: "Who being a banker, broker, merchant, trader, etc., * * * has stopped or suspended, and has not resumed payment of his commercial paper within a period of fourteen days."

The phrase, "commercial paper," as here employed, was intended, it seems to me, to embrace all paper which by usage or statute, is brought within the custom of merchants. I think with Lowell, J., in Re Chandler [Case No. 2,591], that in saying that any person belonging to one of certain designated classes should be deemed a bankrupt if he failed to pay his commercial paper, congress simply referred to a well known and conclusive test of insolvency.

The language of the act above quoted is a legislative declaration of insolvency applied to the particular classes named on account of their relation to the commercial world.

In Davis v. Armstrong, above cited, Hall, J., held that the statute extended to one who at the time he made the note was a merchant, but had gone out of business before it became payable. Such a construction, however, would not warrant the conclusion that one who is within the letter is not also within the meaning of the act. To embrace the first class, the statute must be so extended as to include persons not within its language; while to exclude the second class, is to adopt a construction which rejects those who are expressly within its terms.

If the construction for which the respondent's counsel contend is the true one, it becomes necessary to inquire into the origin of the debt, in proof of which a note or bill is offered; and a merchant, trader, or manufacturer, may suspend payment of all his commercial paper, except such as he has executed in connection with his particular trade or business, and yet maintain his standing for solvency in the commercial world. The dishonor of the paper of a merchant, trader, or manufacturer, given when not engaged in business, or, if he were in business, given in some transaction not immediately connected with his business, is not less damaging to his commercial reputation than the dishonor of commercial paper given in the usual course of his business. One affords no better test of insolvency than the other.

When a man enters the commercial community as a merchant, trader, banker, or otherwise, he assumes all the responsibilities which attach to his calling. One of these is the obligation to take care of all of his commercial paper, whether made before or after he commenced business, and whether given by him as the result of his particular business, or as the result of some transaction not directly within the scope of that business.

The respondent is adjudged bankrupt, and the proper decree will be entered.

Case No. 2,471.

In re CARTER.

[2 Hughes, 447.] [1]

District Court, E. D. Virginia. Sept., 1877.

TRUST DEED—INTEREST—FORECLOSURE—RATE OF INTEREST ON PURCHASE MONEY — EFFECT OF WAR UPON INTEREST.

1. If the trustees, in a deed given to secure the payment of a debt bearing a larger rate of interest, in selling to foreclose, allow time on the purchase-money at a reasonable rate of interest, not by direction of the cestui que trust, the debt secured by the deed continues to bear the larger interest.

2. Interest during the period of the late war allowed to be abated.

[In bankruptcy. In the matter of John R. Carter.] On exceptions to the report of Register Chilton taken by H. W. Sheffey, counsel for a lien creditor.

HUGHES, District Judge. The bond of Carter to Gurnee was for five thousand dollars and interest at the rate of 12 per cent. per annum, payable semi-annually on the 1st days of May and November in each year, the interest commencing to run on the 4th day of July, 1870. On default of the payment of any semi-annual instalment of interest the whole debt was to fall due, otherwise the debt was to mature for payment on the 1st May, 1875. Deed of trust was given upon

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

certain land to secure the debt. Default was made on the 1st November, 1873, and the trustees sold the land upon which the debt was secured on the 14th December, 1874. The sale was required by the trust deed to be made for cash, but for some reason, which is not disclosed by the papers before me, the trustees made the sale on the terms of $2,173 in cash, and three notes, for $1,954 each, respectively, on one, two, and three years' credit, with interest, from date of sale till paid, at the rate of six per cent. interest.

As no evidence is before me, or is reported by the register as having been before him, showing expressly for what object the trustees allowed time on part of the purchase-money, no evidence to show that this allowance of time was the act of the beneficiary in the deed, I think the court ought to presume that credit was given by the trustees in the interest of the sale, in order to enlarge the number of bidders and secure a higher price for the land. I see no evidence of such acts as would amount to a novation of the debt on the part of Gurnee, the creditor. There could have been no novation unless by positive and express act of the beneficiary. If that be so, then the creditor has a right to the payment of his debt, with 12 per cent. interest until paid. The act of the trustees in giving time on part of the purchase-money, at 6 per cent. interest, cannot per se affect the rights of Gurnee. The bond was given at a time when 12 per cent. interest was legal. It was a valid contract, and I see nothing to justify the court in cutting the rate of interest down from 12 to 6 per cent. The exceptions taken by the counsel for Gurnee to the register's report on that subject are therefore sustained.

The report of the register in respect to the claim of Josephus Carr, trustee for Hortensia Coe, disallowing war interest, is approved, and the exceptions of Carr thereto overruled.

Case No. 2,472.

CARTER et al. v. BAKER et al.

[1 Sawy. 512;[1] 4 Fish. Pat. Cas. 404.]

Circuit Court, D. California. March 26, 1871.

INFRINGEMENT OF PATENT—CHANGE IN FORM NOT NECESSARILY A CHANGE IN SUBSTANCE—COMBINATION—MECHANICAL SUBSTITUTE—DEFINITION—EVIDENCE—EXPERTS—MODELS AND MACHINES—IMPROVED MACHINE—GREATER USEFULNESS—MAKING MACHINE—MEASURE OF DAMAGES—DAMAGES, HOW ASCERTAINED—PROFITS—CONFUSION OF RIGHTS—BURDEN OF PROOF—STOCK CARRIED OVER—TWO PATENTS—DAMAGES APPORTIONED—OTHER MACHINES—PROFITS ON ENTIRE MACHINE.

1. Whenever a party avails himself of the invention of a prior patentee, without such variation as will constitute a new discovery, there is an infringement of such prior patent.

2. An infringement involves substantial identity. If the invention of the patentee is a machine, or an improvement on a machine, the patent will be infringed by a machine which incorporates in its structure and operation the substance of the invention; that is, by an arrangement of its mechanism, which performs the same service or produces the same effect, in the same, or substantially the same, way.

[Cited in Fisher v. Craig, Case No. 4,817; Pacific Cable Ry. Co. v. Butte City St. Ry. Co., 55 Fed. 762.]

3. The form or mechanical construction of a machine may be different from a prior machine, and the two still be, substantially, identical. The inquiry for the jury must, therefore, be, whether the defendant's device is, in substance and effect, a new and different thing, or a mere colorable evasion of the plaintiff's contrivance.

4. Where the patent is for a combination of several parts before known and used in machinery, it is no infringement to use any of the parts, where the combination is not used, or any combination of some of the parts with another, or others, substantially different from the omitted parts.

5. But if a well known mechanical substitute for the omitted part has been used in combination with the other parts, there is an infringement; for such mechanical substitute for a thing, must be regarded as the thing itself.

[Cited in King v. Louisville Cement Co., Case No. 7,798; Coolidge v. McCone, Id. 3,186; Fisher v. Craig, Id. 4,817.]

6. Where, in mechanics, one device does a particular thing, or accomplishes a particular result, every other known device which skillful workmen know will do the same thing, or produce the same result, is a known mechanical substitute.

[Cited in Norton v. Jensen, 1 C. C. A. 452, 49 Fed. 868; Wilt v. Grier, 5 Fed. 453.]

7. The testimony of experts is to be considered like any other testimony; is to be tried by the same tests, and receive just so much weight and credit as the jury may deem it entitled to, when viewed in connection with all the circumstances.

8. Rightly understood furnish very persuasive evidence on questions of improvement and infringement.

9. Although a machine may embrace a patentable improvement on a prior patented machine, yet if it embodies such prior machine, or the patented portion thereof, there is an infringement, and the patentee of the improvement cannot lawfully appropriate the prior invention, even though his own improvement is useless without such appropriation.

[Cited in American Nicholson Pavement Co. v. Elizabeth, Case No. 309.]

10. Greater usefulness is a circumstance to be considered by the jury on questions of infringement, but it is not conclusive. The point must be determined upon the whole evidence.

11. The mere making or selling, of a patented machine, is an infringement which entitles the plaintiff to maintain an action.

[Cited in Butz Thermo Electric Regulator Co. v. Jacobs Electric Co., 36 Fed. 197.]

12. The actual damages sustained, directly resulting from the infringement, is the amount to be recovered.

13. The damages must be found from the evidence; not from mere conjecture without regard to evidence.

14. The plaintiff is entitled to recover the profits realized by the wrong-doer from the infringement, as a part of the damages.

15. If the party infringing has improved the machine, and a part of the profits are due to his improvement, the portion of the profits due to

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

such improvement do not belong to the owner of the prior patent; but the burden of proof rests on the infringer to show what portion of the profits are due to his improvement.

16. The actual damages may be more than the actual profits realized by the infringer, as the infringer may have sold at a much lower price than the patentee would have been able, and entitled, to sell. If so, this circumstance should be considered, and the whole profits which the plaintiff would have realized, should be given.

17. So, also, the patentee may have been unable to sell machines manufactured, in consequence of the sales of the infringing party, and have, consequently, been compelled to carry them over. If so, the interest on the capital invested in the machines so carried over, is a proper element of damages to be considered.

18. Where the plaintiff, who patents a machine, and afterwards an improvement on the same machine—his machine put upon the market embodying both inventions—sues for an infringement of the first patent only, he is not entitled to recover, as damages, that part of the enhanced price of the machine, which is due to his second patent; and the burden of proof rests upon him to show how much of the price, or profits, are due to the patent infringed.

19. Plaintiff is not entitled to recover, as a part of his damages, any loss sustained in consequence of an infringement of his patent by reason of his inability to sell other machines, than those embodying the infringed patent. The profits recovered must be the direct and legitimate fruits of the patent infringed.

[Cited in Buerk v. Imhaeuser, Case No. 2,107.]

20. The plaintiff selected certain elements and combined them into a plow which he patented. The plow could only be used as an entirety—as one machine. He had the exclusive right to make, use and vend the machine as a whole: *Held*, that he is entitled to recover of an infringer the profits on the whole machine.

[This was an action by George R. Carter and others against L. L. Carter and others to recover damages for the infringement of letters patent No. 83,283, granted to H. R. Huie, October 20, 1868.]

M. A. Wheaton, for plaintiffs.

Estee & McLaurin and A. Rix, for defendants.

SAWYER, Circuit Judge, charged the jury as follows:

Gentlemen of the Jury: As you have already been informed, this is an action for an infringement of a patent in gang-plows. The plaintiffs claim that their assignor, Huie, invented a new and useful improvement in the implement named, which was not known or used by others, at the time of his invention, and which was not, at the time of his application for a patent, in public use, or on sale, with his consent or allowance.

The improvement claimed to have been made consists in the arrangement and combination of the several simple and separate parts, described in the specifications and drawings annexed to the patent, to wit: the axletree, arm E, slotted oval, spring, slide and lever, in connection with the other parts of a gang-plow, and in the application of them in the arrangement and combination indicated, to the purpose of producing the two effects, or results named; that is to say, firstly, to elevate or depress one wheel of the plow, so that the two wheels shall run upon different planes, as one upon the unplowed land, and the other on a lower plane in the bottom of the furrow, in such a manner, that, by means of the contrivance, the body of the machine, including the driver's seat, and the plows, shall still maintain a level, or horizontal, position; and, secondly, to enable the driver, from his seat, at will, and without delay or change of position, to depress or elevate the plow to the required depth in the ground, or elevate it entirely above the ground, and fix it in the required position.

The claim, and the patent, are for an arrangement, or combination of elements and devices, before known and separately used, into one improvement in the plow, by which, it is claimed, that the two results sought are more readily, expeditiously, conveniently, and better accomplished.

Your first inquiry, gentlemen of the jury, will be, whether the plaintiff's assignor first made the combination as claimed, and whether, when made, it constituted a new and useful improvement in gang-plows. Upon this point, the patent itself is prima facie evidence in favor of the plaintiffs. But the question is to be determined upon all the evidence in the case; and, from an inspection and comparison of the model of the plow, and its mode of operation, with those of plows before in use, and the testimony of witnesses introduced on both sides, I apprehend you will have little difficulty in coming to a correct conclusion on this head.

If you find for the plaintiffs on this point, your next inquiry will be, whether there has been an infringement on the part of the defendants. In the language of another, "An infringement takes place whenever a party avails himself of the invention of the patentee, without such variation as will constitute a new discovery. * * * An infringement involves substantial identity, whether that identity is described by the terms 'the same principle,' 'same modus operandi,' or any other. It is a copy of the thing described in the specifications of the patentee, either without variation, or with only such variations as are consistent with its being in substance the same thing." No certain, definite rule can be stated by which to determine unerringly, in every case, what will amount to substantial identity. The jury, guided by general principles, must determine each case upon its own circumstances. If, however, "the invention of the patentee be a machine, or an improvement on a machine, it will be infringed by a machine which incorporates in its structure and operation the substance of the invention; that is, by an arrangement of its mechanism, which performs the same service, or produces the same effect, in the same, or substantially the same, way."

The question is, whether the given effect is produced, substantially, by the same mode of operation, and the same combination of powers and devices in both machines; mere colorable, or evasive, differences cannot defeat the right of the original inventor. The inquiry, therefore, should be, whether the defendant's device is in substance and effect a colorable evasion of the plaintiff's contrivance, or whether it is really a new and substantially different thing. If the defendants have taken the same general plan, and applied it to the same purpose, and produced the same effect, in substantially the same mode, although they have varied the form of construction merely, it will still be substantially, in contemplation of the patent law, the same thing; otherwise, it will not. Whether or not one machine is an infringement of another, therefore, does not, necessarily, depend upon whether the mechanical constructions are different. But the question is, whether (whatever be the mechanical construction), the later machine contains the means or combination found in the previous machine; whether, taking the structure as you find it, you see the new idea completely embodied in it. In this case, the plaintiff's patent is, substantially, for a combination of parts before separately known, and used in machinery, and, since this is so, it is no infringement to use any of the parts, where the combination itself is not used, or any combination of some of its parts with another substantially different from a third element, or part, described in the specifications of plaintiff's patent. But, if the defendants have only varied their combination, by employing well known mechanical substitutes for some one or more material elements, or parts, of the plaintiff's combination, then there is an infringement, for a mere known mechanical substitute for a thing, for the purpose of determining the question in issue, must be regarded as the thing itself.

It must be apparent to you, gentlemen, that counsel regard the question of mechanical substitutes as having an important relation to this case, even if it does not present the point upon which the principal strain in the decision of the whole case is, ultimately, to come. I, therefore, invite your special attention to that aspect of the controversy, and to the definition of these terms, which I shall now give, and as stated in other portions of the charge and instructions submitted to you.

When in mechanics, one device does a particular thing, or accomplishes a particular result, every other device known and used in mechanics, which skillful and experienced workmen know will produce the same result, or do the same particular thing, is a known mechanical substitute for the first device mentioned for doing that thing, or accomplishing that result, although the first device may never before have been detached from its work, and the second one put in its place. It is sufficient to constitute known mechanical substitutes, that, when a skillful mechanic sees one device doing a particular thing, he knows the other devices, whose uses he is acquainted with, will do the same thing.

To apply these general principles to the machines in question, let us examine them for a moment. In this, the Huie machine (illustrating by the machine), we have the crank axletree, which is one of the parts in the combination and arrangement claimed in the patent, and consists of this whole implement, extending from the end of the spindle outside the wheel, to the outer end of the other spindle outside the wheel. This axletree is again composed of several parts, a shaft in the middle, here, these two arms which form the cranks, and these spindles connected with the arms, upon which the wheels revolve. That is one of the parts of the machine, composed of the several elements named. One of the elements, this arm of the axletree, is composed of different parts, also, one of which is this slotted oval, and the other, this movable arm, called E, in the specifications, lying by the side of the slotted oval.

Another element in this combination constituting the improvement, is the lever, with the spring and slide, or catch, and the segment, which is notched, and into which the slide or catch drops for the purpose of holding the plows in their position at the desired level.

The two results effected by the combination and arrangement of these elements and parts, are, as you have already seen, firstly, by the movement of this lever backward or forward, to elevate or depress the plows to the desired level, and there fix them by the spring and slide: and secondly, by a combination of the slotted oval and movable arm, called E, to form a single adjustable arm, which can be fixed when the plow is in use, by means of which, the party using the plow, is enabled to raise or depress one wheel above or below the other, so that they shall run upon different planes, as one upon the unplowed land and the other in the furrow below, or on a side hill, without affecting the level of the body of the machine, or the plows. Those are the two results to be accomplished. It will be perceived that this arm called E is not, of itself, fixed to the shaft of the axletree, but revolves upon the shaft like a swivel. For the purpose of elevating the plow, a fixed arm, composed of a single straight piece of iron welded, or otherwise permanently attached to the shaft, like the other arm of the axletree, is all that is necessary, if no other result was contemplated by the combination.

But another result is contemplated to be performed, in part, by the same arm of the axletree, as that used in raising the plow, and for the purpose of that other result, on-

ly, in the combination adopted, the arm is not permanently fixed to the shaft. A fixed arm, however, is necessary to effect the result of raising the plows, and the fixed arm is obtained by tightening a nut on the end of a bolt projecting from the movable arm called E, and passing through the slot in the slotted oval. Thus, the arm E and slotted oval, held together by the tightening of the nut, together constitute a single fixed arm—the two together constituting one of the two fixed arms of the crank axletree.

In the Sursa plow, instead of employing the combined arm of two pieces united in the machine, as just shown in the Huie plow, a segment arm—a single piece of iron, the outer end being in the form of a segment—is used for performing the same functions, but the segment arm acts as a single fixed arm for the purpose of effecting the result of raising the plow, and for that purpose might, also, as well be a simple, straight piece of iron.

You will perceive that the arms of these two plows are in the same relative positions, and in the Sursa plow the segment arm is substituted for the combined arm, composed of the arm called E and the slotted oval in the Huie plow. In both machines, the operation of raising the plows, then, is essentially performed by an axletree with a crank at each end in the same position relatively to the rest of the plow, the arms of which are fixed, and for that purpose, might as well be a simple straight piece of iron, like the other arm in the Huie axle moved by a lever attached to the axletree. But the arm of the Huie plow is, in fact, composed of two pieces combined, while the corresponding arm in the Sursa plow consists of a single piece of peculiar shape, the difference in the mechanical construction, and fixing of these arms, being made for the purpose of another result, and having no reference to the operation of raising the plows.

We will now consider the arrangement with reference to the other result to be attained, viz.: the elevation, or depression of one wheel above, or below, the other, so that the two wheels may run upon different planes, as one in the furrow, and the other on the unplowed land, or in plowing upon a side-hill, without affecting the level position of the plows and body of the machine. It is to accomplish this result, that the arm of the Huie plow is composed of two pieces, the slotted oval, and the arm, called E. This is accomplished by loosening the nut on the end of the bolt projecting from this arm, E, through the slot, and sliding the bolt along through this slot the required distance, and fixing it again by tightening the nut at another point on the slotted oval. The effect of this change, you will perceive, is, to set this arm at a different angle from the shaft from that which it occupied before relatively to the fixed arm at the other end of the axletree, and thereby elevating one wheel with reference to the other, and changing the planes upon which they respectively run.

This same result is effected in the Sursa plow by the segment arm, by taking out the spindle from one of these holes in the segment of the arm, and inserting it in another hole, at a different part of the segment, corresponding to the different point at which it is fixed in the slot of the slotted oval in the Huie machine. You will observe that the segment arm, and the slotted oval, are both segments in the same relative portions of the corresponding arms of the respective plows, and that the change is made by moving the spindle along the segment of similar circles similarly situated. If the intervening space between the two holes in the segment arm should be cut out on a circle, there would be a slot similar to that in the slotted oval. In one, the end of the bolt passes through the intervening space, in the slot, and is fixed at the required point, and in the other, the spindle is taken out of the hole and passed over the corresponding space to the other hole, and inserted again. The result in both is to change the spindle from one point in the arm to another. The means of making these rigid are different, one being tightened by a screw, and the other fixed by means of a square hole with the spindle made square to fit it, so that it cannot turn or move. Now what is the mechanical operation by which the result of changing the planes of the wheels is accomplished in both machines?

Stated in the simplest form, I think you will find it to be this in both. It is simply changing the spindle, upon which one wheel revolves to a different point in the arm forming one of the cranks in the axletree. To effect this purpose, both machines have a crank axletree in the same general position and form—both have an arm in the same position with which the spindle is connected. The outer end, or part, of the arm in both, is spread out into the segment of a circle, in order to give room for changing the position of the spindle in the end of the arm from one point to another.

In one, there is a slot in the form of a segment, through which the bolt passes in making the change; in the other, there are holes at different points on a similar segment of a circle, and the spindle is changed from one to the other, and thus the spindle is changed in both from one point in the arm to the other. This is essentially the operation performed, and the result, when the change of position is made, seems precisely the same in both machines.

The only difference is, in the construction of the arm itself, and the consequent difference in making the change, and fixing the arm after it is made.

As we have seen, the arm in one is composed of two parts, in the other of one, as already described, and I think it will be

manifest to you, upon inspection of the machines, that the arm on the Sursa machine may be taken off and substituted in the Huie machine for the combined arm of that machine, and fixed by ordinary known means by an ordinary mechanic, so as to perform its functions in that machine.

But of this, you yourselves are to judge upon inspection and evidence. It is your province, not mine, to determine that fact. There is, undoubtedly, a manifest difference in the mechanical construction of these two arms, and the question for you to determine in this connection, is, whether the segment arm in the Sursa plow can be regarded as a known mechanical substitute for the slotted oval in analogous, or similar combinations, in machinery, as, for instance, for changing a spindle in a machine, from one point to another, and which a mechanic skilled in his art, from a knowledge of his art, and of these devices, as used in machinery, could from that knowledge, simply, upon looking at the machine, substitute the segment arm in the Sursa plow for the combined arm in the Huie plow; that is to say, are the segment arm used in the Sursa plow, and the slotted oval in the Huie plow, devices known to mechanics, as devices used in machinery, for performing similar offices, and used as substitutes one for the other—the devices, and the uses of which, mechanics skilled in their business, know, or ought to know; and could a mechanic, skilled in his trade, from a knowledge, merely, of the devices, and their uses, upon looking at the Huie machine, and seeing the slotted oval, and arm E, combined to form an arm adjustable for the purpose of changing the spindle from one point of the arm to another, substitute the segment arm for the same purpose.

Could a skilled mechanic, after the inspection of the Huie machine, and seeing the desired result and mode of accomplishment, so far as the arm is concerned—that is to say, by changing the spindle from one point in the arm to another—from his knowledge of the devices themselves, as used in other machines, and the cases in which one is a substitute for the other, from that knowledge, merely, pass from one to the other, and substitute the segment arm of the Sursa plow for the combined arm in the Huie plow? If so, then the former is but a known mechanical substitute for the latter, and is substantially the same thing, within the meaning of the law applicable to patent rights, and the substitution of it in the Sursa plow, for the other in the Huie plow, does not constitute a new invention, or discovery, or prevent its being an infringement of the Huie patent.

I will here remark that the segment arm, as a device in this combination for effecting the change in the planes of the wheels, is not claimed as new, or the invention of Sursa, in the Sursa patent. It is, therefore, for this purpose, although used, treated as though it was old. Yet for the other purpose of elevating the plow, unconnected with the purpose of changing the planes of the wheels, the device is not needed; for, we have seen, that a simple straight arm is sufficient for that result.

As to the other portions of the machine, by which the plows are brought to the desired elevation, and fixed in the position—this lever, spring and slide, and this segment of a circle. The lever in both machines, you perceive, is placed near the seat of the driver, on his right, so that he can operate it from his seat without change of position. Both are connected with the crank axletree. By moving the lever backward and forward, the drivers in both elevate the crank axletree upon which the plow is rested, and thus the plows, in both machines, are elevated in the same manner.

In the Huie plow, there are notches at different points along the periphery, or upper edge of the segment. Attached to the lever here, is a spring and slide, or catch. As the lever is moved back and forth by the driver to the required position, the spring presses the slide, or catch, into the notch, on the segment, thus holding the lever in the place, and maintaining the plow at the desired elevation.

Upon the Sursa plow, also, there is in the combination a segment notched on the side, instead of on the top, as in the Huie plow. The lever, also, has a spring attached, and a catch on the side of the lever, to fit into the notch, but the catch is fixed, and the spring, instead of pressing a movable slide vertically into the notch, presses laterally upon the side of the lever, as it moves back and forth, and, in that mode, forces the catch upon the lever into the notch on the side of the segment, thus, also, holding the plows at the required elevation. Each plow then has a spring, catch, and notches in the segment, to perform the same office of holding the lever in the proper position for maintaining the plows at the desired elevation. But there is a difference, also, in the mechanical construction of these devices for performing this function in the two machines, and this is the other principal point upon which the contest hinges. The question here for you to determine, also, is, whether these different forms of construction of these devices are, or not, well known substitutes in machines for the other corresponding forms or devices used in the Huie plow.

Is the form adopted in the Sursa plow, a well-known device in mechanics for securing a lever, or for analogous purposes, as, for instance, securing the lever that operates the brake upon a wagon, and holding it in its position, so that a mechanic, well skilled in his trade, would or ought to know the device, and its uses, and by looking at the Huie machine, from his mere knowledge of his art, of the device and the uses to which it is applied in mechanics, be able to pass from.

the one to the other, and substitute it for that in the Huie machine, without exercising the faculty of invention, or discovery of something new, or without experimenting upon it, to ascertain whether the device would work, or not, to produce the same result. If so, then, it is but using a known mechanical substitute for one of the parts in the combination, and it is, substantially, the same thing as that part, and will not protect the defendants from the charge of infringement.

But if, on the other hand, this is not a device known in mechanics, for accomplishing similar results in machinery, and would require the discovery of something new, the invention of something not before known, or before used in machinery for any similar, or analogous purpose, then its contrivance and application to the purpose indicated, is not the mere substitution of a known mechanical substitute, and is not an infringement.

Gentlemen of the jury, we have, then, two plows, of about the same dimensions, of the same general construction and appearance, both carried on two wheels. Each has a bent axletree located in the same general position, which axletree, when considered with reference to the result of raising the plow, with both wheels running on the same plane, is composed of a shaft, two fixed arms of equal length at right angles with the shaft, and parallel with each other, and a spindle, fixed in each arm, upon which the wheel revolves. The revolution of this shaft, by means of a lever, operates in both precisely the same way, to raise and depress the plows. With reference to the other result, of changing the planes of the wheels, this is effected, in both, by changing the spindles upon which the corresponding wheels in the two machines revolve, from one point to another, and fixing them there, in the corresponding crank-arms in the two axletrees.

When the spindles are thus changed and fixed, the two effects of changing the planes of the wheels, and raising or lowering the plows, are performed by both machines in precisely the same way. The arms of the axles, in both machines, used for effecting the changes in the planes of the wheels, as arms only, are in the same position, and perform all their functions with reference to both results, as simple arms, exactly alike.

The arms, as simple, single arms, are similar in shape, both of them spreading out, like a fan, into a segment of a circle at the outer end, so as to give room for a change of the position of the spindle from one point to the other, for the purpose before indicated.

But the mechanical construction of the arms is different, one being composed of two parts combined to form a single fixed arm, and the other of one; and the modes of changing the spindles from one point to another, and fixing them, are different. The levers and the plows are fixed in the desired positions by means of a notched segment, catch, and spring, in both plows, but of different mechanical construction.

These, when the machines are analyzed, I apprehend, will be found to constitute the only differences between these plows, so far as the questions for you to determine are concerned; and it is for you to determine, whether these differences are substantial, or are only formal, and evasive, arising from employing in the Sursa plow, in the place of those specific parts, or devices, of Huie's combination, other known mechanical substitutes therefor. If substantial, then there is no infringement; but, if merely formal and evasive, and not substantial, there is an infringement.

These are the questions, gentlemen of the jury, for you to determine from the evidence. The testimony of the experts which has been introduced, you are to consider like any other evidence. You are to try it by the same tests that you apply to the evidence of other witnesses, and give it just such credit and weight as you deem it entitled to, from all the circumstances, and no more. You have the models of the various machines before you. These, I think, are readily comprehended, and rightly comprehended, they afford very persuasive evidence.

If, from the whole evidence, you are satisfied that the differences between the Sursa and Huie plows are mere changes of forms, accomplished by substituting, in some of the parts of the combination, mere well-known mechanical substitutes, without any substantial alteration in their real structure, then the plaintiffs are entitled to a verdict on this point. If, on the contrary, they are substantially different combinations of mechanical parts to effect the same purpose, then you must find for the defendants as to these points. It rests with you, gentlemen, to determine these questions of fact, from the entire evidence before you. The law you will take from the court; the facts you will determine yourselves.

I will add that it does not necessarily follow, because a subsequent machine is better than or an improvement on a prior patented machine, that it is not an infringement. It may, or may not, be an infringement, depending upon whether the better or improved machine embodies the old machine. It may contain the whole substance of the first machine, and something more, or be constructed of an improved material, which renders it better and more useful, and makes it the subject of a patent in these particulars. Yet, if it embodies the prior machine, or combination, or improvement, or the patented portion of it, there is an infringement, and the inventor of the improved machine cannot appropriate the prior invention without being liable for infringement, even though his own improvement is useless without such appropriation of the prior patented machine, or patented part of the machine.

The greater usefulness of a machine, the

jury is entitled to consider, as a circumstance tending to show a different construction, but not conclusive, and whether the new machine is substantially different from the old, must be determined upon all the evidence bearing upon the point.

These are the only points, except on the question of damages, upon which I deem it necessary to give you any special instructions. Upon the other points in controversy, not specially referred to, if any there be, I think you will find no difficulty in reaching a correct conclusion.

I have not designed to express, or intimate, my own opinion upon controverted facts, although it would not be improper for me to do so with proper caution. But if you should imagine that you perceive any intimation of my opinion upon the disputed questions of fact in issue, whether you do or not, you are not to be controlled by such intimation; but you are to determine all disputed facts for yourselves from all the evidence in the case. The ascertainment of the facts is the exclusive province of the jury.

If you find for the plaintiffs on the question of the validity and infringement of their patent, it will be necessary for you to find the amount of damages sustained. On this point the verdict should be for the actual damages, which the evidence shows the plaintiffs to have sustained in consequence of the infringement of their patent by defendants—the damages directly resulting from the infringement. That will be the rule of damages. You will ascertain the amount, as near as you can, from the evidence before you. The damages must be found from the evidence, not from mere conjecture independent of the evidence.

The mere making of a machine, or the selling of a machine to others to use, or the use of a patented machine, is an infringement of the patent. Of course, for the mere making, without selling, or using the machine, the damage would be nominal; but still it is an infringement, and if nothing else was done, the holder of the patent would be entitled to recover nominal damages. But, in this case, large sales are shown to have been made by defendants, since the plaintiffs became the owners of the patent, and the damages alleged are large; and if there is an infringement, the plaintiffs are entitled to recover the whole amount of damages proved to have been sustained, be it large or small.

Evidence of the amount of damages has been given by the plaintiffs, and from the evidence you must determine the damages sustained. The profits made by the defendants in selling the machines are proper to be given, as a part of the damages; for the right to make and vend the patented machine, being the plaintiff's property, the profits resulting from the sale of it, ought to belong to them. But as mere profits, the plaintiffs are only entitled to the profits of the sale of their machine, as patented. If the defendants have improved their machine, and if any of the profits are properly credited to defendants' improvement, they do not belong to the plaintiffs; but as the defendants have wrongfully connected the plaintiffs' improvement with their own, and they caused the confusion of rights, if any portion of the profits are properly to be credited to the defendants' improvements, the burden rests upon them to show affirmatively that fact, and how much of those profits ought to be credited to this improvement and deducted from the profits of the sale of the whole machine as improved.

You are also entitled to take into consideration the fact that the plaintiffs, by the infringement, may have sustained other damages beyond the profits actually received by the defendants.

The plaintiffs may have chosen to sell at a higher rate, and they were entitled to sell at a higher price, if they were able to get their plows off in the market at higher prices. But, with reference to this question, the jury should, also, take into consideration the probabilities, as developed by the evidence, as to whether, if the defendants had not infringed the patent, the plaintiffs would have been able to sell as many machines at a higher price, or as many at any price, as have been sold by both plaintiffs and defendants together.

So, also, if the plaintiffs have manufactured machines under the infringed patent, which they could have sold but for the acts of defendants in unlawfully selling the same machine, and which in consequence of such unlawful acts of defendants, they were unable to sell, and were compelled to carry over, they would also be damaged to the extent of the value of the use of the capital invested in such manufactured machines, during the time they were compelled to carry them in consequence of such unlawful acts of the defendants.

If further improvements have been made in the plaintiffs' machines, and subsequently patented, and if the plaintiffs, during the time of the alleged infringement, manufactured and put upon the market plows embodying the first patent, and, also, the improvement covered by the second patent, they are not entitled to recover, as damages, that portion of the price which they might have obtained that is due to the greater value of the machine occasioned by combining the last improvement with the first.

The plaintiffs have sued only, for infringement of the first Huie patent, and their recovery must be limited to the damages arising from the infringement of that patent alone, and the part of the price for which they could have sold due to that patent alone, is all that the jury can take into consideration on this branch of the damages. And I will further add, that if the plows claimed to have been carried over by plaintiffs, in consequence of the infringement by defendants, did not embody in their con-

struction, the patent infringed, then the plaintiffs are not entitled to recover, as a part of their damages, for the use of the capital invested in their construction, nor in any event are they entitled to recover for the use of so much of the additional cost of the plow, if any there be, due to introducing the further improvement made under the second Huie patent. The plaintiffs are not entitled to recover, as a part of the damages, any loss sustained by reason of their inability to sell the Pfiel plows, or any other plows than those made under or embodying the patent infringed. Their profits must be the direct and legitimate fruits of that patent. They may have sustained damages from this source, but they are too remote. It rarely happens, that all the damages, incidental and remote, resulting from a wrongful act, are permitted to be recovered by the law. Only those damages which directly and immediately flow from the wrongful act, can be considered. Remote consequential damages must be discarded.

I instruct you, therefore, that you will not include damages resulting from the dealing of the plaintiffs in other machines than those embodying the patent infringed—the first Huie patent. And whether these machines carried over by plaintiff embodied that patent, and, to what extent the loss sustained by carrying them over, is due to that patent, and what to the additional cost of improvements introduced under the second patent, are for you to determine, so far as you can, from the evidence.

The burden of showing the extent of the damage, if any, arising under this, as under other heads, is on the plaintiff. Defendants insist that, as the plaintiff's grantor only patented the improvement of a plow, they are, therefore, only entitled to recover the profits due to the particular improvement, and not the profits on the whole plow.

But, gentlemen, the patent is not for an improvement on any one specific, or particular plow. It does not appear that any particular plow was selected, and an improvement made on that plow.

But the patentee, so far as appears from the evidence, selected certain elements before known, and combined them and applied them to other parts of a plow constructed after his own fashion, and made the plow in question as a whole. The plow as constructed is his machine. It does not appear, that that particular plow could be employed for any useful purpose without his improvement connected with it. Beyond the mere profits of manufacturing the machine, the profits in the plow must almost necessarily be all due to the patent for the improvement. It is that which fixes the price beyond the expense of manufacturing. At all events, the holder of the patent, alone, is entitled to make, use and vend the machine as a whole, and he must, therefore, necessarily, be allowed the profits on the whole machine.

In my judgment, from the attention I have been able to give this point since it was raised, if there is an infringement, the plaintiffs are entitled to recover the profits made upon the entire plow, and not merely on the part constituting the improvement. If I am wrong, the error, as well as any other errors I may commit, will be corrected elsewhere.

Gentlemen, I do not know that I can say anything further to aid you in arriving at the proper amount of damages. You must take the evidence as you find it, and consider it in the light of the principles I have just stated, and fix the amount from the evidence, according to the best of your ability, remembering that the plaintiffs are entitled to recover, if at all, the full amount sustained resulting directly and immediately from the infringement, and no more.

You will find the damages for two periods: Firstly, from the fifth of January, 1869, to the twenty-seventh of September, 1869; and, secondly, from the fifth of January, 1869, to the present time. The latter will, of course, be arrived at by adding to the damages for the first period, the amount accruing since September 27, 1869. If you find for the plaintiffs, your verdict will be: We, the jury, find for plaintiffs, and assess the damages from January 5, 1869, to September 27, 1869, at —— dollars, and the damages from January 5, 1869, to the present time, at —— dollars. If you find for defendants, you will simply say: We find for defendants.

NOTE [from original report in 4 Fish. Pat. Cas. 404]. The jury found a verdict for the defendants.

CARTER (BRETT v.). See Case No. 1,844.

Case No. 2,473.

CARTER v. The BYZANTIUM.

[1 Cliff. 1.] [1]

Circuit Court, D. Maine. April Term, 1858.

MARITIME LIEN—EFFECT OF TAKING BILLS OF EXCHANGE FOR ORIGINAL DEBT.

1. A lien for repairs and supplies furnished at Norfolk, Virginia, on a ship owned in Maine, is not lost by the creditor taking bills of exchange on one of the owners, which bills were produced in court to be surrendered or cancelled.

[Cited in The Eclipse, Case No. 4,268.]

2. How far, according to the law of Maine and Massachusetts, the taking of a promissory note, by a simple creditor, is an extinguishment of the original debt.

[Cited in The Dubuque, Case No. 4,110.]

[See note at end of case.]

[3. Cited in The Helen M. Pierce, Case No. 6,332, to the point that the presumption of payment arising from the acceptance of nego-

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

tiable paper is merely one of fact, which may be controlled by circumstances indicating a contrary intention.]

[See note at end of case.]

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

In admiralty. This was an admiralty appeal. The schooner Byzantium, owned by parties residing in the state of Maine, arrived at Norfolk, Virginia, in need of repairs and supplies in order to enable her to proceed in safety to her port of destination. At the request of the master, the libellant [David Carter] furnished the necessary supplies and materials and paid for the repairs. When the vessel was refitted, the master drew two bills of exchange on one of the owners in Maine, in favor of the libellant, for the amount then due him, which bills were accepted by the drawee, but were afterwards dishonored. Suit was commenced on the bills, but was never entered in court. It was in evidence that the taking of such bills of exchange, in the absence of a special agreement, was not considered, according to the custom of merchants at Norfolk, as a waiver of the maritime lien on the vessel for repairs, materials, and supplies. In the libellant's account with the schooner, she was credited with the drafts, and appended to the description of them was a recital in the nature of a receipt, as follows,—"Which when paid will be in full of account." Upon the arrival of the vessel in Maine, a libel in rem was filed, claiming to recover on the original account, and the drafts were produced at the trial, and offered to be surrendered. After a hearing, the district judge decreed that the libellant recover the full amount of his account with interest [unreported]. From this decree the claimants [True W. Townsend and others] appealed.

Deblois & Jackson, for libellant.

John Rand, for claimant.

CLIFFORD, Circuit Justice. It is insisted by the respondent that the bills of exchange were received by the libellant in payment of the debt contracted for the repairs and supplies, and that the effect of the transaction, under the law of Maine, was to extinguish the original debt, and of course to discharge the maritime lien upon the vessel. The proposition assumes that the transaction is governed by the law of Maine, where the bills were accepted, and not by the law of Virginia, where they were drawn and received by the libellant. When a party, bound to a simple contract debt, gives his own negotiable security for it, whether a bill of exchange or promissory note, the law of Maine, as expounded in the decisions of her courts, presumes as a matter of fact, in the absence of any circumstances to indicate a contrary intention of the parties, that the bill or note was given and received in satisfaction and discharge of the pre-existing debt. That rule was adopted in Massachusetts before Maine was admitted as an independent state, and has since been followed by the tribunals of both states in repeated decisions. Thacher v. Dinsmore, 5 Mass. 302; Varner v. Nobleborough, 2 Greenl. 121. Very little embarrassment results from the rule, when its application is kept, as it should be, within the bounds of the principle which the rule itself announces. It is merely a presumption of fact, and may be controlled by circumstances indicating a contrary intention. No such presumption arises at common law, or in Virginia, where the bills were drawn and received. One of the principal reasons assigned for the rule by the courts of Maine and Massachusetts is, that if an action may be maintained for the original debt, the debtor may also be sued by an innocent indorsee of the bill or note, and thus be compelled to pay the debt a second time. That difficulty is obviated at common law, and in all the other states where the common-law rule prevails, by requiring the bill or note to be produced at the trial, so that it may be cancelled when the judgment is rendered on the original contract.

None of the decisions in Maine or Massachusetts go further than to hold that the bill or note is a presumption of payment; and all admit that the presumption is merely one of fact, and may be controlled by circumstances; in which case the bill or note, as at common law, must be produced, if in existence, to be cancelled. Where the rule prevails, the new security is merely the substitution of the second promise for the first; and the reasons assigned for it show that it ought not to be adopted except when the remedy upon the former is as effectual as upon the latter. Accordingly, where one of the joint owners of a vessel purchased supplies for her, and gave therefor a negotiable promissory note in their joint names, but without authority from the other owners, it was held that the note was not an extinguishment of the original cause of action, and that the plaintiff might recover on the original promise. Wilkins v. Reed, 6 Me. 220. To the same effect, also, is the case of Descadellas v. Harris, 8 Me. 298, where it was expressly held, that a negotiable security given in a foreign country is not to be regarded in the courts of Maine as an extinguishment of a simple contract debt created abroad, unless it is so considered by the laws of the country where the contract was made. That case is also a direct authority to the point that the giving of such security is only presumptive evidence of the intent to extinguish the prior simple contract debt, and that, like all other presumptions of fact, it is liable to be repelled by the circumstances. Some of the circumstances which will repel that presumption were considered by the court in that case, and others have been considered in still later cases.

In Fowler v. Ludwig, 34 Me. 455, Shepley, C. J., said, if the negotiable paper was accepted in ignorance of the facts, or under a misapprehension of the rights of the parties, it has been held that the presumption might be considered as rebutted. French v. Price, 24 Pick. 13. So if the paper accepted is not binding upon all the parties previously liable; or if the paper of a third person be received, not expressly in payment, the presumption may be considered as repelled. Melledge v. Boston Iron Co., 5 Cush. 158. Any fraud or undue advantage practised by the debtor in procuring the acceptance of the new security will have the effect to defeat that presumption; and in such case the creditor may resort to the original promise to recover his debt. Hervey v. Harvey, 15 Me. 357.

In determining the question whether the creditor intended to extinguish the original promise, the fact that he held collateral security for the performance of the contract is a material circumstance, and has so been considered in courts where it is held that the unexplained reception of the new security afforded a prima facie presumption that it was received in payment; and the courts of Maine and of Massachusetts have nowhere held that it is not sufficient of itself to rebut the presumption that the creditor intended to accept the negotiable note as a substitute for the original promise, so as to deprive him of his collateral security. On the contrary, the case of Butts v. Dean, 2 Metc. [Mass.] 76, affords strong ground to conclude that the supreme court of Massachusetts is inclined to hold that it would be sufficient. See, also, Fowler v. Bush, 21 Pick. 230; Huse v. Alexander, 2 Metc. [Mass.] 157; Page v. Hubbard [Case No. 10,663]. Judge Sprague held in the case last named that the doctrine of the courts of Massachusetts does not go further than to consider the taking of a negotiable instrument as a substitute for a pre-existing debt, where that would not impair any security or right of the creditor, and accordingly determined in the case before him that the lien was not displaced or impaired by the subsequent taking of negotiable promissory notes. Without laying down any general rule as applicable to all cases, but confining the decision to the question under consideration, I am of opinion, on the facts of this case, that the bills of exchange were not received in payment of the repairs and supplies, and consequently that the lien was not displaced by that transaction. They were made and furnished in the port of a state other than the one to which the vessel belonged, and the bills of exchange were drawn and received by the libellant under the law of Virginia, where the taking of a negotiable security for a pre-existing debt is not presumed to be payment. The Chusan [Id. 2,717]. Those bills were accepted by one only of the owners of the vessel who were liable for the original debt; and there is much reason to conclude from the evidence, that when he accepted them, it was with the intent to defraud the libellant out of his debt. For these reasons, as well as for the one already mentioned, that the account current shows that it was not the intention of the parties that the account should be considered as extinguished until the last bill of exchange was paid, I hold that the lien in this case is not displaced; and as the bills of exchange were produced at the hearing, and remain on the files of the court to be cancelled, the libellant is entitled to recover in this suit. The decree of the district court is therefore affirmed with costs.

[NOTE. By the local laws of Maine and Massachusetts, the acceptance of the debtor's negotiable paper for a pre-existing debt by simple contract is a payment and extinguishment of the debt. The Betsy and Rhoda, Case No. 1,366; Palmer v. Elliott, Id. 10 690; Baker v. Draper, Id. 766; Kimball v. The Anna Kimball, Id. 7,772; Hudson v. Bradley, Id. 6,833. The reason of this departure from the principles of the common law is that the debtor might be inconvenienced and possibly obliged to pay the debt twice, as he could not defend against an innocent indorsee. The Betsy and Rhoda, supra. The law presumes that the creditor who has taken the security has renounced his right of action on the original contract. But this presumption may be rebutted by circumstances showing that the intention was otherwise, or that the paper accepted was not binding on all the parties previously liable, or that there was fraud, concealment, or the like. The Betsy and Rhoda, supra; Palmer v. Elliott, supra; Baker v. Draper, supra; Kimball v. The Anna Kimball, supra; Hudson v. Bradley, supra. The rule should be cautiously applied where the remedy on the new security is not as good and effectual as upon the one for which it was substituted. Baker v. Draper, supra.]

Case No. 2,474.

CARTER v. CARLISLE et al.

[1 Hayw. & H. 246.] [1]

Circuit Court, District of Columbia. Dec. 21, 1846.

DISSOLUTION OF INJUNCTION ON BILL AND ANSWER.

Upon a motion to dissolve an injunction upon bill and answer, the charges in the bill being fully met and denied by answer but denial partly upon information and belief, and the court upon inquiry concludes that there are such facts and circumstances appearing upon the face of the plaintiff's bill, which when taken in connection with the answer upon the points denied upon belief only as are equivalent to the testimony of a witness upon such points, then this injunction should be dissolved.

[In equity. Bill by Henry Carter against J. M. Carlisle, J. B. Gardiner & Co., Franklin Gardiner, and R. C. Washington, to set aside a deed of trust, and for other relief. Complainant obtained a preliminary injunction, which defendants now move to dissolve.]

It appears that Mr. Washington was engaged in this city in 1845 in the dry goods business, and had some of his paper remaining out in September in the same year, at

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

which time he and Mr. Carter became partners in the same business; that they continued as partners till January, 1846. During the partnership all Mr. Washington's paper was retired, and the partnership paper substituted to an amount upon which the parties differ; that the terms of dissolution were that Mr. C. should take goods to the amount he invested in the partnership, and make a further purchase of $3,000 of goods from Washington, and that Washington should pay all the debts, and that he would indemnify Carter and hold him harmless. Mr. C. charges that Washington, Gardiner & Co. and F. Gardiner, after the dissolution, by false and fraudulent representation, induced the other creditors of the firm to extend the partnership paper; and by the same means induced them to sell Washington a large stock of goods on credit, and under the assurance that no lien existed or should be given upon any of the stock. Yet (he charges) three days after the goods were received in Washington he (W.), in pursuance of a fraudulent agreement with Gardiner & Co. and F. Gardiner, made a deed of all he possessed to J. M. Carlisle, in trust for the benefit of said G. & Co. and F. G. Mr. C. prays upon these grounds, insomuch as he is bound upon the partnership paper outstanding, and not upon Washington's individual debts, and all Washington's assets are conveyed to the use of said Gardiner & Co. and F. Gardiner, that the deed be set aside, and a receiver appointed for the benefit of all the creditors. Under the deed mentioned above, Mr. Carlisle, as trustee, took possession of the goods, and was about to sell them when Mr. Carter filed this bill (June 22, 1846) and obtained an injunction restraining him from so doing. The defendants answered the bill, and denied every allegation of fraud, confederacy and false representation charged therein, as well as many of the statements of fact.

Jos. H. Bradley, for plaintiff.
Lenox and Jas. M. Carlisle, for defendants.

MORSELL, Circuit Judge, after reviewing the facts in the bill and answer, and remarking that the charges in the bill carefully met and denied by the answer, as far as charges against these defendants, proceeds to inquire whether there are such circumstances appearing upon the complainants' case as would be equivalent to the testimony of a witness in support of the answer upon these points denied by belief only, and, after detailing them, concludes that these facts and circumstances appear to me to be entirely inconsistent with the supposition that there was any lien or trust on the stock of goods conveyed by the deed, as claimed by the complainant, Carter, and that these circumstances, taken in connection with the answer, which expressly denies all notice of such lien, are sufficient to overcome the allegations in the bill. If there even were such an agreement as stated in the bill, I think it must be considered as personal, and that the complainant trusted to the personal security and personal contract of Washington, of which contract the defendants have had no notice. The fact that Carter still enjoys the benefit of the part of the agreement which gave him possession of so great a part of the goods, thereby affirming the agreement, as before alluded to, his silence again during a period of time long enough to have made himself more fully acquainted with all the circumstances he complains of without warning the public thereof, and the other circumstances before stated, are sufficient in my mind to show that there is no truth in the charge. I think the condition also sufficiently proved, and on the whole think the injunction ought to be dissolved.

Case No. 2,475.

CARTER et al. v. CARTER et al.

[1 MacA. Pat. Cas. 388.]

Circuit Court, District of Columbia. June, 1855.

PATENTS —"NUT-MAKING MACHINE" — INTERFERENCE—NEW PARTY— SUPPLEMENTARY EVIDENCE — APPEAL FROM COMMISSIONER'S DECISION — PRIOR INVENTIONS.

[1. A decision of the commissioner denying a patent to either party on interference is appealable, although there is no decision as to which of the applicants is the prior inventor.]

[2. The right to appeal from a commissioner's decision exists, although no time is limited within which to take the appeal.]

[See In re Janney, Case No. 7,209.]

[3. The addition of another party to an interference does not change its nature, so as to make it entirely a new case, where the subsequent proceedings show it to be a rehearing or new trial as to the original parties, as well as to the issues to which the new applicant is to be considered a party.]

[4. Where a new party is allowed to come in on rehearing or new trial of an interference, he comes in subject to the testimony as to priority of invention previously taken in the case.]

[5. The first person who conceives the idea of a process of manufacture, and contrives the means of giving effect to that idea, is the prior inventor.]

[6. Where testimony fails to satisfactorily show that the machine of a person claiming prior invention possessed in the course and order of its operation the necessary and essential feature of the invention claimed, and he admits that there never was any product or attempted production by his machine prior to an examination of the machine of another devised for the same purpose, and that he received explanations as to its mechanism, and at that time did not say or pretend that he had ever invented a machine on substantially the same principles, but, on the contrary, advised an application for a patent for the other machine, he cannot be considered the prior inventor.]

[7. Supplementary testimony as to occurrences of almost 20 years prior, to supply deficiencies in testimony given in a former proceeding, should be cautiously received, especially where a nice point of invention is sought to be established.]

[See Wellman v. Blood, Case No. 17,385.]

[8. The invention of Isaac H. Steer for a machine for making nuts for bolts (for which a patent numbered 13,118 was subsequently granted to Henry Carter) is entitled to priority as against the invention of William Kenyon, for which patent No. 8,427 was granted to Joseph P. Haigh and others.]

[9. Henry Carter and James Rees are entitled to a reissue of letters patent No. 8,322, for improvements made upon the Steer machine, to adapt it to working by power.]

[Appeal from the commissioner of patents.

[On interference. Applications of Henry Carter, assignee of Isaac H. Steer, for a machine for making nuts for bolts; of Henry Carter and James Rees for a reissue of letters patent No. 8,322, granted August 26, 1851, for a like machine; and of Joseph P. Haigh, Andrew Hartupee, and Joseph Morrow, assignees of William Kenyon, for a reissue of letters patent No. 8,427, granted October 14, 1851. From a decision of the commissioner of patents denying the applications, the applicants Henry Carter, assignee, and Carter and Rees, appeal.]

P. H. Watson, for appellants.

MORSELL, Circuit Judge. Carter and Rees, in stating their claim in their specification, say: "We are aware that Isaac H. Steers, on about the year 1840, proposed to make nuts by the process we have here described, but never completed a machine which would do this automatically; therefore we do not claim the process in itself and irrespective of machinery; but being the first to construct a machine capable of making nuts by this process, without any other or further manipulation than is required for feeding in the bar of iron, we claim as our invention, and desire to secure by letters-patent, the machine substantially as herein described for making nuts, by cutting the blank from a heated bar of iron, punching its eye in a closed die-box, pressing it into shape while in the die-box and on the punch, and then discharging it as specified." In describing the operation of compression, they say: "The punching and compressing of the blank is effected as above described while the latter is within the die-box. It is therefore supported at its sides by the sides of the die-box, which prevent the enlargement or straining of the nut under the action of the eye-punch, and is compressed between the cutting and counter-dies while the nut is on the eye-punch and within the die-box." According to the principles of the specification, they produced their model before the commissioner in this case; and the commissioner, in assigning the reasons for the conclusion to which he came, says: "William Kenyon, the inventor, is also introduced as a witness, who states that the principle upon which his machine operates was precisely like that of the machine now sought to be patented by the present contestants. He refers also to the model marked 'D,' which he says operated in the same way as his original machine." The commissioner then says: "The working of this model is in accordance with the claims now placed in interference (meaning model 'D'); so that if this testimony is to be credited, the case is fully made out." From which it is to be inferred, in favor of said Carter and Rees, that the patentability of their invention, as shown by the said model, was admitted as showing the true invention. Their application was filed on the 14th of March, 1854, stating that they had obtained letters-patent for improvements in machines for forming the nuts for bolts and other articles of similar form, which letters-patent were dated on the 26th of August, 1851 (No. 8,322); that they then believed the same were inoperative and invalid, by reason of a defective specification, which defect had arisen from inadvertence and mistake; they therefore desired and offered to surrender the same, and prayed new letters to be granted, according to the aforesaid amended specification.

The appellees say: "What is claimed as the invention of William Kenyon, and is desired to be secured by letters-patent, is cutting a nut or washer from a heated bar, punching a hole therein for the screw, and compressing the said nut or washer into the desired shape at a single operation; also the compressing and discharging the nut or washer by means of the follower or hollow piston, the bracket, the cross-head, and the moving die-box, constructed and operating substantially as described." The principle and mode of operation of the machine is particularly described. It will only be necessary, however, here to state the latter part of it: "The mandrel P, being prevented from receding by the bracket Q, prevents the bar from tilting, whilst the die as it advances cuts off the end of the bar; as the shoving-head advances further by the turning of the shaft B it strikes against the bracket Q, and causes the said bracket to carry forward the mandrel P against the nut in the die M with such force as to give it the desired shape, by pressing the nut into the die and causing it to conform to the shape of the cavity therein. By the time that the shoving-head is half way on its stroke and the bar is half cut through, the heel of the interior cam H urges the round-punch forward through the nut, and returns with a quick motion, to prevent its exposure to the action of the heat of the nut, cuts a round bur out of its centre, forming a circular hole for the screw, and deposits the bur in the hole U in the centre of the square punch T." This application was filed the 10th of August, 1853. They also state that as assignees of William Kenyon they did obtain letters-patent for a new and improved machine for cutting and perforating iron nuts and washers at one operation, which letters-patent were dated the 14th day of October, 1851 (No. 8,427);

that they believed the same was inoperative and invalid, by reason of a defective specification, &c. They therefore prayed that they might be allowed to surrender the same and amend, and that letters might be granted according to the aforegoing specification.

The claim of Carter, assignee of Steer, appears from the specification to be—First, making a nut at a single operation from a heated bar or plate of metal, by cutting off the blank from the bar, punching a hole or eye through it, and swaging it into shape, substantially as set forth in the specification; second, punching the eye of the nut in a die or press-box, by which it is surrounded and firmly supported, and thus prevented from straining or bursting during the operation, substantially as set forth; third, shaping nuts by subjecting them, while hot, to powerful and sudden compression on the punch and in the punching-die, substantially as therein set forth, whereby they are finished with such a degree of smoothness and regularity and precision that they are fit to use in the construction of most kinds of machinery, and are sounder and stronger than unpressed nuts made by machinery. This appears to be dated 13th August, 1852. In the original proceeding there were other parties and claims; but none are now before me other than those I have stated; on the issues and evidence in which cases the commissioner, on the 21st of October, 1854, decided priority of invention, and awarded the same to Kenyon, assignor of Haigh, Hartupee, and Morrow, and limited the appeal to the fourth Monday of November then next. In the reasons for his opinion he states, in substance, that the subject-matter of the then interference was before the office, in February then last, when it was held that the proof as then presented did not show either of the contestants to have been the first inventor of that which they claimed; that Carter and Rees have since become parties, new testimony has been taken, and a new investigation became necessary; that by special agreement a portion of the testimony taken in the former case had been transferred to this. As far as that agreement extends, such testimony would be received and considered; but beyond that, no regard would be paid to the testimony filed in the previous case for any purpose whatever; that the invention then in interference was the making of nuts of hot iron by the several contestants in the manner severally described by them; that it does not consist in the mere making and punching the nuts, but in compressing them into shape and punching them while so compressed. The person who first conceived the idea of doing this, and contrived the means of giving effect to that idea, should be deemed the prior inventor. That Kenyon claimed to have done this in 1835. If he really did this, there will be no further cause of controversy, as none of the competitors attempt to fix a date so early by several years. On the previous trial it was held that though Kenyon doubtless had at that time contrived some sort of a machine for making nuts or washers, there was no sufficient evidence that it either did or was intended to work upon the principle we have above stated. The commissioner asks: "Has the defect in the testimony been now remedied?" He then proceeds to review the testimony, which consisted principally of a re-examination on the part of the appellants of the same witnesses, and on the same subjects as on the former occasion, and says if this testimony is to be credited the case is fully made out; that he should have no hesitation in coming to such conclusion but for the cross-examination of P. H. Watson detailing the statements of Bradbury, when called upon by the counsel for the assignees of Kenyon for the statements of Bradbury. The witness says, among other things: "He stated that if he should testify, his evidence would be fatal to Kenyon's claim as the inventor of the machine. He said, also, that Kenyon never invented a machine that would make nuts."

The commissioner considers these statements as evidence in the case, and as such must have their weight, but thought that there were circumstances in the case which impaired their weight, and says: "Upon a general view of all the testimony in this case, I am induced (though with some hesitation) to come to the conclusion that Kenyon had really in 1835 or 1836 made the invention for which he is now an applicant for a patent, and that he is therefore the first inventor thereof." As an appeal is supposed to be taken from the first decision of the commissioner on the subject of this case (alluded to by him in the foregoing opinion) on the 6th of February, 1854, it may be proper to notice the grounds of that opinion. The subject-matter of the interference and decision was the same. The commissioner distinguishes between what is a requisite degree of compression to sustain an invention for making and punching nuts of considerable thickness before the punch is withdrawn, in order that they may be swaged into uniform shape and regular thickness, having the hole perpendicular to the upper and lower faces of the nut, as in the present application, and the case where thin pieces of metal are to be perforated, when nothing of the kind is necessary. He further says: "But the proof does not satisfy me that Kenyon ever invented the subject-matter of the present interference;" and he proceeds to state the particular deficiencies. As to that of Cochrane's, he says: "He does not seem to have a clear conception of the chief point of the invention, as he states that he cannot say whether they were pressed before or after they were punched." So, as to Kenyon, he says: "Even Kenyon himself does not set forth the working of his machine in such a way as to show that it effected the objects aimed at in the

patents now applied for; that is to say, punching the nuts while under pressure, or an equivalent thereof." It is true that Cochrane and Kenyon both state that the machine invented by the latter was like that produced in evidence; but this is a very loose way of describing a machine in a case where a nice point is sought to be established. So with respect to Vivian's testimony. He says "that witness says this (the model produced as Kenyon's on that examination) was very unlike that brought to him in 1850 by Kenyon and Hartupee as Kenyon's invention, and from which he made drawings, and would necessarily, therefore, have noticed the peculiarities of the machine." The commissioner notices, also, the laches and neglect on the part of Kenyon in applying for a patent, being nearly twenty years from the time he dates his invention, and his carelessness in suffering it to be thrown about and at length destroyed, instead of putting it into practical use. He says: "It is not unreasonable to presume that but for the discoveries of others this machine would never again have been heard from." Finally he says that Kenyon was proved to have visited and inspected the nut machine in operation in Carter and Rees' shop. There is no doubt that he saw and examined the machine. And it is shown by disinterested testimony that he had more difficulty in understanding its operation than would be likely to be felt by one who had invented substantially the same thing. Up to that time his machine had never been used for this purpose. "I feel bound, therefore, to conclude that Kenyon derived his first knowledge of the true nut machine from the machine which he saw in Carter and Rees' establishment, and which is shown by Barret's testimony possessed the properties described in the claim now placed in interference."

The commissioner then proceeds to consider the pretensions of Steer to the invention; says that it is admitted that he had a machine in operation in 1841 on which he made nuts from heated iron; but nothing would warrant the conclusion that he ever entertained the idea which is at the bottom of this invention. The mere punching of a hole through a nut is not that idea. The punching of that hole while the nut is inclosed in the die-box does not reach the point. The nut must be compressed, either at the moment of being punched or after it is so punched, and before the punch is withdrawn, in order to reach the point of patentability; and, as before intimated, the commissioner concludes this opinion by saying: "The only decision, therefore, which can now be made is to deny a patent to either, which is accordingly done." The appellees object that the judge has no jurisdiction to hear an appeal from this last-mentioned decision, because the law allows an appeal only in the case where the commissioner decides which of the applicants is the prior inventor; and the commissioner has not awarded priority to either, and does not decide the question at all as between the parties. That may be true; but he does deny a patent to either; and it is from the decision that refuses to grant the patent to him as applied for that the law allows the appeal. And as no time was limited within which he was to take his appeal, no sufficient reason, it is supposed, existed against the right; but if this were not so, it will be hereafter shown that, notwithstanding the fact of another party's being added, that does not so change its nature as to make it entirely a new case; and the subsequent proceedings show it to be a rehearing or new trial as to the original parties, as well as the issues in which the new applicant is to be considered a party. The cases, therefore, will be considered together.

The first and second reasons for the appeal in the first case are general—for having refused the patent to the appellants and for granting it to the appellees. The third and fourth for error in the effect given to the testimony of the witness Cochrane. The fifth because of error in the speculative views of the commissioner as to the practical working of iron in the manufacture of nuts, and the value of the appearance of the products of a nut machine as a test of the modus operandi of said machine. The sixth and seventh are as to the effect given to Daft's testimony, and that of William Kenyon. The eighth for refusing to permit the appellants to use the depositions of Kenyon, Corcoran, and Daft, taken by and on behalf of William Kenyon, assignees on the former trial, and given in evidence on said trial by said assignees before the commissioner, and now remaining on the files in said case, for the purpose of showing variances and discrepancies between them and the depositions of said witnesses taken and used in the present trial by said appellants on the same subject-matter. In the other case the first is a general reason for denying a patent, &c. The second is that Steer's machine, which was constructed in 1841, would allow of no compression of the nut while on the eye punch, and that the original invention did not contemplate such compression. Third. By deciding that the eye punch in Steer's machine of 1841 was made largest at the outer end, according to one of the forms suggested in his specification filed in the patent office in that year, and that if the nut were compressed around the punch thus formed it could not have been removed. The others are in substance the same with those in the first case.

The first reason which will be considered is the eighth, upon the subject of the refusal to permit the first set of depositions to be used in evidence by the appellants for the purpose therein stated. I pursue this course because it will be then ascertained what evidence is or is not deemed to be in the case; as to which

refusal the commissioner says: "By special agreement a portion of the testimony taken in the former case has been transferred to this. As far as that agreement extends, such testimony will be received and considered; but beyond that, no regard will now be paid to the testimony filed in the previous case for any purpose whatsoever." The commissioner assigns no reason for the refusal, but the counsel for the appellees protested against the right to use the testimony taken in the former case to discredit the witnesses on that trial because—First, that inasmuch as the first interference case was declared between different parties, different questions might arise. When the testimony referred to was taken, Carter and Rees had not made their application. Steer's implement for making nuts was very different from the machine of Carter and Rees, and therefore a different kind and degree of testimony and proof was requisite in the two cases. Second. Haigh, Hartupee, and Morrow, assignees of Kenyon, did not know, until the opinion given, the ground on which the interference was supposed by the commissioner to consist, and therefore did not fully examine the witnesses on the first occasion. It would be wrong, therefore, to endeavor to force testimony into the present case which had not been taken for that purpose. Third. If apparent discrepancies exist in the testimony of the same witnesses in the two cases they could have been satisfactorily explained if due notice had been given. "They ought to have pointed out to the witnesses on the cross-examination the supposed discrepancies. To ascertain the correct principles on this point, it may be proper to advert briefly to the historical facts pertaining to this particular matter. The subject-matter or invention on both trials was precisely the same. The original interferences declared were between Carter, assignee of Steer, and Haigh, Hartupee and Morrow, assignees of Kenyon, David Howell, and Lauriston Town. The specifications were the same. The testimony or depositions of these same witnesses were again taken by the appellees, and used by them on the trial of the issues in this case, with additions to them. The only material difference since the first trial and opinion as to the parties and subject-matter worthy of notice was a new application by Carter and Rees for their invention, and a further interference declared in consequence thereof.

The opinion, as has been already stated, was given in February, 1854, which was that neither of the parties were entitled to a patent for the reasons stated. At that stage of the cause an application was made by counsel on behalf of the appellees for a reconsideration of the decision, and a learned argument was addressed to the commissioner, dated the 16th May, 1854, on the subject; in concluding which argument he says: "Finally, we hope the commissioner will reconsider the matter, either upon the testimony already taken and the question of law arising on them, or upon further testimony to be taken, when we have no doubt of showing from himself that Mr. Vivian's statement was certainly misunderstood." Shortly after this, leave was given to said original parties and to the said Carter and Rees to take testimony for the purpose of being used, as stated in the notices of this reissue or new trial before the commissioner, on the day stated in said notices, under which authority the present depositions of Cochrane, Daft, Kenyon, Vivian, and others were re-examined on the same points, and the additions to their depositions made, on which examination cross-interrogatories were propounded suited to call their attention to what they had stated in their original depositions, and to the variances between those and the present; and furthermore, notice was subsequently given by the appellants to the appellees of their intention to use said depositions for said purpose on this trial. If this trial could have been confined to the original parties only, according to well-settled principles of law, I suppose no doubt could have been entertained that the appellants would have been permitted to use the old depositions for the purposes they wished to use them for on this occasion. What difference, then, does the coming in of the new parties make in the principle? The general rule certainly is, that where the parties are not the same, either identical or in privity, the evidence is not admissible, because there is no mutuality, and the new parties would not have had an opportunity of cross-examination. But from the nature of this peculiar proceeding, where new parties, applicants for the same invention, may be allowed to come in and have a proceeding adapted to the new condition of things, the rule of evidence which will be applicable resembles more a proceeding in chancery than otherwise. He will be received only on the terms of being subject to the testimony which either of the parties have previously taken in the case. To which effect the rule is laid down in 1 Greenl. Ev. § 553: "We have seen that in regard to the admissibility of a former judgment in evidence, it is generally necessary that there be a perfect mutuality between the parties, neither being concluded unless both are alike bound. But" (speaking of a proceeding in chancery) "with respect to depositions, though this rule is admitted in its general principle, yet it is applied with more latitude of discretion, and complete mutuality or identity is not required. It is generally deemed sufficient if the matters in issue were the same in both cases, and the party against whom the deposition is offered had full power to cross-examine the witness." I think, therefore, the appellants ought to have been permitted to use the said depositions in the trial of said issue, and that they may be considered as a part of the evidence now to be acted upon.

My purpose is next to consider the reasons relating to the effect of the testimony as

it tends to support the issue on the part of the appellees. The commissioner gives a description of the invention of which that issue is formed, by saying that it consists of "the punching of holes in nuts of hot iron of considerable thickness, while their sides are sustained laterally by the corresponding sides of a die-box, and also while they are firmly compressed above and below, (or at least such compression should be exerted upon them before the punch is withdrawn,) in order that they may be swaged into uniform shape and regular thickness, having the hole perpendicular to the upper and lower faces of the nut;" that it is a nice point sought to be established, and should be satisfactorily made out by the proof. He states, also, certain tests in the attainment thereof; that "the mere punching of the hole through a nut is not that idea; the punching of that hole while the nut is inclosed in a die-box does not reach the point; the nut must be compressed either at the moment of being punched or after it is so punched, and before the punch is withdrawn, in order to reach the point of patentability," as before stated. This, then, is the standard which the proof must show the first and original invention to have arrived at or been matured by him.

The commissioner's view and reflections, as expressed in his first opinion, on the effect of the proof on the part of the appellees, are, I think, perfectly correct and just, and such as I shall adopt. On that occasion the proof did not satisfy him that Kenyon ever invented the subject-matter of the then interference, and which interference, so far as it respects that matter, is now the same. The question, then, as stated by himself, is, "Have the objections which then existed been removed by the additional testimony?" The question, however, is not as he considered it, with the exclusion of the testimony originally taken, but I think in connection with it. Under any circumstances, the great lapse of time—almost twenty years—which had taken place before the witnesses were called on to state the facts relating to a case where so nice a point is sought to be established, must, in the nature of things, make it very difficult to get at the real truth of the facts as they existed, unless where reduced to writing, and much more so under the circumstances existing at the time when and for the purpose this re-examination was made. That testimony was obtained from the same witnesses, on the same subject, after an apparent full previous examination, with the assistance of very able counsel, and after the decision by the commissioner stating particularly the points in which the former proof was deemed by him deficient, and particularly what it was thought certain features in the invention still required proof of, which opinion was made known to one, if not more, of the witnesses by the assignees before or on their re-examination—can it be doubted that this was calculated unduly to lead the minds of the witnesses to the further proof which the party wished them to make? Under the fairest aspect under which it can be looked at, it would be surely quite, if not more objectionable than would be leading interrogatories, answers to which, according to the settled principles of evidence, would be inadmissible in evidence. What may have been the full extent of its influence on this occasion it is not for me to determine. There certainly are strange and unaccountable inconsistencies and discrepancies between their testimony on the former occasion and that on this. I wish to be understood as not intending to impute any intentional misconduct to any one.

To begin with Mr. Vivian: He says that in 1850 Kenyon and Hartupee brought to him a model, (which it is presumed was that of Kenyon's invention,) from which he made drawings (and would probably note the peculiarities of the machine). This, he says, was very unlike that produced in evidence, both in its principle and combinations. On his examination for the present occasion, in his answer to an interrogatory put on the part of the appellants' counsel—whether he was asked to correct his testimony to meet the objections of the commissioner, having before stated that the opinion had been shown to him by Haigh—he said: "I was not asked to do so; but on reading the opinion of the commissioner, and finding that on my previous testimony no question had been asked on the question of pressure of the nut, or its being sustained laterally in the die-box during the operation of punching, I was prepared at the next examination to give testimony on those particulars." Corcoran's testimony seems to be relied on by the commissioner as unquestionably true in his statements respecting Kenyon's machine of 1836. In the operation of compressing the nuts, (being a fact, as he says, in regard to which he would be less likely to be mistaken than he was in relation to the principle upon which the two machines operated,) the witness says the actual compression would be a tangible fact, evinced by the appearance of the nut itself. Let his testimony about other facts equally tangible be examined, and by comparison of himself with himself it will be found that this is a mistaken confidence. On the former examination he described the nuts to be a quarter of an inch in thickness; since which time the commissioner in his opinion has said the nuts must be of considerable thickness. On his last examination, as if to meet this objection, he says the nuts were three-quarters of an inch thick. On his first examination he stated the machine to be three feet high; on the next, two feet four inches; on the first, two feet wide; on this, three feet six inches; on the first, four feet long; on the second, four and a half feet long; on

the first, that Kenyon said he was going to try the hot iron; on the second, he said that he saw iron nuts three-quarters by a quarter, which Kenyon told him he had made by the machine; but Kenyon swears he never made an iron nut, nor had any experience in making hot-pressed nuts by machinery. With respect to the arrangement and order of operation of the machine on the former occasion, he said the bar was forced into the die by the square punch. In his last examination he says that the box moved up by a stroke of the cam towards the stationary punch, cut off the bar, and pressed it into the box; while pressed, the round punch moved up. In his first examination he cannot say whether the nut was pressed before or after the hole was punched. In his last he says they were pressed before and at the time they were punched; and there are still several other inconsistencies and discrepancies in material matters. What, then, is the rule of law which ought to be applied? If it has been from design, then the rule is falsus in uno, falsus in omnibus; if from ignorance or a careless inadvertence, still all confidence in the truth of what he has said must be lost.

Next, as to Kenyon's testimony. The commissioner, in the remarks contained in his first opinion on this part of the testimony, says Kenyon himself does not set forth the working of his machine in such a way as to show that it effected the objects aimed at in the patents now applied for; that is to say, punching the nuts while under pressure, or an equivalent thereof. In alluding to the model "D," then before him, and deemed insufficient as respected the order of its operation, he says: "But even if intended to work in the precise manner required for the purposes of this case, it is by no means certain that Kenyon's machine was like it in this particular." On this examination Kenyon says that the model "D" (Reinhart) was exactly like his machine of 1835, except in size; also that there was a difference in the course of the operation between the round punch of the model there identified and the one at Washington, but that it operates for the same purpose for both, and was intended to do the same kind of work. This difference in the order of the operations having been considered essentially defective, on the examinations for the present issue, to supply the defects, Kenyon testifies, in substance, that the machine of 1835, in its order of operation of the round punch and other operative parts, was the same as the model at Washington, upon which the application is based; that the combination of dies, punches, and swedges are just alike in the mode of operation, by which it is supposed he intended to convey the idea that the order and course of operation were the same. If so, it is very apparent that he has contradicted himself in a very material point. Again, if the description he has given of the size of his machine be correct, can it be true, as he has stated, that he made the nuts of the stated thickness and breadth by operating the machine himself, and without any assistance? It was utterly impossible. The same rule of law laid down as applicable to the testimony of Corcoran must apply to this. Again, Richardson, who was applied to by Kenyon in the spring of 1845 to make drawings for him of his machine, says, as it respects the operation, that the nut was in the first place cut off, then pressed, and then punched—the pressing and punching being two distinct operations. In this, also, there is a material difference. Kenyon says it was all done by one operation.

The testimony of Bradbury, although it might be considered somewhat lessened in its credit by the circumstance stated by the commissioner, cannot be said to be without some measure of weight. He said that his evidence would be fatal to Kenyon's claim as the inventor of the machine; that Kenyon never invented a machine that would make nuts. This witness had the most amply opportunity of knowing.

Daft, on his first examination, says he does not remember whether or not the nuts were pressed in a closed die box, nor can he say whether they were pressed before or after they were punched; and though he had some of the nuts in his hand, he could not tell of what kind of metal they were made. He thought at the time they were of iron. On his second examination he says the operation was in his presence; and he is then brought to say it formed iron nuts and pressed them, and they appeared to be smooth. He betrays too much ignorance and inconsistency to entitle his testimony to much weight. There is proof in the case that Kenyon visited the shop of Carter and Rees in August, 1850, to examine their nut machine, on which occasion, in the course of half an hour or more, at his request, explanations were made to him how Carter and Rees' machine worked. He was shown the die box, how the nut was pressed and punched, and how it was discharged. He could not understand how the bottom die worked on the punch, &c. He on that occasion does not say or pretend that he had ever invented a machine substantially on the same principles. On the contrary, advises the application for a patent at once. Let this be connected with what Kenyon himself admits, that he never made or tried to make hot nuts on his machine previous to seeing that of Carter and Rees' machines, and also with the absence of sufficient proof on the part of the appellees to show satisfactorily that the machine of 1835 or 1836 possessed in the course and order of its operations those essential features of the invention, as before stated in the opinion of the commissioner to be necessary. With the commissioner, I feel myself bound to conclude that Kenyon derived his first knowl-

edge of the true nut machine, now the subject of interference, from the machine which he saw in Carter and Rees' establishment; and upon the whole, that he was not the original inventor, as claimed on the present issue; and that the priority of invention ought not to have been so awarded. I will next consider the case of Carter, assignee of Steer. The reasons of appeal are the same with those in the case just considered, except the first three. The only special ones are the second and third. The second relates to the compression of the nut while on the eye punch, which the commissioner decided Steer's invention did not contemplate. The third is intended to cover his objection that the eye punch was made largest at the outer end. With respect to the description of the eye punch being largest at the outer end, as stated in the original specification, and intended thereby only to show one of the forms in which the invention might be executed, this is omitted in the present specification, nor does it appear to have been adopted in the model filed in the office. It is therefore unnecessary to decide whether the inference drawn by the commissioner from that circumstance was correct or not. I have with great care examined the model just alluded to—on one occasion with a very skillful expert, mutually agreed on by the parties, and in their presence and alone several times subsequently—and am entirely satisfied that it possesses the important peculiar feature in the operation of the machine of effecting perfect compression of the nut whilst the punch continues in it, by an additional after-pressure, so as to weld up the fissures and obliterate the defects produced by punching the eye. But the views I have already taken will make its application to the model of the appellees before the commissioner unnecessary. I think the following is a correct description of Steer's model: The die box was placed below with a punch in it, both stationary. The swage constituted the bottom of the box. The square punch was placed above and opposite the open side of the box. When this square punch was withdrawn, the end of the bar of heated iron was laid upon the mouth of the box; when the square punch was suddenly and forcibly thrust forward, it separated the piece of metal of which a nut was to be made, carried it into the box upon the eye punch which made the perforations, and, carrying the piece thus punched still forward against the swage or bottom of the box, powerfully compressed it between the square punch and the swage and around the eye punch, which was still in the perforation, thus giving perfect form and compression to the nut, and rewelding and compressing the parts in the eye which had been disturbed, torn, rent, and displaced. The whole is done by a single forward motion of the square punch. The swage was then thrown up, the box and eye punch remaining stationary, and the nut thereby discharged. Now, if this is sustained by the proof, all the conditions stated in the commissioner's opinion will have been gratified. First. It is admitted "that a machine constructed according to the plan represented in the annexed drawing marked 'D' was in use by said Steer for the purpose of experiment in 1841, and that he made sound nuts of iron of uniform and symmetrical form. By means of said machine the same nuts were made champered or beveled at the edges of one side by the powerful compression to which they were subjected in the die-box; that three or more nuts were cut off a heated bar, and properly formed without reheating the bar; and that no practical difficulty was found in the operation of the machine." The drawing "D" is an exact copy, on a reduced scale, of the drawing attached to Carter's application as Steer's assignee, and is an exact copy of the drawing attached to Steer's original application in 1841, and is an exact representation of the machine described in both specifications. Secondly. In addition to this is the testimony of John Fenton, who says he had formerly been a manufacturer of woollen goods by machinery; that in 1841 Steer made a working machine, which was like the model machine deposited by said Steer in the patent office, and which the witness has seen there, and which remained there at the time of giving his testimony. Said model is like the said machine in all essential respects. He had frequently examined said machine. He saw it in operation in 1841. It was operated by Isaac H. Steer in person, with the assistance of Joel Lupton. He went there after the machine was constructed and in the shop, and they took some hot iron to show the witness the operation of the machine, and cut some nuts. The machine made several nuts at one heat of the bar; he can't say how many exactly. They were well made, smooth, and greatly superior to the hand-made nuts, being perfectly smooth and compressed, so much so that he carried some of them to be exhibited to the neighbors. All of the nuts were pressed into the same die and punched by the same punch, and were consequently—that is, all from the same bar of metal—exactly alike. By their general appearance and by their use (upon witness' own tools and wagons, they being in constant use) he knew that they were perfect in strength. The compression of the nut was perfect on all sides. The nuts were made as fast as a man could swing a sledge, as every stroke of the sledge made a nut. There was no difficulty in clearing the punchings or in throwing out the nut when it was completed. If there had been, they could not have gone on with the operation. The compression of the nut took place while the punch was in the eye of the nut and while the eye was being punched. He considered it a great labor-saving machine,

and so he does now, and of great utility. The nuts which he saw made on the machine in question were of the usual proportions of wagon nuts and nuts for machinery, and they were of full thickness. The top of the nut was beveled at the corners, showing the powerful operation of the punch while in the die box. The nut took precisely the reverse form of the die. This proof appears to me to be very full and conclusive to show that in the year 1841 Steer had invented the nut machine according to all the tests stated by the commissioner in his opinion, and that therefore his assignee, Carter, is entitled to a patent therefor as prayed. And it has also been satisfactorily proved that Carter and Rees are entitled to a patent for the improvements they have made upon Steer's machine to adapt it to working by power.

[NOTE. Patent No. 13,118 was thereafter issued to Henry Carter, June 19, 1855, and a reissue patent (No. 313) was granted to Carter and Rees on the same day.

[For another case involving this patent, see Wood v. Cleveland Rolling Mill, Case No. 17,941.]

Case No. 2,476.

CARTER v. CUTTING et al.

[2 Cranch, C. C. 58.][1]

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

DISTRICT OF COLUMBIA—CHANGE OF VENUE.

An issue, sent by the orphans' court to this court, to try the validity of a will, cannot be removed to the other county, under the act of congress of the 24th of June, 1812, § 8.

[See note at end of case.]

[Petition by the heirs of Sally Carter to revoke the probate of her will, devising her estate to Sally C. Cutting, wife of J. B. Cutting.]

An issue was sent by the orphans' court of this county, to this court, to try the question devisavit vel non.

R. J. Taylor, for the defendant, made a motion to change the venue to Washington county, founded upon the defendant's affidavit of partiality and general prejudice in this county. This motion was made under the act of congress (2 Stat. 757) of the 24th of June, 1812, § 8, "to amend the laws within the District of Columbia."

THE COURT, however (THRUSTON, Circuit Judge, absent), was of opinion that it was not a case which could be transferred to another county under that act.

See, also, Alexander v. Wise, May term, 1844 [unreported].

[NOTE. Petitioners applied to the orphans' court of Alexandria county to revoke the probate of the will. Without issuing a summons, that court dismissed the petition, whereupon petitioners appealed to the circuit court of the District of Columbia, which affirmed the action of the orphans' court. Petitioners then appealed to the supreme court of the United States, where the decree of the circuit court was reversed, and the cause remanded, with directions to proceed to a hearing upon the merits. See Carter v. Cutting, 8 Cranch (12 U. S.) 251.]

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

CARTER (FISHER v.). See Case No. 4,815.

CARTER v. HAIGH. See Case No. 2,475.

CARTER (LAMB v.). See Case No. 8,013.

Case No. 2,477.

CARTER v. LANE et al.

[1 Hayw. & H. 176.][1]

Circuit Court, District of Columbia. April 1, 1844.

SALES—CONTINUOUS DEALING—NOTICE OF CHANGE OF TERMS.

1. Where a party deals with another on terms of credit, it is his duty to notify his customer that his terms are cash, before making up the goods for said customer.

[2. Where a tailor has dealt with a customer on credit, he should notify the latter of his change to cash dealings before making up goods.]

At law. Appeal from justice of the peace.

The suit was brought before B. K. Morsell, justice of the peace. The appellees [Charles H. Lane and William Tucker], trading under the firm name of Lane & Tucker, made a pair of pantaloons for the appellant [Bernard F.] Carter, and sent them home ordering the boy not to deliver the pantaloons unless they were paid for. The appellant became offended and refused to take them, whereupon the appellees brought suit. The magistrate gave them judgment for the value of the pantaloons. From which judgment the defendant in the court below appealed.

Barton Key, for appellant.

Jos. H. Bradley, for appellees.

In the trial of the case, the appellees produced two advertisements published in the National Intelligencer, that stated in one, that the firm of Lane & Tucker had received direct from Paris a general assortment of goods, all of which they will sell cheap for cash, or to punctual customers on a short credit, and in the other that they are now prepared to make spring and summer wear cheap for cash.

THE COURT decided, after hearing the testimony of the witnesses, and the arguments of counsel, that inasmuch as the gentleman had before dealt with the appellees on terms of credit, it was their duty to have notified him before they made the pantaloons, that they had changed their terms to cash.

The circuit court reversed the judgment of the magistrate.

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

CARTER v. McGEHEE. See Cases Nos. 11,721–11,725.

CARTER (MENDENHALL v.). See Case No. 9,426.

Case No. 2,478.

CARTER v. MESSINGER.

[11 Blatchf. 34.][1]

Circuit Court, N. D. New York. March 18, 1873.

PATENTS—"SLIDES FOR EXTENSION TABLES"—CONSTRUCTION—PATENTABILITY—VALIDITY.

1. The claims of the reissued letters patent granted to Merrill E. Carter and Elisha Metz, April 4th, 1871, for "improved slides for extension tables," the original patent having been granted to them September 6th, 1864, namely, "1. A metallic connecting slide, D, with flanges to be inserted in the grooves, E, E, of the wooden bars, A, B, C, when constructed, arranged, and operating in the manner and for the purpose specified," and "2. A metallic connecting slide, D, for the bars of extension tables, having the flanges on one side cast thicker than upon the other, so as to hold fast in the groove of one bar, and slide free in the groove of the other, as herein described," and "3. The pin h, and notches or holes, g, when combined with, and used to hold, a metallic connecting slide, D, in its proper position in the groove, E, of the bars of an extension table, as herein specified," so far as the slide is concerned, embrace only a slide which combines in one a double T slide and a double-wedged or dove-tailed slide, and do not embrace a slide which is simply a double T slide, or a slide which is simply a double-wedged or dove-tailed slide.

2. As to the second claim, making the flange on one side thicker than on the other was not new, and was not a matter of invention, and it was not invention to so construct a metallic slide when a wooden slide had been so constructed before.

3. A wooden double T slide being old, and a wooden double-wedged or dove-tailed slide being old, it was no patentable invention to make either form of slide of metal instead of wood.

4. Fastening one piece of wood to another, or one piece of metal to another, or a piece of metal to one of wood, by the use of nails, bolts, or screws, being old it was not a patentable invention to fasten a metallic slide in the groove of the slide bar, by passing a nail or bolt through both.

[In equity. Bill by Merrill E. Carter against Austin E. Messinger for alleged infringement of letters patent.]

N. B. Smith, for plaintiff.

E. Charlton Sprague, for defendant.

WOODRUFF, Circuit Judge. The bill of complaint alleges an infringement of a patent [No. 44,073] granted, September 6th, 1864, to the complainant and Elisha Metz, for "improved slides for extension tables," reissued April 4th, 1871 [No. 4,317]. The answer, among other things, (which, under the conclusions I have reached, it will not be necessary to discuss,) denies any infringement of the rights secured by the patent, alleges that the patentees were not the first and original inventors of the device patented, denies the novelty of the invention, and avers that the reissue of the patent is invalid, because it seeks to enlarge the scope of the alleged original invention, as shown in the original patent, and embraces what was not embraced in such original patent, or the record thereof. To the correct understanding of the subject, in reference to each branch of these defences, it will be useful to refer to the original patent. This will be useful, not merely for the purpose of enquiring whether the reissue is valid, but it may furnish, as matter of evidence, some aid to the questions—what is, in truth, the invention claimed in the reissue itself, and whether the defendant is an infringer.

In their original specification, the patentees, at the outset, declare, that their invention "consists in the peculiar form and construction of the slides that connect or hold together the extension bars, and the manner of securing them in place in the groove." The grooved bars being then described, the specification proceeds: "These slides are of suitable length for the purpose designed, and constitute, in outline, a double T and double wedge or dove-tailed form." Then, describing the slide, its projections forming the double T, which fit in corresponding channels in the bars, and the dove-tail, or wedge, form, growing thinner to the centre, as shown in the drawings, it adds: "This double wedging form of the central portion of the slide forms a corresponding bevel with the sides of the groove" in the bars. The drawings make the form of the slide thus described quite plain, by exhibiting a cross section thereof as inserted in the grooves of two parallel bars. The patentees then state, that they "prefer to cast it of skeleton form, with the hollows or depressions, f, f, in the sides, but, if desirable, the double T at each side may be cast plain and solid." To secure the slides firmly, they make the tongues on one side of the slide a little thicker transversely than they are on the opposite side, so that they will drive closely into the end of the groove in which they are designed to remain stationary. Each slide is also formed with a vertical notch on one side, in which rests a pin passing through the bar. The advantage of this is stated to be the avoiding, and saving the expense, of the drilling of screw holes in the slide, as in the ordinary mode of securing them in place, and of the employment of screws. The specification enlarges on the advantages of what it calls "our combined double T and dove-tail slide," illustrating them by showing a simple double T form, and a simple double wedge or dove-tail form, in the drawings, showing the tendency of the simple double T, by the flanges or tongues, to tear or split out the lips or sides of the groove, and the same tendency added to a tendency to bind in the groove, when the simple double dove-tail is used. These difficulties are stated to be overcome

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

by the patentees, because, while the tongues prevent the wedges or dove-tail from binding, the wedging shape of the dove-tail prevents the lips of the groove from being torn off, by presenting a beveled surface as a bearing, thus strengthening the lips against lateral action, and forming a fulcrum on one side and a resistance on the other, best adapted to resist the strain that is brought to bear. The specification thereupon adds: "We do not claim either simply a double T form, or a double wedging, or dove-tailed form or slide, but, what we claim as our invention, and desire to secure by letters patent, is a slide, D, combining the double T and double wedge or dove-tailed form, the same consisting of the tongues, a, a, and centre, e, arranged in combination with the groove, E, and bars, A, B, C, substantially as herein set forth." "In combination with the slide, D, arranged as above described, provided with the notch, g, and with the groove, E, and bars, A, B, C, we also claim the pin, h, arranged and operating substantially as herein set forth."

Here is a clear and intelligible description of the invention of the patentees, and of what is shown in their drawings, and of just what they claimed; and no one can read it intelligently, without perceiving, that it consists, simply and only, of a slide combining in one the double T slide and the dovetailed slide, and then, further, the mode of fastening them in the grooved bars—first, by making one arm or side of the slide larger than the other, that it may be driven in and be held firmly by the sides of the groove; and, second, by a pin driven laterally through the bar, so as to press the slide in a notch formed on its inner edge. This construction of the specification and claim is rendered certain, not only by the disclaimer of the patentees, which, although not conclusive as an estoppel, is, nevertheless, useful, as evidence of their own consciousness of the fact, but, especially, by the proofs in this cause, that double T slides and double wedged or dovetailed slides were in common and public use theretofore.

I have not been able to discover any imperfection or mistake in this original patent calling for a reissue; nor, in truth, can I discover that, assuming the alleged invention to be patentable, the original patent did not secure to the patentees all that they could claim to have invented.

But, so far as the merits of this case are concerned, the reissued patent does not, in its specification, describe any other or different device as the invention of the patentees, unless, perhaps, the intimation that the slides referred to in the patent are made of some metal, is more distinct. In the original specification, there is no word of declaration that they are to be of metal of any kind. Wood, as the material, will satisfy all the terms of the description, save that, in one line, it is said: "We prefer to cast it of skeleton form," &c. It would be difficult to say, that this declaration of preference precluded the patentees from claiming the slide they described, if patentable, whether made of wood or metal; still less, that they had thereby secured an exclusive right to the use of a metal slide, in contradistinction from a slide made of wood. In the reissued patent, it is said: "A hollow space, or depression, is left in each head, which not only reduces the metal, but leaves less friction," &c.; and this is the only word in the description of the invention in the reissued specification, which suggests that the patentees contemplated the use of metal for their slides. It is in the claims annexed to such reissue that this is made a restriction upon the otherwise broad scope of their description. But, in respect of the device invented, the specification in the reissued patent does not greatly differ from the original. In that, it is also stated, that the "invention consists in the form and construction of the slide, and the means for connecting the same with the extension bars." What, then, is that form and construction, which, in their view, constituted their invention, or, as very specifically afterwards stated, their "peculiar construction and form?" They state it thus: "The central or core portion is made double-wedging or dovetailed, the narrowest point being in the centre, which is the junction or joint between the two bars. The dove-tailed or thickened sides thus rest in the correspondingly-shaped grooves * * * made in the sides of the bars. The outer portions of the slide are formed into two extending or branching tongues * * * which are of T form, and fit in corresponding channels * * * of the groove. This construction makes the bearings * * * broad and separated, which is of much importance to give a firm hold and steadiness of action. A hollow space or depression is left in each head, which not only reduces the metal, but leaves less friction on the contact surfaces, and produces an improved form of the slide, at the same time forming a large bearing." In this last clause, the patentees seem to narrow their invention, by excluding the option which was reserved in the original, to make the head solid, as above explained. They then declare: "We claim a novelty, in the improved form of the slide as above described. A simple double T form of slide was in common use before our invention. Simple dove-tailed slides, without the T flanges, have also been in common use. These separate features we do not claim; but, in their combined form, we obviate many difficulties, such as binding in the groove and the splitting out of the tongues of wood. The broad bearing produced by the separated flanges * * * insures a more perfect action than is attained by the ordinary T form." Each one of the claims which follow refers to the flange thus described, and, of course, excludes the ordi-

nary double T flange, of whatever material it may be made.

1. Language could hardly have been chosen which would have made it more plain, that, in respect to the form and construction of the slide, the patentees claimed, in the reissue, as in the original, a slide combining the double T and the dove-tail, and nothing else. The use of the dove-tail caused a bearing upon that, holding the bars together, and resisting strain tending to tear or split the groove, and, at the same time, spreading more widely the arms of the T, and so preserving their strength, as well as giving them a broader bearing, and, as they say, "a more perfect action." This not only excludes the double T slide, of whatever material composed, but that is, in terms, declared to be in common use, without any discrimination as to material; and that it had been in use, made of wood, for many years, is also, proved by the testimony. The slide so described, and declared to be new, and to be claimed by the patentees, the defendant has not used. He employs the double T slide, and that only.

Upon this branch of the case, it is clear, that the defendant has not infringed the complainant's patent, if it be conceded that that patent is valid. The patentees expressly confine themselves to a slide of a special form and construction, combining the dovetail and the T, and sedulously disclaim, in both the original and the reissue, the use of either alone; so that, on the face of the patents, and waiving all question of the novelty of the invention, and of the validity of the original or the reissued patent, they have, on this score, no ground of complaint of the defendant, who uses the T form only. The claims annexed to the reissued specification are: "1. A metallic connecting slide, D, with flanges to be inserted in the grooves, E, E, of the wooden bars, A, B, C, when constructed, arranged and operating in the manner and for the purpose specified." This claim, in very terms, confines the patentee to the combined form, with so much definiteness described in the specification itself.

2. The complainant insists, that, in another respect, there is an infringement. The reissued patent, as well as the original, describe the slide of the patentees as having the tongues or flanges, a, a, a little thicker on one side than on the other, so that they will drive closely into the groove in which they are designed to remain stationary; and, further, as having a notch on the side which is driven into the groove, in which a pin rests, which passes through the bar, and, by its presence in such notch, prevents any longitudinal movement of the slide, after it has been driven into the groove and the pin is inserted. The two other claims are framed to cover these features, thus: "2. A metallic connecting slide. D, for the bars of extension tables, having the flanges on one side cast thicker than upon the other, so as to hold fast in the groove of one bar, and slide free in the groove of the other, as herein described." "3. The pin, h, and notches or holes, g, when combined with, and used to hold, a metallic connecting slide, D, in its proper position in the groove, E, of the bars of an extension table, as herein specified."

It is well settled, that, in order to learn the true meaning and construction of the claims in a patent, the whole specification may be consulted; and, where the claim itself incorporates in it, by reference, several features of. the invention, this becomes essential. In this view, neither of these claims can be construed without including the specific form of the slide, D, as therein described; and that, as already shown, the defendant has not used.

But, if that be not the true construction of these claims, and they are to be taken to claim broadly any slide firmly driven into the groove on one side, other considerations are equally fatal to the complainant. As to the second claim, 1st, it is distinctly proved that making one side of the slide thicker or larger than the other, so as to be driven firmly into the groove on one side, was not new. 2d. It being palpable that the grooves in the bars are of the same size, it was equally palpable, that the side of any slide that was to be held fast in the groove of one bar must be larger than that side which was to move or slide freely in the groove of the other. This was not matter of invention. It rises hardly to the dignity of mechanical judgment. Common sense, or even obvious necessity, suggest it so plainly, that one must be greatly deficient not to see it. 3d. If it be said that it is not shown that this was ever before employed to hold metallic slides, but wooden slides only, it must suffice to say, that transferring a mode of constructing wooden slides, in this respect, to metallic slides, is not invention. It operates in precisely the same way in both. Indeed, although it were conceded that that form of construction was, of itself, not sufficient, when applied to a wooden slide, without glue, and is effectual when applied to a metallic slide supplemented by the pin, still, the operation is identical in kind, and, if there be any difference whatever, it is in the degree of effectiveness. If screws had been used to bind parts of a wooden frame together, it would not be invention to put parts of an iron frame together with screws, when the mode of application was identical. On this ground, therefore, if the second claim is not to be construed as including the specific form of the plaintiff's slide, D, the complainant must fail.

As to the making of the notch and the insertion of the pin. In the original patent, the notch and the notch and pin only are described as the means of holding the slide against longitudinal motion; and, in that, and in the proofs taken herein, the advan-

tages of the notch are made prominent, in this, that, being further removed from the face of the grooves, there was more strength in the intermediate portion of the wood of the bar. In the reissue the patentees have attempted to enlarge their claim. They describe this part of the fastening as a "notch or hole," and, in the claim, they say "notches or holes." This is claimed, with much force, to render the claim void; and, if it do in fact claim what is not shown or suggested in the original, and is not a mere equivalent, then the claim of the defendant on this point is correct. But, there is another view of the subject. If the claim can be construed, (without including the complainant's special slide,) as a broad claim to holding any slide, or any metallic slide, in position by a pin or bolt run through it, then the claim cannot be sustained at all. For, be it observed, the defendant does not use the notch. He inserts his slide in the groove, and secures it there by bolting it in, the bolt or nail passing through the bar and the hole in the slide. This mode of securing one piece of wood to another, or one piece of iron to another, is so ancient, that its date can hardly be found. Bolting a tenon in a mortice, whether of wood, or metal, or of both, as well as hundreds of other every-day instances, of securing, by nails, or bolts, or pins, inserted in holes made for the purpose, preclude any claim that the defendant may not, if he please, secure his slide in that manner. As already shown, he is at liberty to use the double T slide, and, using that, he may fasten it in place by bolts, pins, nails, or screws, or any old well-known manner of effecting a like result. It follows, that the defendant is in no fault, and the complainant's bill cannot be sustained.

On the hearing, much was said upon an assumption that the complainant's slide was patented strictly as a metallic slide, instead of a wooden slide. The views above expressed seem to me to render it unnecessary to rest any conclusion upon either view of the patent in that respect, for, as it is confined, in respect to form, to the specific slide described, the defendant does not infringe it by his slides, whether of wood or metal. At the same time, if the complainant's patent be not confined to the specific form of combined slide which he describes, but can be construed broadly to include any metal double T or dove-tailed slide, I should be of opinion, that, as each of those, made of wood, were in common use, the substitution of metal was not patentable, even if it was better, for it required no new device or mode of application to make it available. Hotchkiss v. Greenwood, 11 How. [52 U. S.] 248.

Neither is it necessary for me to consider the argument, that the reissue is void because it embraces more than is shown in the original. No opinion is necessary on that point, since my conclusion is, that, conceding its validity as limited by the preceding discussion, the defendant does not infringe any exclusive right which can be legally claimed under it. The bill of complaint must, therefore, be dismissed, with costs.

CARTER (SARGENT v.). See Case No. 12,362.

Case No. 2,479.

CARTER v. SWIFT et al.

[1 Lowell, 398.] [1]

District Court, D. Massachusetts. 1869.

MONEY—GOLD AND CURRENCY—TENDER—COSTS.

1. Part of the proceeds of a whaling voyage were received in gold, and part in currency, and some advances were made to the libellant in gold. The account of the voyage was made up wholly in currency, the owners allowing and charging the premium on gold. *Held*, it was properly made up.

2. The libellant was to have a lay of one forty-second part of the catchings. If the account was so made up that he received this share, it was rightly made up, whether in one currency or another.

3. The libellant could not require that the gold dollars paid him at San Francisco should be charged at their face only, if the result would be to give him more than one forty-second part of the actual net returns.

4. The respondents having offered a certain sum before suit, based upon the mode of accounting adopted by the court, and no question of the sufficiency of the tender, in point of form, being made, the libellant was refused costs, unless it should turn out that the respondents had made a mistake in their computation, as to which the libellant had leave to go to an assessor.

In admiralty. The libellant [W. C. Carter] was entitled to a lay of one forty-second part of the net proceeds of the whaling voyage of the bark Camilla, for the time that he served on board the vessel, as compared to the whole voyage, after deducting the advances already made him, and the only question raised in the case was, whether the respondents [Jireh S. Swift, Jr., and others] could charge him with a premium on the gold coin paid him at San Francisco. The owners of the vessel made sale of a part of their cargo for gold, at San Francisco, and of a part for gold at home, according to the custom of the trade, and of the greater part for paper, and rendered their account wholly on a paper basis, allowing and charging the premium on all specie received and paid.

F. L. Porter, for libellant.

W. W. Crapo, for respondents.

LOWELL, District Judge. The voyage appears to have been properly made up. If the owners were obliged to account only for the number of dollars received without regard to currency, it would be in their power to sell the whole cargo for gold, and account

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

for it in paper. This a court of admiralty could not permit, if it were possible legally to avoid it. If the account is to be reformed, it must be reformed on both sides, and this might work great injustice to those of the crew who had not received large advances, though it might happen to be favorable to this libellant. The contract of the libellant was for one forty-second part of the proceeds; and in whatever currency the account is made up, if he receives payment in the same currency, he receives his fair share. I agree that in the naked case of a payment of so much money, the contract being silent as to the currency, if the debtor chooses to pay it in specie he cannot ordinarily ask for a credit for more than the number of dollars which he has paid. But here the question is of a fair settlement of proportions. An admiralty court will look at the fact, and if the libellant asks to have the account so adjusted as to give him more than one forty-second part of the actual net returns, it will refuse his request If he had been put in possession of one forty-second part of the oil and bone, worth in gold dollars at San Francisco a much less proportion of what the whole cargo would have brought at New York or New Bedford, in paper, as shown by what the remainder did bring, it is clear he could not now recover more; and, so far as that payment goes, this is substantially what he received. A certain part of the cargo was disposed of at San Francisco, for gold, and the libellant got a share of the gold; reckoning the price of the whole cargo, wherever sold, in paper, and reckoning his payment in the same, he is now entitled to only what the respondents are admitted to have offered him, unless there has been a mistake in computation. The case more nearly resembles Tufts v. Plymouth Gold Mining Co., 14 Allen, 407, than Bush v. Baldrey, 11 Allen, 367, which was relied on in argument.

The libellant is to recover the sum offered him, and interest. It was agreed that the computation might be revised by an assessor if the libellant desired it, and if it should turn out that he was not offered enough, he will have costs; otherwise not.

Decree accordingly.

Case No. 2,480.

CARTER v. TREADWELL et al.

[3 Story, 25.][1]

Circuit Court, D. New Hampshire. Oct. Term, 1843.

EQUITY JURISDICTION — SUIT BY FOREIGN ADMINISTRATOR—CITIZENSHIP — PLEADING — BILL TO CANCEL AGREEMENT — MULTIFARIOUSNESS—PARTIES.

1. Where a bill was brought by the plaintiff as administrator, and the defendant pleaded, that he was not administrator, inasmuch as he had not taken out administration in New Hampshire before filing this bill—it was *held*, that the plea was sufficient on general principles, and also that the statute of New Hampshire in relation to actions commenced by persons acting as administrators did not govern the rule of this court in equity, but was confined to suits at law, and was addressed only to the state courts.

[Cited in Pulliam v. Pulliam, 10 Fed. 30.]

2. *Held*, also, that the plaintiff might maintain a suit in the circuit court as a citizen of Maine, in his character of administrator, if he took out letters of administration in New Hampshire.

3. Certain timber land was purchased by A. of X. and Z., A. agreeing to pay therefor at the rate of one dollar per thousand feet for all the good pine timber, to be ascertained by certain persons appointed by all parties, who were accordingly appointed, and made the estimate. A. subsequently conveyed a portion to D., D. agreeing with X. and Z. to pay therefor one fourth of the price in money and the remainder in notes, and they giving a bond to convey to him the land on full payment of the notes. D. died insolvent, and A. became his administrator, and agreed with X. and Z. in his behalf to surrender the bond for the notes, which was done. The present bill was afterward brought by A. as administrator of D., and charged that there was a gross error in the original appraisement, unknown to him, (A.), by which D. had been induced to make the said bargain, and prayed that the bargain should be set aside, and the purchase money paid by D. should be refunded. But A. made no personal claim for relief. It was *held*, 1st, that the bill was objectionable for multifariousness in mixing up the independent claims which A. had personally and which he had as administrator. 2d, that it set forth no case for cancelling the original agreement. 3d, that even if it had, it was too defective and loose to support such a claim, in not bringing the proper parties before the court, and in alleging a mere mistake, without fraud, as a ground of relief, which, under the circumstances, was not sufficient.

This was a bill in equity in the following terms:

"Ezra Carter, Junior, of Portland, in the county of Cumberland, state of Maine, and a citizen of the state of Maine, for himself and also in his capacity of administrator of the goods, chattels, and estate of Seth R. Adams, late of Portland, aforesaid, and at the time of his decease a citizen of said state of Maine—to which capacity of administrator, your orator was duly appointed on the twenty-first day of November, A. D. 1837, and thereafterwards was duly qualified to act accordingly, brings this his bill against Daniel H. Treadwell of Portsmouth, in the county of Rockingham, state of New Hampshire, merchant, and a citizen of the state of New Hampshire, and Alfred W. Haven, of said Portsmouth, merchant, and a citizen of the state of New Hampshire. And thereupon your orator, complaining, says that on the tenth day of June, in the year of our Lord one thousand eight hundred and thirty-five, said Treadwell, and Haven, and one Henry L. Wiggin, were the owners, or claimed to be the owners, of seventeen thirty-second parts of township numbered four in the sixth range of townships west of the Kennebec river, in the million acres, so called, in the state of Maine, excepting lands

[1] [Reported by William W. Story, Esq.]

reserved for the public uses—in the following proportions, to wit, the said Treadwell and Wiggin of seven thirty-second parts each, and the said Haven of three thirty-second parts,—and being such owners, or claiming to be, the said Treadwell, Haven and Wiggin, on the same tenth day of June, executed an indenture of agreement between themselves of the one part, and said Ezra Carter, Jr., of the other part, which said indenture was also executed by the said Carter, and was in the words and figures following, to wit: 'This indenture, made June 10, 1835, between Daniel H. Treadwell, Alfred W. Haven, and Henry L. Wiggin, on the one part, and Ezra Carter, Jr. witnesseth—that said parties of the first part, have agreed to sell to said Carter part of township No. four, in the sixth range, west of the Kennebec river, in the million acres, excepting public lands, viz. the said Treadwell to convey seven thirty-second parts, and the said Haven three thirty-second parts, and the said Wiggin seven thirty-second parts, and to procure a sufficient deed from the owners of the remainder, at the rate of one dollar per thousand feet, for all the good merchantable pine timber thereon, to be ascertained by the report of five good judges, to be agreed upon by the parties; or if they cannot agree, to be appointed by Daniel Eastman, Jr. and Phineas Eastman, of Lovell, who in that case are to be two of the judges, if they will agree to it. Said judges to be appointed within two weeks, to go on as soon as may be convenient, and estimate the amount of timber and make their report; and the parties of the first part agree that upon failure to convey each the part owned by him upon performance of the conditions to be performed by said Carter, they will each, so failing, forfeit and pay to said Carter such proportion of fifty-five thousand dollars as his part is of the whole of said tract. And if they shall not within a month produce good bonds from the owners of the remainder as above, they will forfeit and pay to said Carter one thousand dollars jointly. And the said Carter agrees to pay to the parties of the first part so much as said tract shall amount to, according to the report of said judges, viz.—Five thousand dollars down, and enough with said five thousand dollars to make up one fourth part of the whole within six months, and the remainder in three equal annual payments, with interest annually thereafter; interest to commence in two weeks after said Carter shall receive a copy of the report of said judges; and said Carter is within six months to procure and deliver to said parties of the first part, good notes for the three last payments, with a mortgage of the premises, or other satisfactory security; and the said Carter agrees that he will, within one week, procure and deliver at the Cumberland House in Portland, or at said Treadwell's house in Portsmouth, a bond with good sureties to make the abovementioned payments in the above described manner, and deliver the notes and security as above. The obligors to forfeit and pay to the obligees fifty-five thousand dollars on failure to perform the conditions thereof. And the said Carter is to forfeit the five thousand dollars, if he shall not procure and deliver said bond, as above. The expense of exploring and estimating the timber, to be paid equally by the parties of each part. The deeds to be given by the parties to be warrantee deeds. It is agreed to extend the time for appointing the appraisers to one month. If the said obligors shall upon failure of performance pay the fifty-five thousand dollars, the parties of the first part are to pay back to said Carter, the five thousand dollars paid by him. D. H. Treadwell, A. W. Haven, Henry L. Wiggin, Ezra Carter, Jr.'

"And on the same day the said Treadwell, by writing on the back of said bond, acknowledged the receipt of the five thousand dollars therein contemplated, in part execution of said indenture, in the words and figures following, viz.—'June 19, 1835. Received five thousand dollars, the first payment abovementioned. D. H. Treadwell.'

"And afterwards, to wit, on the seventeenth day of June, A. D. 1835, in furtherance of said indenture of agreement, a bond was executed and delivered to the said Treadwell, Haven and Wiggin, agreeably to the provisions of said indenture, signed, as your orator now recollects, is informed, and verily believes, and executed, by said Carter, Ebenezer H. Scribner, Asa Hanson, Joseph Spaulding, George Pierce, Seth R. Adams, above named, and Nathaniel S. Littlefield, all citizens of said state of Maine; and the receipt of said bond was acknowledged in writing by said Treadwell, according to the recollection, information, and belief of your orator, on said indenture, in the words and figures following, to wit,—'Portland, June 17, 1835. Received a bond agreeable to the import of the foregoing obligation. D. H. Treadwell.'

"And on the same seventeenth day of June, A. D. 1835, your orator, acting for himself, by his writing, under his hand and seal, either upon said indenture or a copy thereof, as your orator now recollects, is informed and believes, made and executed a transfer and assignment of a part of his interest therein, as follows, viz. 'Know all men by these presents, that I, Ezra Carter, Junior, mentioned in the foregoing contract, for the consideration hereinafter mentioned, and a valuable sum of money to me paid by Ebenezer H. Scribner, and Asa Hanson of Portland aforesaid, Joseph Spaulding of Caritunk in the county of Somerset, George Pierce of Harrison, Seth R. Adams of Windham, and Nathaniel S. Littlefield of Bridgton, in the county of Cumberland, do hereby bargain, sell, transfer, and assign unto them eleven sixteenth parts of the foregoing con-

tract, subject to the performance of the same proportions of the conditions thereof. To have and to hold the same, with all the privileges thereof, and appurtenances to the same belonging, and subject to all the terms, conditions, and agreements therein contained, in the following proportions, viz. Two sixteenths each to said Scribner, Spaulding, Pierce, Hanson, and Littlefield, and one sixteenth to said Adams. In witness whereof I have hereunto set my hand and seal this seventeenth day of June, A. D. 1835. Ezra Carter, Jr.'

"And by his further writing on the same, your orator acknowledged as follows, viz.—'June 17, 1835. I acknowledge to have received of the several persons mentioned in the above assignment, their several proportions of the foregoing sum of five thousand dollars, paid by me to the said Treadwell, Haven and Wiggin. Ezra Carter, Jr.'

"And afterwards, to wit, on the twentieth day of said June, the original parties to said indenture, in further and proper execution of the intentions and requirements thereof, made this agreement and signed the same, in writing, on the back of said indenture, or a copy thereof, as follows, to wit,—'We the above named Daniel H. Treadwell, Alfred W. Haven, Henry L. Wiggin, and Ezra Carter, Jr. do hereby appoint Phineas Eastman, and Daniel Eastman, Jr. of Lovell, David Bradley, of Fryeburg, and George W. King, of Portland, and Winthrop Smart, of Ossipee, in the state of New Hampshire, the foregoing named judges, and in case of the refusal or inability of either of said persons to perform the duties assigned them, then we agree that said Phineas Eastman and Daniel Eastman, Jr. shall fill all vacancies; and that said judges shall make duplicate reports to each of the parties as soon as convenient. And a report of the majority shall be final and conclusive upon both parties. Dated June 20, 1835. D. H. Treadwell, A. W. Haven, Henry L. Wiggin, Ezra Carter, Jr.'

"That said Haven and Treadwell did thereafter transmit a copy of said indenture and agreement last above cited, to said Phineas and Daniel, in a letter by them, said Treadwell and Haven, respectively signed, requesting and enjoining upon said Phineas and Daniel the performance of said trust, in the words and figures following, to wit: 'Portsmouth, July 6, 1835. Messrs. Phineas and Daniel Eastman, Jr.: Gentlemen,—You will perceive by the above copy of a contract made with Mr. Ezra Carter, Jr., of Portland, that you are appointed to be two of the judges of the timber on No. 4. We hope that you will accept the appointment, and we wish you to notify Messrs. King, Bradley and Smart of their appointment immediately. We are desirous to have you commence on the duty as soon as may be convenient to you. Respectfully yours, D. H. Treadwell, A. W. Haven.'

"That said Daniel Eastman, Junior, Phineas Eastman, and George W. King, thereafter declined acting as judges, pursuant to said indenture, and thereupon said Daniel Eastman, Jr., and Phineas Eastman, by the authority vested in them as aforesaid for that purpose, appointed to fill said vacancies Andrew Killgore, Thomas Farrington, and James Eastman. And the said judges, in the months of July and August of the year last aforesaid, proceeded to examine said land and to estimate the amount of timber thereon, and a majority of said judges, to wit, the said Killgore, Farrington, and James Eastman, agreed to report, and did report in the words and figures following, viz. 'We, David Bradley, Winthrop Smart, James Eastman, Thomas Farrington, and Andrew Killgore, the judges agreed upon and appointed to appraise, judge, fix and ascertain the number of feet of all the good merchantable pine timber on township numbered four, in the sixth range in the million acres, on the west side of the Kennebec river, in the county of Somerset, and state of Maine, and within named, exclusive of public lands, and having taken upon ourselves the burthen of said appointment, and having all given the within named Daniel H. Treadwell, Alfred W. Haven, Henry L. Wiggin, and Ezra Carter, Jr. due notice of the time and place of hearing and of proceeding to ascertain said amount of said timber, and all having heard said parties within named, and having all personally, carefully and attentively examined, explored, considered, estimated and ascertained all the good merchantable pine timber on said township, exclusive of public lands, we do award, order, report, adjudge, determine, and have ascertained there is on said township, exclusive of public lands, one hundred and ninety-five millions, eight hundred and fifty thousand feet of good merchantable pine timber. And we do further award, order, report, adjudge and determine that the expense of exploring and ascertaining said timber as aforesaid, is one thousand two hundred and seventy-four dollars and sixty-nine cents. Given under our hands this twenty-eighth day of August, A. D. 1835. Andrew Killgore, Thomas Farrington, James Eastman.'

"And your orator further complaining says, that after said report was made, Ebenezer Scribner, as your orator has been informed and believes, went to Portsmouth to see said Treadwell and Haven and Wiggin, with a view of settling, or endeavoring to settle said concern; and immediately afterwards came to Portland, or Windham, or wherever said Adams, then living, was found, and then and there represented to said Adams, that he, said Scribner, was authorized by said Treadwell and Haven to offer said Adams that he might have the one-sixteenth of said township, in which he, said Adams, had become interested as aforesaid, at the rate of seven dollars and fifty cents per acre, on condition that he

would pay said Treadwell and Haven one quarter thereof in cash, in advance, instead of paying the quarter in six months, as provided in said indenture; and would give his notes for the other three quarters, as provided and agreed. And said Adams, supposing and believing that he was in law bound and obliged to purchase said land according to the report of said appraisers, and fully believing that said report was correct and true, and that said land did actually contain the amount of timber specified in said report, and also believing that said Scribner was acting in good faith, and was to purchase of said Treadwell and Haven on the same terms, then and there concluded to purchase said one-sixteenth on the terms aforesaid, and to pay therefor the sum of seven dollars and fifty cents per acre, one fourth in money, and the residue in three equal annual instalments, or payments, as aforesaid, and in fulfilment of your orator's aforesaid indenture and agreement with said Haven, Treadwell, and Wiggin. That having come to the determination aforesaid, the said Adams raised and furnished his proportion aforesaid of said purchase money, including his proportion in the five thousand dollars above named, paid to said Haven and Treadwell as aforesaid, and amounting in all to the sum of two thousand five hundred and fifty dollars, and at the same time made his three several notes for the sum of twenty-five hundred and fifty dollars each, payable to said Treadwell and Haven, in one, two, and three years, with interest annually, bearing date September 12, 1835; or gave two such notes, payable in one and two years with interest, and a note for seven hundred seventy-eight dollars and fifty cents, payable in three years with interest; and for the remainder of said third annual payment gave said Haven and Treadwell other notes or securities, as this complainant is informed and believes, amounting in all to the sum of twenty-five hundred and fifty dollars for said last annual payment, including said note of seven hundred and seventy-eight dollars and fifty cents; and all of said payments and notes were delivered to and received by said Haven and Treadwell in Portland aforesaid, on said twelfth day of September, as the complainant is informed and believes, and said Haven and Treadwell then and there gave said Adams, according to the information and belief of this complainant, an obligation executed by them in writing, in the words or substance as follows, viz. 'Know all men by these presents, that I, Daniel A. Treadwell, of Portsmouth, New Hampshire, in consideration of the sum of ten thousand two hundred dollars, have agreed to sell and convey unto Seth R. Adams, of Windham, Maine, one-sixteenth of township No. 4, sixth range west of Kennebec river, in the Bingham purchase, except public lands, being in the million acres, lying in the county of Somerset and state of Maine, according to the survey and plan of E. Coburn, Esq. by good and sufficient warrantee deed in fee, on payment of said conditions as follows, viz.—The consideration is paid and secured as follows, viz.—One quarter part in cash, in advance, the other three quarters in one, two, and three years from the twelfth day of September, A. D. 1835, secured by certain notes signed by said Adams, with interest annually. Now on the full and complete payment of the amount aforesaid, with interest, in the proportions aforesaid, the said notes are to be void and delivered up, and this agreement to be faithfully performed, otherwise to be void and of no effect. D. H. Treadwell.'

"That the said Treadwell and Haven were jointly interested in said obligation, given to the said Adams as aforesaid, by whomsoever signed and however written, concerning all of which your orator prays that said Haven and Treadwell may be required specially to answer, and annex a copy of said obligation to their answer.

"And your orator further complaining says, that after said writings were executed, the said Adams, during his life time, paid divers large sums of money to said Treadwell and Haven, in extinguishment of said notes, still believing said land to be timbered as said judges had reported, and that he was bound in law to complete the purchase of the same accordingly—being ignorant of any mistake or error in the estimate by them made—and advanced sundry other sums of money in conducting operations on said land, the whole proceeds of which were, during the life time of said Adams and after his decease, received and appropriated by said Haven and Treadwell in further extinguishment of said notes, amounting in all, as this orator is informed and believes, including said advance payments, to seven thousand two hundred and twenty-three dollars twenty-one cents, exclusive of interest on such payments, since the same were respectively made; from which payments your orator believes should in equity, and assents to be deducted so much of the payments derived from said operations on said land, as were conducted by said Adams, over and above the actual advances in money therefor made by said Adams, of which sums your orator prays that the said Haven and Treadwell may be required specifically to answer.

"And your orator further complaining saith, that some time after the decease of said Adams, to wit, in the winter of 1840, as your orator is informed and believes, said Treadwell and Haven, together with other parties interested in said lands, and without the participation, concurrence, or knowledge of your orator, or of said Adams, or of any person acting in behalf of or representing said Adams, or his estate, he being then deceased, had certain proceedings for partitioning the

several parts of said land held in common by said Treadwell and Haven and others; and caused the same to be examined, explored and surveyed anew by commissioners duly authorized for that purpose, and by others, which occasioned the suspicion and belief that there had been a gross mistake and error on the part of the judges before named, in their estimate and report of the quantity of timber on said township, and that all parties had acted under a mutual mistake in the bargain and purchase predicated upon said estimate and report. That said suspicion and belief led to a subsequent careful inquiry and examination of the fact thus suspected and believed by purchasers of parts of said township under the indenture and bargain aforesaid, as this complainant has been informed and believes, who charged upon and notified said Treadwell and Haven of said gross error and mistake on the part of said judges, committed as aforesaid, and that said Treadwell and Haven did thereafter become satisfied and convinced of the same, and upon certain proceedings instituted in this honorable court by said other purchasers under said indenture, did subsequently consent to, and did in fact rescind said bargain and purchase, and refunded the money and other property received by and paid to them, by such other purchasers, for their respective portions of said township, to the satisfaction of said other purchasers. And your orator distinctly charges upon said Treadwell and Haven, upon the information and belief of this complainant, that there was a gross error and mistake on the part of said judges, in their estimate and report of the amount of timber on said township; that in said estimate and report, said judges included, either through design or accident, a vast quantity of timber that was neither good nor merchantable, and did not come within the meaning of the indenture aforesaid; and also a vast amount of timber that did not belong to, nor stand upon said township; that there never was, in fact upon said township, and was not at the time of the appraisement, estimate and report aforesaid, any thing like the amount of nine thousand feet of timber to the acre, of all kinds; nor so much as one half that amount of good merchantable timber; nor, in fact, more than two thousand feet of such timber to the acre;—that the purchase by said Adams under your orator's aforesaid indenture with said Treadwell and Haven, was predicated entirely upon said estimate and report of said judges, said Adams having no other means of learning any thing of the amount of timber on said land; —that the whole purchase was founded on an entire mistake and misapprehension of your orator and of said Adams, and also of said Haven and Treadwell, as your orator distinctly avers, if said Treadwell and Haven did not know the truth respecting the amount of timber then actually upon said township, or have reason to suspect and believe that said estimate and report of said judges were entirely wrong, and much beyond the truth, which your orator prays may be distinctly answered by said Treadwell and Haven;—that said one-sixteenth part of said township, purchased as aforesaid by said Adams, was never worth one half of the amount said Adams paid for the same, per acre; that said Adams was most grossly and grievously deceived and led astray by said estimate and report of said judges, founded as it was on a wrong mode of estimating the amount of timber, and on an entire mistake and misapprehension of all parties to it, and of his obligation to purchase the same under your orator.

"And your orator further charges that, as he is informed and believes, said Adams was grossly deceived and misled by said Scribner in the representations made by him as to the rate at which said Treadwell and Haven were willing to sell their interest in said township;—your orator believes that in fact said Treadwell and Haven were willing, proposed and agreed, to sell their said interest at the rate of seven dollars per acre, and did in fact sell a portion of said township to said Scribner, at that rate, while the said Adams supposed that said Scribner was purchasing at the same rate with himself and the other purchasers who signed the bond of purchase as aforesaid;—and your orator charges, that said Treadwell and Haven were purposely combining and confederating with said Scribner in the premises, to conceal from said Adams the true terms and conditions upon which said Treadwell and Haven were selling said land to said Scribner, under the indenture aforesaid, and to defraud said Adams by inducing the belief aforesaid, or afterwards knew and assented thereto. And your orator is informed and believes the truth to be, that the whole of said parts of said township, specified in the indenture and obligations aforesaid, were sold for seven dollars per acre, and that the amount received of said Adams, and of said other purchasers, over that sum, on the parts by them purchased respectively, went, or was to go, to said Scribner's benefit in some way; and that to this end said Scribner, and said Treadwell and Haven were confederating together, and were mutual agents of each other, or that said Scribner was the agent of said Treadwell and Haven to induce said Adams to purchase at the rate of seven dollars fifty cents per acre, and as a compensation for his, said Scribner's services, in deceiving said Adams with said other purchasers, received his own proportion of said land at a less rate, or that said Treadwell and Haven were knowing at the time said Adams purchased of them, and paid them money and notes as aforesaid, that said Scribner had deceived said Adams in the purchase, or had good reason to suspect and believe that said Adams was deceived by said Scribner, as to the amount paid or to be paid

by said Scribner for the number of acres he purchased.

"And your orator further shows and complains unto this honorable court, that after said Adams' decease, said Treadwell and Haven preferred and presented their demands and notes against said Adams for payment, to your orator as administrator of the estate of said Adams, and the same were examined and allowed for payment by the commissioners of insolvency duly appointed to hear and examine said demands and all other claims upon said estate presented by creditors—although said Treadwell and Haven still retained absolute title to said land. And that your orator did, in ignorance of the mistake, misapprehension, and error hereinbefore set forth in relation to the amount of timber on said township, and in total ignorance of the error, made as aforesaid, by said judges of said timber, and without the means of knowing or suspecting the same, or the combination or confederacy of the said Treadwell and Haven with the said Scribner as herein before set forth, to mislead and deceive said Adams respecting the terms upon which said parts of said township were being sold by said Haven and Treadwell, and that the same were being sold in part to said Scribner at a less price than seven dollars and a half per acre; and being ignorant of the information and knowledge which the other part purchasers of said township had obtained in partitioning the same, respecting the error, mistake and misapprehension aforesaid, and that not one half of the timber reputed by said judges to be on said township was to be found in fact thereon; and being ignorant of said Haven and Treadwell's discovery and knowledge of said error, mistake and misapprehension, and that in good faith and justice, said purchase, made as aforesaid by said Adams of said Treadwell and Haven, was void, and ought not to be enforced, and the notes by him given ought to be surrendered and cancelled; and knowing the inability of said Adams' estate to pay the remaining unpaid amount of said notes and consummate said purchase, your orator did, in his capacity aforesaid, as administrator of said Adams' estate, at the desire and request of said Treadwell and Haven, surrender to them through their attorney, the aforesaid bond, given by them to said Adams as aforesaid, for a conveyance of the land aforesaid, in consideration that the surrender of the notes held as aforesaid by said Treadwell and Haven against the estate of said Adams should be made by said Treadwell and Haven, which surrender was made accordingly, and all of said Treadwell and Haven's demand aforesaid was transferred and made over by an order or assignment in favor of the widow of said Adams. And your orator further avers, that the only claim which was then known to your orator as existing in favor of said Adams' estate, and embraced in and by said settlement, against said Treadwell and Haven, was supposed and understood only to be a claim at common law upon the bond aforesaid, conditioned upon the payment of the notes aforesaid, and the same was in that manner adjusted, surrendered and cancelled, to wit, at Portland aforesaid, on the eighth day of August, A. D. 1840—and a written discharge executed accordingly by your orator, to said Treadwell and Haven, a copy of which your orator prays may be annexed to said Treadwell and Haven's answer to this bill.

"That after said settlement last aforesaid, by this complainant, with said Haven and Treadwell, to wit, within the year next ensuing, your orator was for the first time informed and persuaded of the error, mistake, and misapprehension herein before described, respecting the report of said judges of the amount of timber on said land, and of said Treadwell and Haven, and of said Adams, and of the fraudulent acts and collusion towards said Adams by said Scribner and said Treadwell and Haven, as herein before set forth, and believing, as he now distinctly charges upon said Treadwell and Haven, that, at the time of the settlement aforesaid, and the surrender of said bond to said Treadwell and Haven by this complainant, and the assignment of said notes, the said Treadwell and Haven well knew, and believed, and improperly and against good faith and fair dealing designedly concealed from your orator, to induce and effect said settlement, all the aforesaid facts and circumstances of the error and mistake committed by the said judges in their aforesaid report respecting the amount of timber on said township, and upon which said Adams' purchase and bond and notes and payment of money, aforesaid, had been made; that they also well knew, and believed, and improperly concealed from this complainant, that said Adams had been misled and deceived by the same; and that he had been misled and deceived as herein before stated, by the said Scribner, and that it was wrong, and improper, and against good faith and fair dealing, for this complainant, acting in his aforesaid capacity of administrator of said Adams' estate, to surrender said bond, and cancel the claim incident thereto, and founded in the circumstances in which said bond originated, in favor of said estate, and lawful creditors and representatives of the said Adams, against said Treadwell and Haven, and that this complainant never could have been justified in so doing, had he been possessed of the knowledge of said error, mistake, collusion and deception aforesaid; and that this complainant, as administrator aforesaid, was ignorant of the equity of the claim of said estate against said Treadwell and Haven; and that said Treadwell and Haven did, in said settlement, and acting upon their knowledge of the error,

mistake and worthlessness of the land aforesaid, and upon this complainant's ignorance of the discoveries which had been made by said Treadwell and Haven and the other part-purchasers of said land with said Adams, in relation thereto, practice an undue, unwarrantable and unconscionable advantage upon this complainant, and as administrator, in said settlement, and that the same ought to be re-opened, and re-adjusted, which he prays may be done. And your orator, in view of all the facts herein before stated, being advised that said purchase made by the said Adams as aforesaid, ought not to have been enforced, but that the same should have been rescinded—and that the settlement of the above described bond and notes, made by this complainant as aforesaid with said Treadwell and Haven on the 8th day of August, A. D. 1840, ought to be rescinded and nullified, and said parties be restored to their respective rights as the same existed prior to and at the time of said settlement, have requested the said Treadwell and Haven to rescind the same, and to pay back to your orator all the money so as aforesaid paid by said Adams to said Treadwell and Haven for said land, and that said notes be restored and cancelled, and that the estate of said Adams be indemnified by said Treadwell and Haven for the use or interest of the money paid them as aforesaid from the times of the payment thereof. And your orator well hoped that said defendants would have complied with such reasonable request, but they have refused so to do."

The bill, after putting several interrogatories, concluded with a prayer that, "upon a full and perfect hearing and discovery, and understanding of all matters aforesaid, all the cash so aforesaid paid by the said Adams may be refunded, with interest, and that the notes aforesaid may be given up to be cancelled, and that your orator may be repaid the expenses and damages which he and said Adams may have suffered by reason of the premises, and that your orator, for himself, and in his said capacity of administrator, may have such other and further relief in the premises as the circumstances of the case may require, and to your honors may seem meet."

The defendants put in a plea to that part of the bill which respected the claim as administrator of Adams, and a demurrer to the residue of the bill. The plea was as follows: "And now the said defendants by protestation, not confessing all or any of the matters and things in the said complainant's bill contained to be true, in manner and form as the same are therein and thereby alleged and set forth, and denying all, and all manner of fraud, fraudulent combination and conspiracy, contrivance and concealment, as therein charged, to the matter therein contained, and to so much thereof as sets forth, that said Ezra Carter, Junior, is the administrator of the estate of said Seth R. Adams, and to so much thereof as relates to any contract of purchase between said Adams and these defendants and seeks to have such contract rescinded, and prays for relief in the premises, and that these defendants may be required to refund to said Carter all the money paid by said Adams upon the said purchase, and that the notes given in payment therefor, may be given up to be cancelled, and that the complainant may be repaid all damages and expenses which said Adams may have suffered by reason of the premises, do thereunto plead, and for plea say, that said Carter is not administrator in the bill mentioned, or the legal representative of said Seth R. Adams, duly appointed and qualified to act as therein set forth. All which matters and things these defendants aver to be true, and plead the same to so much of said bill as aforesaid, and pray the judgment of this honorable court whether they ought to be required to make any other or further answer thereunto."

The demurrer was as follows: "These defendants by protestation, not confessing all or any of the matters and things in the said complainant's bill contained, to be true, in such manner and form as the same are therein set forth and alleged, and denying all, and all manner of fraud, fraudulent combination and confederacy therein charged, and in no sort waiving the benefit of their plea filed herewith, but wholly relying and insisting thereon to so much of said bill as therein set forth, do demur to the residue of said bill, and for cause of demurrer show that the complainant has not thereby made such a case as entitles him, in a court of equity, to any discovery from these defendants, or either of them, or any relief against them, as to the matters contained in said bill; and that any discovery which can be made by these defendants, or either of them, cannot be of any avail to the said complainant for any of the purposes for which a discovery is sought against these defendants by the said bill, nor entitle the complainant to any relief in this court touching any of the matters therein complained of. Wherefore, and for divers other good causes of demurrer appearing in said bill, these defendants do demur to so much thereof as aforesaid, and pray the judgment of this honorable court whether they shall be required to make any other or further answer to the said bill, and pray to be hence dismissed with their reasonable costs in this behalf sustained."

The case being set down for argument, was now argued upon the plea and demurrer by C. S. Davies for defendants, and by W. H. Y. Hackett for plaintiff.

Hackett, for plaintiff, said:

The plaintiff's counsel contend, that the demurrer is insufficient to oust this court of the jurisdiction claimed by the bill, because Carter sues as well in his private, as his official capacity of administrator. The lan-

guage of the bill is "for himself and also in his capacity of administrator, &c." Whether the facts upon which the case depends will or will not substantiate an equitable interest, as well for himself as for his intestate, is a question, which cannot be entered upon, much less settled upon the defendant's demurrer. But this failure of the bill is a conclusive answer to the demurrer. But the facts set out in the bill show Carter to be personally as well as officially interested. He bought the interest in the land in question under a mistake of respondents. Upon the same mistake he sold to his intestate. If that mistake be such as vitiates this sale either as between Carter and the respondents, or as between Adams and the respondents, Carter is alike interested; for he is interested upon his liability over to the estate of Adams for the amount paid to him by Adams, and is interested again in his own right to recover back of respondents the amount paid by him to them. The facts, as laid, then, are sufficient, if sustained by proof, to warrant the proceeding by Carter against respondents, as well in his individual as in his official capacity. He proceeds in both capacities, and he is to recover in either or both, as the equity of the case shall dictate upon proof of all the facts. Carter complains that he personally acted under a mistake in what he transacted with the respondents touching the land while acting in his individual capacity, and that he acted under a like mistake in what he did with them in his official capacity; and that the respondents acted either fraudulently or mistakenly in either instance, so that all of both transactions were void. Such is the nature of the allegations of the bill. Equity alone can remedy these mistakes. Carter is a citizen of a different state from that of which the respondents are citizens. If, as administrator, neither by virtue of the original powers of this court, nor by the local legislature of New Hampshire, this court cannot hold jurisdiction of the case, it will take cognizance of his individual rights and liabilities growing out of this transaction with the defendants, and retain jurisdiction of the bill. It is admitted that Carter is administrator of Adams in the state of Maine. The jurisdiction of this court is derived from the amount in dispute and the citizenship of the parties. Does the capacity in which the plaintiff sues affect the jurisdiction of this court? Does not citizenship confer a privilege independent of local or state legislation, and draw after it as an incident, the capacity in which he may claim to act? If it be not so, how would this case stand on principle, if the plaintiff were administrator of Adams in New Hampshire? He would then be so far naturalized in New Hampshire as to be enabled to sue in their state courts. Looking at the principles and objects on which the jurisdiction of this court rests would there be any violence in holding that he was quoad hoc a citizen of New Hampshire, and therefore under an incapacity to sue in this court? The plaintiff is the legal representative of the intestate, and according to the letter and spirit of the act conferring and defining the jurisdiction of this court, has a right to sue here. But be this as it may, this demurrer is at least premature, for by the statute of New Hampshire (Rev. St. 320) it is provided, that "any person interested in the estate of any person, deceased, may commence an action as administrator thereof, which shall not be abated on the attachment, but by reason that such person is not administrator thereof, nor by his decease, if the administrator then or afterwards appointed shall, at the first or second term of the court, endorse the writ and prosecute the same as plaintiff;" and at the second term of the pendency of this suit there may be such an administrator of Adams as the court will recognize as such. 2 N. Stat. 380.

Davies, for defendants, in reply, said:

The complainant has undertaken to bring this suit in his own behalf, and also in capacity of administrator of Adams. These claims are entirely distinct; and a distinct objection is presented to each by these pleadings. To the claim of the complainant in his own right the defendants have demurred, as exhibiting no case for the equitable interposition of this court. To the claim set up as administrator of Adams the defendants have by plea properly denied that he is administrator. These objections (which were briefly opened before the court, at May, in Portsmouth) are to be separately considered and disposed of.

To follow the order of plaintiff's argument —first, (in regard to the complainant's own alleged right,) on the demurrer.

1. No contract or transaction between the complainant in his right and the defendants, is set forth in the bill, other than the mere purchase of the bond, on June 10th, 1835, for the sum of $5000. In this there was no mutuality on the part of the complainant; he did not engage to purchase the land; he only gave that price for the privilege. That sum was to be allowed towards the payment for the land, if he had purchased under the bond: otherwise it was payment for the bond itself, and for the right of pre-emption, given by it. The complainant sold out eleven sixteenths of his interest to sundry persons, as set forth by him. And a story is carried on in the bill of dealings and negotiations of some of them, or their assigns, with the defendants, with which the complainant, in his own character, has nothing to do. You look in vain for any thing further in regard to him in his own right, or to any remainder, throughout the bill. He shows himself to have had no further concern in the business on his own behalf; is nowise connected with any of the parties in any subsequent proceedings; did not be-

come purchaser of any part of the lands, and ceased to have any interest in the subject. It is not pretended that any mistake or fraud existed in the transaction with Carter, or at that period. Among those persons was Adams. And it is suggested in argument, that the bill may be maintained on account of the complainant's liability to the estate of Adams. No liability is shown. No pretence is made of any mistake then; (the pretended mistake arose afterwards, in the doings of the appraisers or judges.) The complainant may wait till he is called to account, and until the transaction between himself and Adams is rescinded, if it ever could be.

Secondly, as to the plea, "Ne urques administrator."

2. The defendants have pleaded to so much of the bill as relates to the claim of the complainant as administrator of Seth R. Adams, that he is not administrator. By setting down and presenting this plea for argument the allegation is of course admitted; and it is immaterial whether administration has or has not been taken out in another state, as surmised in the argument. Since the complainant has not taken out administration in New Hampshire, he cannot sue there as administrator in the courts of the United States. To this point Story on Conflict of Laws (section 513) and the cases bearing upon it collected, have been already cited. As to the statute provision of New Hampshire referred to, it is not necessary to consider how it would affect the jurisdiction of the courts of the United States, as the complainant has not shown, that he has any such interest in the estate of Adams, as that provision contemplates; or that any construction has been given to it, or can be, that would go to the extent. In short, it is submitted, that the complainant has shown no right or interest, in any respect, upon either point, to maintain the present bill, and that it ought therefore to be dismissed.

STORY, Circuit Justice. The case presented by this voluminous bill may be thus briefly stated. Carter purchased of the defendants and one Henry L. Wiggin seventeen thirty-second parts of a certain township of land, in Maine, viz. seven thirty-second parts of Treadwell, three thirty-second parts of Haven, and seven thirty-second parts of Wiggin; and the vendors covenanted to procure a conveyance of the remaining fifteen thirty-second parts from the other owners to Carter, and who was to pay therefor at the rate of one dollar per thousand feet for all the good merchantable pine timber on the township, to be ascertained by the report of certain persons to be appointed by the vendors, and Carter was to pay in cash a part of the consideration money, and give a bond for the due fulfilment of the other terms of the sale; and the vendors covenanted to perform their part of the agreement, or to pay Carter $55,000. The bond was accordingly executed. The appraisers were appointed and duly made their report, estimating the amount of the timber at 195,850,000 feet of good merchantable pine timber. Carter conveyed to certain persons eleven sixteenth parts of his purchase, and among others to Seth R. Adams, the intestate, one sixteenth thereof; the parties to whom the same were conveyed being the sureties upon his (Carter's) bond. Adams afterwards entered into an agreement with Treadwell and Haven, by which he agreed to pay them for his one sixteenth part of the township at the rate of seven and a half dollars per acre, one fourth part in money, and the residue in three equal annual instalments, and give his notes therefor. This was accordingly done; and Treadwell gave Adams a bond to convey the one sixteenth part of the township upon the full payment of all the instalments. Adams afterwards paid large sums of money to Treadwell and Haven on his notes. Adams afterwards died, leaving his estate insolvent; Carter took administration upon his estate and made a settlement with Treadwell and Haven of their demand, by which he agreed to surrender up to them their bond, and they agreed to surrender to him the notes then held by them against Adams' estate, and their demands were accordingly assigned in favor of Adams' widow.

The bill alleges, that, in point of fact, there was a gross error and mistake in the appraisers in their estimate of the pine timber in the township, there not being half that quantity thereon; that Adams in making and completing his bargain with Treadwell and Haven was not aware of the mistake and error, and, in fact, was induced to make that bargain by the gross deception and misrepresentations of one Scribner, who was acting in confederacy with Treadwell and Haven. The bill further alleges, that Carter, at the time of his settlement with Treadwell and Haven, was not aware of the mistake and error of the appraisers, or of the deception and misrepresentations of Scribner; and it insists that the bargain of Adams, and his own settlement with Treadwell and Haven, ought on these accounts to be set aside and rescinded, and the money paid by Adams recovered back by him as administrator. The bill does not state any case for relief to Carter himself upon his original bargain and purchase. It is under these circumstances, that the plea and demurrer have been put in to the bill. And first as to the plea. It asserts that Carter is not administrator of Adams, as alleged in the bill. In point of fact, Carter has been appointed administrator of Adams, who was a citizen of Maine at his death, by the proper court in Maine; but at the time of filing his bill he had not taken out administration in New Hampshire, where the defendants live, and where the bill is brought, although adminis-

tration has, since the pendency of the bill, been duly obtained by him in New Hampshire.

The first question then is, whether the plea is good; and it having been set down for argument by the plaintiff, he thereby admits it to be true in point of fact, and the only remaining ground for consideration is, whether it is valid in point of law. Upon general principles, there is no doubt that it is valid, unless there is something in the laws of New Hampshire which varies the known rule, that to entitle a party to recover a debt or assert a claim as administrator against a person resident in another state than that where the intestate was domiciled at his death, it is essential that he should have obtained letters of administration in the state where he seeks to recover the debt or to assert the claim. In the present case, there is no difficulty in Carter's maintaining a suit in the circuit court as a citizen of Maine, in his character of administrator of Adams, if he should take letters of administration in New Hampshire. This has been supposed to be fully established ever since the case of Chappedelaine v. Dechenaux, 4 Cranch [8 U. S.] 306; and therefore one inconvenience supposed in the argument at the bar is removed. But it is said that by a recent statute of New Hampshire (Rev. St. N. H. 320) a different rule is prescribed. That statute provides, "that any person interested in the estate of any person deceased, may commence an action as administrator thereof, which shall not be abated, nor the attachment lost by reason, that such person is not administrator thereof, nor by his decease, if the administrator then or afterwards appointed, shall at the first or second term of the court endorse the writ, and prosecute the same as plaintiff." Rev. St. N. H. 1842, p. 320, tit. 19, c. 161, § 10. It is plain from the language of this statute, that it is solely applicable to suits at law, and not applicable to suits in equity. It is as plain, that it is addressed to the state courts, and to the state courts only, and can in no respect be admitted to govern the practice or proceedings in the courts of the United States even in suits at law, unless specially adopted in practice by those courts; and a fortiori it can have no bearing upon the practice and proceedings thereon in suits in equity. It might furnish an analogy by which, possibly, the courts of the United States might seek in a fit case to regulate their own discretion; but it can furnish no rule to govern them. The statute, therefore, does not avoid or surmount the difficulty; and the plea remains, with all its original relevancy and force, as a bar to the suit under existing circumstances.

As to the demurrer to the residue of the bill, viz. that, which respects Carter's claim in his own individual and personal right, it seems to me that it is fully sustained. There are various objections to it, which seem to me strong and decisive. In the first place it seems to me, that the bill is open to the objection of multifariousness in mixing up an independent claim of Carter in his own right with the transactions of Adams with the defendants, with which he had nothing to do, except in his capacity as administrator. What has Carter, individually and personally, to do with the negotiation and arrangement by which as administrator of Adams he surrendered up the bond and cancelled the notes given by Adams to the defendants? The very groundwork of his bill, to which his prayer for relief is directly applied, is to recover and receive back from the defendants the monies paid to them by Adams, which monies, of course, must be recoverable and receivable only in autre droit, as the administrator of Adams. Carter can have no right to mix up his own personal claims on the defendants, if any, in the original purchase of the township with that of Adams under other contracts, and arrangements, subsequently made without any co-operation or connexion with Carter. In the next place, the bill states no case whatsoever for setting aside or cancelling the original contract of purchase with the defendants and Wiggin; and if it did, it would be fatally defective, unless Wiggin were made a party thereto, (which he is not,) or a sufficient ground were shown why he was not or could not be made a party; if indeed in such a case it were practicable to proceed without making him a party; upon which I give no opinion. In the next place, to such a bill, seeking to set aside and cancel the original contract, Scribner and Hanson, and Spaulding, and Pierce, and Littlefield, if not the widow, or heirs of Adams, seem to be necessary parties, and ought not to be dispensed with. In the next place, the bill, for such a purpose, is far too loose and defective, and general in its averments, to make out a case to set aside the original purchase or cancel it. No fraud or intentional misrepresentation is positively or directly alleged on the part of the vendors, or of the appraisers of the pine timber. It is simply and nakedly stated, that the appraisers acted under a mistake of the real amount of the pine timber in the township. But how this mistake occurred, whether it was any thing more than an over estimate made in the exercise of a fair and sound judgment, or whether it was by fraud or circumvention, or imposition or design, is not pointedly put in the bill. The court is left to grope its way in the dark on this, the very gist of the bill, and involving all its merits. Surely it will not be contended, that any mistake, however small, or accidental, or honest on the part of the appraisers, the chosen judges selected by the parties themselves for this very purpose, would justify the court in rescinding the original purchase. That would

be to defeat the very object and intent of the parties in selecting the "good judges" to make the appraisement. For these reasons, and others might be added, it appears to me that the demurrer ought to be allowed.

But the plaintiff asks, in the event that the court should sustain the plea and demurrer, that he may be allowed to amend his bill. From what has been already suggested, it appears to me, that the truest and best course is to have the bill dismissed without prejudice, instead of attempting to amend it in such a manner as to make it efficient. Indeed, two bills will be necessary, if Carter persists in his own individual claim, one for that claim, and one in his capacity as administrator, for the claim of Adams. I think, therefore, that the present bill ought to be dismissed, with costs, but without prejudice to any other bill or bills, which the plaintiff may be advised to bring in this court.

CARTER (UNITED STATES v.). See Cases Nos. 14,739-14,741.

CARTER (WHITNEY v.). See Case No. 17,583.

Case No. 2,481.

CARTRIGHT v. BOSTWICK.

[1 Betts, C. C. MS. 55.]

Circuit Court, S. D. New York. May 11, 1842.

SUBSTITUTION OF PAROL AGREEMENT FOR BOND—CONSIDERATION.

[A bond under seal is not superseded by a subsequent parol agreement of exactly like terms and effect, which rests upon no mutuality, and as to which the promisee parts with nothing, nor assumes any responsibility.]

[At law. Action by N. G. Cartright against W. C. Bostwick upon an agreement.]

Demurrer to declaration for want of consideration in contract, and because a sealed contract is in force between the parties in relation to same subject matter.

PER CURIAM. The agreement on the part of the defendant discloses no consideration adequate to support it. The declaration shows that it is intended to supersede a previous sealed contract in relation to the same matter; and for aught shown by the pleadings, the stipulations are precisely correspondent to those in the bond. We find no case sanctioning the doctrine that a parol agreement of exactly like terms and effect will rescind or displace a specialty. 21 Wend. 628, and 13 Wend. 75, rest upon a different doctrine. But if this point is not conclusive the other is, that no consideration is exhibited here. The new agreement rests upon no mutuality, nor does the party to whom the promise is made part with any right or incur any responsibility, as the occasion of the engagement. The only consideration supposed by the plaintiff is, that the new agreement operates as an extinguishment of the bond, and by means of that prejudice, he acquires a right to enforce this promise. The authorities do not support the position, and upon general principles we think the plaintiff should seek his remedy upon his more specific and formal contract. Judgment in favor of the claimant.

CARTTER (WESTLAKE v.). See Case No. 17,451.

Case No. 2,482.

CARTWELL et al. v. The JOHN TAYLOR.

[Newb. 341.][1]

District Court, E. D. Louisiana. Nov., 1842.

SEAMEN'S WAGES—SHIPWRECK—SALVAGE BY CREW—BY OTHERS—COMPENSATION.

1. The crew of a wrecked vessel, who have by meritorious exertions saved the tackle, apparel and furniture of that vessel, have a claim for compensation in the nature of salvage upon the property so saved.

[See note at end of case.]

2. It is the general doctrine of the English maritime law, from which ours is derived, that the payment of wages is dependent upon the earning of freight. If no freight be earned, no wages are due, for freight is the mother of wages; but in cases of shipwreck where the seamen cannot earn wages and yet perform a meritorious service, they are entitled to a salvage compensation for their labor and services in preserving the wreck of the ship and cargo, or either.

[See Rev. St. § 4524, cited in note at end of case.]

3. Where salvage is allowed to seamen for services performed in preserving the wreck of their own vessel and her cargo, the amount of wages they were receiving at the time of the disaster, is a safe and proper criterion to be adopted by the court in fixing the quantum of salvage they are to receive.

4. Compensation in such a case allowed to seamen, must be paid out of the proceeds of the property saved.

5. In awarding a salvage compensation at the rate of fifty per cent., in accordance with the stipulations of a written contract between the United States consul at Havana of the one part, acting for the master, owners and underwriters of the wrecked ship, and the master of the schooner Warrior of the other part, in pursuance of which the said schooner came to the relief of the wrecked vessel, the court will not give the whole compensation to the master and owners and leave the seamen to look to the other moiety for their reward. The contract is not a rule that binds the court to grant so large a percentage on the value of the property saved to the master and owner only, as ostensible parties to the agreement, when it is shown that the dangers and toils incident to the enterprise, have been shared by the seamen, who were doubtless induced to embark in the undertaking by the very fact that such a contract was entered into by the master.

In admiralty.

Mr. Cohen, for libelant.

Mr. Moise, for the master and owner of the Warrior.

Mr. Schmidt, for intervener Grant.

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

McCALEB, District Judge. This is a libel in rem against the tackle, apparel, furniture, and a portion of the materials lately belonging to the ship John Taylor, which was wrecked near Cape Antonio, on the south coast of the island of Cuba, on the 18th of October last, while pursuing her voyage from Liverpool to the port of New Orleans. The original libel was filed by four of the crew of said ship, claiming a lien on the said tackle, apparel, etc., for the satisfaction of their wages, and also for additional compensation in the nature of salvage, for having saved the said tackle, apparel, &c., from the wreck of the said ship. Intervening libels were afterwards filed by twenty-one more of the crew of the wrecked vessel, claiming wages and compensation also in the nature of salvage, as set forth in the original libel. Then followed the intervening libel of Edward Griffith, master of the schooner Warrior, intervening for himself and for James Chapman, owner of said schooner, and William Saunders, mate, Joseph Lovell, John Noyes, John Robinson, Benjamin Mitchell and Charles H. Corbin, seamen on board said schooner, and Nicholas P. Trist, the American consul at the port of Havana. Lastly the libel of intervention of T. A. Grant was filed, claiming compensation in the nature of salvage for services in traveling by land across the island from Cape Antonio to the city of Havana for the purpose of procuring aid for the wrecked vessel, her crew and passengers.

I shall first consider the claim of the crew of the John Taylor. It has been most satisfactorily proved that they worked with energy and fidelity: that their services in saving the tackle, apparel, &c., of the wrecked vessel, were of the most meritorious character. The strictest subordination prevailed among them, and they manifested the most perfect willingness to do their duty, and displayed the utmost promptitude in executing the orders of the master. Through their aid, in conjunction with that of the officers and crew of the schooner Warrior, almost all the tackle, materials, &c., of the John Taylor were saved. The first question that arises is: Have they a right to claim wages for the services they had rendered, and if not, in what manner are they to be compensated? I have examined the authorities on this subject with the strictest care and attention, and although it must be admitted that the ablest admiralty tribunals have differed somewhat in opinion, I am inclined to think that the view taken by Mr. Justice Story in the case of The Two Catherines [Case No. 14,288], is not only sustained by the greatest weight of authority both in England and in this country, but presents the whole subject in a light which reason must at once adopt and the immutable principles of justice forever sanction. I shall quote his remarks at some length. "It is laid down as a general doctrine of the English maritime law, from which ours is derived, that the payment of wages is dependent upon the earning of freight. If no freight is earned in the voyage, no wages are due; for, in the expressive phraseology of the ancient law, freight is the mother of wages. Hence, if the ship be lost during the voyage, so that no freight is earned, the mariners lose their wages. And by parity of reason, if by inevitable accident the freight is partly lost, it seems that the seamen lose a proportion of their wages. The ground of this doctrine is said to be, that 'if the seamen should have their wages, in such cases they would not use their endeavors nor hazard their lives to save the ship.' Sid. 179. And the argument now is that the reason of the rule shows that it does not apply to a case of shipwreck like the present, where the whole freight is lost; for if the seamen are not entitled to wages for salvage from the wreck, they can have no motive to remain by and use their exertions to save it. And it is earnestly contended that all the cases in which it has been held that no wages are due to the seamen, are cases, not of shipwreck, but where the ship perished at sea, so that there was a total loss of ship and freight. It appears to me that upon the established doctrines of our law, where the freight is lost by inevitable accident, the seamen cannot recover wages, as such, from the ship owner. And it is perfectly immaterial in such cases whether the ship be lost or be in good safety. Nor does the case of shipwreck, strictly speaking, form an exception to the generality of this rule. It more properly introduces another principle, that of allowing salvage to the crew when they cannot earn wages and yet perform a meritorious service." After commenting at length upon the different opinions entertained by different authors, he thus proceeds: "But whatever may be the true doctrine on this subject in respect to wages, I am clear that upon principle, the seamen are entitled to salvage for their labor and services in preserving the wreck of the ship and cargo or either. It is a claim founded in natural justice and sustained by the most obvious motives of public policy and interest."

The opinion of Mr. Justice Story is but a re-assertion of the same doctrine maintained by Judge Peters in the case of Taylor v. The Cato [Case No. 13,786]. "The claim of the sailor," said he, "is not under his contract for wages out of freight; but in a new character as a salvor, he regains a rightful claim to wages, restored by rescuing the articles (whether parts of the ship or cargo) from the perils and loss to which the wreck had exposed them." The reasoning of these eminent judges I am inclined to adopt as my own rule of decision. The right which these seamen have to claim a reward, cannot be doubted; and it is immaterial whether this reward be granted as wages, or as salvage strictly so called, since the loss of wages consequent upon a loss of freight, is supplied by a compensation in the light of salvage for

their meritorious services in saving from the wreck the tackle and materials, upon which the law secures them a lien. Following the high precedents to which I have referred, I think it fair and equitable to take the amount of the wages[2] which these seamen were receiving as my guide in awarding the quantum of salvage, and shall therefore allow them a continuance of those wages on the homeward voyage, at the same rate per month, to the day when the tackle, furniture and materials were taken into custody by the marshal of this court.

And now, in regard to the party upon whom this charge is to fall, I should probably feel some doubt, were I not happily furnished with a precedent by which I can be satisfactorily guided, to be found in the decision of Judge Story in the case of The Two Catherines [Case No. 14,288]. "It is not," says he, "like the ordinary charge of seamen's wages, which are a charge upon the ship owner, and are to be borne by the freight; but it is in the saving of the materials of the ship for the benefit of those who are to receive it cum onere. The case of Frothingham v. Prince, 3 Mass. 563, is also directly in point." The charge, then, will be paid out of that portion of the proceeds of the property saved which may fall to the underwriters, to whom, as I have learned, the property has been abandoned. It is my next duty to consider the claim of the owner, master and crew of the schooner Warrior, which went from the port of Havana to the relief of the John Taylor. This she did under a special contract entered into by Capt. Griffith, her master, and N. P. Trist, the American consul at Havana, "acting for and on behalf of the master, owner and underwriters of the ship John Taylor." I have examined with attention the contract under which the salvage at the rate of fifty per cent. is claimed, as well as all the facts and circumstances under which the services were rendered; and I can see no good reason for changing the rule of decision adopted in the case of The Clarion [Case No. 2,795], decided in this court a few days since. As to the merit of the services rendered, there can be no doubt. The evidence shows that the Warrior remained near the wreck almost a month: that she was frequently in great danger, and was on one occasion compelled to slip her cables and put to sea, as her anchors dragged among the rocks and she ran the risk of being thrown ashore. During the time she remained near the wreck her crew were busily employed in transporting the salt from the John Taylor on board their own vessel, and in stripping the former of such parts of her as were sufficiently valuable to be saved. In a word, the Warrior and her crew did all that human agency could accomplish in affecting the object they had in view when they left the port of Havana. Yet, in awarding the very liberal salvage of fifty per cent. as stipulated in the contract, I know no principle either in law or equity which would justify the court in giving the whole amount to the master and owner, and compelling the crew to look to the other moiety for their share of the salvage. I cannot recognize the agreement as a rule that binds the court to grant so large a per centage on the value of the property saved to the ostensible parties to the agreement, when the dangers and toils incident to the enterprise have been shared in equally by others, who doubtless were induced cheerfully to embark in the undertaking in consequence of this very agreement. To the view of the master and owner of the Warrior it may be very proper thus to subject to a mere contingency the hopes of their gallant crew. But in the eye of the court, it becomes a matter of great importance to protect the rights of the latter as well as the former; and if a particular indulgence is to be extended to either side, the seamen should reap the benefit of that indulgence; and for the obvious reason, that they are not always possessed of the capacity to protect their own rights.

But the ingenious proctor for the master and owner, as well as of the crew of the Warrior, has contended that the latter do not seek to avail themselves of the written contract, but wish to assert their claim against the whole amount of property saved. This position is equally objectionable, since it directly interferes with the rights of another set of salvors, whose claims, though asserted upon a different principle, imperatively demand the protection of the court. And it is quite apparent that when these claims have been satisfied, there will be but a pittance remaining for the underwriters. With due respect for the zeal displayed in the argument of this case, the court would respectfully suggest, that however meritorious may be the services of salvors, there is such a thing as overstepping the bounds of reason and moderation in the demands which are usually made for compensation for those services. This was a case which peculiarly called for the exercise of disinterested heroism and self-devotion, a case in which the appeals in favor of humanity were loud and irresistible. Let us hope that in such a case the meritorious exertions and the deeds of gallantry, which in fact have not been magnified beyond the deserts of those who performed them, were prompted in some small degree by the influence of the golden precept, "Do unto others as you would have others do unto you;" and not solely by the instigations of avarice or rapacity. Let it not be said, that bold and hardy adventurers in the cause of human suffering, after accomplishing the meritorious object they had in view, now seek to swallow up all that was left by the mercy of the winds and the waves.

[2] [See note at end of case, citing Rev. St. § 4524.]

I proceed now to establish the mode of distribution, and leave the precise quantum of salvage allowed to be hereafter ascertained. The proceeds of the property saved from the wreck of the John Taylor amounts to $4,800; of this sum fifty per cent. is awarded to the owners, master and crew of the schooner Warrior, after deducting the costs of court and all expenses, and the two and a half per cent. due the consul in Havana. In allowing this last amount, I have deviated from the decision given in the case of The Clarion [supra]. In that case no proof was given of the right of the consul to make the charge. In the present case it was clearly shown. Besides, in the case of The Clarion, the amount allowed to the owners, master, &c., was sufficiently large to justify the course therein pursued. From the whole proceeds must be also deducted the $29 still due to Mr. Grant for traveling across the island to Havana. I award him no more, because it has been proved by the master of the John Taylor, that this sum, in addition to the $100 he has already received, is a fair compensation for his services; and because he was at one time willing to receive it as satisfaction in full. I see no good reason why he should have subsequently demanded a higher compensation, the opinion of the attorney whom he consulted, to the contrary notwithstanding. When these deductions shall have been made from the whole amount of the proceeds, fifty per cent. of the remainder is to be divided among the owner, master, mate, and five seamen in the following manner: To the owner I award one-third of the fifty per cent; and the other two-thirds I divide into sixteen shares of $100 each. Of these shares I award the captain or master seven shares, the mate four shares, and each seaman one share. From the other moiety must be deducted the sum of $161, the value of a small boat, a cable, and an anchor, which were lost by the master of the Warrior, and for which he shall be indemnified. The clerk will be furnished with an abstract of this decree, and ordered to pay over the money in accordance with the mode of distribution above prescribed, after the payment of the costs of court.

[NOTE. One of the earliest cases in this country to allow salvage to a seaman for services to his own ship was that of The Blaireau, 2 Cranch (6 U. S.) 240. There the master and other members of the crew deserted the vessel, leaving one seaman alone upon her. With the assistance of other salvors, she was brought into port. The court laid special stress upon the fact that, by abandoning the seaman to his fate, the captain had absolved him from further duty under his contract. In the later cases this idea is still more strongly emphasized, and the right of a seaman to salvage in his own vessel is made to depend upon whether, before rendering the services, his contract has been put an end to, either voluntarily by the master, or by vis major. Thus, in the case of The Triumph, Case No. 14,183, it is said: "The vital question is, had the contract with the seaman been dissolved? that is, was he bound to render the service for which he claims salvage compensation, or had he been previously discharged from all obligation under his contract?" The same principle is laid down by Judge Lowell in The Olive Branch, Id. 10,490. In that case the ship had stranded. The master was absent, and there was no mate. The crew, however, got the vessel off, with some difficulty and danger. Salvage was denied on the ground that the voyage was not ended, nor the contract in any way annulled or dissolved. See, also, The Antelope, Id. 484; The Niphon, Id. 10,277; The Akbar, 5 Fed. 456; and the very recent case of The C. P. Minch, 61 Fed. 511. In this case salvage was denied because, although the master and part of the crew had left the ship, it did not certainly appear that he intended to abandon her, and the voyage was in fact completed, and wages paid to the crew. In the case of The Dawn, Case No. 3,666, Judge Ware seemed to be of opinion that, in case of wreck, the seamen might have two distinct claims, one for wages and another for salvage; the wages to be paid exclusively from the proceeds of any materials belonging to the ship, and the salvage to be a charge against the general mass of the property saved.

[The act of June 7, 1872 (17 Stat. 268, § 30; Rev. St. § 4524), provides that the right to wages shall not be dependent on the earning of freight, "but in all cases of wreck or loss of vessel, proof that any seaman or apprentice has not exerted himself to the utmost to save the vessel, cargo, and stores, shall bar his claim."]

CARTWRIGHT (GOODWIN v.). See Case No. 5,551.

CARTWRIGHT (LORAINE v.). See Case No. 8,500.

Case No. 2,483.

CARTWRIGHT et al. v. The OTHELLO.

[1 Ben. 43.] [1]

District Court, E. D. New York. March, 1866.[2]

ARREST OF GOVERNMENT PROPERTY — BOTTOMRY BOND—VESSEL CHARTERED TO THE GOVERNMENT —MOTION TO VACATE PROCESS.

1. Where a vessel under charter to the United States, whose owners were to victual and man her, took on board a load of property captured by the army of the United States to bring it to New York, and meeting with disaster on the voyage, her master took up money on a bottomry of the vessel and cargo, and on her arrival in New York a libel was filed to enforce the bottomry bond, and the vessel and cargo were seized by the marshal under the process, and no appearance being entered for either vessel or cargo, the district attorney of the United States, before the return of the process, applied on affidavit for an order directing the release of the property and vacating the process, on the ground that government property was not subject to the process of the court, —*Held*, that whether the vessel could be considered as government property under the charter was doubtful, and that such a question should not be disposed of before appearance, and on motion.

[Cited in Lands v. Cargo of 227 Tons of Coal, 4 Fed. 479.]

2. That though the cargo was government property, it had been put by the government into the custody of the master of the vessel, and it was doubtful whether granting the order would put the government into possession of it.

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

[2] [Affirmed as to the cargo, and reversed as to the vessel, in Case No. 10,611.]

3. That the law of the case ought to be determined upon a hearing on issues properly and formally framed, instead of upon motion.

[Cited in Cushing v. Laird, Case No. 3,508; Lands v. Cargo of 227 Tons of Coal, 4 Fed. 479; Romaine v. Union Ins. Co., 28 Fed. 636.]

[In admiralty. Libel by David G. Cartwright and Frederick H. Harrison against the schooner Othello and cargo.]

This was a motion to vacate the process issued in the cause. It appeared from the papers read upon the motion that the schooner Othello was chartered by her owners to the government of the United States, at the rate of fifty dollars per day, for an indefinite period of time, the owners to victual, man, and navigate the vessel, and transport therein such property as might be tendered by the quartermaster of the United States army. According to the terms of the charter party, the vessel was to be kept fit for service by her owners, and all sea risks to be borne by them. Under this charter, and while under the command and in the possession of the master not an officer in the service of the United States, but appointed and paid by the owners, she set sail from Wilmington for New York, laden with a cargo of property which had been captured by the army of the United States. In the prosecution of her voyage, she met with disaster at sea, and was compelled to put into St. Thomas for repairs. While there, the master, in order to raise money necessary to repair and enable him to prosecute his voyage, executed a bottomry bond in the usual form upon both vessel and cargo, to secure the sum of $15,535, alleged to have been borrowed by him for the purposes aforesaid. The vessel thereafter proceeded upon her voyage, and arrived in this port, when the bond not being discharged, a libel was filed in this court to enforce it, and the vessel and cargo taken into custody by the marshal under the admiralty process issued according to the prayer of the libel. Before any appearance or claim for either vessel or cargo had been entered, the district attorney, on behalf of the United States, before the return day of the process, moved, upon affidavits, for an order directing the discharge of the property from custody, and vacating the process, on the ground that the cargo was conceded to be the property of the United States, and that by virtue of the peculiar provisions of the charter party referred to, the vessel also was, in law, government property, and as such not subject to the process of the court.

B. D. Silliman, Dist. Atty., for the United States. J. J. Ridgway, for libellants.

BENEDICT, District Judge. According to my present impression, the view taken by the district attorney in regard to the vessel can hardly be maintained. But however that may be, I am clearly of the opinion that such a question as is raised by the facts above narrated should not be finally disposed of before appearance and upon a motion. It does not yet appear that the owners of the vessel, who are the parties responsible for that portion of the advances chargeable to the ship, will not come forward on the return of the process and claim their property, while the interest of the government in the controversy, so far as regards the vessel herself, is certainly very slight, for it appears that the hire of the vessel had been suspended by the quartermaster before the seizure of the vessel, because of a refusal of the master to deliver the cargo.

As to the cargo, the facts are somewhat different, for that is conceded to be the property of the United States. It is property, however, in no way connected with any active operations of either army or navy. It was committed to the custody of the master of this vessel, to be transported by him to this port. While in the prosecution of the voyage, the master, by reason of disaster at sea, has been compelled, in a foreign port, to pledge the cargo to these libellants, by way of bottomry; and upon the termination of the voyage, before any delivery of the property to any officer of the government, and while it still remained in the custody of the master, it was seized by the marshal, by virtue of process issued out of the court of admiralty, in an action brought to enforce payment of the bottomry loan; now, inasmuch as it appears that previous to the seizure by the marshal, the government had failed to obtain possession of the property from the master of the vessel, the order applied for here would not necessarily have the effect to put the government in possession. If such would be the effect of an order releasing the property from the custody of the marshal, because of the great hardship of thus, by an interlocutory order, made on motion, without the interposition of claim or answer, depriving the libellants of any opportunity to derive any advantage from their bottomry bond, and possibly of any opportunity to secure the opinion of an appellate court, I should feel very unwilling to grant the application, unless I felt satisfied that the law of the case was free from all doubt. What the law of the case is, should, I think, be determined in this case, as has been done in other cases where property of the United States has been seized by the marshal, in private suits, (The Thomas A. Scott [Case No. 13,920], Shipman, J.,) upon a hearing upon issues properly and formally framed. The application must, therefore, be denied, both as to vessel and cargo.

[NOTE. The libellants appealed to the circuit court, which affirmed the decree entered herein as to the cargo, and dismissed the libel as to the same, but without costs in either court, but reversed the decree as to the vessel, and directed that the case as to the vessel be heard on the merits. See Case No. 10,611.]

CARTZLER (PARKER v.). See Case No. 10,730.

Case No. 2,484.

CARUANA v. BRITISH & N. A. ROYAL MAIL STEAM-PACKET CO.

[6 Ben. 517.][1]

District Court, S. D. New York. May, 1873.

BILL OF LADING—DELIVERY OF CARGO — NOTICE TO CONSIGNEE WHEN VESSEL IS NOT NAMED IN THE BILL OF LADING.

1. A bill of lading was executed at Malta, on January 2, 1872, acknowledging the receipt there, in good condition, of eighty-five boxes of oranges for shipment to Liverpool, "to be there reshipped on board a Cunard steamer or steamers bound for New York, via Queenstown and (or) Boston," to be there delivered in like good order and well conditioned, on payment of certain freight. It also contained a clause that the goods were "to be taken from alongside by the consignee, immediately the vessel is ready to discharge," or they would be landed and deposited in a warehouse or sent to public store. On the 2d, 3d, or 5th of February, 1872, the consignee named in the bill of lading sent his agent with the bill of lading to the office of the Cunard Steamship Company in New York. He showed the bill of lading to the clerk having charge of the department of inward freight, and asked if the goods named in it had arrived. He was told that they would probably arrive by the Russia, which was to sail from Liverpool on February 3d, and that, on the arrival of any steamer, a list of the cargo and consignees of goods on board of her was published in the Journal of Commerce. The consignee inspected that list on the arrival of the Russia, and not finding his name, sent again to the office, and was told that the goods had not come by the Russia, but, if they were coming, would come by the next steamer. On the arrival of that steamer, his goods were not on her, and he sent again to the company's office, and was then told that the goods had arrived by the China, which came on the 1st of February. Her cargo list had been published on the 3d of February, and on the 5th of February the goods had been sent to the public store under a general order. Before the consignee learned these facts and applied for his goods, they had been sold to pay storage. The consignee filed a libel against the company to recover their value: *Held*, that the publication of the cargo list of the China was not such a notice to the consignee as is requisite to discharge a ship owner from liability under a bill of lading.

[Cited in Unnevehr v. The Hindoo, 1 Fed. 630; The Boskenna Bay, 22 Fed. 665.]

2. That, under such a bill of lading as this, which mentioned no vessel, and on such inquiry as the consignee made, it was the duty of the ship owners to have seen to it that he was advised truly as to the arrival of his goods.

3. That the ship owners were therefore liable, on the bill of lading, for the value of the goods.

[In admiralty. Libel by Carmello F. Caruana against the British & North American Royal Mail Steam-Packet Company.]

Charles Donohue, for libellant.

Daniel D. Lord, for respondents.

BLATCHFORD, District Judge. This suit is brought to recover the value of eighty-five boxes of oranges, shipped at Malta, under a bill of lading given by the respondents, the proprietors of a line of steamers running between Liverpool and New York, and known as the "Cunard Line," and consigned to the libellant, at New York. The bill of lading is dated at Malta, January 2d, 1872. It reads thus: "Received, in good order and condition, from Dr. L. Ullo, for shipment to Liverpool, to be there reshipped on board a Cunard steamer or steamers bound for New York, via Queenstown and (or) Boston, eighty-five boxes oranges, being marked and numbered as in the margin," eighty-five boxes, C. F. C., "and are to be delivered, in the like good order and well conditioned, at Jersey City, being within the jurisdiction of the custom house of the aforesaid port of New York, * * * unto C. F. Caruana, Esq., or to his assigns, freight for the said goods being paid on delivery, as per margin," £18 14. * * * "The goods to be taken from alongside by the consignee, immediately the vessel is ready to discharge, or otherwise they will be landed by the master, and deposited at the expense of the consignee, and at his risk of fire, loss or injury, in the warehouse provided for that purpose on the steamship wharf at Jersey City, or elsewhere, or sent to the public store, as the collector of the port of New York shall direct, and, when deposited in the warehouse, to be subject to storage, the collector for the port being hereby authorized to grant a general order for discharge immediately after entry of the ship."

The libel alleges the shipment of the goods under the bill of lading, and avers that they arrived in New York, but the respondents did not deliver them to the libellant, and they became wholly lost to him.

The answer avers that the goods were taken to Liverpool, and there shipped in a Cunard steamer for New York; that, by the usage of trade, notice of the arrival of goods and of readiness to discharge is given by publication in a daily newspaper, notice of the day when the vessel will be ready to discharge being also posted in a conspicuous place in the New York custom house, of which usage the libellant had notice; that the notice of arrival of the goods and of readiness to discharge was duly given in the manner described, and thereupon it became the duty of the libellant to procure a permit for the delivery of the said goods, and to take them from alongside of the vessel when landed; that the goods were landed on the respondents' wharf at Jersey City; that the libellant was not ready to take them, and did not obtain a permit therefor, whereupon they were sent to the public store, under a general order granted by the collector of the port of New York; that, after deposit in the said warehouse, and in consequence of the libellant's neglect to take the same, as he was bound to do by the terms of his contract, the goods became liable to decay and were sold to pay storage, such sale being in

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

conformity with the usage and custom of trade; and that the respondents are not responsible for the loss on the goods.

The name of the steamer by which the goods were to be sent from Liverpool to New York, is not given in the bill of lading, nor is the day on which they would leave Liverpool stated therein. The days of sailing of steamers of the Cunard line from Liverpool for New York, in January and February, 1872, were as follows: the Java, January 6th; the Calabria, January 13th; the China, January 20th; the Abyssinia, January 27th; the Russia, February 3d; and the Algeria, February 10th. The libellant had no information as to what steamer would bring the goods. On the 2d, 3d or 5th of February (the 4th falling on Sunday), the libellant's son and agent, on his behalf (no information that the goods had arrived having been received by the libellant), went to the office of the respondents, in New York, having the bill of lading with him, and placed it in the hands of a clerk of the respondents in such office, who had charge of the department of inward freight, and asked him if the goods named in it had arrived. The clerk inspected the bill of lading and informed the libellant's son, that the goods would probably arrive by the Russia, which was assigned to sail from Liverpool February 3d. He also then gave to the libellant's son a printed list, as above, of the names of the vessels and the days of their sailing from Liverpool, and informed him that a list of the names of the consignees, and of the number of packages consigned to them respectively, by the vessels of the line, was on their arrival, generally published in a daily newspaper published in New York, called the Journal of Commerce. The libellant was a subscriber to that paper. He watched for the arrival of the Russia, and, when she arrived, examined her cargo list as published in the Journal of Commerce, but it did not contain his goods. They did not come by the Russia. The libellant's son thereupon went to the respondent's office, and saw the same clerk, and asked him if the goods had arrived by the Russia, and was answered that they had not, and was also told by the same clerk, that, if they were coming at all, they would come by the Algeria. The libellant then watched for the arrival of the Algeria, and, when she arrived, examined her cargo list in the same newspaper, but did not find his goods in it. The libellant's son thereupon went to the office of the respondents, and was told by the same clerk, that the goods had not arrived by the Algeria, but had come by the China, which, he said, had arrived about the 3d of February. He demanded the goods, but they were not delivered to him. The China did bring the goods. She arrived on the 1st of February, and was entered at the custom house on the 2d. Her cargo list, containing a statement that she had arrived, and had brought 85 packages of merchandise for the libellant, was published in the Journal of Commerce on the morning of the 3d of February. The 85 boxes were sent to the public store, under a general order, after 10 o'clock a. m., on the 5th of February, the libellant not having obtained any permit for them, or entered them at the custom house, because he did not know of their arrival.

At the time of the first visit of the libellant's son, the clerk had not seen a manifest of the China's cargo, even if such manifest was in the office. The latest manifest he had seen was that of the Java's cargo. The clerk acknowledges, in his testimony, that the reason he told the libellant's son that he thought the goods would arrive by the Russia was, that he did not think they would reach Liverpool in time to come by either the Calabria, the China or the Abyssinia. The manifests of the cargoes of the various steamers, as they arrived, were taken to, and kept in, the office of the respondents. They were there for reference. On the second visit of the libellant's son, after the arrival of the Russia, and which must have been after the 15th of February, and when the attention of the clerk was called to the goods a second time, the manifest of the China's cargo must have been in the office, showing that the libellant's goods came by her. Yet the clerk did not consult it, nor did he tell the libellant's son that the goods had come by the China. The publication of the cargo lists in the newspaper is not shown to be the act of the respondents, as a notice emanating from them in fulfilment of any duty to give a notice. The answer avers, that, by the usage of trade, notice of the arrival of goods and of readiness to discharge is given by publication in a daily newspaper, and that notice of the day when the vessel will be ready to discharge is also posted in a conspicuous place in the New York custom house, and that the libellant had notice of such usage, and that notice of the arrival of these goods and of readiness to discharge was duly given in the manner described. No such usage is proved. Nor is it shown that the respondents gave any such notice as is averred. Whatever notice the publication of the cargo list of the China was, it is not shown to have emanated from the respondents, nor was there any publication of any notice of readiness to discharge. The libellant had no knowledge or information as to the vessel which was to bring his goods. He sent his bill of lading in abundant season to the office of the respondents, and spread before them all the information he had, which was the date of the bill in Malta. It was their duty, under such a bill of lading, and on such inquiry as the libellant made, to have seen to it that he was advised truly as to his goods. Instead of that, the respondents misled him. They substantially told him that his goods could not arrive sooner than by the Russia,

knowing as they did the date of their delivery in Malta. He could know nothing on that subject. They were bound to know everything. They, in effect, told him that his goods had not arrived by the China, when his son went there after the arrival of the Russia. He cannot be held responsible for not having examined the cargo list of the China, as published in the newspaper of February 3d.

The provision in the bill of lading, that the consignee is to take the goods from alongside as soon as the vessel is ready to discharge, must have a sensible construction. What vessel? None is named in the bill of lading. It is to be "a Cunard steamer or steamers." The respondents could divide the shipment, and send it in parts, by several steamers. The steamer or steamers were to be "bound for New York via Queenstown and (or) Boston." The respondents could send the goods all by way of Boston, or could send some by way of Boston and some direct to New York, and could divide the goods among several steamers. If sent by way of Boston, their ultimate destination being the respondents' wharf at Jersey City, they must reach that wharf by a conveyance other than that in which they left Liverpool. Under such a contract, the consignee is entitled to a notice of the arrival of his goods, and is not obliged to watch for the arrival of a nameless vessel, or for the appearance on the wharf of goods which may come from Boston by one of many means of transport; and, if he does what this consignee did, he does all that is incumbent upon him to entitle himself to receive actual notice of the arrival of the goods, when they do arrive and their arrival is known to the carrier.

There must be a decree for the libellant, with costs, with a reference to a commissioner to ascertain the amount of the damages sustained by the libellant.

CARUSI (REED v.). See Case No. 11,642.

Case No. 2,485.

CARVER v. BRAINTREE MANUF'G CO.

[2 Story, 432; 2 Robb, Pat. Cas. 141; 10 Hunt, Mer. Mag. 470.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1843.

PATENTS — REISSUE — "COTTON GIN" — CONSTRUCTION — INTERPRETATION — QUESTION FOR JURY — MASSACHUSETTS MANUFACTURING CORPORATION ACT — "DEBTS CONTRACTED."

1. The patent act of 1836, c. 357, § 13 [5 Stat. 122], and the act of 1837, c. 45, § 8 [5 Stat. 193], authorizing the re-issue of a patent, because of a defective or redundant specification or description, without fraud or for the purpose of adding thereto an improvement, do not require the patentee to claim, in his renewed patent, all things which were claimed in his original patent, but gives him the privilege of retaining whatever he deems proper.

[Cited in Wilson v. Rousseau, Case No. 17,832; Crompton v. Belknap Mills, Id. 3,406; Chicago Fruit-House Co. v. Busch, Id. 2,669; Parham v. American Button-Hole, O. & S. M. Co., Id. 10,713; Dorsey Harvester Rake Co. v. Marsh, Id. 4,014; Albright v. Celluloid Harness-Trimming Co., Id. 147; Gould v. Ballard, Id. 5,635; McWilliams Manuf'g Co. v. Blundell, 11 Fed. 420.]

2. Where the plaintiff, in a patent for "a new and useful improvement in the ribs of the cotton-gin," claimed, as a part of his invention, the increasing the space between the upper and lower surface of the rib, either by making the ribs thicker at that part, or by a fork, or by any other variation of the particular form; it was *held*, that the claim was sufficiently accurate as a matter of law, and that it was not necessary that he should describe all possible modes by which the rib might be varied, but only the most important, and that mere formal variations therefrom would be violations of the patent.

3. Objections, that a patented invention is old; or that the specification in a patent does not clearly describe the mode of making the machine; or that the original and the renewed patent are not for the same invention; or that either were obtained with a fraudulent intent; all involve matters of fact, and are for the jury, upon the evidence, to decide.

[Cited in Wilson v. Rousseau, Case No. 17,832; Blanchard v. Putnam, 8 Wall. (75 U. S.) 426. Distinguished in Poppenhusen v. Falke, Case No. 11,279.]

4. Where the original patent was for "a new and useful improvement in the ribs of saw gins for ginning cotton," and the renewed patent was for "a new and useful invention in the manner of forming the ribs of saw gins for ginning cotton," and in the renewed patent was claimed, in addition to the thickness of the rib, the sloping up of it so as to leave no shoulder; it was *held*, that the claim in the renewed patent, was not for two distinct improvements, but for additional parts of the same improvement, and that the same thing was patented in both patents.

[Cited in Ex parte Ball, Case No. 810.]

5. Patents are to be interpreted by a consideration of the whole instrument, and it is to be thereby determined what thing is intended to be patented.

6. The statute of Massachusetts of 1821, c. 28, relating to the individual liabilities of members of manufacturing corporations, is to be construed as a remedial statute, and the phrase "debts contracted," as employed therein, means not only debts in the strict sense of the term, but any liabilities incurred by the corporation. If the liability be for unliquidated damages arising from contract or tort, it relates to the time of its origin, and not of its liquidation; and, therefore, it was *held*, that the testimony of Edson, who was a member of the corporation at the time when the liability asserted in the present suit arose, must be rejected, although he had since sold out all his interest.

[Cited in Re Sutherland, Case No. 13,639; Cuykendall v. Miles, 10 Fed. 345; Re Boston & Fairhaven Iron-Works, 29 Fed. 786. Applied in Chase v. Curtis, 113 U. S. 463, 5 Sup. Ct. 559. Distinguished in Powell v. Oregonian Ry. Co., 36 Fed. 728.]

Case [by Eleazer Carver against the Braintree Manufacturing Company] for infringement of a patent, dated the 16th of November, 1839 [and numbered 17], for "a new and

[1] [Reported by William W. Story, Esq., 10 Hunt, Mer. Mag. 470, contains only a partial report.]

useful improvement in the ribs of the cotton gin." The present patent was a renewed patent, granted upon the surrender of the original patent [No. 777], dated the 12th of June, 1838, which was cancelled on account of a defective specification. The specification annexed to the original patent was as follows: "To all whom it may concern: Be it know that I, Eleazer Carver, of Bridgewater, in the county of Plymouth, and state of Massachusetts, have invented a certain improvement in the manner of forming the ribs of saw gins, for the ginning of cotton, and I do hereby declare, that the following is a full and exact description thereof: In the cotton gin, as heretofore known and used, the fibers of the cotton are drawn by the teeth of circular saws through a grating formed of a number of parallel bars or ribs, having spaces between them sufficient to allow the saws to pass, carrying the fibres of the cotton with them (which are then brushed off by a revolving brush), but not wide enough to let the seeds and other foreign substances pass through. Above the saws, the ribs come in close contact, thus forming a shoulder at the top of the space between them. Various forms have been given to the bars or ribs, with a view to procure a free passage for the cotton, but the cotton-gin, as heretofore made, has been always subject to the inconvenience of the grate becoming choked by hard masses of cotton, and motes, or false seeds, collecting in the upper part of the spaces between the ribs, and impeding the action of the saws, and also preventing the mass of cotton, which is drawn by the saws up to the top of the spaces, but not drawn through them, from rolling back freely, so as to pass again over the saws, as it should do. My improvement, which I am about to describe, is intended to obviate these difficulties, and it consists in giving a new form to the ribs composing the grate. Instead of making the ribs of a bar of iron of equal thickness throughout, so that the upper and under surfaces shall be parallel, I so form the rib that at the part where the saws pass through, carrying the cotton with them, the space or depth between the upper or outer surface, and the lower or inner surface, shall be greater than the thickness of the rib in other parts has heretofore been, or needs to be, and so great as to be equal to the length of the fibre of the cotton to be ginned, so that the fibre shall be kept extended between the ribs for about its full length, while it is drawn through them by the saws. This will, of course, require either that the rib should be as thick at that part as the length of the fibre, or that the rib should be forked or divided about that part, so that the upper or outer surface and the under or inner surface shall diverge to that distance from each other, instead of being parallel, as formerly, when the rib was made of one bar of uniform thickness. This under or inner surface then takes a new direction upwards, and slopes toward the upper or outward surface, until the two surfaces meet above the periphery of the saw. This last described part of the under surface is fastened against the frame-work of the gin. The operation of this improvement is, that those fibres of the cotton, which are so firmly caught by the teeth of the saws as to be disengaged from the mass of the cotton to be ginned, are drawn out to their full length, and pass clear through the grate, and are then brushed off by the revolving brush, while the fibres that are drawn into the grate, but are not caught by the teeth of the saws firmly enough to be carried quite through, are disengaged, and pass up to the point, where the under surface meets the upper surface above the saws, and finding no obstruction there, pass back out of the grate without choking it, and roll down again with the mass of the unginned cotton, and are then caught below by the saws and carried up again, and so on, until all the fibres are drawn through. Having thus described my improved rib, and its advantages, I now claim as my invention, and desire to secure by letters patent, the increasing the depth or space between the upper or outer surface of the rib and the lower or inner surface of it, at the part where the cotton is drawn through the grate, so that it shall be equal to the length of the fibre of the cotton to be ginned (whether this be done by making the ribs thicker at that part, or by a fork or division of the rib, or by any other variation of the particular form), and I also claim, as part of the same improvement, the sloping up of the lower or inner surface of the rib, so as to meet the upper or outer surface above the saws, leaving, when the rib is inserted into the frame, no break or shoulder between the two surfaces, but a smooth and uninterrupted passage upwards between the ribs as above described." The defendant pleaded the general issue, and also filed special matters of defence.

Willard Phillips and Fletcher, for the defendants, at the trial made several points of defence, which, however, are sufficiently referred to in the opinion of the court.

Franklin Dexter, for the plaintiff, denied the validity of all the objections. As the matters of objection were afterwards fully considered in the arguments for a new trial, they are here also admitted.

At the trial, one Edson, who was a member of the corporation (the defendants) at the time of the supposed infringement, but had since sold out his interest, was offered as a witness for the corporation. But upon an objection by the plaintiff, his testimony was rejected, as being inadmissible, as he still had an interest in the event of the suit. THE COURT, however, ruled out the testimony, hesitanter, expressing a desire to re-examine it, if the verdict should be for the plaintiff.

A great deal of evidence was introduced on each side; but the questions on which the

cause seemed principally to rest, were questions of law, and were accordingly argued by the counsel in the course of the trial.

STORY, Circuit Justice, upon the close of the arguments, said: So far as the questions of fact are concerned, I shall leave them for the consideration of the jury, if upon the whole evidence the counsel desire it. But the questions of law are those upon which I am ready to express my present opinion, subject to re-examination, if the counsel shall wish any of them to be more deliberately considered. The first objection is, that the specification has not sufficiently described the mode of making the improvement, or in such full, clear, and exact terms as to enable a skilful mechanic, skilled in the art or science to which it appertains, or with which it is most nearly connected, to make or construct it. This is certainly a matter mainly of fact. It is true, that the plaintiff, in his specification, in describing the thickness of the rib in his machine, declares, that it should be so thick, that the distance or depth between the upper and the lower surface should be "so great as to be equal to the length of the fibre to be ginned," which, it is said, is too ambiguous and indefinite a description to enable a mechanic to make it, because it is notorious, that not only the fibres of different kinds of cotton are of different lengths, long staple, and short staple; but that the different fibres in the same kind of cotton are of unequal lengths. And it is asked, what then is to be the distance or depth or thickness of the rib? Whether a skilful mechanic could from this description make a proper rib for any particular kind of cotton, is a matter of fact, which those only, who are acquainted with the structure of cotton gins, can properly answer. If they could, then the description is sufficient, although it may require some niceties in adjusting the different thicknesses to the different kinds of cotton. If they could not, then the specification is obviously defective. But I should suppose, that the inequalities of the different fibres of the same kind of cotton would not necessarily present an insurmountable difficulty. It may be, that the adjustment should be made, according to the average length of the fibres, or varied in some other way. But this is for a practical mechanic to say, and not for the court. What I mean, therefore, to say on this point is, that, as a matter of law, I cannot say, that this description is so ambiguous, that the patent is upon its face void. It may be less perfect and complete, than would be desirable; but still it may be sufficient to enable a skilful mechanic to attain the end. In point of fact, is it not actually attained by the mechanics employed by Carver, without the application of any new inventive power, or experiments? If so, then the objection could be answered as a matter of fact or a practical result.

The next objection is, that the patentee has omitted some things in his renewed patent, which he claimed in his original patent as a part of his invention, viz., the knob, the ridge, and the flaring of the lateral surface of the rib above the saw, and that he claims in his renewed patent the combination of the thickness and the slope of the front and back surfaces of the rib. Now, by the thirteenth section of the patent act of 1836, c. 357, it is provided, that whenever any patent, which is granted "shall be inoperative or invalid by reason of a defective or insufficient description, or specification, or by reason of the patentee claiming in his specification as his own invention more than he had or shall have a right to claim as new, if the error has or shall have arisen by inadvertency, mistake, or accident, and without any fraudulent or deceptive intention, it shall be lawful for the commissioner, upon the surrender to him of such patent, and the payment of the further sum of fifteen dollars, to cause a new patent to be issued to the inventor for the same invention, for the residue of the period then unexpired for which the original patent was granted in accordance with the patentee's corrected description and specification." And it is afterwards added, that "whenever the original patentee shall be desirous of adding the description of any new improvement of the original invention or discovery, which shall have been invented or discovered by him subsequent to the date of his patent, he may, like proceedings being had in all respects as in the case of original applications, and on the payment of fifteen dollars, as hereinbefore provided, have the same annexed to the original description and specification." The act of 1837, c. 45, § 8, further provides, "that whenever any application shall be made to the commissioner for any addition, or a newly discovered improvement, to be made to an existing patent, or whenever a patent shall be returned for correction and reissue, the specification annexed to every such patent shall be subject to revision and restriction, in the same manner as original applications for patents; the commissioner shall not add any such improvement to the patent in the one case, nor grant the reissue in the other case, until the applicant shall have entered a disclaimer, or altered his specification of claim, in accordance with the decision of the commissioner." See Act 1836, c. 357, § 7.

Now, I see nothing in these provisions which upon a reissue of a patent requires the patentee to claim all things in the renewed patent, which were claimed as his original invention, or part of his invention in his original patent. On the contrary, if his original patent claimed too much, or if the commissioner deemed it right to restrict the specification, and the patentee acquiesced therein, it seems to be, that, in each case, the renewed patent, if it claimed less than the original, would be equally valid. A speci-

fication may be defective and unmaintainable under the patent act, as well by an excess of claim, as by a defect in the mode of stating it. How can the court in this case judicially know, whether the patentee left out the knob, and ridge, and flaring of the lateral surface of the rib, in the renewed patent, because he thought, that they might have a tendency to mislead the public by introducing what, upon further reflection, he deemed immaterial or unessential, and that the patent would thus contain more than was necessary to produce the described effect, and be open to an objection, which might be fatal to his right, if it was done to deceive the public? Act 1836, c. 357, § 15. Or, how can the court judicially know, that the commissioner did not positively require this very omission? It is certain, that he might have given it his sanction. But I incline very strongly to hold a much broader opinion; and that is, that an inventor is always at liberty in a renewed patent to omit a part of his original invention, if he deems it expedient, and to retain that part only of his original invention, which he deems it fit to retain. No harm is done to the public by giving up a part of what he has actually invented; for the public may then use it; and there is nothing in the policy or terms of the patent act, which prohibits such a restriction. The other part of the objection seems to me equally untenable. If the description of the combination of the thickness and the slope of the front and back surfaces of the rib, were a part of the plaintiff's original invention, (as the objection itself supposes,) and were not fully stated in the original specification, that is exactly such a defect as the patent acts allow to be remedied. A specification may be defective, not only in omitting to give a full description of the mode of constructing a machine, but also in omitting to describe fully in the claim the nature, and extent, and character of the invention itself. Indeed, this latter is the common defect, for which most renewed patents are granted.

Another objection is, that the plaintiff, in his claim, has stated that the desired distance or space between the upper and the lower surfaces of the rib, whether it "be done by making the ribs thicker at that part, or by a fork or division of the rib, or by any other variation of the particular form," is a part of his invention. It is said that the modes of forking and dividing are not specified, nor the variations of the particular form given. This is true; but then the patent act requires the patentee to specify the several modes, "in which he has contemplated the application of the distinguishing principle or character of his invention." Act 1836, c. 357, § 6. Now, we all know that a mere difference of form will not entitle a party to a patent. What the patentee here says in effect is: One important part of my invention consists in the space or distance between the upper and lower surfaces of the ribs, and whether this is obtained by making the rib solid, or by a fork, or division of the rib, or by any other variation of the form of the rib, I equally claim it as my invention. The end to be obtained is the space or distance equal to the fibre of the cotton to be ginned; and you may make the rib solid, or fork it, or divide it, or vary its form in any other manner, so as that the purpose is obtained. The patentee, therefore, guards himself against the suggestion, that his invention consists solely in a particular form, solid, or forked, or divided; and claims the invention to be his, whether the exact form is preserved, or not, if its proportions are kept so as to be adapted to the fibre of the cotton which is to be ginned. In all this I can perceive no want of accuracy or sufficiency of description, at least so far as it is a matter of law, nor any claim, broader than the invention, which is either so vague or so comprehensive, as, in point of law, not to be patentable. It was not incumbent upon the patentee to suggest all the possible modes by which the rib might be varied, and yet the effect be produced. It is sufficient for him to state the modes which he contemplates to be best, and to add, that other mere formal variations from these modes he does not deem to be unprotected by his patent.

Another objection is, that the patentee has not sufficiently described the slopes between his ribs, so as to make the description intelligible, or to enable a skilful mechanic to construct them. Whether this be so, or not, is not a matter of law upon the face of the patent, but a matter of fact for the jury, if there be any serious doubt about it.

Some other objections have been taken, such as, that the invention is not new, that the original patent and the renewed patent are not identical for the same invention, and that the patent was obtained with a fraudulent intent, for the purpose of covering the invention of Copeland, which has been patented and sustained in this court against the claim of the plaintiff. But these all involve matters of fact, which belong to the province of the jury, upon the evidence, with which I do not intermeddle, and upon which the parties are at liberty to take the opinion of the jury.

I have thus stated summarily, according to the suggestions of the counsel for the defendants, my own views of the patent, and of the objections taken thereto. I have stated them in my own language, and with a view to make my own meaning clear. I cannot admit that I am bound to respond to the very terms in which the objections are taken, or to give instruction to the jury, affirming or denying them, without qualification or explanation. If the counsel for the defendants wish for a more deliberate examination of the points of law, after the trial is over, they can be brought again before this court, upon a motion for a new trial;

or, if a verdict is given to the plaintiff to an amount which will justify an appeal, the opinion of the supreme court may be taken upon the matters of law.

Upon these statements of the court, the defendants' counsel elected not to go to the jury, and a verdict was by consent taken for the plaintiff, for $960.50, subject to the opinion of the court upon the matters of law; and also to the ruling of the court as to the inadmissibility of one Edson, who was at the time of the supposed infringement, a member of the corporation, and had since sold out his interest; and whom the court rejected as a witness for the corporation.

In the trial of this case the following rulings were excepted to by the defendants: The defendants understand the following points to have been ruled by the court, viz., "That the describing and claiming the increasing of the distance from where the cotton goes in, to where it comes out from between the grates, to be equal to the length of the fibres of cotton to be ginned, is a sufficiently accurate, specific, and definite description and claim. That the patentee had a right to drop the things patented in his original patent, viz. the knob, the ridge, and the flaring of the lateral surface of the rib above the saw, and patent in his renewal, the combination of the thickness and the slope of the front and back surfaces of the rib. That the claiming of the increasing of the distance from where the cotton enters to where it comes out from between the ribs, by forking, division, or any variation of the particular form, is not claiming too much. That the patentee had a right to claim, and patent, the knob or projection F, in his renewal, of the same width as the rib, notwithstanding he had described and patented the same in his original as narrower than the rib. That the patentee was not bound to specify the modes of forking and division, and variations of the particular form claimed and patented by him. That the original was invalid and inoperative, within the provisions of the patent law for a renewal. That the patentee, by specifying the distance, which the cotton is carried between the ribs, and not claiming the same, as an element of his patent, did not thereby abandon the same. That the patentee, by distance, which the cotton was so carried to be equal to the 'full' length of the fibre in the original, was not thereby precluded from claiming and patenting that distance, caused by thickness of the rib or otherwise, equal to the average length of the fibres on one seed, in his renewal. That the patent describes, and claims with sufficient clearness, and exactness, a slope between the ribs. That the specification states sufficient elements for a patent for a combination, and adequately specifies, points out, and claims a combination. That John Edson was interested in the event of the suit, and by reason of such interest was incompetent as a witness. It was, as the counsel for the defendants understood the case, established by the testimony and not disputed, that the thickness of the grate, or distance that the cotton passed between the grates, and the obliquity or slope of the shoulder, as specified by the plaintiff, were neither of them new."

Phillips and Fletcher, for defendant, now moved for a new trial.

Franklin Dexter, for plaintiff.

STORY, Circuit Justice. To many of the objections stated in the motion for a new trial, to the supposed rulings of the court, a very brief answer may be given. In the first place, I cannot admit that they are in terms the actual rulings of the court, upon the points in controversy at the trial; and since they have been furnished to me, I have drawn out at large the views, which I then suggested upon the points in controversy at the trial; so that my actual meaning should be accurately understood. Upon further reflection, I do not feel it necessary to add to the views there suggested. They were as follows: (Here the judge recapitulated the remarks already cited as made at the trial.) I see no reason to be dissatisfied with what was then said; and if the observations then made were correct, it seems to me that they dispose of the principal objections, at least, so far as my own judgment is concerned. They might be elaborated, but they contain the substance of all that I desire to say on these points.

One point is, however, now brought out upon the argument for a new trial, which was not so fully suggested at the trial, and, indeed, which arose so incidentally, that it was scarcely a matter calling for any very positive expression of the opinion of the court. It is now said, that the plaintiff's claim is, in fact, for a new combination of a rib of a particular thickness, with the particular sloping up of his rib, as described in the specification; and that it is not the thing which is patented. It appears to me, that there is more of refinement in the form of this objection, than there is of difficulty in resolving it. The renewed patent is, in terms, a patent for "a new and useful improvement in the ribs of saw gins for ginning cotton." The original patent is substantially like it in the descriptive words. It is for "a new and useful improvement in the manner of forming the ribs of saw gins for ginning cotton." The language of the specification annexed to the renewed patent is, for "an improvement in the manner of forming the ribs of saw gins for ginning cotton." So that in substance we may clearly see, that the same improvement is designed to be included in the descriptive words. In the summing up of his claim in this last specification the patentee says: "I now claim as my invention, and desire to secure by letters patent, the increasing the depth or space between the upper or outer surface of the rib, and the lower or inner surface of it, at

the part where the cotton is drawn through the grate, so that it shall be equal to the length of the fibre of the cotton to be ginned (whether this is done by making the ribs thicker in that part, or by a fork, or division, or by any other variation of the particular form); and I also claim as a part of the same improvement the sloping up of the lower or inner surface of the rib, so as to meet the upper or outer surface above the saws, leaving, when the rib is inserted into the frame, no break, or shoulder between the two surfaces, but a smooth and uninterrupted passage upwards between the ribs, as above described." The drawings annexed to the specification are designed to make the description more palpable and clear. And it is not without significance in the case to remark that, as the patent is for an improvement upon the common cotton-gins, it presupposes, on the part of those interested in the matter, a full knowledge of the machinery and structure of the common gins. Now, to me it is perfectly clear, that the present patent is founded upon a claim for one entire thing, that is, for an improved rib, or a specified improvement upon the common rib of cotton-gins. It is not a claim for two distinct and independent improvements, each susceptible of a distinct operation, or each claimed as a distinct invention; but both are claimed as parts and parcels of the same improvement, and necessary thereto. I do not say, whether each of the specified things, going to make up the entire improvement, might not have been separately claimed as several inventions. That is not a necessary point in the present case. What I mean to say is, that they are not so summed up in the claim; but they are summed up as making an entirety. They go to make up the improved rib, which is patented. That rib is the thing claimed, and not the thickness or depth or space of the rib alone, or the sloping up of the surfaces thereof alone. Both are claimed as parts of the same improvement, but neither alone as constituting it. I see no objection to its being called a combination of particular forms and arrangements of structure to complete the improved rib. In a just sense, that is a combination which requires different things or different contrivances or different arrangements to be brought together, to accomplish the given end. But it is far from following from this, that the combination is not and may not be treated as an entirety.

There is no magic in words; and above all, in patents, the court looks through the whole patent and specification, in order to ascertain what the thing claimed and patented is; whether it is for an entirety, or for various distinct improvements, capable of a distinct operation, and independent use in the same machine, or for both; or whether it is for a combination of two or more things in a particular machine, to produce a given result, or for a simple or single improvement in a particular machine; or whether it is for any one or more of them. There is no artificial or universal rule of interpretation of such instrument beyond that which common sense furnishes, which is to construe the instrument as a whole, and to extract from the descriptive words and the claim, what the invention is, which is intended to be patented, and how far it is capable of exact ascertainment, and how far it is maintainable in point of law, supposing it clear from all ambiguity. Now, looking at the present patent, it seems to me impossible to entertain any real doubt as to its true interpretation. It is, as the words of the claim state it to be, for a single thing—"an improved rib." The improvement is upon the existing rib in the cotton gin, and consists in two things, neither of which (as has been already suggested) is claimed separately, but both together, as constituting one conjoint improvement. It appears to me, that the claim sufficiently expresses the real nature, extent, and character of the improvement, and is in perfect compliance with the sixth section of the patent act of 1836, c. 357. I should not have thought it necessary to consider this objection so far, if it had not been for the zeal and ingenuity, with which it has been pressed upon the court. Call the improvement an entirety, or a combination, as we may please, it is still a patent for "an improved rib," and nothing more.

The remaining objection is to the rejection of the testimony of Edson. And here it is, that I have entertained some doubt, upon which I was desirous of hearing the further argument, which has now been had. The defendants were created a corporation by the statute of Massachusetts of the 14th of June, 1823, and were, of course, made subject to all the liabilities and requirements of the general statute of 1821, c. 28 [Laws Mass. 600], respecting the liabilities of manufacturing corporations. That statute provides "that every person, who shall become a member of any manufacturing corporation which may be hereafter established in this commonwealth, shall be liable in his individual capacity for all debts contracted during the time of his continuing a member of such corporation." The question turns, therefore, upon the meaning of the words "debts contracted," in the statute. Do they mean literally and strictly such debts as are due and payable in money, ex contractu, by the positive or implied engagements of the corporation, and resolve themselves into liquidated or determinate sums of money, due as debts (see 2 Bl. Comm. 464; 3 Bl. Comm. 154), or do they extend to all legal liabilities incurred by the corporation, and which, when fixed by a judgment, or award, or otherwise, are debts of the corporation? And if the latter be the true meaning, then, does the statute liability exist only from the time when it becomes an ascertained debt of the corporation, or does it relate back to the origin of the liability, and bind the corporators from that time?

If the words "debts contracted," in the statute, are to receive the limited construction, that they are applicable only to debts in the strict sense of the term, that is, contracts of the party for the payment of money, and nothing else, it is obvious, that the purposes of the statute, which although, in some sense, it may be deemed penal, is also in another sense remedial, would be comparatively of little value. Suppose the case of a contract by the corporation to do work, or to manufacture goods of a particular quality or character, or to furnish materials, or to buy cotton or wool undelivered, or to build houses, or to employ workmen; and the contract should be entirely unperformed, and broken, and refused to be performed, so that the right of the other party would be, not to money, but to unliquidated damages for the non-performance or refusal to perform; if these, which are by no means uncommon contracts, should be without the purview of the statute, it would have a very narrow and inadequate range and operation. Yet such cases sound merely in damages. Suppose a manufacturing corporation to obstruct its neighbor's mill-privilege, or stop his mill works, by back flowage, if such acts be not within the protection of the statute, we see, at once, that an insolvent corporation might do irreparable mischief without any just redress to the other party. Suppose such an insolvent corporation should unlawfully, under an unfounded claim of right, convert 100 or 1000 bales of cotton belonging to a third person, we see, that the mischief could be redressed only by an action of trover for unliquidated damages; and if the individual corporators were not liable therefor, after an unsatisfied judgment, the statute would be little more than a delusion. If, on the other hand, we should construe the statute broadly as a remedial statute, and give to the word "debts," a meaning, not unusual, as equivalent to "dues," and to the word "contracted," a meaning, which, though more remote, is still legitimate, as equivalent to "incurred," so that the phrase, "debts contracted," in this sense would be equivalent to "dues owing," or "liabilities incurred," the statute would attain all the objects for which it seems designed. The supreme court of Massachusetts, in Mill Dam Foundery v. Hovey, 21 Pick. 455, held, under the statute of 1829, c. 53, § 6 [3 Metc. Laws Mass. 297], which makes the stockholders liable for the debts of the corporation, that the term "debts" included a claim for unliquidated damages. That was a case arising ex contractu; but the language certainly extends the term "debts" beyond its close and literal meaning. And if it covers cases of unliquidated damages, ex contractu, it is difficult to say, why it should stop there, and not go further and cover cases of unliquidated damages arising from torts to property. In each case there is no debt until the damages are ascertained and liquidated; and then the debt seems to relate back to its origin. Blackstone says, "A debt of record is a sum which appears to be due by the evidence of a court of record; thus, when any specific sum is adjudged to be due from the defendant to the plaintiff in an action or suit at law, this is a contract of the highest nature, being established by the sentence of a court of judicature." 2 Bl. Comm. 464; 3 Bl. Comm. 160. Here Blackstone manifestly included all sorts of actions or suits, where the judgment is for a sum certain, whatever may be its nature or origin. 2 Bl. Comm. 464; 3 Bl. Comm. 160, 161; Com. Dig. "Debt," A. 2.

I agree that it is no part of the duty or functions of courts of justice, to supply the deficiencies of legislation, or to correct mischiefs which they have left unprovided for. That is not the question here. But the question is, whether, if the words of a statute admit of two interpretations, one of which makes the legislation incomplete for its apparent object, and the other of which will cover and redress all the mischiefs, that should be adopted, in a statute confessedly remedial, which is the most narrow, rather than that which is the most comprehensive, for the reason only, that the latter will create an obligation or duty, beyond what is imposed by the common law? It seems clear, that in common parlance, as well as in law, the term is in an enlarged sense sometimes used to denote any kind of a just demand. See Com. v. Keeper of Philadelphia Jail, 4 Serg. & R. 506; Gray v. Bennett, 3 Metc. [Mass.] 522, 526. And in the Roman law it had sometimes the like enlarged signification. "Sed utrum ex delicto an ex contractu debitor sit, nihil refert," says the Digest. Dig. lib. 5, tit. 3, l. 14; Pothier, Pand. lib. 50, tit. 16, note 69. Upon this subject I confess that with all the lights which have been thrown upon the question by the able arguments at the bar, I am not without some lurking doubts. But having reflected much upon the subject, and being in the same predicament, which Lord Eldon is said to have suggested as having sometimes occurred to himself, that he felt doubts, but was unable to solve them to his own entire satisfaction, I have at length come to the conclusion that the rejection of the witness as an interested witness was right. I follow out the doctrine of the case of Mill Dam Foundery v. Hovey, 21 Pick. 455, which, as far as it goes, disclaims the interpretation of the word, "debt" as limited to contracts for the payment of determinate sums of money. Passing that line, it does not seem to me easy to say, that if cases of unliquidated damages may be treated as debts, because they end in the ascertainment of a fixed sum of money, that we are at liberty to say, that the doctrine is not equally applicable to all cases of unliquidated damages, whether arising ex contractu or ex delicto. If ultimately it ends in a debt,

as a judgment for damages does, that case asserts, that its character as a debt relates back to its origin. Besides, it seems to me upon principle to be reasonable, if not absolutely justified by authority, to hold, that if the transaction occurs while a person is a member of the corporation, and he would, if he remained a member, be liable for the ultimate debt adjudged, it may well be treated as an inchoate debt consummated by the judgment. Since the argument was had, my attention has been called to the case of Gray v. Bennett, 3 Metc. [Mass.] 522, 530, 531, which, in several respects, confirms the reasoning, which I had previously adopted, in relation to the meaning of the word "debt," and the construction which it ought to receive in a remedial statute. If I had seen that case at an earlier period, it would have somewhat abridged my own researches on the same subject. The result is, that the motion for a new trial is over-ruled, and judgment must pass for the plaintiff.

[NOTE. For another case involving this patent, see Carver v. Hyde, 16 Pet. (41 U. S.) 513.]

CARY (GOODYEAR v.). See Case No. 5,562.

CARY v. NAGEL. See Case No. 2,403.

CARY (SAN FRANCISCO SAVINGS & LOAN SOCIETY v.). See Case No. 12,317.

CARY (STURGESS v.). See Case No. 13,572.

CARY (STURGIS v.). See Case No. 13,573.

CASANAVE (WASHINGTON v.). See Case No. 17,225.

Case No. 2,486.

The CASCO.

[2 Ware (Day. 184) 188;[1] 4 Law Rep. 471; 15 Hunt, Mer. Mag. 290.]

District Court, D. Maine. Feb. 10, 1842.

AFFREIGHTMENT—RIGHTS OF SHIPPER—LIABILITIES OF OWNERS.

1. In every contract of affreightment, whether by charter-party or bill of lading, the ship is, by the marine law, hypothecated to the shipper for any damage his goods may sustain from the insufficiency of the vessel, or the fault of the master or crew.

[Cited in The Flash, Case No. 4,857; The Hendrik Hudson, Id. 6,358; The Bird of Paradise, 5 Wall. (72 U. S.) 563.]

2. If a vessel is let on a contract of affreightment, by charter-party, the owners will not be held responsible for a loss occasioned by the violence of the elements, although the dangers of the seas are not expressly excepted by the charter-party

[Cited in The Star of Hope, Case No. 13,312; The J. A. Goddard, 12 Fed. 184; The Giles Loring, 48 Fed. 470.]

3. But if they are chargeable with any neglect or fault without which the loss would not have happened, they will be liable.

[Cited in The Giles Loring, 48 Fed. 470.]

[1] [Reported by Edward H. Daveis, Esq.]

In admiralty. This was a libel on a charter-party. The master of the brig Casco chartered her to the libellant for a voyage to Porto Rico, to carry a cargo of lumber, and from thence to her port of discharge in the United States, touching at Turk's Island for a cargo of salt, if required by the charterer. The voyage was performed to Porto Rico and the cargo delivered. From that place she went to Turk's Island and took a cargo of salt. On her return from Turk's Island she was found to leak so badly that a large part of the salt was lost. Of 5,676 bushels laden, only 3,132 bushels were delivered at Portland, the deficiency amounting to 2,544 bushels. This libel was brought by the charterer against the vessel to recover damages for the loss. The questions of law which arose and were discussed in the case, together with the substance of the testimony, appear in the opinion of the court.

Mr. Rand, for libellant.

T. A. Deblois, for respondents.

WARE, District Judge. The first question, which was raised and discussed at the bar, was whether, under this charter-party, the vessel in specie is liable for any loss, which the charterer may have sustained from damage to the cargo. It is contended on behalf of the respondents, that there was a demise of the vessel herself to the charterer, by which the possession was transferred to him; that he, under the charter-party, became owner for the voyage, and thus his own carrier, and consequently, if any damages have been sustained from the fault of the master or crew, his remedy is solely against the master, and not against the vessel. This is a question which must be determined by the terms of the instrument itself.

The charter-party is in its form somewhat special and peculiar. It sets forth that it is made and concluded between Allen G. York, the master, who is also part-owner, and John B. Brown, the libellant; and the master, in consideration of the covenants and agreements of the libellant, does covenant and agree on the freighting and chartering of said vessel to the said party of the second part (the libellant), for a voyage from the port of Portland, 'to one port in the island of Porto Rico, and from thence to her port of discharge in the United States, touching at Turk's Island for a cargo of salt, if required by the party of the second part.' The charter-party then proceeds to state the covenants on the part of the master; first, that the vessel shall be kept, during the voyage, tight, staunch, and well fitted, tackled with every requisite, and with men and provisions necessary for such a voyage; secondly, that the whole vessel, with the exception of the cabin and the necessary room for the crew, and the sails, cables, and provisions, shall be at the disposal of the charterer; and thirdly, he engages to receive on board all such lawful goods and merchandise as the

charterer or his agents may think proper to ship. The libellant, on his part, agrees to furnish cargoes for the vessel at Portland and Porto Rico, or Turk's Island, and to pay, for the charter of the vessel, 1,175 dollars, one half to be considered as earned at her port of discharge, and so much to be paid as may be required for the vessel's disbursements, and the balance on the delivery of the cargo in the United States, and also to pay all the expenses of loading at Portland. It seems very clear from these covenants that the possession of the vessel was intended to be in the master. He is to victual and man her, he agrees to receive on board such goods as the charterer shall choose to ship. The charterer agrees to furnish the cargoes, to pay the expenses of loading at Portland, and to advance, at her outward port of delivery, so much of the freight as may be required for the vessel's disbursements. Why should these covenants be inserted if the possession of the vessel was to be transferred to the hirer, and to be navigated by him? It is quite evident that this charter-party was a contract of affreightment for the transportation of goods, and not a demise of the vessel; that the owners retained possession under their master, and must be considered, therefore, as carriers.

There is, in the common form of charter-parties, a clause by which the ship and freight are specifically bound for the performance of the covenants in the charter-party. There is none such in this, but this is a condition which, by the marine law, is tacitly annexed to every contract entered into by the master for the transportation of goods, whether by bill of lading or charter-party. The ship is, by operation of law, hypothecated to the shippers for any loss she may sustain from the insufficiency of the vessel or the fault or the master or crew. There is another peculiarity in this instrument. It is usual, in charter-parties of affreightment, as well as in bills of lading, to insert a clause specially exempting the master and owners from losses occasioned by the dangers of the seas. This instrument contains no such exception, but, this, as was justly contended in the argument for the respondents, is an exception, which the law itself silently supplies without its being formally expressed. It is a general rule of law, founded upon the plainest and most obvious principles of natural justice, that no man shall be held responsible for fortuitous events and accidents of major force, such as human sagacity cannot foresee, nor human prudence provide against, unless he expressly agrees to take these risks upon himself. "Casus fortuitous nemo praestat." Pothier, Des Obligations, No. 142. 6 Toullier, Droit Civil, Nos. 227, 228; Dig. 50, 17, 23; Story, Bailm. § 25. There is an exception to this rule, that is entirely consistent with the principle of the rule itself. It is, when the party to be charged has been guilty of some fault, without which the loss would not have happened. The liabilities of the owners, in this case, are precisely the same, and no more extensive than they would have been if the usual exception of the dangers of the seas had been inserted in the charter-party.

Having disposed of these preliminary matters, we come to the questions which have been principally discussed at the bar. They are partly questions of law, and partly fact. In the first place, there does not appear to be any sufficient reason for questioning the seaworthiness of the vessel, when she sailed from Portland. She was carefully examined by Mr. Fickett, a calker, before she was loaded, and he states that, with very slight repairs which were made by him, she was in perfect order for the voyage. And, in point of fact, on her outward passage, and till after she left Turk's Island, she did not leak more than vessels which are considered tight ordinarily do. On the 7th day after sailing on her return voyage, she was found to have sprung a leak. The weather was not at the time, and had not been, tempestuous or unusually bad. There had been, part of the time, a heavy head-beat sea, and the ship at times labored badly. Occasionally there were fresh winds, but not amounting to a gale. On the 7th of November, at 8 o'clock a. m., it was found that the vessel leaked badly. The entry in the log is, that the day commenced with fresh breezes and cloudy weather, with a heavy cross-head-beat sea; at 6 o'clock p. m., took in foretop-gallant-sail, the brig laboring heavily; tried the pump every half hour; middle part of the day, high winds and heavy head-beat sea; tried the pump every quarter of an hour. At 8 o'clock a. m., commenced leaking badly; double-reefed the mainsail, and single-reefed the foretopsail; two hands at the pumps. For the whole 24 hours she kept on her course N. W. with the wind N. N. E. The testimony of the witnesses substantially agrees with the account given in the log. There was a fresh wind with a heavy swell of the sea. The vessel also had a cargo which tried her strength, but all these causes do not seem to have been sufficient materially to injure a strong and staunch vessel. There can, however, be no doubt that she was strained at that time, and her seams were opened so as to admit a considerable quantity of water. During the remainder of the voyage the weather was variable, but the vessel encountered none of unusual severity, until her arrival off Cape Cod. There she met a heavy gale, and was obliged to carry a press of sail to keep off a lee-shore. After it was discovered that the brig leaked, fruitless attempts were made to discover where the leak was, and she continued to leak more or less until her arrival at Portland on the 23d of November. The master then made a protest and called a survey of the vessel.

After the cargo was discharged, the vessel was examined and repaired by the same calker who examined her before the voyage. He stated that he found openings in her seams, which appeared evidently to be recent, and showed that she had been strained during the voyage. There was a leak about a foot in length in the garboard streak. The butts and wood ends were a little slack, and wanted some calking;—there was a small leak under the forecastle, the seams were a little open at the break of the deck, and the water-ways were considerably open. The vessel, on the whole, bore evident marks of having been strained, but the injury could not have been great, as the calker used but thirty pounds of oakum in putting her in good order for another voyage, and the whole expense of repairs did not exceed fourteen dollars. It appears also that the ship was easily kept free of water, during the whole voyage, by one pump, except for a short time when the leak was first discovered.

If the injury to the vessel was so inconsiderable, the question presents itself, how happened it that so large a part of the cargo was lost? All the witnesses, who examined the vessel before the cargo was discharged, agree in ascribing the loss to two causes; first, the limber holes (which are small holes made in the under part of the floor timbers next the keelson, making a passage for the water to flow from the forward part of the vessel back into the well), it appears, were choked up so as to prevent the flow of the water. A considerable quantity of water, which should have found a passage back into the well, was thus constantly kept forward, between the ceiling or skin of the vessel and the outside planks. The second was the want of sufficient dunnage at the bilge, between the first and second thick streaks, in the forward part of the vessel. All the witnesses agree that there was sufficient dunnage on the floor, and also on the sides of the vessel in the after part. But at the bilge, between the two thick streaks, from the mainmast forward, there was on the starboard side about eighty square feet, and on the larboard side about forty square feet uncovered with dunnage. On examining the ceiling here, the seams were found to be open. On the starboard side, one seam was open for five or six feet, to the width of five-eighths of an inch, and on the larboard side there was a seam open as wide, for fifteen or sixteen feet; and generally the ceiling was not sufficiently tight to prevent the water from being forced through by the motion of the vessel. The vessel having a flat floor, when she was sailing with the wind on her beam and thrown down on the opposite side, the water, which was prevented from passing through the limbers into the well, was washed down to her bilge, and by the motion of the ship blown up through the open seams of her ceiling directly upon the salt. Nearly all the witnesses agree that it was in this way that the salt was lost. And in point of fact the whole extraordinary wastage was [on the sides] [2] in the forward part of the vessel; the loss in the after part was not more than what is usual. The evidence also is, that the salt melted most in the larboard wing, though that was better supplied with dunnage than the other side. But then it appears from the log, that the vessel, during the greater part of the passage, was sailing on her larboard tack, and this would naturally occasion the most waste there, if it was produced by the blowing of the water through the seams of the ceiling. On a view of the whole evidence, it may, I think, safely be taken as an established fact, that the loss of the salt arose from the two causes that have been mentioned.

The whole case, then, seems to be reduced to this, whether the neglect of the owners to provide means for clearing the limber holes, and the neglect of the master to place sufficient dunnage on the wings of the forward part of the vessel to protect the salt from the water, are faults of such a character as to render the parties legally responsible for a loss occasioned by these very deficiencies. If no fault can be imputed to the master or owners on this ground, the loss must be ascribed solely to the dangers of the seas, and be borne by the shipper; for though these dangers were not, by the terms of the charter-party, in terms excepted from the responsibilities of the master, the exception is made by the law. A person is never presumed to take upon himself the risk of inevitable casualties, which the common law somewhat irreverently calls the acts of God, unless he expressly agrees so to do. The law never requires impossibilities. "Impossibilium nulla obligatio est." Dig. 50, 17, 25. But when a party is chargeable with a neglect or fault, without which the loss would not have happened, he will then be held responsible for a loss by inevitable accident, or an accident of major force. It is not that the casualty is imputed to him, but his own neglect or fault which is the occasion of the accident proving fatal. Some vessels have movable boards or plank placed over the limbers, called limber boards, so that they may be taken up to clear the limbers when they become choked; some have a rope or small chain rove through these limber holes to clear them when necessary. This vessel had neither. The board over the limbers was fastened down, and no examination was made to ascertain whether the limbers were free or not. Now, if the importance of providing a passage for the water is such that grooves are cut in the timbers for that express purpose, it certainly would seem to be a want of proper care on the part of the owners to provide no means for keeping them clear; especially as they

[2] [From 4 Law Rep. 471.]

are liable to become stopped. If this passage had been kept clear, so as to admit the flow of water from the forward to the after part of the vessel, it is certain that the pump would have easily kept her clear. The accumulation of the water forward would easily have been prevented, and of course the salt would not have been dissolved. And, in the second place, with respect to the dunnage. Upon this point, a number of witnesses of extensive experience in navigation, either as ship-owners or ship-masters, were examined. Some were of opinion that the dunnage in this case was sufficient for a tight vessel; others thought that the dunnage, whether the vessel was tight or not, for a cargo of salt ought to be carried higher up upon the wings. But all agreed that it was insufficient if the vessel was not tight. It must be admitted upon the evidence that the vessel was tight when she received her cargo, and that the leaks were produced by straining with a heavy cargo and a heavy swell of the sea. But, admitting the vessel to be tight, it is still true that some water will find its way into a tight vessel; and it is certain that the ceiling, or what in the language of the sea is called the skin of the vessel, was far from being tight. The seams were open to such a width that in the rolling of the vessel the water, if it did not find its way into the well through the limbers, would be freely blown through them upon the salt.

Did, then, the master or the owner take all the precautions for the safety of the cargo, which were required by the nature of their engagement? The duty of the owners, under a contract of affreightment by a charter-party is to provide a vessel tight and staunch, and every way fit and prepared for the particular service for which she is hired. The seaworthiness of the vessel, and her fitness for the particular voyage, is a term of the contract implied by law. The common law holds the owner to a warranty in this particular, and though the vessel may have been examined before sailing by skillful shipwrights and pronounced by them every way fit for the voyage, yet, if the goods of a shipper are injured from some latent defect of the vessel, the better opinion is that the owner will be responsible. 3 Kent, Comm. 205, 213; Curt. Merch. Seam. 202; Lyon v. Mells, 5 East, 428. And this warranty against latent defects is held by Pothier to result from the nature of the contract. In every contract of letting and hiring, the letter undertakes that the thing let is fit for the purpose for which it is hired. Pothier, Contrat Charte Partie, No. 30; Contract de Louage, Nos. 110, 112. And then with respect to the stowage of the goods, the master is held to the most exact care and diligence, and it is particularly his duty to provide proper dunnage to prevent the goods from being injured by the leakage. Abb. Shipp. pt. 4, p. 346, c. 5, § 1. The degree of care will of course depend on the nature of the cargo, some goods being more liable to injury by exposure to wet than others. My opinion upon the whole is, that the neglect upon the part of the owners to provide means by which the limbers might be kept open so as to leave a free passage for the water from the forward part of the vessel to the well, and the omission on the part of the master to provide proper dunnage for the wings of the forward part of the vessel, are such neglects as render them legally responsible for a loss that may be ascribed directly to those deficiencies.

Case No. 2,487.

CASE v. BEAUREGARD et al.

[1 Woods, 125.] [1]

Circuit Court, D. Louisiana. June 15, 1871.[2]

PARTNERSHIP DEBTS—FOLLOWING PARTNERSHIP PROPERTY—RIGHTS OF CREDITORS.

1. The rule that trust property may be followed into whosesoever hands it comes, with notice of the trust, does not apply to a case where an officer of a bank, being a member of a partnership, without due security, lends to his firm money of the bank, which becomes mingled with the other property of the partnership.

[Cited in Case v. New Orleans & C. R. Co., Case No. 2,493; Merchants' & Farmers' Bank v. Austin, 48 Fed. 27.]

[See note at end of case.]

2. Although it is generally true that partnership creditors are to be preferred in the distribution of the property of the partnership, and may follow it, if necessary, when one of the partners attempts to appropriate it to the payment of his individual debts; yet a mere simple contract creditor cannot maintain a suit for this purpose unless the partnership has in some manner gone into liquidation, or its property has been subjected to a trust for payment of debts—as where an assignment has been made in fact or in law.

3. Partnership creditors, merely as such, have no lien on the partnership property before obtaining judgment and execution; but can only be subrogated to the lien of the partners, and are therefore without remedy where such lien has been waived by them.

In equity. Hearing on bill, answers, replications and proofs.

J. D. Rouse, for complainant, who cited Rogers v. Batchelor, 12 Pet. [37 U. S.] 221; U. S. v. Hack, 8 Pet. (33 U. S.) 271; Clagett v. Kilbourne, 1 Black. [66 U. S.] 346; Civ. Code La. art. 2823 (2794); Story, Eq. Jur. § 1253; Collins v. Hood [Case No. 3,015]; Innes v. Lansing, 7 Paige, 583; [Russell v. Clark's Ex'rs] 7 Cranch [11 U. S.] 89; Lawton v. Levy, 2 Edw. Ch. 197; 1 Blatchf. 232 [McCalmont v. Lawrence, Case No. 8,676].

John A. Campbell, H. C. Miller, and L. E. Simonds, for the N. O. & Carrollton Railroad Company, cited Hagan v. Walker, 14 How. [55 U. S.] 29; Hoxie v. Carr [Case No. 6,802];

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

[2] [Affirmed in Case v. Beauregard, 99 U. S. 119.]

Ex parte Ruffin, 6 Ves. 119; Story, Eq. § 1259.

W. W. King, for Fourth National Bank of New York.

BRADLEY, Circuit Justice. On the 13th of May, 1867, the First National Bank of New Orleans was closed, and upon an examination of its affairs, was found largely insolvent, and the plaintiff was appointed its receiver, under the 50th section of the national banking act. Amongst the assets were found a note of "G. T. Beauregard, Lessee," for $40,000, dated Sept. 14, 1866, payable on demand, and a draft of T. P. May on A. C. Graham, of New York, for $125,000, dated March 19, 1867, but not accepted. These documents had been credited to the bank account of "G. T. Beauregard, Lessee," which was, nevertheless, overdrawn $72,000, and without these credits, would stand overdrawn $237,000. T. P. May and A. C. Graham were largely interested in the bank, and had been its principal managers, Graham being president from July, 1865, to July, 1866, and May being president from the latter date to the failure of the bank. "G. T. Beauregard, Lessee," was a partnership firm consisting of G. T. Beauregard and the said T. P. May and A. C. Graham, the partnership being lessees, in the name of Beauregard, of the New Orleans & Carrollton Railroad (a horse-car railroad in the city). The lease was taken in April, 1866, and Beauregard was to manage the business, and May and Graham were to put in $150,000 capital each. Their bank account, up to the time the bank failed, had credits, other than the note and bill above mentioned, to the amount of $295,000, and debits to the amount of $532,000. The credits were made up of deposits of the daily receipts of the road, and several cash payments of $20,000 each, made by Graham. Of the debits, about $35,000 was paid for real estate for the road, $130,000 for reconstruction, $155,000 for current expenses, $85,000 for stables, car sheds, houses for employees, etc. The residue was for horses, cars, and other incidents to the railroad business. The rents and current expenses exceeded the receipts of the road.

It further appeared, that on the 8th of May, 1867, Graham assigned all his interest in the Carrollton Railroad and firm of G. T. Beauregard, Lessee, to the Fourth National Bank of New York, to secure the payment of a claim of over $50,000 against the First National Bank of New Orleans, for which Graham had become responsible. This assignment appears to have been made in good faith, and was recorded on the 15th of May. On the 14th of May, 1867, May being a defaulter to the government as assistant treasurer, for over a million of dollars, assigned to the United States, as security for his indebtedness, a large amount of property, including all his interest in the Carrollton Railroad; and on the 16th he assigned Graham's interest also, pretending to own Graham's share, and to have a sufficient power of attorney for that purpose. But the weight of evidence is against this pretension, and the prior assignment of this share by Graham himself took the precedence. On the 21st of August, 1867, the United States, by its agent, assigned all its interest in the Carrollton Railroad and partnership of G. T. Beauregard, Lessee, to Bonneval, Hernandez & Binder, defendants in the cause. The assignment purported to be for two-thirds interest, and was guarantied clear of all debts except the indebtedness of May and Graham as lessees and copartners in the firm. Bonneval and his associates, supposing themselves to be owners of two-thirds, and Beauregard retaining his one-third of the leased property, they together surrendered the old lease and all the partnership property to the New Orleans & Carrollton Railroad Company, and received therefor 4,000 shares, being an equal amount of capital stock of the said company to that which was then outstanding; thus becoming one-half owners of the whole property of the company, including the property by them put into the concern. The company assumed the debts of the firm of G. T. Beauregard, Lessee. This arrangement as to the issue of new stock was sanctioned by an act of the legislature. The stock thus obtained by Beauregard, Bonneval and their associates has all been disposed of to other persons.

In view of these facts, the receiver of the bank contends, 1. That he is entitled to follow the property of G. T. Beauregard, Lessee, and subject it to a trust in favor of the bank, on the ground of its being the product of the money of the bank, wrongfully taken by the partners; 2. That, as a creditor of the partnership, he has a right to have the partnership property applied to the payment of the debts of the firm; and charges the defendants, namely, the present railroad company as newly organized, and Bonneval, Beauregard and their associates, as intermeddling with and taking possession of said property with full knowledge of the equities with which it is affected.

1. The first ground of relief, namely, that the property belongs to the bank, or is held in trust for the bank, because purchased with the money of the bank, is clearly untenable. Beauregard & Co. were engaged in business which required a considerable amount of funds, and became large borrowers of the bank. With the money thus obtained, and with other money derived from the proceeds of their business and other sources, they paid expenses, made repairs, bought cars, horses and other property, and found themselves at the end of the year largely behind. The bank is their creditor, and considering May's peculiar relations, it has cause to make a charge of official misconduct against him; but how does that entitle the bank to claim the property of the firm as its own?

The identity of the property purchased or procured with the money of the bank cannot be ascertained. It was mingled with the other money of the firm, and the whole mass was used indiscriminately for all the purposes of the company. Can the receiver point to a single car or horse or lot of ground, and say, "This was purchased with the money of the bank?" Other creditors of the firm have become interested, and nothing but inextricable confusion would ensue if any such claim were allowed to prevail. Where trust property is converted, and the proceeds can be identified, it may undoubtedly be followed by the cestui que trusts, and brought back to be appropriated to its original purposes. Money of a bank embezzled or misappropriated by its officers may undoubtedly be followed up in the same way, if the money itself, or its proceeds, can be identified, and no innocent person is injured by its recovery. But supposing the money now in question could be regarded as thus misappropriated, the impossibility of identifying it, and of doing justice to third parties, renders the application of the principle impracticable.

2. The position that May's assignment to the government was void as against the bank, on the ground of its being an assignment of partnership property to pay an individual debt, is equally untenable. The assignment was only of May's interest, which interest was individual property which he had a right to assign if his partners did not object. They had an equity to have the property subjected to the payment of the partnership debts, and to this equity the partnership creditors might be subrogated, unless the partners themselves waived it. The creditors, as such, had no lien on the property. They could only operate through the lien of the partners, and if this was given up, they were without remedy unless they could show fraud. No fraud is attempted to be shown in this assignment. It was made subject to the payment of the firm's debts, and with this condition the New Orleans & Carrollton Railroad Company received it, agreeing to discharge the debts of the firm, except such as had been assumed by Bonneval and his associates. Graham did not object to the assignment, except so far as it covered his own share, which he himself assigned to a creditor of the bank itself. Beauregard did not object —for he joined with the assignees of May's assignees in assigning the whole property of the firm to the Carrollton Railroad Company, with a stipulation that said company should pay all the debts of the firm. The case then amounts simply to this—a partnership firm assign their interest in the partnership property, subject to a stipulation for the payment of the partnership debts; and a creditor of the partnership files a bill against the assignees to obtain a direct appropriation of that property to the payment of the said debts. Such a bill certainly cannot be sustained, even at the suit of a judgment and execution creditor, unless it be shown that the assignment was intended to defraud the creditors of the firm. This cannot be pretended here, where the assignment itself contains a stipulation that the partnership creditors shall be paid.

But an insurmountable difficulty in the complainant's case is, that he is only a simple contract creditor, without any judgment, execution or specific lien to stand upon; and the partnership has not gone into liquidation. It is not enough for a person simply to allege that he is a creditor of another to enable him to pursue his debtor's property into the hands of others claiming to have purchased it; he must have a judgment and execution, or some lien upon it, or it must be subjected to a trust for creditors, or placed in a course of liquidation. If a statute subjects a particular fund to a particular class of claims, it may be regarded as imposing a trust thereon; or if the debtor makes an assignment for the benefit of creditors; or if the law makes an assignment for him, as in case of bankruptcy; in all such cases the creditors for whose benefit, as cestui qui trusts, the fund is held in trust, may come into court without a judgment and ask for its administration in accordance with the trust. But without some such constituted trust or lien, a creditor has only the right to prosecute his claim in the ordinary courts of law and have it first adjudicated before he can pursue the property of his debtor by a direct proceeding. The propriety of such a preliminary adjudication in this case is apparent from the fact that one of the controversies in the case is, whether the bank, of which the complainant is receiver, was a creditor of the firm to the amount claimed. The defendants allege that the amount of the bill of exchange, namely, $125,000, at least, was the debt of May, and not the debt of the firm, being a portion of the capital which he was bound to put in, and being procured from the bank by him personally, and placed to the credit of the firm on his own account.

The bill must be dismissed with costs.

[NOTE. Complainant appealed to the supreme court, which affirmed the decree of the circuit court, on the grounds, as assigned by Mr. Justice Story, who delivered the opinion, that the assignments by Graham to the New York bank, by May to the United States, by the United States to Bonneval, Hermandez & Binder, and the act of fusion by which the rights of all the parties became vested in the New Orleans & Carrollton Railroad Company, had the effect to convert the partnership property into property held in severalty, or at least to terminate the equity of any partner to the payment of the joint debts, and therefore, unless the assignments and the act of fusion were fraudulent, the bank, of which complainant was receiver, had no claim upon the property held by the railroad company, arising out of the fact of its relation of creditor to the partnership; also that there was nothing in the case to impeach the bona fides of the transaction by

which the property became vested in the railroad company, and that the provisions of the Louisiana Code, art. 2823, providing that "partnership property is liable to the creditors of the partnership in preference to those of the individual partner," created no specific lien upon the property which continued after it had ceased to belong to the partnership. The court further held that, in the absence of satisfactory evidence that the property was purchased with the bank's money, it did not, in equity, belong to, nor was it clothed with a trust for, the bank; and therefore the bank had no specific claim on the property, nor a trust which a court of equity could enforce. Case v. Beauregard, 99 U. S. 119.

[Complainant subsequently recovered judgment against the defendants Beauregard, May, and Graham for the sum of $237,008.89 (see case on error, Beauregard v. Case, 91 U. S. 134), and filed his bill against the same defendants as herein to have the transfers of the partnership property declared void, and to compel the defendant railway company to pay to him as receiver the amount of such judgment, and there was a decree for defendants, dismissing the bill. See Case No. 2,493.]

Case No. 2,488.

CASE v. BROWN.

[1 Biss. 382;[1] 2 Fish. Pat. Cas. 268.]

Circuit Court, N. D. Illinois. June, 1862.[2]

PATENTS—"SEED PLANTER"—PATENTEE NOT CONFINED TO PRECISE FORM OF HIS COMBINATIONS—PRIOR DESCRIPTION, WITHOUT PATENT—A RESULT OR AN EFFECT CANNOT BE PATENTED—DAMAGES FOR INFRINGEMENT.

1. The claim of Case for the combination of the valve in the seed tube, the valve in the seed hopper, and the lever with its arrangement for re-adjusting the valves as described, construed.

2. Any person who takes the substance, although the form may be changed, violates the patent.

3. If a prior invention be described in an application made to the patent office for a patent, it can make no difference whether it was actually patented or not.

4. A result or an effect cannot be patented, —only the particular mode which the patentee has devised. In this case the patentee can only claim the double dropping by his particular mode.

[Cited in Brown v. Selby, Case No. 2,030.]

5. Where the patentee devised, not the various parts, but the whole combination, it is not an infringement to use a part of the combination.

[Cited in Brown v. Selby, Case No. 2,030.]

[See note at end of case.]

6. A clear and simple rule of damages is to ascertain what pecuniary profits or benefits the defendant has derived from the use of the invention of the plaintiff.

At law. This was an action on the case tried by Judge Drummond and a jury, to recover damages for the infringement of letters patent [No. 12,231] granted to plaintiff [Jarvis Case] January 17, 1855, and reissued November 16, 1858 [No. 623], for an "improvement in seed planters." The claim of the patent was as follows: "In combination with a corn planting machine that is constantly moved over the ground, and drops the grain intermittently, the so combining of two slides, one of which is at or near the seed hopper, and the other at or near the ground, or their equivalents, with a lever as that the operator, or attendant on the machine, can open said slides at the proper time to deposit the seed, and prepare a new charge by the double dropping herein specified." The device used by the defendant [George W. Brown] was covered by letters patent, granted to him May 8, 1855, and reissued December 11, 1860. The claim of the defendant's re-issue was as follows: "So combining with a lever by which both may be operated, a valve or slide in the seed hopper, and a valve in the seed tube, as that a half motion of the lever by the operator riding on the machine, by which they are operated, shall both open and close the seed passages at regular periods and pass measured quantities only, substantially as described." The difference claimed by the defendant between the two machines was that the plaintiff attained the result of double dropping of corn in planting by a backward and forward motion of a hand lever, the backward motion being obtained by a weight and recoil spring, acting automatically, while the defendant attained the result by contriving a double seed tube, with the valve hung therein upon a central pivot, whereby but one motion, or a half motion of the lever was required.

The defendant in reference to the construction of the plaintiff's patent, and the originality and novelty of his claim, offered in evidence a machine invented and used in 1852, by Charles Finn, and described in an application filed by him in the patent office. The defendant insisted that the plaintiff's machine was identical with the Finn machine in every respect, both requiring two motions of the lever to produce the result, except that the return motion, in the Finn machine attained by hand, was, in the plaintiff's machine, attained by the recoil spring connected with and forming a part of the lever; and that, in order to uphold the plaintiff's patent, the claim should be construed to cover only such a lever as he described with its recoil and automatic return; and that upon this construction it should be submitted to the jury whether the device of the defendant (he not using the recoil spring) attained the result in a substantially different manner from either the plaintiff or Finn, or whether the plaintiff's claim was not void for want of novelty.

The counsel for the plaintiff asked the court to instruct the jury: "That the plaintiff, in and by his patent, claims any mode of combining a valve in the seed tube, and a valve in the seed hopper, or their equivalents, with a lever, so that the operator may, by

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

[2] [Affirmed in Case v. Brown, 2 Wall. (69 U. S.) 320.]

one operation or the application of one muscular force, carry a charge of corn from the seed hopper into the seed tube, and arrest it at the lower valve and by the same operation or muscular force let out from the lower valve and drop into the furrow a charge of corn, previously dropped and lying at the lower valve. That the plaintiff by his patent is not confined to the peculiar means of returning the seed slides which he has adopted in his said model, which is called by the witnesses the automatic element. That it appears from the patent that he did not intend to confine his combination to a machine where the operator walked after the machine, drawn by one horse, which he drives, but that he intended to employ it in a machine where he also rode and another drove, if you please. That his claim covers any arrangement to operate the valves and lever in a machine of different shape from his model, which will produce the result in substantially the same way, although he may not in the other machine employ the rock shaft and weighted lever, or any automatic element; he may employ some substitute for the automatic element so that he by one operation, or the application of a single muscular force applied to the lever, drops from the lower valve and supplies a new charge to take its place by the same operation or muscular force, as aforesaid, applied to the lever combined with the valve at the seed tube or their equivalents." The court declined to give the instructions requested, but charged the jury as set forth.

James H. Roberts, S. B. Gookins, and J. O. Felton, for plaintff.

L. Douglas, E. C. Larned, and S. A. Goodwin, for defendant.

DRUMMOND, District Judge (charging jury). The allegation of the plaintiff is that the defendant has violated a combination in machines for planting corn by what is called a double drop, secured by letters patent. The plaintiff claims that he invented the combination in February, 1853, for which an application for a patent was subsequently made and a patent granted, which was afterwards surrendered and a re-issue taken in 1858. It is this last patent that governs the rights of the plaintiff, although the re-issued patent must stand upon the invention as originally set forth in the first letters patent. The construction of the patent is for the court.

The claim of the plaintiff is combining a seed hopper and seed tube and lever, so that by a slide or valve in the hopper and at the end of the tube, the corn by one operation can pass from the hopper into the tube, and from the tube to the ground, at one instant of time. The corn being placed in the hopper, and the slide opened, a hill of corn is deposited at the end of the seed tube. The machine is then ready to perform its office as it is drawn over the ground, viz.: to plant in what are called check rows. The operator or attendant, by means of a mere pressure of the thumb or hand upon the lever, opens the valves in the hopper and in the tube at once, and the corn goes from the tube to the ground, to be immediately replaced by corn from the hopper. The slides or valves are instantly re-adjusted by a spring and weight attached to the lever, and this completes the operation.

So that the claim of the plaintiff consists of the combination of the valve in the seed tube, the valve in the seed hopper, and the lever with its arrangement for re-adjusting the valves as described. In this, the patentee is not confined to the precise form of the combination. Any person who shall take what is the substance of the combination, although the form may be changed, would still violate the patent of the plaintiff. And the question in all cases of this kind is, whether by mere change of form the substantial, the essential, part of the combination is retained. Perhaps no better criterion can be adopted than to determine whether in the change that is made there is an exercise of mere mechanical skill or inventive power. If the former merely, then it may with confidence be declared that the substantial, the essential, part of the combination is not changed; if the latter, then the principle is not the same.

Having ascertained the nature and character of the invention which is secured to the plaintiff by letters patent, the first inquiry is, was the plaintiff the original inventor of the combination which is set forth in his specifications? The law declares that when a patent has been issued to a party, he shall be presumed to be the first inventor, because certain prerequisites are required before the patent shall issue. But it also declares that a party may contest the right of the patentee by showing that the thing patented has been known or used before. As it is only for some unknown combination or machine that the patent can issue, the defendant has in this case contested the novelty of the invention by the plaintiff, and has alleged that the combination has been known and used before. He has introduced evidence which, he alleges, tends to establish that fact. It is therefore a question to be determined by the jury, upon the evidence, whether the patentee is the first and original inventor of the combination which he claims. If he is not, his patent must fall, and he can not recover damages in this case. It is alleged on the part of the defendant, in the first place, that there was a machine constructed by Charles Finn, of Laporte, Indiana, in 1852, which had substantially the same combination. Whether the machine of Finn, which has been introduced in evidence, is substantially the same as that of the plaintiff, is a question of fact to be found by the jury. Finn's machine was not patented, but an application was made to the patent office for a patent, and it was described, and if it was substan-

tially the same thing as the plaintiff's, it can make no difference whether it was patented or not. But the machine of Finn must have been a practical machine, capable of performing the object of the maker. It has been asserted that there were various differences between the machine of Finn and that of the plaintiff. It is said that in the latter, there is the application of but one force to produce the double dropping referred to, while in the former there are two forces. It is for the jury to say whether the means which the plaintiff adopts to re-adjust the slides are substantially the same as the force which is applied to the lever in Finn's machine, to re-adjust the slides there. It is admitted that by the application of one force there is not a double dropping produced in Finn's machine, as in the plaintiff's machine, but there must be an application of another force. In the one instance this force readjusts the slides; in the other they are re-adjusted automatically, as it is termed—that is to say, without the aid of the operator or attendant, but simply by the weight and spring attached to the lever. The material point as to Finn's machine, consists in the fact, as alleged by the defendant, that Finn's machine and Brown's are identical in the manner in which the re-adjustment takes place, and that if the plaintiff's machine and Brown's are identical in this respect, then the plaintiff's is also identical with Finn's. How this may be, is a question of fact to be found by the jury. In order to constitute an infringement of a combination, the whole combination must be used. For instance, the combination of the plaintiff, as already stated, consists of a valve at the end of the seed tube, the valve in the hopper and the lever.

Now admitting that the plaintiff was the first inventor of this combination, and that it is secured to him by letters patent, still any one can use the whole combination except the valve at the end of the seed tube, or the whole except the valve in the hopper, or all except the lever as described, and still not infringe the claims of the plaintiff. In order to constitute an infringement the whole combination must be used, because he claims not the various parts, but the whole combination together. The plaintiff cannot claim double dropping of corn; that is a result, or an effect. He can only claim the double dropping by the particular mode which he has devised. Any one can produce the same results by other and different modes, and still not violate the claim of the plaintiff. In order to constitute a violation, there must be a use of the same method substantially as that adopted by the plaintiff.

As for example, Morse invented a method of writing by means of electricity evolved by the galvanic battery, but it has been decided that any one else can produce the same results by different means. And although he claimed the result, the supreme court of the United States held that that was a void claim, and all that he could claim was simply the means by which he produced the result. The claim of the plaintiff has been stated. It will be observed that he claims that he has so adjusted the valves in the seed hopper, in the seed tube and the hopper, and the tube and the lever, as to produce what he terms the double dropping; that a charge of corn shall leave the hopper and the bottom of the seed tube simultaneously. He does not claim in language, what has been termed by the counsel on both sides, the automatic return of the lever, but he claims the kind of lever connected with the hopper, the seed tube and the slides, which has been described in the specifications, and we cannot separate the specifications from "the claim," and we must take the lever as he has described it, and its mode of operation just as though he had distinctly set it forth in "the claim." The court has already stated that the invention of the plaintiff is the so combining these parts as to produce a new and useful result. His invention, then, is not in having discovered a new thing, but a new combination of things, and it consists of the whole combination; so that in order to constitute a violation of the patent, it is necessary that a party use the whole combination, that is to say, the tube, valves and lever combined in substantially the same way as Mr. Case has combined them. If any one of the elements which is necessary to constitute the entire combination is left out, then there is no infringement.

For example: if you take out what is called the flipper at the bottom of the seed tube, or the valve in the seed tube, or the lever, and use the rest without one of these, you would not infringe, because Mr. Case claims the entire combination. So that in order to constitute an infringement of the letters patent, there must be used, by the defendant, the valve at the end of the seed tube, the valve in the hopper and the lever, all of these combined and operating substantially in the same way as they do in Mr. Case's machine.

But a mere change of form—for example, in the lever and its mode of operation, the adoption of some equivalent, suggested by mere mechanical skill—would not prevent it from being an infringement; otherwise, if the change were one of substance, and requiring the exercise of inventive power. The only remaining question is as to the damages which the plaintiff may have sustained if the defendant has infringed.

And the court thinks that the clear and simple rule to guide the jury in this case is —if they shall believe from the evidence the defendant has infringed the patent of the plaintiff—to ascertain what pecuniary profits or benefits the defendant has derived from the use of the invention of the plaintiff.

That would be any profits which he may have derived on a machine constructed between the time of the re-issued patent in November, 1858, and the commencement of the suit in September, 1860. Considerable evi-

dence has been introduced tending to show that the lower valve, or flipper, as it is called, does not add anything materially to the value of the defendant's machine. If that shall be so, and if it is also true that the defendant has by the use of that valve violated the plaintiff's letters patent, still it is the duty of the jury to give the plaintiff nominal damages.

The jury found for the defendant.

This decision was affirmed by the supreme court. [Case v. Brown] 2 Wall. [69 U. S.] 320.

[NOTE. Complainant brought error, and the supreme court, in affirming the opinion, held, Mr. Justice Grier delivering the opinion, that the court below correctly charged the jury as to what constituted infringement, and that there was no error in refusing to charge, in substance, that plaintiff had a right to claim any mode of combining the various mechanical devices in the improved machine which would produce the same effect or result, as mere equivalents for those described in his patent. Case v. Brown, 2 Wall. (69 U. S.) 320.]

Case No. 2,489.

CASE v. CITIZENS' BANK OF LOUISIANA.

[2 Woods, 23;[1] 1 Thomp. Nat. Bank Cas. 276.]

Circuit Court, D. Louisiana. Nov. Term, 1873.

NATIONAL BANKS—TRANSFERS IN CONTEMPLATION OF INSOLVENCY—DEFINITION OF "INSOLVENCY."

1. The word "insolvency," as used in the 52d section of the currency act of 1864 (13 Stat. 115; Rev. St. § 5242), is synonymous with the same word as used in the bankrupt act.

[Cited in Roberts v. Hill, 23 Fed. 311.]

2. To make transfers, assignments, deposits and payments void under said section, it is only necessary that the insolvency should be in the contemplation of the bank making the transfers, etc., and not that it should also be known to or contemplated by the party to whom they are made.

[Cited in National Security Bank v. Price, 22 Fed. 698; Roberts v. Hill, 23 Fed. 311. Criticised in Roberts v. Hill, 24 Fed. 574, 576.]

This is a bill in equity [by Charles Case, receiver, against the Citizens' Bank of Louisiana], and was submitted for final hearing and decree upon the pleadings, evidence, and arguments of counsel.

John A. Campbell, Thomas Allen Clarke, J. D. Rouse, and F. F. Case, for complainant.

Armand Pitot and M. M. Cohen, for defendant.

WOODS, Circuit Judge. The 52d section of the "currency act" (13 Stat. 115) declares that "all transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any association, or of deposits to its credit; all assignment of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use or for the use of any of its shareholders or creditors, and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof with a view to prevent the application of its assets in the manner prescribed by this act, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void." Relying upon these provisions of the statute, the complainant, Charles Case, the receiver of the Crescent City National Bank, files this bill against the Citizens' Bank of Louisiana.

The bill, after averring the appointment of the complainant as receiver, alleges, in substance, that between the 1st day of December, 1872, and the 6th of February, 1873, the Crescent City Bank drew bills of exchange on F. de Lizardi & Co., of London, amounting in the aggregate to £26,501 5s. 7d., each being payable in sixty days after sight, and sold the same to the defendant, the Citizens' Bank. That afterwards, about the 26th of February, 1873, the said Lizardi & Co. having, after the acceptance by them and before the maturity of the bills, failed, the defendant demanded from the Crescent City Bank indemnity against loss on said bills, and for the purpose of such indemnity the Crescent City Bank transferred to the defendant promissory notes, bills and evidences of debt amounting to $150,000, which were then and there the property of the Crescent City Bank. That at the time of the transfer, the Crescent City Bank had drawn and had negotiated for value bills of exchange on Lizardi & Co. to an amount largely exceeding its capital stock; that the bank had provided Lizardi & Co. with funds to meet the same at maturity; that by the failure of Lizardi & Co. the bills would be dishonored and the bank held liable therefor, and that the funds provided for the payment of said bills had been then lost to the bank by reason of the failure of Lizardi & Co., and that by reason thereof and of other losses the bank was then insolvent; that its insolvency was known to itself and the defendant; that said notes, bills, and evidences of debt were transferred to the defendant in contemplation of the insolvency of the Crescent City Bank, and with a view to give a preference to the defendant over other creditors. The bill prays that the transfer of said assets be declared void, and that defendant may be compelled to account for them to the complainant.

The answer of the defendant, the Citizens' Bank, which is given under the common seal of the corporation, denies all the material averments of the bill, except that the Crescent City Bank had provided Lizardi & Co. with funds to meet the bills drawn on them; that by the failure of Lizardi & Co., the said bills would be dishonored and the bank held liable therefor, and that the funds provided had been lost to the bank at the time of the transfer to the defendant

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

of said assets. The complainant files the general replication.

In passing upon the case, it is material to consider what it is necessary for the complainant to establish in order to render void the transfer of the notes, bills, etc., to the Citizens' Bank. The transfer must have been made after the commission of an act of insolvency, or in contemplation of insolvency, and with a view to give a preference to one creditor over another, or with a view to prevent the application of the assets of the bank in the manner prescribed by the currency act. I know of no reason why a different meaning should be given to the word "insolvency" as applied to banks in the currency act, from the meaning given the same word in the bankrupt act as applied to traders.

"Insolvency, as used in the bankrupt act of 1867 [14 Stat. 534], when applied to traders, does not mean an absolute inability of the debtor to pay his debts at some future time, upon a settlement and winding up of his affairs, but a present inability to pay in the ordinary course of his business; or in other words, that a trader is insolvent when he cannot pay his debts in the ordinary course of his business, as men in trade usually do, and such must be the conclusion even though his inability be not so great as to compel him to stop business." Wager v. Hall, 16 Wall. [83 U. S.] 599. This definition of insolvency, in my judgment, is the meaning of the word in the currency act. It is only necessary that the insolvency should be in the contemplation of the bank making the transfer. The party to whom the transfer is made need not know of or contemplate the insolvency of the bank which makes the transfer. Thus it was held by Mr. Justice Story, under the bankrupt act of 1841 [5 Stat. 442], that to constitute a conveyance "in contemplation of bankruptcy," it was not necessary that the professed creditor should know of the debtor's insolvency, or should co-operate with him to obtain a priority of payment. Peckham v. Burroughs [Case No. 10,897].

The facts clearly established by the evidence, and about which there seems to be no dispute, are as follows: Between December 2, 1872, and February 6, 1873, the Crescent City Bank had drawn bills on F. de Lizardi & Co., of London, which had been sold by the bank, and which were held as follows:

By the Citizens' Bank.....	£19,400
By the Canal Bank of New Orleans..	5,500
By the State Nat. Bank of New Orleans	5,000
By Eugene Kelly & Co.....	35,000
By Edward C. Palmer.....	10,000
By Mr. A. Carriere.....	4,000
By Duncan, Sherman & Co.....	5,000

—And other bills held by other persons. So that at the time of the failure of the house of Lizardi & Co., there were bills outstanding drawn by the Crescent City Bank on Lizardi & Co., to the amount of £111,000. The failure of the house of Lizardi & Co., the drawees and accepters of these bills, took place on February 14, 1873, before the maturity of any of the bills, and was positively known to Summers, the president of the Crescent City Bank, on the 16th inst. By the transfer of notes, bills, and other evidences of debt, on February 26th, by the Crescent City Bank to the Citizens' Bank, the latter was fully secured, for the bills held by it, drawn on Lizardi & Co. by the Crescent City Bank, to the amount of £19,400. On March 13th, in consequence of the failure of Lizardi & Co., the circulation of the Crescent City Bank went to protest, and the bank has since been put in liquidation. The Citizens' Bank lost nothing by the failure of the Crescent City Bank, having been fully secured for the bills held by it on Lizardi. The Canal Bank, Eugene Kelly & Co., Palmer & Carriere, received no security on or payment of the bills held by them, amounting to £54,500. The capital stock of the Crescent City Bank was $500,000.

These facts show the commission of an act of insolvency by the Crescent City Bank, the insolvency of the bank, the transfer of notes, bonds, etc., and the preference of one creditor to another. These facts alone do not, however, make the transfer void. It is necessary to the complainant's case to establish two additional facts: 1. That the transfer was made in contemplation of the insolvency of the Crescent City Bank, and 2. That it was made with a view to give a preference to the Citizens' Bank over other creditors, and to prevent the application of said assets in the manner provided by the currency act. If the complainant has established these facts in addition to those already stated, he has made out the case averred in his bill.

In passing upon the first point, it is pertinent to inquire, was the Crescent City Bank really insolvent at the time of the transfer of the notes, bills, etc., to the Citizens' Bank, on the 26th of February, 1873? We have in evidence a report of the condition of the bank on the 14th of February, 1873, the very day that Lizardi & Co., of London, failed. On that day the resources are stated at $1,545,854.51, in which is included an item of $561,958.01, under the head of "Other Cash Assets." This item is shown by the testimony of John Davis, the bookkeeper of the bank, "to consist of a class of bonds, stocks, etc., which bonds amount to 90 per cent. of the capital, which is $564,000. The bonds are $500,000. So that on account of $564,000, there were $500,000 bonds." It is evident from this statement that this item of $561,958.01 consisted mainly of the bonds of the United States to secure the circulation of the bank, with the premium thereon. It was not therefore a cash item, it was not available for the payment of the liabilities of the bank. The exhibit in which this item occurs, and the same item is found in the ex-

hibits made on February 24th, February 28th and March 7th, was not a fair statement of the condition of the bank. This is made apparent by the fact that among the liabilities of the bank, the capital stock is not set down as a liability to offset the bonds deposited to secure circulation, with the premium thereon. The item, therefore, of $561,958.01, should be stricken from the statement of the resources of the bank. This leaves the resources at $983,896.50, on February 14th. On the same day, the liabilities of the bank are stated at $973,303.12, showing an excess of resources over liabilities of $10,593.38 only. But on the 14th of February, Lizardi & Co., of London, failed. On that day, as shown by the evidence of Davis, the exchange clerk of the Crescent City Bank, the amount of the bills outstanding drawn by the Crescent City Bank on Lizardi & Co., of London, was £111,000, which, reduced to dollars at the current rate of exchange at that time, would be about $604,000. The bank had sent forward about $606,000 to cover these drafts; these remittances were misappropriated by Lizardi & Co., and none of the $604,000 of exchange drawn by the Crescent City Bank on Lizardi & Co. was paid by them.

Here then is a bank which on February 14th shows resources over liabilities to the amount of only $10,593, and on that day, by the failure of Lizardi & Co., has withdrawn from its available resources, for an indefinite period, the sum of $606,000, with the prospect of losing in the end a large portion thereof. This statement makes perfectly clear the "inability" of the Crescent City Bank "to pay its debts in the ordinary course of business;" in other words, makes clear its insolvency. This loss or suspension of assets by the failure of Lizardi & Co. was greater than the available resources of the bank, added to its capital stock, by more than $95,000. Summers, the president of the Crescent City Bank, must have known of this condition of affairs before the 26th of February. In fact he must have known it; it is impossible he should not have known it as soon as he heard of the failure of Lizardi & Co. Reynes testifies that "on the 15th of February, he received a dispatch from Eugene Kelly, of New York, who held bills of the Crescent City Bank on Lizardi & Co. to the amount of £35,000, that the acceptances were due that day, and that they were unpaid, and that such dishonor was virtually the failure of the bank, and that he expected no preferred payments. Reynes showed the telegram to Summers, the president of the Crescent City Bank, and insisted on his acting according to it." Faurie, the cashier of the Crescent City Bank, testifies that the remittances sent by the bank to Lizardi & Co., of London, to pay those bills, were misappropriated and therefore the bills came back. "When we found the remittances were misappropriated, we thought it would break the bank." "Some of the directors thought that if the remittances had been properly appropriated, they would come out all right; but if they had not been properly appropriated, they knew the bank had gone under. They said so. As soon as we were advised of the misappropriation of the remittances made by Lizardi & Co., of London, every officer of the bank knew that it was broken." Geo. Jonas, the president of the Canal Bank, testifies, that as soon as it was known that the house of Lizardi & Co., of London, had failed, the credit of the Crescent City Bank was materially impaired, its business was diminished, there was urgency and anxiety among its creditors to obtain security. As soon as it was known that Lizardi & Co. had failed, every creditor wanted security if he could get it. He (Jonas) went to see Summers, the president, several times, to get security. Summers made an appointment to meet him on February 23d, and said he would bring bills receivable of a sufficient amount to cover the bills held by the Canal Bank. He failed to keep the appointment, but sent Jonas word the next day that his board determined to make no further preferences, and declined to give any security whatever." He further testified, that upon the failure of Lizardi & Co., the stock of the Crescent City Bank ran down rapidly, and he heard of parties who were anxious to get rid of it for nothing, on account of their liability as stockholders in case of a failure. Edward C. Palmer testifies, that he was in commercial business in New Orleans, and was director in a national bank at the time of the failure of Lizardi & Co. He says that upon that event there was but one opinion expressed, that it could not do anything else but ultimately break the Crescent City Bank. This was a general opinion among financial men that he talked with. L. F. Generes, who had often been director of banks in New Orleans, testifies that immediately on the failure of Lizardi & Co., of London, there was great anxiety here about the Crescent City Bank from its relations with Lizardi & Co. It manifested itself some days after the failure was known. At first there was no anxiety, but still it grew up and became very urgent.

The result of this evidence is that upon the failure of Lizardi & Co., of London, the Crescent City Bank was insolvent. As soon as it was known that Lizardi & Co. had misappropriated the funds sent to pay the bills drawn on them by the bank, the insolvency of the bank was known to its cashier and directors, and was currently rumored and suspected by the interested public. The board of directors, as early as February 22d, had "determined to make no further preferences." Here is the official act of the board of directors, which, in effect, implies the insolvency of the bank. Is it possible that Summers, a member of and president of the board of directors, and who himself reported this action of the board to Jonas, did not know of the insolvency of the bank?

The "contemplation of insolvency" is in my judgment clearly established.

It remains to inquire whether the transfer of notes, etc., made on the 26th of February to the Citizens' Bank, in contemplation of insolvency, was made with a view to the preference of one creditor to another. The fact is beyond dispute that the Citizens' Bank was preferred, because it was paid in full, while other creditors, similarly situated, were not paid any part of their claims. Did Summers, in making the transfer of notes, etc., do it with a view to a preference? The law presumes he had in view the natural result of his acts. But defendant claims to have shown that the transfer was made to provide means to pay the bills drawn by the Crescent City Bank in London, and thus save the credit of the bank. Why then were not all the holders of the bills applied to to discount paper from the portfolio of the bank, and thus furnish the means, each to take care of his own bills. This arrangement was made with a part, but not with all. It was made with the Citizens' Bank and others. They were secured, and the bills held by them paid. The bills held by others were left unsecured, and were protested. How was the credit of the bank to be maintained by such a course? E. C. Palmer, who held £10,000 of the bills of the Crescent City Bank, drawn on Lizardi & Co., heard of the failure of the drawers on February 15th, and within two hours went around to the bank. He saw Faurie, the cashier, who told him to go in and see Summers, the president of the bank. He found him talking with three or four of the directors. No offer was made to Palmer to transfer to him assets from the portfolio of the bank, in order to secure him. Doubtless he would have been willing to take care of the £10,000 of bills of exchange which he held, drawn by the Crescent City Bank on Lizardi & Co., if he could have been made secure out of the portfolio of the bank. So would the Canal Bank, and Eugene Kelly & Co., and Carriere. But no such opportunity was afforded them. These favors were reserved by Summers for the Citizens' Bank and others.

The truth is, as is evident by the testimony, that one at least of the purposes of the transfer of assets to the Citizens' Bank by the Crescent City Bank was to secure the Citizens' Bank on the bills which it had purchased from the Crescent City Bank on Lizardi & Co. The pretense that this transfer was to sustain the credit of the Crescent City Bank is too transparent to deceive any one. I am of opinion, therefore, after a review of all the evidence in the case, that the transfer by the Crescent City Bank to the Citizens' Bank, of the notes, bills etc. mentioned in the bill of complaint, was made in contemplation of insolvency, with a view to the preference of one creditor to another, and is therefore utterly null and void. Let a decree be entered as prayed in the bill.

Case No. 2,490.

CASE v. CLARKE.

[5 Mason, 70.] [1]

Circuit Court, D. Rhode Island. June Term. 1828.

CITIZENSHIP—DOMICILE—INTENTION.

1. To constitute a person a citizen of a state, so as to sue in the courts of the United States, he must have a domicil in such state.

[Cited in Burnham v. Rangeley, Case No. 2,176; Prentiss v. Brennan, Id. 11,385; Poppenhauser v. India-Rubber Comb Co., 14 Fed. 708; Ward v. Blake Manuf'g Co., 5 C. C. A. 538, 56 Fed. 440.]

2. If he removes into a state animo manendi, that is sufficient, whatever may be his motive for removal. But a mere temporary change of place, without any intention of permanent residence, constitutes no change of domicil.

[Cited in Cheever v. Wilson, 9 Wall. (76 U. S.) 123; Morris v. Gilmer, 129 U. S. 328, 9 Sup. Ct. 293.]

Case for defamation. The writ averred the plaintiff [Benjamin W. Case] to be a citizen of Massachusetts, and the defendant [Joshua Clarke] to be a citizen of Rhode Island. Plea to the jurisdiction, that the plaintiff is a citizen of Rhode Island, and not a citizen of Massachusetts, as alleged in the writ, and issue thereon. At the trial it appeared, that the writ was dated on the 29th of September, 1827, and was served on the 30th of the same month. The plaintiff was a physician, resident in Newport, Rhode Island, having his home there, and practising his profession. About the 28th of September, 1827, he went with his wife to Troy, Massachusetts, and took lodgings in a house there at board, avowedly for a few days only, and said, that his stay was uncertain. He remained there only two days, and then returned to Newport with his wife, saying, that he must visit his patients in Rhode Island. This was the whole evidence of citizenship.

Turner and Pearce, for plaintiff.

Mr. Searle, for defendant.

STORY, Circuit Justice. It appears to me very clear, that there is no sufficient proof, that the plaintiff is a citizen of Massachusetts. To effect that purpose it should be established, that there was a bona fide change of domicil. I do not say, that we can inquire into the motives for the change, or the reasons, which influence a man to remove from one state to another. Be these motives or reasons what they may, there must still be a bona-fide intention of removal, and a real change of domicil. If a person, wishing to commence suits in the courts of the United States, instead of the state courts, chooses to remove into another state, and executes such intention bona fide, he may thereby change his citizenship. But his removal must be a real one, animo manendi, and not merely ostensible. Now in

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

the present case, no person can wink so hard as not to see, that the plaintiff never had any intention to change his domicil. He went to Troy upon a mere temporary visit, for a transient purpose, and apparently for the sole purpose of suing out and serving the present process. He returned as soon as the service was completed; and resumed his business as usual. How can such acts, construing them most favourably for him, demonstrate any intentional change of his common domicil? As well might a man passing into another state in the progress of a journey of business or pleasure claim to be a citizen of such state. There must be some plain overt acts establishing a real removal of domicil. The return here followed too soon upon the removal not to demonstrate, that it was merely an ostensible, and not a real change of domicil. I, for one, feel no desire to encourage attempts of this nature; and am willing, that the state courts should retain all the jurisdiction over causes originating between the citizens of the same state.

Verdict for the defendant.

Case No. 2,491.

CASE et al. v. DOUGLAS et al.

[1 Dill. 299.][1]

Circuit Court, D. Nebraska. 1870.

REMOVAL OF CAUSES—ACT OF MARCH 2, 1867.

Under the act of March 2, 1867 (14 Stat. 558), where the suit in the state court is brought by copartners on a firm demand, the defendants are not entitled to have the same removed to the federal court on filing a petition and affidavit showing that a part of the plaintiffs are citizens of the state in which the suit is brought and the defendants are citizens of another state; in such case, in order to authorize the removal, all of the plaintiffs should be shown to be citizens of the state in which the suit was brought.

[Cited in Grover & Baker S. M. Co. v. Florence S. M. Co., 18 Wall. (85 U. S.) 587; Petterson v. Chapman, Case No. 11,042.]

This is an action by D. W. Case, R. B. Beals, and H. H. Denton, partners, under the name of Case, Denton & Co., against the defendants, copartners, under the name of Douglas, Brown & Co., to recover for work and labor performed by the plaintiffs' firm for the defendants.

The action was commenced in 1869, in one of the state courts of Nebraska. After answer, the defendants filed, under the act of March 2, 1867 (14 Stat. 558), their petition to remove the action to this court.

The petition for removal sets forth, inter alia, "that the plaintiffs, or at least the said D. W. Case, who is the active manager of said suit in behalf of said plaintiffs, and the said R. B. Beals are citizens of the state of Nebraska, and that the defendants are citizens of the state of Iowa; that the matter in dispute exceeds, etc., and that by reason of prejudice and local influence, the defendants will not be able to obtain justice in the district court of the state," etc.

The state court ordered a removal of the cause as prayed, and in this court the plaintiffs now move to remand the same "because the petition and affidavit do not show that the federal court has jurisdiction,' inasmuch as all the parties plaintiffs do not appear to be citizens of the state of Nebraska."

George W. Doane and John Carrigan, for the motion.

Isaac Cook, contra.

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

DILLON, Circuit Judge. The motion to remand must be granted. The application for removal was based upon the act of March 2, 1867 (14 Stat. 558). This act provides, under certain circumstances, for such removal where "there is a controversy between the citizen of the state in which the suit is brought, and a citizen of another state."

This language is taken from the judiciary act, and, so far as respects the question now presented, its meaning had been judicially determined long before the act of March 2, 1867, was passed. In adopting that language in the later act, congress must be taken to have adopted also its settled construction, which is that where the interest is joint each of the parties concerned therein must be competent to sue in the federal courts, and this competency must appear on the record. Strawbridge v. Curtiss, 3 Cranch [7 U. S.] 267; Corporation of New Orleans v. Winter, 1 Wheat. [14 U. S.] 91; Moffat v. Soley [Case No. 9,688]; Commercial & Railroad Bank v. Slocomb, 14 Pet. [39 U. S.] 60; Irvine v. Lowry, Id. 293; Bank of Cumberland v. Willis [Case No. 885]; Allin v. Robinson [Id. 249]; Susquehanna & W. V. Railroad & Coal Co. v. Blatchford, 11 Wall. [78 U. S.] 172; Sands v. Smith [Case No. 12,305.]

Applying these principles to the present case, it is obvious that the removal was improperly ordered, since it does not appear that all of the plaintiffs were citizens of Nebraska. For aught that is shown one of them may be a citizen of the same state as the defendants.

The case is distinguishable from that of Sands v. Smith [supra], where the right of removal given by the judiciary act was held to be affected by the act of February 28, 1839 [5 Stat. 321], and of July 27, 1866 [14 Stat. 306], in relation to defendants. Motion granted.

NOTE [from second edition of original report]. Removal to federal court on ground of citizenship authorized only when all plaintiffs are competent to sue all defendants in federal court. Cited: Petterson v. Chapman [Case No. 11,042]; Florence S. M. Co. v. Grover & Baker S. M. Co., 110 Mass. 80.

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

Case No. 2,492.

CASE v. KELLY.

[Cited in Farmers' Loan & Trust Co. v. Green Bay & M. R. Co., 12 Fed. 774. See opinion of the supreme court on appeal from the decree herein. 133 U. S. 21, 10 Sup. Ct. 216.
[Nowhere reported.]

CASE (LANNING v.). See Case No. 8,072.

CASE (MORRISON v.). See Case No. 9,845.

Case No. 2,493.

CASE v. NEW ORLEANS & C. R. CO. et al.

[2 Woods, 236.][1]

Circuit Court, D. Louisiana. April Term, 1876.[2]

RES JUDICATA.

A creditor's bill which sought to follow as trust money, funds of a bank invested by its officers in a railroad company, was dismissed, on the ground among others that the identity of the property purchased with the money of the bank could not be ascertained: *Held*, that such decree was a bar to a new bill brought for the same purpose, and substantially the same as the first except that it contained an averment which was not in the first bill, to the effect that the complainant had reduced to judgment his claim against the officers of the bank for the misappropriated funds.

[See note at end of case.]

In equity. This cause was submitted on the bill, pleas, replication and evidence. The bill alleged in substance that G. T. Beauregard, Thomas P. May and A. C. Graham formed, about the 18th of April, 1866, a partnership under the name of G. T. Beauregard, Lessee; that said partnership leased from the New Orleans & Carrollton Railroad Company, for a term of twenty-five years, its railroad and other property appurtenant thereto, and spent large sums of money in repairing and rebuilding said railroad, and in purchasing real estate for the use of said road, which real estate is described in the bill. It is further alleged that all or nearly all the money paid out by Beauregard, Graham and May, for the purchase of said lease and expended in making improvements on and equipping said road, and in conducting its business, was obtained from the First National Bank [of New Orleans]; that the partnership opened an account with the bank in the name of "G. T. Beauregard, Lessee," and became indebted to the bank for money advanced in the sum of $237,008. The bill further stated that the complainant [Frank F. Case], in his capacity of receiver of said bank, brought suit on the law side of this court against said partners Beauregard, Graham and May, on their said indebtedness; and that on the 26th of February, 1873, he recovered a judgment against Beauregard and May for $79,002 each, that being their respective virile shares of said debt as ordinary partners, but that Graham, not having been found, no judgment was or could be rendered against him. Executions were issued on said judgments and returned nulla bona. [See Beauregard v. Case, 91 U. S. 134.] The bill further averred that the bank had a lien and privilege upon all the property of the partnership, and had a right to be paid out of the same in preference to creditors of the individual partners. The bill further alleged that Graham and May had conveyed their interest in said property; that the partnership assets came into the possession and ownership of Beauregard and certain other persons, to wit, Bonneval, Binder and Hernandez; that in consideration that said railroad company would assume all the debts of said partnership of "Beauregard, Lessee," and give to said Beauregard, Bonneval, Binder and Hernandez, 4,000 shares of the capital stock of the company, they transferred to the said company the said lease and all the other property belonging to said partnership of Beauregard, Lessee. The bill charged that these transfers to Bonneval, Binder and Hernandez, and from them and Beauregard to the railroad company, were made with a full knowledge on the part of the transferees of the rights of the bank in the property transferred. The prayer of the bill was that the court would decree that there was due the complainant, as receiver as aforesaid, from the partnership of Beauregard, Lessee, the said sum of $237,008 with interest, and by each of the partners one third of said sum; that the New Orleans & Carrollton Railroad Company might be condemned to pay to him the sum so due, as aforesaid, from said partnership, and that all transfers and conveyances of said partnership property might be declared void. The plea in bar filed by the defendants to this bill was to the effect that on the 4th of June, 1870, the said complainant had filed his bill in this court against the same corporation and the same natural persons as are defendants in this bill, setting forth substantially the same cause of action and praying the same relief as is sought in this suit; that defendants had answered said bill and the complainant had filed a replication to the said answer, and testimony was taken by both parties, and on the 14th of June, 1871, the cause was submitted to this court, which on the 15th of June, 1871, rendered a decree dismissing the complainant's bill with costs. To this plea the complainant filed his replication, and the cause was submitted upon the issue thus formed.

J. D. Rouse and W. W. King, for complainant.

John A. Campbell and Henry C. Miller, contra.

WOODS, Circuit Judge. The evidence submitted to sustain the plea, to wit, the record

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

[2] [Affirmed in Case v. Beauregard, 101 U. S. 688.]

and decree of the court which is pleaded as a bar to this suit, shows that the bill in the former case made substantially the same averments with a single exception, to be hereafter noticed, and prayed the same relief as the present bill. The averments in the present bill not contained in the former one are those to the effect, that the complainant had recovered judgments against Beauregard and May, in an action at law each for his virile share of said indebtedness; that execution had issued and been returned nulla bona; that May had gone into bankruptcy, and that Graham was out of the jurisdiction of the court. The first bill, however, averred that Beauregard, Graham and May were all insolvent.

It is evident that the substantial difference between the two cases lies in this, that the first bill lacked the averment which the present bill contains, that the claim of the complainant against the partnership of "Beauregard, Lessee," had been sued to judgment as against Beauregard and May, and that execution had been issued thereon and returned unsatisfied. The answer to the first bill insisted that the various transfers by which the railroad company acquired title to the property of the partnership of Beauregard, Lessee, were valid, and the title of the company indefeasible, denied that the complainant or the bank ever had any lien or privilege thereon, or that said property was in any manner bound for the indebtedness of said partnership, or that the railroad company ever assumed or bound itself for the same, and denied all the allegations of the bill charging said company or said property acquired by it with any liability whatever to complainant or the bank of which he was receiver.

The original case was tried at the April term, 1871, of this court, by Mr. Circuit Justice Bradley, by whom it was decided in a written opinion to be found in 1 Woods, 125 [Case v. Beauregard, Case No. 2,487]. One of the grounds upon which the court decided against the complainant and dismissed his bill is stated, as shown by the report, as follows: "The first ground of relief, namely, that the property belongs to the bank, or is held in trust for the bank, because purchased with the money of the bank, is clearly untenable. Beauregard & Co. were engaged in business which required a considerable amount of funds, and became large borrowers of the bank. With the money thus obtained, and with other money derived from the proceeds of their business and other sources, they paid expenses, made repairs, bought cars, horses, and other property, and found themselves at the end of the year largely behind. The bank is their creditor, and considering May's peculiar relations, it has cause to make a charge of official misconduct against him; but how can that entitle the bank to claim the property of the firm as its own? The identity of the property purchased or procured with the money of the bank cannot be ascertained. It was mingled with the other money of the firm, and the whole mass was indiscriminately used for all the purposes of the company. Can the receiver point to a single car, or horse, or lot of ground, and say, this was purchased with the money of the bank? Other creditors of the firm have become interested, and nothing but inextricable confusion would ensue if any such claim were allowed to prevail. Where trust property is converted and the proceeds can be identified, it may undoubtedly be followed by the cestuis que trust, and brought back to be appropriated to its original purposes. Money of a bank misappropriated or embezzled by its officers may undoubtedly be followed up in the same way, if the money itself or its proceeds can be identified, and no innocent person is injured by its recovery. But supposing the money now in question could be regarded as thus misappropriated, the impossibility of identifying it and of doing justice to third parties, renders the application of the principle impracticable." See Case v. Beauregard [supra]. This ground, upon which, among others, the bill was dismissed, is entirely independent of the fact, whether the claim of the complainant had been reduced to judgment or not. The court, in effect, has decided, that with or without a judgment, the relief prayed by the bill cannot be granted. The case, in every shape it may assume, has been decided against the complainant and the bill dismissed. He cannot relieve himself of the effect of the decree of dismissal by putting his claim in judgment. That would be simply to add an entirely immaterial fact to the case he had made by his first bill.

The present bill, as already stated, differs from the bill which was dismissed in the single fact, that it avers that the debt due to complainant had been reduced to judgment. The court is, therefore, asked to decide, whether this fact changes the title of the complainant to the relief he prays. The court has, in the first case, decided that precise question, and held that it does not. The questions presented by this bill have been decided by this court. They cannot be raised again by adding an immaterial fact to the record. In my judgment, the plea is sustained by the proof, and there must be a finding and decree for defendants, and the bill must be dismissed with costs.

[NOTE. Complainant appealed to the supreme court, which affirmed the decree below dismissing the bill, and held that the decree on the former hearing (Case No. 2,487) determined the equities of the case, whether the reasons for dismissal were sound or not, and that that decree, having been affirmed by the supreme court on the merits, was an adjudication upon complainant's equity to be paid out of the property in the hands of the railroad company, and a bar to the complainant's present claim; and, further, that the court would not reconsider the question or determine as to whether the

bank has a lien on the property sought to be charged, or whether there had been a trust in its favor. Case v. Beauregard, 101 U. S. 688.]

Case No. 2,494.

CASE v. REDFIELD et al.

[4 McLean, 526;[1] 2 Robb, Pat. Cas. 741.]

Circuit Court, D. Indiana. May Term, 1849.

ASSIGNMENT OF PATENT RIGHT—RECORDING—NOTICE—ASSIGNEE'S RIGHT IN RENEWAL — ACTION FOR INFRINGEMENT—DECLARATION.

1. It is not essential to the validity of an assignment of a patent right between the parties, or as against strangers, that it should be recorded in the patent office.

[Cited in Perry v. Corning, Case No. 11,004.]

2. The record is notice to purchasers.

[Cited in Perry v. Corning, Case No. 11,004.]

3. An ordinary assignment will not convey to the assignee an interest in the renewed patent.

[Cited in Hodge v. Hudson River R. Co., Case No. 6,559; Jenkins v. Nicolson Pavement Co., Id. 7,273.]

4. The renewal is for the benefit of the inventor, and an interest in it before the renewal must be especially assigned.

5. The individual who holds the original right patented, and also an improvement on that right, must assert his entire right in an action for an infringement.

[Cited in Gamewell Fire-Alarm Tel. Co. v. City of Chillicothe, 7 Fed. 354. Distinguished in Hayes v. Dayton, 8 Fed. 705.]

6. To show a violation of the patent, the declaration need only aver that the defendant has constructed, used, and sold to others, the things patented.

In equity.

Smith & White, for plaintiffs.

Judah & McGaughey, for defendants.

HUNTINGTON, District Judge. The plaintiff claims to be the assignee of the patent right granted to Zebulon and Austin Parker, on the 19th October, 1829, for the term of fourteen years, for the invention of "a percussion and reaction water wheel for mills," etc. And he alleges that on the 27th of June, 1840, the said patentees having invented a new and useful improvement on the above right, a patent [No. 1,658] for the improvement was issued to Zebulon Parker and Robert McKelvey, administrator of Austin Parker, deceased, in trust for his heirs at law, for fourteen years. On the 31st July, 1841, McKelvey, for the consideration of twenty-five hundred dollars, assigned to Zebulon Parker, "all the right, title and interest which said heirs had in said invention and improvement, as secured to them by said letters patent, for the whole of the United States, with certain exceptions, and for the use and behoof of his legal representatives, for which letters patent were or may be granted for said improvements, as fully and entirely as the same would have been held and enjoyed by said heirs had that assignment and sale not been made." Other assignments were made down to the right asserted by the plaintiff. And the plaintiff avers that the defendants have infringed his right, as stated under the patent.

The defendant demurs to the declaration, and assigns, as causes of demurrer, the following: 1. "That the declaration does not show that any assignment was ever made by the administrator of Austin Parker, deceased, of the extension of the original patent granted to Zebulon and Austin Parker, nor does it show any right in the present plaintiff in but one-half of the present patent." 2. "The declaration is double and multifarious in this, that the plaintiff sues for the invasion in each count, of two separate and distinct rights growing out of separate and distinct patents, that is to say, for the invasion of the original patent granted October 19th, 1829, and also for an invasion of the patent for an improvement granted 27th June, 1840." 3. "The declaration does not set forth in what or by what means, the defendants violated the patents set forth."

There is also a demurrer to the last count in the declaration, which sets out the assignments, but does not aver that they are recorded in the patent office. The assignments are set out in the declaration originally filed, and they are stated to have been recorded in the office; but this can not obviate the objection made by the demurrer to the last count. By the law of congress, the assignments are required to be recorded; but the effect of an omission to have them recorded is not declared. It has been held by Mr. Justice Story, that a failure to record an assignment was not essential to its validity as between the parties and against strangers, and was only necessary by way of notice to purchasers. The same construction has been given to the statute by several circuit courts of the United States, and we think it is the true one. The demurrer to the last count in the declaration is therefore overruled.

In regard to the objection first made on the special demurrer, that there has been no assignment of the interest in the heirs of Austin Parker, in the extended patent, it must be admitted that there has been no assignment of it since the patent was extended; and if there was no assignment of this interest before the extension, the truth of the fact is established, whatever may be its legal effect. In the case of Wilson v. Rousseau, 4 How. [45 U. S.] 646, it was held, that the extension of the patent was given for the benefit of the original inventor or his representatives to compensate him for his expenditures, labor and ingenuity in the invention, and in perfecting it; and that an ordinary assignment of the right in the patentee would not convey any right in the extended patent. But, that such an interest, when intended to be assigned, must be ex-

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

pressed. The original patent of the Parkers was extended for seven years, on the 4th of October, 1843. And, since the extension, there has been no assignment by the heirs of Austin Parker. But the plaintiff relies upon the assignment of McKelvey to Zebulon Parker, on the 31st July, 1841, as transferring the interest of the above heirs in the renewal patent. And it would seem from the language of that assignment this construction of it is sustainable. It appears at the time of this transfer the original patent had but little more than two years to run. And, although one-half of the improvement on the original patent was included in the assignment, yet the improvement without the original invention could not be used, and would be of little value. The sum of twenty-five hundred dollars was the consideration named in the assignment. From this it would be reasonable to infer that the entire interest in the heirs, present and future, in the invention, was intended to be conveyed; so large a sum would not have been paid for one-half of the improvement on the original right, and a moiety of the original patent which would expire in two years. The operative words of the assignment show the intention of the parties. They are, "all the right, title and interest which said heirs had in said invention and improvement as secured to them by said letters patent, for the whole of the United States, with certain exceptions, and for the use and behoof of his (Zebulon Parker's) representatives, for which letters patent were or may be granted for said improvements, as fully and entirely as the same would have been held and enjoyed by said heirs had that assignment not been made." Here is not only a present but a future interest assigned. An interest secured by the present letters patent, or by patents which may (hereafter) be granted for said improvements. This was intended to transfer the right under a renewal of the patent. No other construction can be given to the words used. They can not be made to apply to any correction of a supposed error in the specifications or claims of the patent. Under the law when this assignment was made, the patent was not void for claiming more than was invented. And it is not pretended that there is any want of precision in the specifications. Under the act of 4th of July, 1836 [5 Stat. 124], § 18, for the extension of a patent, it may have been supposed that a new grant would be issued. But a much shorter mode has been adopted by an indorsement on the original patent.

The second ground of objection in the special demurrer that "the declaration is double and multifarious," is not sustainable. The wrong complained of is for an infringement on the improved patent, not for a violation of the original patent or of the improvement upon the original grant, but of the entire right, united in the plaintiff, by the different patents and assignments. The right set up is an entirety, and being united in the same individual is not susceptible of a division. Had he divided his cause of action, claiming damages in one case for the infringement of the original patent, and in another for an infringement of the improvement, the actions could not have been sustained. As well might different actions be brought for trespass, upon a close, on the ground that the land was held under distinct titles. The injury done was to the entire close, and that constitutes the ground of the action. It may be admitted that two defendants can not be united in the same action, where each has infringed distinct patents: for in that case there could be no joint defense. There would be no right common to the defendants, and consequently both would be subjected to additional costs and delays by the joinder of the two. But where the original patent and the improvement on it are united in the same person, they constitute a whole, an entire right, and must be asserted as such in an action for an infringement.

The other ground of demurrer, as to the violation of the plaintiff's right is answered by the declaration. The wrong done is alleged in the usual form, that the defendant "made, constructed, used and vended to sundry persons," etc., the said invention. The special demurrer is overruled.

[NOTE. For other cases involving this patent, see note to Parker v. Hatfield, Case No. 10,736.]

CASE (UNITED STATES v.). See Cases Nos. 14,742 and 14,743.

CASE OF.

[NOTE. Cases cited under this title will be found arranged in alphabetical order under the names of the parties.]

CASES OF.

[NOTE. Cases cited under this title will be found arranged in alphabetical order under the quantity or number of cases; e. g. "Cases of Silk Ribbons. See Six Cases of Silk Ribbons."]

Case No. 2,495.

In re CASEY.

[10 Blatchf. 376;[1] 8 N. B. R. 71.]

Circuit Court, D. Vermont. Jan. 18, 1873.

PRACTICE IN BANKRUPTCY—REVIEW—APPEAL—FINAL DECREE—SUMMARY PROCEEDING.

1. The review, by the circuit court, of an order made by the district court, in the exercise of its summary jurisdiction in bankruptcy, under the 1st section of the bankruptcy act of March 2, 1867 (14 Stat. 517), cannot be had by means of an appeal, taken under the 8th section of said act.

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

2. The practice in general use, in the second circuit, for the review of such an order, is by a petition to the circuit court, setting forth so much of the proceeding in the district court as is necessary to show the order complained of, and the facts on which it was based, or the evidence, where the facts are in dispute, pointing out specifically the supposed error or errors, and asking a review and reversal, or modification, of the order complained of.

3. A mere notice of appeal is not "proper process," for invoking a review of such an order.

4. Semble, that the review of such an order may be applied for at any time before the supposed erroneous order is carried into execution.

5. A summary proceeding, by order to show cause, based upon a petition in the district court, in bankruptcy, asking that the assignee in bankruptcy be directed to pay the mortgage debt out of the estate, and that, in default of payment, the assignee and a subsequent mortgagee be foreclosed of all equity of redemption in the mortgaged premises, cannot, for the purposes of an appeal from an order made thereon, directing that a decree of foreclosure be made in favor of the petitioner upon one mortgage, and in favor of such subsequent mortgagee on another, and ordering a reference, to ascertain the amount due on those mortgages, and dismissing the petition as to a third mortgage, but not settling the terms, or conditions, or times, when the foreclosure shall become operative, be regarded as a suit, so as to sustain an appeal taken from such order, under the 8th section of said act.

6. Such an order, if regarded as made in a suit, is not a final decree therein.

7. The appeal provided for by the said 8th section can be taken only from a final decree.

8. Jurisdiction to foreclose a mortgage on the estate of a bankrupt, at the instance of the mortgagee or holder, is not included in the powers to be exercised summarily under the 1st section of said act.

[Cited in Bradley v. Healey, Case No. 1,781; Olney v. Tanner, 10 Fed. 104.]

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

In bankruptcy.

John Prout, for petitioner.

John W. Stewart and E. J. Ormsbee, for assignee.

WOODRUFF, Circuit Judge. Isaac Alden, claiming to be the owner, by assignment, of certain two mortgages upon real estate of the bankrupt, presented his petition to the district court, setting out a mortgage dated June 19th, 1841, made by a former owner of the premises, to one Austin, afterwards assigned to the petitioner, and another mortgage, dated August 7th, 1855, made by the bankrupt to Mary A. Newman, which was afterwards, as he states, delivered to him, and which, he states, he now owns, with the promissory notes thereby secured. The petitioner also states, that, on the 10th of November, 1865, the bankrupt executed another mortgage, upon the same premises, to Nathan T. Sprague. He further states, that the amounts of the several mortgages are due and unpaid, with the exception of certain payments on account thereof, which it is not material here to specify; and he asks, that the bankrupt and the assignee of his estate in bankruptcy, Thurman Brokins, and the holder of the said third mortgage, Nathan T. Sprague, show cause why the court should not order the assignee to pay the first two mortgages out of the funds of the estate of the bankrupt, if any he has, or, in default of a payment thereof by them, or some one of them, that they and each of them be foreclosed of all equity of redemption in said premises, or why the petitioner should not have such other order or relief as to the court should seem equitable, &c. The bankrupt, apparently, paid no attention to this petition. The assignee and the third mortgagee showed cause. The former sets up the existence of various alleged defences to the mortgages described in the petition as held by the petitioner, and alleges that various payments have been made thereon which are not credited; that the notes secured by the mortgage given to Newman are barred by the statute of limitations; that the petitioner has no title, legal or equitable, to the mortgage given to Newman, or the notes secured thereby; that, when the said Newman conveyed the real estate to the bankrupt, for the consideration, in whole or in part, expressed in the said mortgage given to her for the price, she covenanted that the premises were free and clear of all other incumbrances, whereas, in fact, the prior mortgage to Austin was then an incumbrance thereon; that the amount of such prior mortgage ought, in equity, to be allowed to the estate of the bankrupt, in abatement of the sum secured by the mortgage to her; that the mortgagee Newman has never assigned the mortgage which was executed and delivered to her; that, in respect to the notes which the petitioner claims to have purchased, they have never been endorsed by her, and she denies his title thereto; that, in respect to others of said notes, (being about one-half of the amount mentioned in the said mortgage,) they are held by, and belong to, the wife of the petitioner, as her separate property; and, finally, that, on the 22d of March, 1870, the petitioner and his wife released to the bankrupt the mortgaged premises. The mortgagee Sprague alleges the validity of his own mortgage, and, upon information and belief, states that payments have been made on the other mortgages, and, also, that, except upon recent information, he has no knowledge of the existence of such mortgages.

Proofs were taken upon the facts alleged, and the district court made an order, "that a decree of foreclosure be made in favor of the petitioner, upon the mortgage described in the petition as executed on the 19th of June, 1841, * * * to Gustavus A. Austin, and also on the mortgage described in said petition as executed on the 11th of November, 1865, * * * to Nathan T. Sprague, and that the case be referred to the clerk of said court, to ascertain the sums due on

said mortgages respectively," and dismissing the petition, with costs, as to the notes and mortgages alleged to have been executed in 1855 to Mary A. Newman. From this order the petitioner appealed in the form and manner prescribed in the eighth section of the bankrupt law, which regulates appeals to this court from the district court in cases in equity, under the jurisdiction created by that act. The assignee in bankruptcy moves to dismiss the appeal, and, subject to that motion, the propriety of the order has been discussed.

The appeals provided for in the eighth section are appeals in that class of cases mentioned in the third paragraph of the second section of the act, which gives to the circuit and district courts concurrent jurisdiction of suits, at law or in equity, which may be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property, or rights of property, of said bankrupt, transferable to or vested in such assignee. The cases in equity mentioned in the eighth section, are suits in equity, whereof the district court obtained jurisdiction by the paragraph last referred to. The appeal in such cases is not the application for a review of the summary orders or proceedings of the district court in the ordinary course of proceedings in bankuptcy, or upon petition therein. The summary jurisdiction given by the first section of the bankrupt law may be exercised upon the ordinary processes, orders to show cause, notices of motion, &c., therein, or upon petition, where special aid or relief is sought in any matter embraced in that jurisdiction. The review of orders made thereupon is not by appeal under the eighth section, but by bill, petition, or other proper process, of any party aggrieved. The precise form of invoking the general superintendence and jurisdiction of this court, to review such orders, is not fixed by the statute, but, the practice in this circuit, in general use, is for the party desiring such review to present to this court a petition, setting forth so much of the proceeding in the district court as is necessary to show the order complained of, and the main facts upon which it was based, or the evidence, when the facts are in dispute, pointing out specifically the supposed error or errors, and asking a review and reversal, or modification, of the order complained of.

I have heretofore, in this district, in Re Clark [Case No. 2,802], expressed my disapproval of an attempt to bring into this court the proceedings of the district court for review, upon the vague and general allegation, even in a petition, that there is error therein. The law contemplates, that, whether the superintendence and jurisdiction of this court be exercised by bill, petition, or other proper process, the matter be brought before the court in some form in which the errors alleged shall be presented for examination, and not that this court shall be called upon to rove through the entire proceedings, on a general allegation that there is somewhere error therein. If, therefore, in the absence of specific statute provision, it were claimed, that, irrespective of the eighth section, a notice of appeal would be "proper process," for invoking such review of summary proceedings in the district court, I should be constrained to hold that such a notice is not sufficient.

In this matter, the proceeding in the district court was not a suit. It was an application to the summary jurisdiction of the court, sought to be exercised by an order upon the assignee and others to show cause as upon motion, and, on showing cause, an order thereupon was made. If it appeared that the form of a notice of appeal had been adopted under the belief that this court would treat that as "proper process," under the first clause of the second section, the suggestion would be obvious, that such a notice would not, per se, bring before this court the proceedings of the district court, nor any part of them. There is no statute, nor any rule, which gives such a notice effect to bring those proceedings into this court. Whether such a notice would operate even to warrant this court to make any order by which the proceedings of the district court should be certified to this court, is not clear; and, whether this court could make an order based upon such notice, permitting the party supposing himself aggrieved to amend his proceeding, by filing a petition or specification of errors, nunc pro tunc, it is not necessary now to consider, for reasons which will be suggested. Such an order does not seem to be necessary. I find no specific limitation of the time within which a review of summary proceedings may be sought; and it would seem, therefore, that such review may be applied for at any time before the supposed erroneous order is carried into execution.

It was urged, by the counsel for the petitioner, that, although the proceeding was not so in form, yet it was, in substance, a suit in equity to foreclose mortgages held by the petitioner, heard upon bill, answers, and proofs, and that mere form ought to be disregarded, and the appeal sustained under the eighth section of the bankrupt act. I cannot concede that the proceedings may, with any propriety, be deemed and treated as a suit. But, if I could, then I should certainly be compelled to dismiss the present appeal, for, the order sought to be reviewed is not a final decree in such a suit. The order, as an order in a foreclosure suit, is interlocutory merely. It determines, preliminarily to a decree in foreclosure, as to which of the three mortgages a decree of foreclosure shall hereafter be entered, and, with a view to such decree, directs the ascertainment of the amounts due; but, what are to be the terms and conditions of the foreclosure of the

equity of redemption, nor at what time such foreclosure shall be final and operative, as a bar to the right of redemption, is not settled, nor is the order, in any sense, ripe for final execution. This court has heretofore held, that the appeals given to the circuit court, in suits in equity, by the eighth section of the bankrupt act, are from final decrees of the district court, and not from orders, or interlocutory decrees, not settling all the rights in controversy. Clark v. Iselin [Case No. 2,824].

I have discussed these questions at some length, because the views of this court in relation to the practice under the bankrupt law do not seem to have been fully understood in this district; and I might dispose of this proceeding here, by directing that the appeal be dismissed, but, I foresee that the petitioner may feel some embarrassment and uncertainty respecting the course which is open to him. It is, therefore, not altogether impertinent, in view of a possible renewal of the application to review the order made in the district court, by the filing of a petition of review, or otherwise, to say, that the proceeding was a mistaken one, in the first instance. Jurisdiction to foreclose mortgages upon the estate of the bankrupt is not included in the powers to be exercised summarily under the first section of the bankrupt act. Jurisdiction to order such foreclosure, in favor of an alleged mortgagee claiming adversely to the assignee, and adversely to another mortgagee or mortgagees, where the title of the applicant is disputed, the amount claimed is denied to be due, and where it is insisted that he has already released the lien, if any existed, is, most clearly, not embraced in that first section. Controversies like the present must be conducted by a suit, to which all persons claiming adversely to the complainant are made parties, and in which each will have the right of appeal given by the law, and, when the amount is sufficient, to the supreme court of the United States.

I forbear expressing an opinion upon the facts in this case; but, it is not obvious, that, if a part of the notes secured by the mortgage to Mrs. Newman are owned by the wife of the petitioner, as her separate estate, a foreclosure can be had in a suit in equity to which she is not a party; nor, if Mrs. Newman claims the other notes adversely to the petitioner, and that is known to the other parties interested, is it clear that she is not to be made a party to any proceeding by the petitioner, in equity, to enforce them as a lien. Upon what ground this mortgage to Mrs. Newman was deemed invalid, or was excluded by the order made by the district court, was not suggested on the argument. It may have been because the real parties interested therein were not before the court. Obviously, the claims in this respect were not very fully exhibited. Whatever may be said of defect of parties, it is, at least, doubtful, whether the petitioner did not acquire some interest in the mortgage debt by his purchase from the holders of the notes in Virginia; and, if the decision proceeded upon the ground that the petitioner and his wife had released the mortgage debt, then the proofs tending to show that there was no such intention, that there was no consideration for such a release, and that the execution of the instrument claimed to have such an effect was under a total mistake, which a court of equity ought to correct, all show the importance of having the matter before the court by regular suit, invoking the power of the court to reform the instrument, or otherwise relieve the parties from the technical legal effect of it, as, also, to present the other facts with all proper parties, so that the decree may be effective and be reviewable in appropriate form. For the present, the duty of the court is to dismiss the appeal.

Case No. 2,496.

CASEY v. LA SOCIETE DE CREDIT MOBILIER et al.

[2 Woods, 77;[1] 1 Thomp. Nat. Bank Cas. 285; 7 Chi. Leg. News, 313; 21 Int. Rev. Rec. 219.]

Circuit Court, D. Louisiana. Nov. Term, 1874.[2]

NATIONAL BANKS — PLEDGE OF SECURITIES BY — VALIDITY—PREFERENCE TO CREDITOR — RIGHTS OF RECEIVER.

1. The preference of one creditor to another by a national bank, mentioned in section 5242, Rev. St., is a preference given to the creditor to secure or pay a pre-existing debt.

2. When a national bank (being embarrassed and in need of assistance, receives a loan of money or other valuable material aid, from a person who knows its embarrassed state, on condition that the party making the loan or giving the aid shall be secured therefor, and the security is accordingly given by pledging a part of the assets of the bank, this is not giving him a preference over other creditors, within the meaning of section 5242, Rev. St.

[Cited in Armstrong v. Chemical Nat. Bank, 41 Fed. 239.]

3. The legislature of Louisiana has left it in doubt whether indorsement as well as delivery is essential to the pledge of a negotiable instrument.

4. The receiver of an insolvent national bank holds only the estate and title of the bank in its assets, and he has no greater rights in enforcing their collection than the bank itself would have had.

5. Neither the bank nor its receiver could recover possession of negotiable securities pledged by the bank for advances to it, on the ground that the pledge was ineffectual for want of indorsement of the securities, while at the same time holding on to the assets to secure repayment of which the pledge was given.

6. When a national bank agreed to deposit with a certain commercial firm in pledge a portion of its assets to secure a loan to be made

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

[2] [Reversed in Casey v. Cavaroc, 96 U. S. 467.]

to itself, and the loan was received by the bank, it was *held*, that there was no legal obstacle to the depositing of the assets according to the contract, arising from the fact that the president of the bank was a member of the firm with which the deposit was to be made.

7. A national bank which makes a contract not authorized by its charter cannot repudiate the contract, and at the same time retain its fruits.

8. When a national bank pledged a portion of its assets to secure a loan to itself, and the notes pledged were changed from time to time as they fell due, and others substituted in their stead, and this was according to the contract between the bank and the pledgee: *Held*, that the pledge of such substituted notes was not void.

[See note at end of case.]

The case as presented by the pleadings and proofs was substantially as follows: On the 12th of July, 1873, the New Orleans National Banking Association, a corporate body organized under the national banking act June 3, 1864 (13 Stat. 99), was engaged in the banking business in the city of New Orleans, and continued to carry on business until the 4th day of October, 1873, when it suspended payment. On the said 12th day of July, 1873, the defendant, "Société de Credit Mobilier," of Paris, entered into an arrangement with the said banking association through Charles Cavaroc Sr., its president, whereby the "société" agreed on its part to accept bills of exchange to be drawn by the banking association, payable ninety days after sight, to the amount of one million francs, and the association agreed to place with the société ten days before the maturity of said bills the amount thereof. The banking association further agreed to deposit securities in the hands of the commercial firm of C. Cavaroc & Son, of which said Charles Cavaroc Sr., was a member, for the purpose of securing the société against loss from the failure of the association to place the amount required to meet said bills at maturity. The said firm of C. Cavaroc & Son was constituted by the société its agent to receive and hold said securities. In pursuance of this arrangement, on or about the 12th of July, 1873, bills of exchange were drawn upon the société by the banking association at ninety days' sight to the amount of one million francs, and the same were sold by the banking association, and the proceeds, amounting to $218,450.34, were appropriated by the banking association—were credited on its books to the société, and the bills were accepted by the société. On the day of the date of the drafts, or the day following, a list was made out of notes due the association, amounting to $220,021.43, and the notes named in the list were put in an envelope and handed to C. Cavaroc & Son, by direction of C. Cavaroc Sr., the president of the association, to be held as security for the société, to protect it from loss by reason of its acceptance of the drafts. It was subsequently stipulated by C. Cavaroc Sr., on behalf of the association, that as soon as any of said notes matured, they should be replaced by others of like amount. Some time subsequent to the 12th of July, C. Cavaroc Sr., fearing that the notes already set apart would not be sufficient to secure the société for its acceptance of said bills, caused another list of notes, amounting to about $100,000, to be made out, and the notes to be deposited with C. Cavaroc & Son, as additional security. As notes matured and were paid or renewed, they were replaced by others, in pursuance of the agreement above stated. The evidence showed that on the 12th of July the association was embarrassed, and that long before its suspension, on the 4th of October, it was insolvent. When the banking association suspended payment, C. Cavaroc & Son claimed to hold all of said notes then in their hands, amounting to $325,011.26, to secure the société for its acceptance of said bills. After the suspension of the bank it was placed by the order of the comptroller of the currency, in the custody of John Cockrem, as receiver. Cockrem having resigned, the present complainant was appointed receiver in his stead. The bill asks the court to adjudge and decree that all of the said notes held by C. Cavaroc & Son belong to and are the property of said banking association, and that the same, and all the proceeds thereof be placed in the hands of complainant as receiver, to be administered and applied to the payment of the claims of the creditors of said association. The bill is based upon the 52d section of the national currency act (Rev. St. § 5242), which declares as follows: "That all transfers of the notes, bonds, bills of exchange and other evidences of debt to any association, or of deposits to its credit, all assignments of mortgages, securities on real estate, or of judgments or decrees in its favor, all deposits of money, bullion, or other valuable thing for its use or for the use of any of its shareholders or creditors, and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by this act, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void."

J. D. Rouse and J. R. Beckwith, for complainant.

Thomas Allen Clarke, Thomas L. Bayne, and Henry Renshaw, Jr., for La Société de Credit Mobilier of Paris and for Nat. Park Bank of New York.

Edward C. Billings, for Charles Cavaroc & Son and for F. Schuchardt & Sons.

John Finney and H. C. Miller, for various other defendants.

WOODS, Circuit Judge. The claim of the complainant is that the alleged transfer of the notes and assets of the banking association to C. Cavaroc & Son, to secure the société for its acceptance of the bills of the as-

sociation, was a transfer thereof in contemplation of insolvency, with a view to prevent the application of the assets in the manner prescribed by the national currency act, and with a view to the preference of one creditor to another; that such transfer is therefore null and void, and that said notes are still the property of the association, and applicable to the payment of its debts.

It has been held by this court that to make "transfers, assignments, deposits and payments" void under the 52d section of the currency act, it is only necessary that the insolvency should be in the contemplation of the bank making the transfer, and not that it should be known to or contemplated by the party to whom they are made. Case v. Citizens' Bank [Case No. 2,489]; Peckham v. Burrougns [Id. 10,897].

The evidence in the case satisfies my mind that the banking association, at the time it made the arrangement already recited with the societé, to wit: on the 12th of July, 1873, was in an exceedingly embarrassed condition, if not actually insolvent. Although C. Cavaroc Sr., its president, testifies that he did not at that time think that the bank was insolvent, he had abundant reason to know soon after that date that it was embarrassed and in a critical situation. This is evidenced by his application for assistance to other banks of the city of New Orleans. In my judgment the evidence shows so much clearly, but it does not show more.

But conceding that C. Cavaroc Sr., the president of the bank, at the time he transferred the notes to C. Cavaroc & Son, for the security of the societé, knew that the association was insolvent, will that fact render the transfer made under the circumstances recited void? That alone is not sufficient. One of two alternatives must exist: (1) It must be with a view to prevent the application of the assets in the manner prescribed by the currency act, or (2) with a view to the preference of one creditor to another. Is it the meaning of the section of the currency act on which the bill is based, that after a national bank is in contemplation of insolvency, no person could do business with it except at the risk of having any means he may put under the control of the bank, no matter under what solemn contract for security, confiscated for the use of the general creditors of the bank? If this is the construction to be given to the 52d section of the currency act, then the moment a bank becomes embarrassed, it must give up and suspend payment, for all who come to its assistance must do so without security. In my judgment, the preference of one creditor to another, mentioned in the 52d section, is a preference given to an existing creditor for a pre-existing debt. If a customer or friend of a bank, knowing it to be embarrassed and in need of assistance, proffers it, for instance, a loan of $50,000 in cash, on receiving security for the amount by a transfer of a part of its portfolio, that cannot be fairly construed as giving him a preference over other creditors. Other creditors are not injured by such a transaction, for the securities that such a creditor takes out, he leaves an equivalent in cash. He becomes a creditor solely on condition of receiving security.

The policy of the law is plain, namely: to prevent preference among creditors holding pre-existing debts. It clearly was not the purpose of the act to forbid the bank from giving security to its friends for means to be advanced on the spot or in the future. The general creditors are not injured by such an arrangement; they may be greatly benefited by it.

Take the case in hand. Suppose the association were actually insolvent on the 12th of July. The societé in effect puts one million of francs into the possession of the bank, and takes security for it. Is the general creditor any worse off? The bank had nothing when the securities were transferred. It gets dollar for dollar for what it transfers. Can that be called giving a preference to one creditor over another? As claimed by counsel for defense, it is in effect an exchange of values rather than the giving of a preference to a creditor. It seems to me to be established, beyond all controversy, by the evidence in this case, that the pledge of the notes of the association complained of was not made in contemplation of insolvency, but it was a struggle on the part of the officers of the bank to avoid insolvency; it was not made to give preference of one creditor over another, but it was a plan adopted by the bank to secure means to carry on its business with a view to be able to pay all its creditors. The construction claimed by complainant for the 52d section of the currency act would make the banks a trap in which the means of their friends, furnished on the pledge of securities, would be drawn in and applied to the payment of the general creditors.

In my judgment the construction placed on the 35th section of the bankrupt act is applicable also to the 52d section of the currency act. That section of the bankrupt act declares that any sale or other disposition of property made by a person insolvent, or in contemplation of insolvency, within six months before the filing of a petition in bankruptcy, by or against him, by any person who has reasonable cause to believe him insolvent, such sale being made with a view to prevent the property coming to his assignee in bankruptcy, etc., shall be void. Under this section it has been held that a sale made in good faith, for the honest purpose of discharging a debt, and in the confident expectation that by so doing the person could continue business, will be upheld. Tiffany v. Lucas, 15 Wall. [82 U. S.] 410. So in Cook v. Tullis, 18 Wall. [85 U. S.] 332, it was held that an exchange of values may be made at any time, though one of the parties

to the transaction may be insolvent; that there is nothing in the bankrupt act that prevents an insolvent from dealing with his property, selling or exchanging it for other property, at any time before proceedings in bankruptcy are taken by or against him, provided such dealings be conducted without any purpose to delay or defraud his creditors or give a preference to any one, and does not impair the value of his estate. And in Tiffany v. Boatman's Sav. Inst., 18 Wall. [85 U. S.] 376, it was held that a man really insolvent, but not having yet openly failed, and hoping to overcome his difficulties and to carry on his business, violates no provision of the bankrupt act by pledging his property for money lent, this money being lent at the time when the pledge was made. See, also, Clark v. Iselin, 21 Wall. [88 U. S.] 360. On the strength of these authorities, construing a provision of the bankrupt act similar to the 52d section of the currency act, and upon my own independent judgment of what is the purpose and intent of said section, I am of opinion that the original transfer made by the banking association to the société of the assets mentioned was not void.

But the complainant insists that the transfer was void, because not made in compliance with the Code of Louisiana. It is claimed that the Code requires that when a negotiable instrument is pledged by a debtor it must not only be delivered to the creditor to whom it is transferred, but must be indorsed (Rev. Civ. Code, art. 3123), and as it was conceded there was no indorsement of the notes in question, the attempted transfer was ineffectual to carry title.

There has been some confusion in the legislation of Louisiana upon this subject, so that it is not by any means clear whether an indorsement as well as delivery of a negotiable instrument is necessary in order to complete an act of pledge. The act approved March 15, 1855, entitled "An act relative to pledges" (see Fuqua's Civ. Code, 421, note), appears to have been a re-enactment of the act of 1852 (see Acts 1852, p. 15). The first section of this act declares that when a debtor wishes to pawn promissory notes, bills of exchange, etc., he shall deliver to the creditors the notes, bills of exchange, etc., so pawned; and such pawn so made, without further formalities, shall be valid as well against third persons as against the pledgers thereof, if made in good faith. There can, it seems to me, be no doubt that the purpose of this section was to make the delivery of a promissory note without indorsement sufficient as an act of pledge. But in a subsequent revision of the statute law of the state, the provision requiring indorsement was allowed to remain; so that we have in the same statute book an article declaring that indorsement as well as delivery is necessary to the pledge of a promissory note, and another article in effect declaring that indorsement is not necessary. In my judgment it is not necessary to determine in this cause whether indorsement is or is not essential. The receiver holds only the estate and title of the bank in its assets. His title is the same as that of an assignee in bankruptcy. It will not be pretended that the bank could recover back the assets which it had pledged and delivered to the agents of the société because they were not indorsed, and at the same time hold on to the proceeds of the drafts, for the acceptance of which the assets were pledged, unless there was fraud; and there was no fraud in this case.

An assignment in bankruptcy, like any other assignment, by operation of law, passes the rights of the bankrupt precisely in the same plight and condition as he possessed them, subject to all equities. Mildord v. Mitford, 9 Ves. 100; Gibson v. Warden, 14 Wall. [81 U. S.] 248; Campbell v. Slidell, 5 La. Ann. 274; Mitchell v. Winslow [Case No. 9,673]; Ex parte Dalby [Id. 3,540]. There seems to be no reason why the position of receiver of an insolvent bank under the currency act is any better than that of an assignee in bankruptcy. If the receiver holds the same title to the assets of the bank that the bank itself held, he cannot avoid a pledge which the bank could not avoid. He is not a third person, in the sense of the Civil Code. In the case of Matthews v. Rutherford, 7 La. Ann. 225, it was held that a notarial act of pledge, or a written act registered in a notary's office, is a formality which is necessary to protect the payee against third parties, but its omission is unimportant as between pledger and pledgee. I am of opinion, therefore, that the failure to indorse the notes pledged by the bank is a defect of formalities in making the pledge of which neither the bank nor the receiver can take advantage.

It is further claimed by the complainant that C. Cavaroc Sr., the president of the association, could not at the same time act as president and agent of the association and as the agent of the société. It is true that the same person cannot sell as the agent of one and at the same time buy as the agent of another, and a contract made by one who acts as the agent of both parties may be avoided by either principal. See Story, Ag. § 211, and note. Such a contract, made by a person acting as agent for two principals, involves an absurdity. But in this case the contract was made between the "société" and the "association," the latter acting through its president. But it seems to me clear that there was no legal obstacle, the contract having been made and being in force, to the turning over by the association, acting through Cavaroc, its president, of the assets in pledge to be held by the commercial firm of C. Cavaroc & Son. In fact, C. Cavaroc & Son were mere depositaries or stakeholders, and all stakeholders are agents for both parties.

It is further claimed by complainant that Cavaroc, the president of the banking association, could only act by authority of the char-

ter or by vote of the directors in making the pledge of the assets of the association, and that no such authority is found in the charter or minutes of the board of directors. The minutes of the board of directors are evidence, however, that they knew what arrangement had been made between their bank and the "societé," and they approved it by voting a compliment to C. Cavaroc Jr., by whose agency the arrangement had been made. The books of the bank showed that it had received a million of francs as the result of this arrangement. It is impossible that the directors should have been ignorant of these facts—they never repudiated the contract nor returned to the societé the fruits of it. This is a ratification. The acts of a corporation, evidenced by a vote written or unwritten, are as completely binding upon it, and as full authority to its agents, as the most solemn acts done under the corporate seal, and promises and engagements may as well be implied from its acts and the acts of its agents as if it were an individual. Abb. Dig. Corp. 579, and cases there cited. A corporation which has received the benefit of a loan cannot avoid liability on a mortgage to secure its payment by denying the authority of those who contracted the loan on its behalf. [Ottawa Plank Road v. Murray, 15 Ill. 337];[3] Bissell v. Michigan, S. & N. I. R. Co., 22 N. Y. 258; [Pine Grove Tp. v. Talcott, 19 Wall. (86 U. S.) 678];[3] Bank of U. S. v. Dandridge, 12 Wheat. [25 U. S.] 70, 71.

It is claimed, lastly, by the complainant, that the contract between the banking association and the societé was not legitimate banking business and could not be lawfully carried out. We are not cited to any clause in the national currency act forbidding such a contract, and can see no reason why the association might not lawfully make it. But conceding that the currency act, which is the charter of the association, did not authorize such a contract, it does not follow that the association can repudiate the contract and keep its fruits. Corporations have no right to violate their charters, but they have capacity to do so and to be bound by their acts when a repudiation of such acts would result in manifest wrong to innocent parties. Bissell v. Michigan, S. & N. I. R. Co., 22 N. Y. 258. When it is a simple question of capacity to contract arising either on a question of regularity of organization or of powers conferred by the charter, a party who has had the benefit of the contract cannot be permitted in an action founded upon it to question its validity. Steam Nav. Co. v. Weed, 17 Barb. 378. See, also, Despatch Line v. Bellamy Manuf'g Co., 12 N. H. 205; Moss v. Mining Co., 5 Hill, 137. I am of opinion, therefore, that even admitting that the business carried on under the contract between the association and the societé was irregular and not within the limits of legitimate banking, that having made the contract and enjoyed its fruits, neither the association nor its receiver can demand to keep the money of the societé, which was received by virtue of the contract, and require the societé to deliver up the assets that were transferred to it in consideration of the contract.

Complainant further insists that the notes pledged by the association were changed, from time to time, as they fell due, and others substituted in their stead, and that this renders void the pledge, at least so far as such substituted notes are concerned. The evidence leaves no doubt on my mind that such substitution was made. In fact, it is admitted by defendant. But has the substitution the effect claimed by complainant? The case of Clark v. Iselin, 21 Wall. [88 U. S.] 360, is a pointed authority to sustain the negative of this proposition, and settles this objection to the title of defendant conclusively against complainant.

I have gone over the grounds relied upon by complainant, to avoid the pledge and transfer of the assets of the New Orleans Banking Association to the Societé de Credit Mobilier. I am unable to find that any of the grounds are tenable. In my judgment the pledge of these assets was a good one to secure the societé against loss by the failure of the association to comply with its contract, and the receiver is not entitled to the pledged notes, or their proceeds, until the societé has been made whole. The bill must therefore be dismissed, and the injunction heretofore allowed dissolved.

[NOTE. The plaintiff appealed to the supreme court, which reversed the decree of the circuit court, and remanded the cause, with directions to enter a decree for complainant. The ground of the reversal, as stated by Mr. Justice Bradley, who delivered the opinion, was that the pledgee, the Credit Mobilier, had never had possession of the securities, nor were they ever in the possession of a third person agreed upon by the parties, but that the actual possession and control was in the pledgor, the bank, and that, therefore, the defendant, the Credit Mobilier, had no privilege as to third persons, within the Louisiana law. Casey v. Cavaroc, 96 U. S. 467.]

[3] [From 21 Int. Rev. Rec. 219.]

Case No. 2,497.

CASEY et al. v. LEARY.

[2 Ben. 530;[1] 8 Int. Rev. Rec. 122.]

District Court, E. D. New York. Oct., 1868.

MARITIME LIEN—SUPPLIES AND REPAIRS—OWNERSHIP OF VESSEL—OATH AGAINST OATH—ATTACHMENT AGAINST NON-RESIDENT.

1. Where a suit was brought against L., as owner of a steamer, to recover for supplies furnished to her in the fall of 1867, and issue was taken on the question of ownership, and the libellants proved a conveyance of the vessel to him in 1865, and an oath of ownership made by him at the custom-house on the same day, and

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

a subsequent oath to the same effect made in November, 1867, and the answer set up that he had been compelled to appear in the cause by an attachment of the vessel as his property, but the defendant, on the trial, testified that he never had any interest in the vessel whatever: *Held*, that if the recorded owner of a vessel, who has sworn that he is her owner, may be allowed to take the position that he has no interest in her, it is not unreasonable to require that such position should be sustained by some other proof than the declaration of the party himself.

2. That the defendant in this case must be held liable as owner.

3. The power of the court to issue an attachment against a non-resident of the district, reaffirmed.

[In admiralty. Libel by Jeremiah Casey and others against Charles C. Leary.]

Benedict & Benedict, for libellant.

Beebe, Donohue & Cook, for defendant.

BENEDICT, District Judge. This action is brought against the defendant, as owner of the steamer Saragossa, to recover the amount of a bill of supplies furnished that vessel in this port, during the months of September, October, November, and December, 1867. No question is made as to the fact that the articles sued for were furnished the vessel and were necessary; but it is insisted that the defendant was not the owner of the vessel nor interested therein. To prove the defendant's ownership, the libellants have put in evidence a bill of sale of the steamer from George Leary to the defendant, executed and recorded on the 1st of November, 1865, together with an owner's oath made by the defendant on the same day, in which he declares "I am a citizen of the United States and the true and only owner of the said vessel." A similar oath made by the defendant in November, 1867, is also put in evidence. And it also appears from the testimony of the defendant that he was engaged in the shipping business and transacted some of the business of this vessel at his place of business in New York. The evidence for the defence consists of the testimony of the defendant, who now swears, that he never was an owner of or interested in the vessel—that she was never sailed for his account or benefit—that his brother, Arthur Leary, was the agent of the vessel, and whatever business of the vessel was transacted by the defendant was done by him in the capacity of agent of his brother Arthur, and by his direction. The defendant further testifies that he does not know for whom the vessel was being run, and that he can give only an impression as to who did own her. That he took the title and made the first oath at the request of his brother, but cannot recollect how he came to make the second one in 1867. No other testimony is produced to explain the defendant's relation to the vessel, and, upon this evidence, I am asked to adjudge that the defendant had no interest in the vessel, and therefore is not liable for these repairs. I cannot so adjudge upon the unsupported statement of the defendant, as made in court, in contradiction of his oaths at the custom-house. The vessel was conveyed to the defendant by an absolute bill of sale; he then took a solemn oath, declaring himself to be the true and only owner of the vessel. This oath he repeated in 1867, and it seems to me to be asking much when the court is urged to disregard these oaths, and believe only the oath now made in court, to the effect that the former oaths were untrue. The question here, it should be noticed, is not whether the relation of the defendant to this vessel was that of a mortgagee or an owner, but whether he had any interest whatever. He does not claim to have held the title by way of security, but declares that he never was in any way interested in the vessel. This declaration, made in court, is in conflict with his two former declarations made at the custom-house, and he has no right to complain if the court—compelled to elect which oath to believe—rejects the one which is made to avoid a pressing demand. Furthermore, the defendant, although he held the title to this valuable vessel, claims to be unable to say for whose benefit he held it, or who did own her. His brother, Arthur Leary, was the agent of the vessel, but he is not called to say by whom he was employed; nor is George Leary, who executed an absolute bill of sale of the vessel to the defendant, called to explain it, or to confirm the defendant in his present statement. If it be conceded that, notwithstanding the recording act of 1850, a party procuring himself to be recorded as owner of a vessel, and making oath that he is such owner, is at the liberty to take the position that he has no interest whatever therein—a question unnecessary to be considered here—it is certainly not unreasonable to require that the position when taken, should be supported by other evidence than the declaration of the party, contradictory of his oath at the custom-house, when such evidence is within his power. Again, the defendant, although declaring upon the stand that he never had any interest in the vessel, in his answer sets up that his appearance in the action was compelled by a seizure of her, and it is in evidence that the action was commenced by an attachment of this very vessel as the property of defendant, and that he thereupon appeared and procured her release by giving security. If he had no interest in the vessel, it is not easy to understand why he paid any attention to the seizure, nor to see how the attachment of another man's property compelled this man to appear. The fact that when the vessel was seized as the property of the defendant, no person but the defendant appears to have been affected by the seizure; that no person asked for her release; that he did so ask and sets up in defence that her seizure compelled him to appear, are significant circumstances, and it has not been made to appear

how they can be reconciled with the position which the defendant has undertaken to maintain in this action. Upon the question of fact which the case presents, I feel bound therefore, upon the evidence as it stands, to hold against the defendant. A point of law as to the jurisdiction of the court, arising out of the fact that the defendant did not reside, and was not served with process, within this district, has been taken in this cause but not argued, this court having pronounced upon the point in a previous case. The decision in the case referred to—Atkins v. Fibre Disintegrating Co. [Case No. 600]—I have no desire to modify or retract, and it must stand as the law of this court until reversed by an appellate court. Let a decree be entered in favor of the libellant for the sum of $827.78, with interest and costs.

CASEY (SEDGWICK v.). See Case No. 12,610.

CASEY v. SOCIETE DE CREDIT MOBILIER. See Case No. 2,496.

CASH (HOUSE v.). See Case No. 6,736.

Case No. 2,498.

CASH v. ONE THOUSAND TWO HUNDRED AND SEVENTY-SEVEN DOLLARS AND FIVE CENTS.

District Court, D. Florida. Feb., 1879.[1]

CONSORTSHIP — PROOF OF CHARACTER OF AGREEMENT—NATURE OF THE RELATION—TERMINATION —ACTION TO ENFORCE.

[1. Agreements of consortship by masters of vessels engaged in the business of fishing, freighting, wrecking, or the like, unless limited by special understandings when made, are taken to be general, and to extend to all earnings by either vessel.]

[2. The burden of proving the restricted character of the agreement rests upon the party alleging it.]

[3. The special intention or understanding of either party as to the character of the agreement will not control its operation, unless expressed when the agreement is made.]

[4. Such an agreement is for and on account of the vessels, although made by the masters thereof.]

[5. In the absence of a stipulation as to the determination of such an agreement, it can only be terminated by voluntary dissolution and notice.]

[6. While, by the character of the vessel or the agreement, its interest in the consortship may be small, this will never be presumed, but the general principle that the interests of the vessel control will govern.]

[7. The change of owners, master, or crew of one vessel without notice to the other parties cannot affect the consortship.]

[8. Persons joining or becoming interested in a vessel during an agreement of consortship enter upon the relation, and assume the risk of profit or loss.]

[9. On libel to enforce an agreement of consortship, the question being one of considerable interest to the community, and the court being unable to say that respondent's refusal to pay, thus compelling a resort to the court, was wrong under the circumstances, he should not be charged with the costs, but the same should be ordered paid from the fund in controversy.]

[In admiralty. Libel by W. D. Cash and others against $1,277.05, and F. J. Moreno.]

W. C. Maloney, Jr., for libellant.

G. Browne Patterson and L. W. Bethel, for respondent.

LOCKE, District Judge. This is a cause to enforce the division of an amount earned and received by the schooner Florida for services rendered the Spanish steamer Garcia, under an alleged agreement of consortship made and entered into by the master of that vessel with the master of the schooner California in December last, for an equal division of the earnings of those two vessels. Such agreements are frequent in this district, and are generally intended to relate more particularly to the business of wrecking, but at other times, where no limits are expressed in making the agreement, extend to all earnings from whatever source. In this case the consortship was general, as money earned by the California from fishing, freight, and passage money had been divided with the Florida; and it is admitted that it was such as would include earnings from salvage service. It was also indefinite and undetermined in time. Such agreements of consortship, unless limited by special understandings when made, are taken to be general, and extend to all such amounts as may be earned by either vessel. They may be restricted as closely as the parties making may desire and express at the time, but the burden of proving such restricted character of the agreement rests upon him alleging it; and, unless it is shown that such restriction is expressed at the time of making, any special attention or understanding of either party cannot be accepted as controlling or influencing its operation. Such a consortship is for and on account of the vessels, although made by the masters. In all maritime matters, agreements of affreightment, charter parties, contracts for insurance, supplies or repairs or other maritime nature, they are presumed to be made for and on account of the vessel and those connected with her, and not on account of master or crew. The vessel is the object, and all relations existing between the parties are through her.

The supreme court, in Andrews v. Wall, 3 How. [44 U. S.] 568, in speaking of a consortship of this nature, says: "Although made by the master of the vessel, it must be deemed to be made on behalf of the owners and crews, and to be obligatory on both sides until formally dissolved by the owners. The mere change of masters would not dissolve it, since it is not a contract for the personal benefit of themselves, or for any particu-

[1] [Published by permission, from the MSS. of Hon. James W. Locke, District Judge.]

lar service. It falls precisely within the same rule, as to its obligative force, as the contract of the master of a ship for seaman's wages, which, if within the scope of his authority, binds the owner, and is not dissolved by the death or removal of the master. Besides, the agreement or stipulation for consortship was for an indefinite period, and consequently could not be broken up or dissolved, only upon due notice to the adverse party; and the mere removal of the master of one of the vessels, by the owner thereof, for his own benefit, or at his own option, could in no manner operate without such notice, to the injury of the others." This, then, is the general controlling principle in such consortships, namely, that it is through the vessels that the interests are united, and through them alone, and unless it has been stipulated and agreed between the parties that some other circumstances shall terminate the contract, voluntary dissolution and notice, alone, can. It may be true that frequently the character of the vessel, or the agreement with master and crew, is such that her interest in the consortship is but small when compared with theirs; but this can never be presumed, and the general principle that the interests of the vessel control still governs. The change of owners cannot injuriously affect the interest of seamen, nor can a change of master or crew affect a contract of affreightment or charter party made on account of the vessel, unless it has been particularly specified that it should. The change of owners of one vessel without notice to the other parties could not affect the consortship, nor could the change of master or crew. The supreme court says plainly that the removal of a master could not, and, if not the master, certainly not the crew. Whoever joins a vessel, or becomes in any way interested in her, during the existence of a contract consortship, enters upon such relation with the burden of such agreement, and takes the risk, whether he makes or loses. If not so, neither party could be certain of his relations with his consort, and his movements are liable to be interfered with, and loss incurred. These being the principles upon which such contracts can alone exist in equity to those engaged or interested in them, let us apply them to the cause under consideration; for, in applying principles, neither questions of amount nor persons can be considered.

The first point of defense is that the consortship was made with Roberts, the former master of the California, and not with Albury, who was master at the time of earning the money in question; nor on account of her owner; and that the entire crew had been changed, and none of them had been the parties consorted with, or that the present crew shipped with the understanding that they were consorted. This point is answered by the decision of the supreme court, and embodies only question of law, namely, the construction to be placed upon such contract, and does not depend at all upon the opinion of the party making, as it does not appear that there was any material expression of opinion varying the general construction. The new crew, it appears, were informed of the consortship, but their opinion whether they were bound by it or not could have been taken in their favor, had the suit been against them for a share in the earnings of their vessel, and it would not be fair to consider them in the present case. They joined the vessel under the circumstances of the consortship, of which they were aware, and are bound by the legal construction of it. Demerritt, the respondent, states that he would not have consorted with Albury, but did consort with Roberts, on account of his skill and knowledge of fishing. There was no expression of this idea at the time of making the agreement, and no stipulation that it should be terminated by a change of masters. Demerritt could have protected himself and his owners by such an understanding at the time of the contract, the same as an insurer can stipulate against a change of masters without notice and consent; but where such a matter is not mentioned it can have no force.

In further defence, it is urged that the understanding was that both vessels should fish up the reef until they met at Cape Florida, when one vessel should take all of the fish, and proceed to Havana, but that the California, instead of following this course, went on a salvage cruise in search of floating cotton which was reported adrift in the Gulf Stream. Now, were it shown that this was a condition precedent, or a part of the agreement of consortship, and that at the time both parties understood it so, it would have much force; but I do not find that to have been the case. It nowhere appears that it was understood to be a part of the contract of consortship that they should fish, if more profitable business offered, but that this was an understanding outside of, and separate from, the original agreement, and subservient to circumstances which might offer opportunities for profit or gain. Now, was there any misconduct or bad faith in the owner, master, or crew of the California in discharging their first crew, or going on a wrecking voyage, which should prevent them in justice from claiming in this matter, although the contract might have been virtually terminated? If it had been shown that the crew of the California had been discharged, and she left any length of time doing nothing, but looking to her consort for earnings, the matter might well be urged; but that does not appear to have been the case. Before Roberts left, he had engaged Albury as master, a crew was shipped, and she went to sea very soon. A temporary delay in the change of crews could cause no more injury to respondent than would the vessel's lying idle a few hours, the same length of time, with

crew on shore. In regard to the California's going for cotton, had all parties interested been consulted at the time, I am satisfied the consort would have been unanimous, as under the circumstances such a voyage promised a greater profit than would one for purpose of fishing alone, and therefore I do not consider her voyage improper. Had she fallen in with a large amount of cotton, the Florida would certainly have been entitled to a portion of the salvage. Demerritt had an opportunity, when the vessels met at Roderiquez, to terminate the consortship, and in not doing so assumed the risk of meeting a vessel in distress himself, or sharing with Albury if he fell in with one. The question has been asked, to whom should the money go, if awarded? We may also ask from whom would money have been claimed had the California, instead of the Florida, fallen in with the Garcia. Not from those individually with whom the consort was made, but those who had accepted the relation previously occupied by them, and taken the chances either to share their earnings with the Florida and her crew, or take a share from them. This is a question which is of considerable interest to this community, and I cannot say that I consider the respondents so far in the wrong in refusing the payment, and compelling a resort to the courts for a judicial decision, as to justify charging the entire costs to them.

It is therefore ordered that the costs be paid from the total amount, and the libellants receive one-half the net residue.

Case No. 2,499.

CASHAU v. NORTHWESTERN NAT. INS. CO.

[5 Biss. 476.][1]

Circuit Court, E. D. Wisconsin. Oct. Term, 1873.

INSURANCE—NOTICE AND PROOFS OF LOSS—SERVICE OF COPY — PROOF OF LOSS — LIABILITY OF RE-INSURER.

1. The condition in a policy of re-insurance, that all persons having a claim in case of loss shall proceed at once to give immediate notice and render a particular account of the loss, etc., means that the notice and schedule must be served in a reasonable time under the circumstances.

2. The service of copies of proofs of loss and of notice, etc., upon the re-insurer is sufficient if not objected to at the time.

3. The condition in a policy of re-insurance, that in case of loss the re-insurer shall pay pro rata at and in the time and manner as the re-insured, means that the re-insurer shall have all the advantages of the time and manner of payment specified in the policy of the re-insured. It has no reference to the insolvency of the re-insured.

The Fulton Fire Insurance Company of New York, insured Simpson, Norwell & Co. against loss or damage by fire, to the amount of $5,000, on a stock of goods in their store in Chicago, for the term of one year from the 21st of October, 1870; and the defendant company on the same day re-insured the Fulton Fire Insurance Company in the same amount. The conditions of the policy issued by the defendant company were, "That the loss be paid immediately after due notice and satisfactory proof of the same, and in no event shall this company be liable for a sum greater than such portion hereby insured bears to the whole sum insured by the company re-insured. And in case of loss this company shall pay pro rata at and in the same time and manner as the company re-insured. And all persons having a claim under this policy shall proceed at once to put the property in the best order, and give immediate notice and render a particular account thereof in writing under oath, stating the time, origin and circumstances of the fire." On the 9th of October, 1871, and while the policy was in force, the insured goods were destroyed by fire. The Fulton Company was made insolvent by that fire, and a receiver was appointed and qualified on the 16th of October. Proof of loss was made November 9th, with schedule of adjustment, showing loss at $4,689.66, and was served on the receiver of the Fulton Company December 8th. January 22d, 1872, the receiver of the Fulton Company addressed a note to the defendant company, enclosing proofs of loss, the receipt of which was acknowledged by the secretary of defendant, January 27, 1872, without objection. December 29, 1871, notice of service of proofs on the Fulton Company, and that the defendant is held liable, were served on Alexander Mitchell, the president of the defendant company, and their receipt was acknowledged by the secretary, January 4, 1872. The Fulton Company had paid the insured twenty per cent. on the loss. No objection had been made to the service of copies of the proofs and adjustment. The jury under instructions from the court found a verdict for the plaintiff [John Cashau], who sued as assignee of the receiver of the Fulton Company, for the amount at which the loss had been adjusted, with interest. The defendant's counsel moved for a new trial.

Finches, Lynde & Miller, for plaintiff.
Palmer & Hooker, for defendant.

MILLER, District Judge. The motion for a new trial is founded upon three points:

1. The notice and proof were not given in time, and are not such as the defendant's policy calls for.

2. They do not purport to be originals, but are copies.

3. The defendant is not liable to pay the whole amount adjusted, but only a pro rata.

The receiver of the Fulton Company, gave the defendant the copies of the notice and proofs which he had received from the agent in Chicago. The secretary of the defendant

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

company acknowledges the receipt of the copies without making objections as to the time or manner of the service, and not making demand for the originals. I think, that under the delay necessarily arising out of and connected with the insolvency of the Fulton Company, the service of copies of notice and proofs of the loss—particularly in the absence of objections on the part of the defendant—should be adjudged to have been given in time, and to be a substantial compliance with the condition of the defendant's policy. New York Bowery Fire Ins. Co. v. New York Fire Ins. Co., 17 Wend. 357; O'Neil v. Buffalo Fire Ins. Co., 3 Comst. [3 N. Y.] 122. Due good faith requires that objections to proof, etc., be pointed out. Aetna Fire Ins. Co. v. Tyler, 16 Wend. 385; Fland. Ins. 563–566, and cases there cited. The word "immediate" must mean a reasonable time under the circumstances.

The contract of re-insurance is one of indemnity between the insurer and the re-insurer. It has no connection with the insured, except in the nature of a surety in equity. The re-insurer may discharge its liability by paying the amount of the policy to the insured, as owner of the property insured, or to the re-insured. The financial condition of the re-insured is not to be taken into account in the computation of the amount to be paid on the policy of re-insurance. The insolvency of the original insurer is no defense, in whole or in part, to a suit against the re-insurer. It is claimed on the part of the defendant that the condition in its policy is an exception to this position of the law. The amount of per centage paid by the receiver of the Fulton Company to the original insured has no relation to or connection with the defendant's liability under the policy of re-insurance. The condition in that policy, that "in case of loss the company shall pay pro rata at and in the same time and manner as the re-insured," cannot mean that in case of the insolvency of the Fulton Company the defendant shall only be obliged to pay the pro rata of the dividends of the assets of said company, upon the claim of the first insured. It cannot have such application. The condition means that the defendant shall pay at and in the same time and manner as the re-insured company shall pay or be bound to pay according to its policy, and that the defendant shall have all the advantages of the time and manner of payment specified in the policy of the Fulton Company—otherwise the defendant's policy would not be the contract of indemnity intended, and endless litigation might ensue. New York Marine Ins. Co. v. Protection Ins. Co. [Case No. 10,216]; Carrington v. Commercial Fire & Marine Ins. Co., 1 Bosw. 152; Fland. Ins. 32, 33, and notes; In re Republic Ins. Co. [Case No. 11,705].

The motion for a new trial is overruled.

NOTE [from original report]. See further where notice is to be given forthwith, Beatty v. Lycoming Co. Mut. Ins. Co., 66 Pa. St. 9. As to what is a waiver of conditions in regard to the furnishing of proofs of loss, etc., see Cahill v. Andes Ins. Co. [Case No. 2,289], and cases there cited. For a full collection of authorities on liability of re-insurer, consult Ex parte Norwood [Case No. 10,364].

CASHIEL (UNITED STATES v.). See Case No. 14,744.

Case No. 2,500.

CASKIE v. WEBSTER.

[2 Wall. Jr. 131.][1]

Circuit Court, E. D. Pennsylvania. April, 1851.

ASSIGNMENT FOR BENEFIT OF CREDITORS—COMITY BETWEEN THE STATES.

1. A general voluntary assignment, valid by the laws of one of the United States—though assumed to be void if it had been made in another—will carry property in that other against an attaching creditor there.

2. The case of Ingraham v. Geyer [13 Mass. 146], decided A. D. 1816, in which an opposite doctrine was held, is not law.

Martin, of Virginia, made an assignment, valid by the laws of that state, of all his property to Caskie, of that same state, for the benefit of such of his creditors as should assent to certain terms set forth in it, and which are not allowed by the laws of Pennsylvania. Several creditors, chiefly of Virginia, assented. One item of his property was a debt due by a resident of Pennsylvania; and before Caskie could get the money from this debtor, Webster, a Pennsylvania creditor, who had refused his assent, attached it for a debt, which was due to him. Assuming such an assignment as Martin made, to be void if it had been made in Pennsylvania—which, however, the court thought it was not—one question in the case was, whether this debt passed to the general assignee in Virginia, or was held by the attaching creditor in Pennsylvania.

Mr. Porter and Mr. Webster, for the Pennsylvania creditor. There is no doubt, that in England the law is as we contend. In Le Chevalier v. Lynch, 1 Doug. 170, an attaching creditor was protected against the assignees of the bankrupt in England; although the plantation in which the foreign attachment was instituted, was within the same dominion, where the bankrupt law was enacted. But the exact point now before the court has been decided in this country. Ingraham v. Geyer [13 Mass. 146], in the supreme court of Massachusetts, is this case with a change of names only;—Massachusetts for Pennsylvania, and Pennsylvania for Virginia. On facts like those before us,—a voluntary assignment,—Parker, C. J., gives the opinion of the court: "To give effect to this assignment so as to intercept the lien obtained by a creditor here, under the laws of our own state, when by the ef-

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

fect of that assignment, he would be deprived of all opportunity of participating with the creditors in Pennsylvania in the proceeds of the debtor's effects, would be an undue partiality to foreign creditors, not warranted by the principles of justice, nor required by the comity of nations."

T. I. Wharton and Henry Wharton, on the other side.

GRIER, Circuit Justice. A debt is a mere incorporeal right. It has no situs, and follows the person of the creditor. A voluntary assignment of it by the creditor, which is valid by the law of his domicil, whether such assignment be called legal or equitable, will operate as a transfer of the debt, which should be regarded in all places.

In America, bankrupt or involuntary assignments by operation of law, have not been considered as subject to this rule. But I know of no other established exception to the general rule, that a transfer of personal property, valid by the law of the owner's domicil, is valid everywhere. I know there are some cases to be found, in which the courts of some states of this Union have decided that a voluntary assignment for the benefit of creditors, valid by the law of the creditor's domicil, will be disregarded, where it is prejudicial to the interests of attaching creditors in other states, or invalid by the laws of the state, where the debt or property is attached. Such is Ingraham v. Geyer, cited at the bar. But these decisions are not binding as authority beyond the states, in which they were made, and the counsel have not brought to our notice any case, controlling us, where the doctrine of them has been affirmed. Sitting here as a court of the United States, we do not think that the different states of this Union are to be regarded as a general thing in the relation of states foreign to each other. Especially ought they not to be so regarded, in regard to questions relating to the commerce of the country; which is coextensive with our whole land, and belongs, not to the states, but to the Union.

CASKIN (LEONARD v.). See Case No. 8,257.

CASKS OF.

[Note. Cases cited under this title will be found arranged in alphabetical order under the quantity or number of casks; e. g. "Casks of Sherry. See Six Hundred and Thirty Casks of Sherry."]

CASS (CITIZENS' NAT. BANK v.). See Case No. 2,732.

CASSALLY (McNAUGHTER v.). See Case No. 8,911.

CASS COUNTY (JORDAN v.). See Cases Nos. 7,517 and 7,518.

CASS COUNTY (KENNARD v.). See Case No. 7,697.

CASS COUNTY (WASHBURN v.). See Case No. 17,213.

CASSEDY (UNITED STATES v.). See Case No. 14,745.

Case No. 2,501.

CASSEDY v. WILLIAMS.

[Hayw. & H. 151.][1]

Circuit Court, District of Columbia. Aug. 28, 1843.

PAYMENT—SPURIOUS BANK NOTES.

Where notes of a bank were given in payment of a negro boy, and the party paying the same knew that the said notes were issued without the authority of the corporation, by individuals using the name of such bank or corporation, for the purpose of deceiving and defrauding the public, the passing of said notes was no payment for the purchase of said boy.

At law. The defendant [William H. Williams] purchased, on the 9th of October, 1840, a negro boy, of the plaintiff [William H. Cassedy], at Leesburg, Va., for $600, and paid for the boy the amount in "Millington" money. A few days after the sale the Millington Bank failed, and its paper became utterly worthless. The plaintiff sued for the amount.

Jos. H. Bradley, for plaintiff.

Brent & Brent, for defendant.

Counsel for plaintiff contended that the bank originated in the grossest fraud; that the defendant had good reason to know of the insolvency of the bank at the time of the payment of the money. On the part of defendant it was contended that the money circulated as current money for several days subsequent to the day of sale, and that he was ignorant of the condition of the bank and paid the money in good faith.

The points of law raised will appear in the following prayers:

"If the jury shall find from the evidence that the plaintiff at the time of selling said negro boy received in payment therefor the sum of $600 in the notes of the Commercial Bank of Millington, then, to entitle the plaintiff to recover, the jury must be satisfied that the plaintiff tendered said notes before suit brought, to defendant or his agent, or at the residence or place of business of defendant or his agent." Refused.

"If the jury believe from the evidence that the plaintiff sold the negro boy and received in payment therefor $600 in the notes of said bank, and that said notes were genuine notes of said corporation, then the defendant was not responsible for the payment of said notes, unless he acted in bad faith, and there is no evidence in this cause that defendant did act in bad faith." Refused.

"If the jury find from the evidence that the defendant had no superior means of knowing the worthlessness of the paper of said bank than the plaintiff might have had by

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

the exercise of due diligence and reasonable inquiries, then there was no bad faith on the part of defendant in passing said paper, even if the jury find that defendant, through his agent, did pass such paper, knowing it to be worthless, and did not disclose his knowledge to the plaintiff." Refused.

"If the jury believe from the evidence that the plaintiff sold the negro boy and received in payment therefor the said notes, and that the plaintiff did pass away any part of said amount, then the plaintiff cannot recover in this action, although he may have tendered the residue of said money to defendant before suit, or may have produced it in court as stated in the evidence." Refused.

"If the jury find from the evidence that there were acts of user under the act of the legislature of Maryland incorporating the said Commercial Bank of Millington, and that the notes paid to plaintiff were genuine notes, signed by the acting cashier and president of the Commercial Bank of Millington, and that said notes were of value in the market at the time of passing them to the plaintiff, and that the Bank of Millington did redeem its notes until October 13, 1840, then the defendant, by passing said notes, cannot be liable, although he might have apprehended insolvency in said bank, and might have believed that it would sooner or later fail." Refused.

"Notwithstanding the jury may be satisfied from the evidence that the said notes, passed by the defendant to the plaintiff, would not have been paid at the bank if presented at the time they were passed, the defendant is not responsible for the non-payment by the bank, and only undertook that the said notes were as they purported to be, genuine notes of the said bank, unless it be proved by satisfactory evidence that at the time the said notes were passed the defendant knew that the same would not be paid." Refused.

"If the jury shall find from the evidence that the plaintiff received in payment for his negro boy the sum of $600 in notes of the Commercial Bank of Millington, and that said notes were passed in good faith to plaintiff, then the plaintiff is not entitled to recover, notwithstanding the jury shall find that the defendant purchased said slave by his agent, and notwithstanding the said notes were in fact utterly worthless and were of no value to plaintiff, if such worthlessness was not known to the defendant at the time of such purchase." Granted, and excepted to by counsel for plaintiff.

"If the jury believe from the evidence that the witness, agent for said defendant, paid for the negro boy purchased from plaintiff out of his own money and for his own benefit, and that the defendant never received any benefit from said purchase, then the plaintiff is not entitled to recover, notwithstanding the jury shall believe that said witness was general agent for defendant to purchase negroes in the fall of 1840, and notwithstanding the money paid to plaintiff was utterly worthless and notwithstanding the defendant and said witness knew said paper to be worthless." Granted, and excepted to by counsel for the plaintiff.

"Should the jury be satisfied from the evidence that the defendant paid the plaintiff $600, the amount claimed, in notes of said bank as the consideration for the purchase of the said negro boy, and that the same were accepted without objection by the plaintiff, and that the said notes were current at the place of payment, previous to and upon the day of sale when said payment was made, and that said bank did not stop payment until four days thereafter, and that said notes were current at the Chesapeake Bank in Baltimore, Maryland, and not dishonored or discredited there until the day after said sale, or thereafter, and that said payment was made bona fide, and that the plaintiff has failed to prove by satisfactory evidence that the defendant knew or had good reason to believe at the time of said payment that the said bank was in failing circumstances, and would not redeem the said notes, and that the plaintiff has also failed to prove by satisfactory evidence that the said defendant was connected with the bank in fraudulently circulating the said notes, then the said payment in said notes was a valid one, and the said negro was paid for by the defendant and the plaintiff cannot recover in this action, and the defendant is entitled to a verdict in his favor." Granted, and excepted to by counsel for the plaintiff. Judge Thruston absent.

"Should the jury be satisfied from the evidence that the defendant was the holder of the bank notes passed to the plaintiff in payment of the negro boy, the law presumes the defendant to be a bona fide holder of the same for a valuable consideration, unless the contrary be proven." Granted, and excepted to by counsel for the plaintiff. Judge Thruston absent.

"That the defendant is not liable by reason of the non-payment of the said supposed Millington Bank, although they would not have been paid by said supposed bank if they had been presented for payment on the day on which they were paid by the defendant to the plaintiff, unless the defendant then knew, or had good reason to believe that they would not be paid when presented, and did not disclose such knowledge and reason to the plaintiff." Granted, and excepted to by counsel for the plaintiff.

"If the jury find from the evidence that the bank notes were issued and circulated by persons exercising powers under the acts of Maryland incorporating the said Commercial Bank of Millington, then it is not competent for the plaintiff to deny the existence of said corporation." Granted, and excepted to by counsel for the plaintiff.

"But if from the evidence the jury shall be

of opinion that the said notes were issued by certain individuals using the name of the Commercial Bank of Millington, without the authority of said corporation, and for the purpose of deceiving and defrauding the public, then it is competent for the jury to find such fraud, and if from the said evidence, they shall be further of opinion that the said defendant knew or had reasonable cause to believe the existence of said fraud before the said notes were so passed to said plaintiff, then the passing of the said notes if passed by the agent of said defendant was no payment for the purchase of said negro boy." Granted, nem. con.

Verdict was for the plaintiff for $575, with interest from October 9, 1840.

The defendant moved in arrest of judgment. After argument by the counsel, and after due consideration, the court overruled the motion, and judgment was entered on the verdict.

Case No. 2,502.

CASSEL v. DOWS et al.

[1 Blatchf. 335; 1 Liv. Law Mag. 193.][1]

Circuit Court, S. D. New York. Oct. Term, 1848.

BILL OF EXCHANGE—ACTION BY HOLDER—STRIKING OUT ENDORSEMENTS—ACCEPTANCE — PROMISE TO ACCEPT.

1. Where the endorsements on a bill of exchange, subsequent to that of the payee, were made for the purpose of transmitting and collecting the paper, they may be stricken out at the trial, in a suit by an endorsee.

2. Even if the endorsements were made for value, yet the suit may properly be brought in the name of the party who is the owner of the paper at the time of bringing the suit, whether the endorsements be stricken out at the trial or not.

3. A bill was protested for non-acceptance, and also for non-payment; a qualified acceptance was written on the bill at the date of the latter protest, to the amount of the proceeds of certain property against which the bill was drawn; the proceeds were afterwards paid and receipted on the bill: *Held*, that they were not accepted in satisfaction but only as far as they would go.

4. A letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is a virtual acceptance, binding on the person who makes the promise, if the bill be taken on the credit of the letter by a person to whom it is shown.

5. Where, however, the letter has no reference to the particular bills to be drawn, but is a general authority to draw at any time and to any amount, against property to be shipped, the party writing it cannot be held as acceptor of a bill drawn under it.

6. The letter may however be regarded as a promise to accept the bill, and the writer of it may be sued on such promise by any person who may have taken the bill on the credit of the promise.

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission. 1 Liv. Law Mag. 193, contains only a partial report.]

At law. This was an action [by James W. Cassel against David Dows and Ira B. Cary] on the following bill of exchange:

"St. Louis, Mo. March 10th, 1846. J. W. C. Ninety days after date of this my original bill of exchange, (duplicate of same tenor and date unpaid,) pay to the order of Andrew Huston, five thousand dollars, value received, and charge the same to account of your obt. se't. Andrew Huston. To Messrs. Dows & Cary, New-York.

(Endorsed.)

"Pay W. G. W. Gano, Cashier, or order,
"Andrew Huston.
"W. B. Taylor, Jr." (Erased.)
"Pay C. J. Stedman, Esq., or order,
"W. G. W. Gano, Cas." (Erased.)

On the face of the bill was written the following acceptance: "We accept the within draft, for so much of the amount therein mentioned, ($5000,) as the nett proceeds of one hundred and eighty-five casks of hams, against which it was drawn, shall amount to, after deducting commissions and all charges, and for no more, payable when the nett proceeds shall be received by us in cash, and the amount of such nett proceeds ascertained. New-York, June 11, 1846. Dows & Cary." On the back of the bill was the following receipt: "Received, New-York, October 13th, 1846, from Dows & Cary, their check for thirty-eight hundred and sixty-two 51-100 dollars, being in full for the nett proceeds of the within named 185 casks of hams, for which this draft was accepted by said Dows & Cary, as per their account of sales rendered. For C. J. Stedman, J. B. Varnum."

The plaintiff was a citizen of Ohio, and the defendants were citizens of New York, composing the firm of Dows & Cary. The declaration contained a count against the defendants as acceptors, two counts on their promise to accept drafts drawn against consignments of western produce to them by the owner, and the usual money counts. The defendants pleaded the general issue and payment, and gave notice of set-off. The cause was tried at New-York before Mr. Justice Nelson, in May, 1848.

It appeared on the trial that, before and at the time of the drawing of the bill, one Benjamin F. Smith was the agent of the defendants at St. Louis, Missouri, to obtain consignments of produce to them and make advances for them upon the same. He was specially advised by them by letters under date of December 12th, 1845, and February 2d, 1846, that in case he could find any good safe lots of pork, lard or flour, for consignment, the drafts of the owner would be duly honored, on the property being put in safe condition for shipment, at $4 1-2 to $4 3-4 per barrel on flour, $5 1-2 per barrel on prime pork, $7 1-2 per barrel on mess pork, 5 cents per pound on lard, and 4 1-2 cents per pound on hams. Previously to the receipt of those letters Smith had acted as the

agent of the defendants, under a verbal authority from them to procure consignments and make advances, and, in order to obtain funds for such advances, he was authorized by them to draw or cause drafts to be drawn on them at New-York.

The bill in question was drawn by Huston under the authority and in pursuance of the direction of Smith, on a consignment of hams to the defendants. It was negotiated to the plaintiff on the same day on which it was drawn, (March 10th, 1846,) and he advanced in money the face of it less the interest. Before he consented to take the draft he made particular inquiries of Smith as to the authority of Huston to draw it, and was assured by Smith that Huston drew it by his, (Smith's) direction, against a consignment of property to the defendants, and that he, (Smith,) was fully authorized to make the arrangement. The letters of December 12th, 1845, and February 2d, 1846, were also shown to the plaintiff by Smith, before he purchased the draft, and, upon the faith of the letters and of Smith's assurances, he consented to advance the money. The defendants were immediately advised, both by Smith and by Huston, of the consignment, and of the draft drawn against it, the receipt of which advices they acknowledged in a letter to Smith dated March 20th. In that letter they complained that a draft at 90 days was too short, and requested that any further advances should be made on longer time, but did not intimate that there was any want of authority to draw, or that the paper would not be accepted. The draft was presented to the defendants on the 21st of March, acceptance of it was refused, and it was protested for non-acceptance. In a letter written by the defendants to Smith on that day they assigned as a reason for the non-acceptance that the advance of 4 cents per pound on hams was too much as the market then stood, but they afterwards wrote to Smith that the paper would have been accepted had it not come through a house in New-York which would sell their acceptances for the first offer, to the injury of their credit.

Warehouse receipts for the hams were given by Huston to Smith when the draft was drawn and the money advanced, and the property, which was at Quincy and at Bardstown, Illinois, was shipped to the defendants on the 27th of March and the 22d of April. It was received by them, and on the 12th of October they rendered an account of the sale of it, by which the nett balance amounted to $3,862 51.

On the trial, a member of the firm in New-York through which the draft was sent, testified that W. B. Taylor, Jr., whose name had been on the back of the bill, but was stricken out, was a clerk of his, and had put his name on the draft for security in its transmission, and had no interest in it; that the initials J. W. C. was a mark of his house, and indicated that the paper was received from the plaintiff. The bill was presented for payment on the 11th of June, 1846, but payment was refused, and it was duly protested for non-payment, at the request of C. J. Stedman, of New-York. Gano, whose name was on the bill, was cashier of a bank in Cincinnati. He endorsed the bill to Stedman, and his endorsement was stricken out after the receipt of October 13th, 1846, on the bill, was given. The original bill was received for collection from the plaintiff by his attorney, before the commencement of the suit, and was then in its present state as to endorsements and erasures. It was admitted that the plaintiff was indebted to the defendants in the sum of $410 35, with interest from the 1st of February, 1844. The court charged the jury that the plaintiff was entitled to recover the amount of the bill, after deducting the payment receipted on it and the set-off. The defendants excepted to the charge, and, a verdict having been found against them for $859 46, they now moved for a new trial, on a case.

George C. Goddard, for plaintiff.
Cornelius Van Santvoord, for defendants.

NELSON, Circuit Justice. I. The case of Dugan v. U. S., 3 Wheat. [16 U. S.] 172, is an authority in favor of the right of the plaintiff to sustain this suit in his own name, notwithstanding the endorsements upon the bill subsequent to that of Huston. The proof shows with reasonable certainty, that those endorsements were made for the purpose of transmitting and collecting the paper. They, therefore, might have been stricken out at the trial. But, if otherwise, and if they had been made for value, in the usual course of business, inasmuch as it appears that the plaintiff was the holder and owner of the paper at the time the suit was brought, it was properly brought in his name; and this, whether the endorsements were stricken out at the trial or not. On the plaintiff's becoming revested with the title to and interest in the bill, the endorsements, whether for value or transmission, became matters of form, and were properly disregarded.

II. The bill was presented for acceptance on the 21st of March, acceptance was refused, and it was duly protested. Afterwards, on the 11th of June, it was protested for non-payment. A qualified acceptance by the defendants appears on the bill under the latter date, to the amount of the proceeds of the hams against which it was drawn, and it is insisted that this is conclusive upon the plaintiff, as he must be presumed to have taken the conditional acceptance, and to have waived the benefit of the previous refusal.

There is no positive proof in explanation of the circumstances under which this conditional acceptance was written on the bill. The fact, however, that Stedman, who presented the bill for payment at that time,

caused it to be protested on the same day for non-payment, affords ground for the conclusion, that he did not assent to the qualified acceptance, but, on the contrary, regarded it as a refusal of payment, and as dishonoring the paper. The subsequent receipt from the defendants of the avails of the hams, when taken in connection with the previous facts and circumstances, must be deemed to have been an application of the proceeds, only as far as they would go towards payment, and not an acceptance of them in satisfaction. The receipt does not purport to be in full, and the protest which Stedman caused to be made, at the time of the conditional acceptance, is altogether irreconcilable with the idea, that he intended to assent to that acceptance and take the proceeds in satisfaction. The conclusiveness of the receipt of the proceeds depends upon the conclusiveness of the conditional acceptance. If the latter fails, the former must also.

III. The main question in the case is, whether or not the plaintiff can maintain the suit in his own name, under the counts charging the defendants with a promise to accept drafts drawn against consignment of western produce to him by the owner. The draft in question having been drawn by Huston in pursuance of authority communicated by the defendants to Smith their agent, there can be no doubt that Huston could have maintained the action in his own name. It is insisted, however, that the plaintiff cannot, on the ground of a want of privity between him and the defendants, and that the promise, if made at all, was made to the owner and shipper of the produce, and not to any third person who might choose to advance money upon the draft.

The cases of Coolidge v. Payson, 2 Wheat. [15 U. S.] 66, and of Boyce v. Edwards, 4 Pet. [29 U. S.] 111, are direct authorities to show, that the defendants in this case are not chargeable as acceptors of the bill. To make them liable in that capacity, the letters authorizing Huston to draw should have described the bill to be accepted, with reasonable certainty, so that its identity could not be mistaken by the party who should take it upon the faith of such authority. In Coolidge v. Payson the letters specified the particular bill to be drawn, and the endorsee, who had taken it on the faith of such authority, recovered against the defendants as acceptors. The court came to the conclusion, after a review of all the cases, that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, was a virtual acceptance, binding on the person who made the promise, if the bill was taken on the credit of the letter by a person to whom it was shown. In Boyce v. Edwards the plaintiff failed to recover against the defendants as acceptors, the authority to draw having been general, as it was in the case before us. The defendants were merchants in Charleston, who gave a general letter of credit to one Anderson of Georgia, to buy and ship cotton to them, and, on sending the bill of lading, to draw upon them for the price. The bills in question had been drawn in pursuance of this authority, and negotiated to the plaintiff, who took them on the faith of the letter of credit. In the court below the plaintiff was allowed to recover against the defendants as acceptors. The supreme court, after referring to the case of Coolidge v. Payson, and other cases affirming the same doctrine, held, that the judgment of the court below was erroneous, on the ground, principally, that the letter had no reference to the particular bills to be drawn, but was a general authority to draw at any time and to any amount, upon lots of cotton shipped, and that it did not describe any particular bills in terms not to be mistaken, which was indispensable in order to make the defendants liable as acceptors. The court further remarked, that the distinction between an action on a bill as an accepted bill, and one founded on a breach of a promise to accept, seemed not to have been adverted to, but that the evidence necessary to support the one or the other was materially different; that to maintain the former, the promise must be applied to the particular bill alleged in the declaration to have been accepted, while in the case of the latter, the evidence might be of a more general character, and the authority to draw be collected from circumstances and extended to all bills coming fairly within the scope of the promise. The court also observed, that, as respected the rights and remedies of the immediate parties to the promise to accept, and of all others who might take bills upon the credit of such promise, they were as secure and as attainable by an action on the breach of the promise to accept, as they could be by an action on the bill itself; and that the action might have been sustained, as the evidence stood, if the declaration had contained a count, properly framed, on a breach of the promise to accept.

The same doctrine was asserted and applied in the case of Russell v. Wiggin [Case No. 12,165]. There the defendants gave to one Breed a letter of credit, authorizing one Endicott to value on them at London, at six months sight, at any place in India, for account of Breed, for any sums not exceeding in all fifteen thousand pounds sterling, engaging that the bills should be duly honored when presented, if drawn within twelve months from the date of the letter. The plaintiffs, to whom the letter was exhibited, took the bills in question for value, relying on the commercial standing of the defendants, and on their promise in the letter. The declaration contained a count on a promise to accept. Judge Story, after an elaborate examination of the question, both on principle and authority, came to the conclu-

sion that the plaintiffs were entitled to recover. He referred to the case of Boyce v. Edwards, as affirming the same doctrine, and observed that in that case the court held, that if, because the bill to be drawn was not definitely described in the manner limited by the case of Coolidge v. Payson, the promise to accept would not operate as an acceptance in favor of the party receiving the bill, still it would operate as a promise to him to accept the bill when drawn, and thus be equally available. See, also, Adams v. Jones, 12 Pet. [37 U. S.] 207.

Upon the foregoing view of the authorities, therefore, this suit was properly instituted in the name of the plaintiff, and may be sustained on the promise to accept, as laid in the third and fourth counts of the declaration. New trial denied.

Case No. 2,503.

CASSELS v. VERNON.

[5 Mason, 332.] [1]

Circuit Court, D. Rhode Island. June Term, 1829.

MARRIED WOMAN — ADMINISTRATION TO HUSBAND WITH WILL ANNEXED — JURISDICTION OF PROBATE COURT — CONCLUSIVENESS — ACCOUNTING — INTEREST AGAINST TRUSTEE.

1. The grant of administration to a husband on his wife's estate with the will annexed, by a probate court, is conclusive to establish her right to make the will, for the general jurisdiction includes the right to inquire into this fact.

2. Interest will not be allowed against a trustee holding a fund, when he had made no interest, if there be no laches or neglect, or use of the money, on his part.

Bill in equity for an account. The cause was set down by consent of parties upon the bill, answers, exhibits, and admissions of the parties, and was argued by Samuel A. Crapo and Philip Crapo for the plaintiff, and by Searle for the defendant [William Vernon].

STORY, Circuit Justice. The present bill is brought by John Cassels, as administrator with the will annexed of his late wife, Jane Cassels, deceased, against the defendant as executor of Samuel Brown, deceased, for an account and decree of payment of a certain trust fund belonging to her estate, entrusted during her lifetime to the defendant's testator for her use. Mrs. Cassels died in England, where her will was duly proved in the prerogative court of Canterbury, and administration thereon granted to the plaintiff in 1828; and he has since presented the same to the proper probate court of Rhode Island, by which administration has been granted to him in like manner. The will of Mrs. Cassels purports to have been made in virtue of a power reserved to her by a certain bond, executed before her marriage by the plaintiff to a Mr. Champlin of Newport, the object of which was to secure to her the absolute disposal of her whole estate. Her will purports to dispose of her real and personal estate, first, to her husband for life, with a power to him afterwards to appoint and distribute the same among their children; and in default of such appointment, an equal distribution among their children, who should survive him, and if none survived, then to his own use in fee. There is no dispute between the parties as to the sum now due to Mrs. Cassel's estate; and the defendant makes no objection to paying it, provided he can be secure in so doing. It will be necessary, therefore, only to consider, whether either of the objections taken at the argument furnishes any solid ground for a denial of relief.

The first objection is, that the plaintiff has united in his bill a claim for the money as administrator of Mrs. Cassels, and also a claim for the same in his individual capacity, meaning, probably, though not so stated in the bill, as husband of the deceased. It is very properly stated, that these claims are inconsistent with each other, and that an admission of the one necessarily supersedes the other. The allegation, however, of a right in his individual capacity, is sustained by no facts alleged in the bill, and indeed is a mere naked assertion in the introductory part of the bill, in which, after stating his representative character, the bill adds, "and also in his private and individual capacity." The bill is certainly incorrect in this union of inconsistent claims; and if the objection had been taken upon demurrer, it would have overthrown the bill, unless an amendment was allowed. Courts of equity will not permit distinct and independent titles to be set up in the same bill, for that would be to allow multifariousness; much less will it permit inconsistent titles, or alternative titles, for that might tend to very inconvenient consequences in point of evidence. It is the duty of the party, who seeks the assistance of the court, to state his own title directly, without any alternatives, and not to put the court upon the duty to select, out of many, any one, which it may ultimately think, upon the evidence, can be supported. See Salvidge v. Hyde, Jac. 151; Edwards v. Edwards, Id. 335; Mole v. Smith, 1 Jac. & W. 665. This difficulty, however, could have been gotten rid of by an amendment; and coming on after a full answer, and a hearing by consent of parties, the shortest course will be to dismiss the bill as to all claims, except that made in the representative character. I do not say, that this is quite regular; but upon a mere slip, not affecting the rights of the parties, and where I should certainly allow an amendment, it seems hardly worth while to put the parties to the expense of a new bill. Unless some material objection occurs to this course, beyond what has been already stated, I shall venture to follow it,

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

not meaning, that it shall be drawn into precedent.

Taking the bill then to be solely in the representative character, the defendant insists, that the plaintiff is bound to establish all the material facts, asserted in his bill, in order to found a decree. He must show, that there was a marriage, that the wife had authority to make the will, and that there has been a sufficient probate of the will to entitle the plaintiff to institute the suit. I agree, that all these facts are in some sort before the court, and require proof. But my opinion also is, that they are sufficiently proved by the proper legal evidence. The courts of probate of Rhode Island have exclusive jurisdiction to grant administrations upon the estates of deceased persons within the state, and for this purpose to allow probates of the wills of persons dying testate abroad, as well as at home. See St. R. I. (Dig. 1822) pp. 211, 221. The jurisdiction applies as well to the wills of married women, as of those, who are sole. This point has been already disposed of in the case of Picquet v. Swan [Case No. 11,133]. If the jurisdiction attaches, all the incidents attach, and among others the incidental right of inquiry, whether the person was at the time competent to make the will. The decision of the probate court, being a court not only of competent but exclusive jurisdiction, establishing the will, and granting administration with the will annexed, is conclusive upon the very points now in controversy, and cannot be gainsaid. The proper remedy, if any, was by appeal. See Thompson v. Tolmie, 2 Pet. [27 U. S.] 157. It is not for this court to re-examine, whether the probate court had before it sufficient evidence to justify its decree. For us, it is sufficient, that such a decree was made, and that a valid administration now subsists under it. Even, if the decree were erroneous, as the probate of a will, it would still be good as a grant of administration; and such as would protect any payment made to the administrator.

No other objection has been made to the plaintiff's right of recovery. And my opinion, therefore, is, that he is entitled to a decree for the principal sum, admitted on all sides to be due, viz. $5205.70. A claim has been made for interest in behalf of the plaintiff. But I can perceive no sufficient foundation for it. Mrs. Cassels died as long ago as 1804, and no administration was taken out on her estate until 1828. No interest is proved to have been made by Mr. Brown; and for twenty years Mr. Cassels seems to have left Mr. Brown without any knowledge of his residence, and without any instructions what to do with the dividends of principal and interest as they were made on the stock, from 1801 to the time of the final redemption in 1819. Under such circumstances of neglect on the part of Mr. Cassels, there is no reason to give interest, which must operate as a penalty.

CASSILY (McVAUGHTER v.). See Case No. 8,930.

CASSIN (LEE v.). See Case No. 8,184.

CASSIN (PALMER v.). See Case No. 10,687.

CASSIUS, The (ARTHUR v.). See Case No. 564.

CASSIUS, The (KETLAND v.). See Case No. 7,743.

CASTEEL (HENDERSON v.). See Case No. 6,350.

Case No. 2,504.

CASTELLO v. BOUTEILLE et al.

[Bee, 29.] [1]

District Court, D. South Carolina. March 18, 1794.

CAPTURE BY PROSCRIBED PRIVATEER—SUBSEQUENT CAPTURE BY DULY-COMMISSIONED PRIVATEER—OUSTER OF JURISDICTION.

1. Jurisdiction of the court is ousted in case of capture on the high seas, by a privateer lawfully commissioned, of the property of an enemy to the sovereign issuing the commission.

2. The case is not altered though the capture should have been originally made by a proscribed privateer.

In admiralty.

The libel states that Castello was owner and commander of the brigantine St. Joseph, which was loaded in the port of Carthagena by himself and other subjects of Spain, which is in amity with the United States. That on the 22d of September last, in his way to Cadiz, he was captured on the high seas by the sloop Fair Margaret, commanded by F. H. Hervieux, and carried into Cape Fear river in North Carolina. That two days after their arrival within the bar of Wilmington, the said sloop and brigantine suddenly weighed anchor and proceeded to sea. This is said to have been in consequence of directions from the president of the United States to the governor of North Carolina to take possession of the brigantine and deliver her up to the libellant.

The libel further states that Hervieux then proceeded to Charleston, where, upon some agreement between him and the defendant Bouteille, the latter went to sea in the Sans-Pareille, and, at some distance from the bar of Charleston, took possession of the brigantine, landed the Spanish crew in Georgia, and brought the vessel into Charleston. Hervieux and his people had previously quitted her.

The libel also states some proceedings respecting the brigantine and cargo in consequence of directions from the president of the United States to the governors of North and South Carolina, the latter of whom declined all interference. And the collector of Charleston, not thinking himself authorized to detain the vessel, she was finally left in

[1] [Reported by Hon. Thomas Bee, District Judge.]

the hands of Bouteille. Whereupon, by a decree of the consul of France, the said vessel and cargo were advertised and sold, except fifty bales of cotton, which were taken into the custody of the marshal of this court by warrant issued therefrom. The libel concludes by praying restitution of vessel and cargo, and compensation for the detention of the same.

The jurisdiction of the court is denied by a plea which states, that the Sans-Pareille was a private vessel of war, duly commissioned by France to capture and make prize of all vessels, goods and merchandize found on the high seas, and belonging to the king of Spain or any of his subjects. That by virtue of this commission Bouteille captured this vessel and cargo on the high seas, and without the limits and authority of the United States. That by the 17th article of the treaty with France, this court is precluded from investigating the lawfulness of the capture and making any decree thereon. Plea concludes with a prayer that the suit may be dismissed with costs.

In support of the plea it was insisted that a neutral tribunal cannot determine the validity of prizes made by two belligerent powers from each other. That the 17th article of the treaty with France is conclusive as to the present question. That the 5th article of the convention with the United Netherlands compared with the 2d article of the treaty with France, to which it refers, is also conclusive. That this question has already been decided in the district courts of Pennsylvania and New-York, against the jurisdiction, in cases not so strong as that before this court. That on the face of the libel it appears that the question of prize or no prize is involved in this case. That this court having no power to condemn, of course cannot restore. Lee, Capt. 77, 78, 81, 220, 221; Bynk. 191, 194; 2 Vatt. Law Nat. 263–265. That this court, not being authorized to decide the question of prize, cannot determine whether the first or second capture was legal, or whether either of the privateers was proscribed. That the president, knowing this, referred the inquiry to the governor, and not to this court, as a matter properly cognizable by the executive, and not by the judiciary. That the opinion of individuals ought not to operate with the court, the treaty being plain and conclusive. That the jurisdiction of this court is defined by the 9th section of the act for establishing judicial proceedings, and does not extend to cases of captures. The advocates for the libellant contend that this is a case of a peculiar nature, and must be determined on its own grounds, as it differs from any case in the books. That the St. Joseph having been captured by a proscribed privateer, must be restored, into whatever port of the United States she may go. That if the doctrine contended for on the other side should obtain, a neutral vessel may be cut out of our harbours or from our wharves, without redress. That the president of the United States having already settled the principle, this court must restore if the present case comes up to that principle. The opinions of the secretary of state, and solicitor-general of Virginia were produced, in which those gentlemen recommended an application to the judiciary. Beaw. Lex Merc. 206, was quoted to support the jurisdiction of this court. It was said that the question was not whether the treaty should be fulfilled; but whether this case comes within the treaty. That if this court is deprived of jurisdiction in all cases of prize, it could not give redress for a breach of neutrality in our own harbours. That the article of the treaty with Holland extended merely to matters of trade and navigation, and did not apply here.

From these pleadings and arguments, it appears to me that the court must decide three points. 1st. Whether the St. Joseph was the property of Spanish subjects, or not. 2d. Whether the capture was made by the citizens of France on the high seas, beyond our limits of jurisdiction. 3d. Whether this court has any jurisdiction, if the two preceding points should be determined in the affirmative. As the libel states expressly the Spanish character of this vessel and cargo, it is unnecessary to say a word upon that part of the subject.

It is not contended by the libellant that the privateer was owned by other than French citizens, or that there is any defect in her commission. But it is said that the original seizure was made by a proscribed privateer; and much stress is laid upon the subsequent interference of the president of the United States. The court cannot notice this. The constitution has wisely separated the judicial and executive departments, and we must not infringe the barriers. At any rate the Sans-Pareille was not within the president's censure; and if the Fair Margaret was improperly fitted out in our ports, and proscribed on that account, complaint must be made to the executive, who will proceed by negotiation to obtain the due redress.

Arguments are drawn from a comparison of the 5th article of the convention with Holland to the 2d of the treaty with France. Neither of them seems to me to apply to this case. The treaty with France is of a general nature, and intended to be permanent under all circumstances of war and peace with other nations. The convention with Holland is distinct from our treaty with that power, and relates expressly to recaptured vessels, and to prizes made by either party on their common enemy. As to vessels cut away from a wharf, or captured in our harbours, such acts would amount to felony or piracy and the court would not hesitate to exercise jurisdiction, independently of any treaty in existence. The citizens or subjects of foreign nations receive protection, and owe a corresponding alle-

giance; and what would be criminal in one of our own citizens would be equally so in them, while this state of things lasted.

The cases of the ship William, and brigantine Catharine, decided in the district courts of Philadelphia and New-York, though differing materially from the present, have been adduced to illustrate the point of jurisdiction. I have read both decisions with pleasure; they are ably drawn up, and are, I presume, correct, as no appeal from either has taken place. As to their being the opinions of individuals, I see no reason why that circumstance should deprive them of all right to consideration. Respectable character for legal knowledge, supported by sound argument and clear deduction, will always command respect as well in the case of a judge of the United States as in those of Vattel, Bynkershoek, Puffendorf, or Beawes. But these opinions are confirmed by the language and conduct of the president of the United States, as contained and evinced in the letter from Secretary Jefferson to Mr. Morris, our minister in Paris. This proceeding of the executive has been submitted to both branches of the legislature, and has met with their decided approbation. This, it is true, wants the forms of law, and is not, therefore, binding upon a judge. If, however, his own opinion concurs, as mine does in the present case, much satisfaction must be derived from the coincidence of sentiment with the men so dignified by their wisdom and patriotism.

Upon the whole, I am clear that the plea in this case is relevant; that the libel must be dismissed; and that the fifty bales of cotton must be delivered up.

Case No. 2,505.

CASTER v. WOOD.

[Baldw. 289.][1]

Circuit Court, E. D. Pennsylvania. April Term, 1831.

ANSWER—AMENDMENT—SUPPLEMENTAL ANSWER.

1. Where a defendant had answered generally to a matter, of which he had no particular knowledge, he was allowed to file a supplemental answer on the same subject, after he had acquired particular information concerning it. He may introduce into such answer, new matter which has come to his knowledge since filing the original answer on furnishing the opposite party with the names of the witnesses by whom he expects to prove it.

[Cited in Reed v. Crowley, Case No. 11,644.]

2. Applications to amend an answer are in the discretion of the court.

The defendant had filed his answer on the 19th of March, 1831; on the 21st of April, Mr. Brashears moved for leave to file an additional answer, as an amendment to the one filed. This motion was founded on an affidavit of the defendant, stating that at the time of filing his answer, he had only a general knowledge of the facts referred to in the first part of the amended answer now offered; that from ignorance of the particulars, he was obliged to answer generally, and he did not obtain possession of the papers and documents, which were necessary to give him information, which would enable him to answer with any particularity till the 19th of April; that at the time of filing his answer, he was entirely ignorant that Edward Livingston had filed a bill in the equity side of the circuit court of the district of New York, against the complainant in this case, concerning the title to the lands embraced in the contract between him and the defendant, which is the subject matter of the present suit. But that such bill has been filed by said Livingston, the knowledge of which did not come to defendant till about the 1st of April, and that the said bill is referred to and annexed to the amended answer now offered.

In support of the motion, Messrs. Brashears and Sergeant referred to 2 Madd. 375, 376, and 4 Madd. 21, 27, for the general principles on which answers are permitted to be amended.

Mr. Budd and Mr. Binney opposed the motion, on the authority of the cases in 10 Ves. 401; 2 Mer. 57; and 2 Ves. & B. 256.

BY THE COURT. Applications to amend an answer are not grantable of course, but depend on the discretion of the court. They are viewed more favourably when made to reform an answer, than when made to take it off the file and substitute a different one; the former is allowed in many cases, the latter only in special cases, where the conscience of the court is satisfied that the purposes of justice require it. 4 Madd. 28; 4 Johns. Ch. 375, 376.

As a general rule, the plaintiff is entitled to the benefit of all the admissions of the defendant on oath, and it must be a clear case where the answer will be permitted to be taken from the file. But the present motion is merely to amend and explain matter not fully stated in the answer, on account of the partial information then possessed by the defendant, and the introduction of new matter since come to his knowledge, deemed material to the case. We think it comes within the established rules of courts of equity, and therefore allow the amendment, imposing on the defendant the condition of furnishing the opposite party with the names of the witnesses whose depositions he intends to take.

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

CASTILLERO (UNITED STATES v.). See Cases Nos. 14,746 and 14,747.

Case No. 2,506.

CASTLE v. LEE.

[11 N. B. R. (1875) 80.][1]

Circuit Court, D. Minnesota.

BANKRUPTCY—SETTING ASIDE PREFERENCE:

To set aside a preference made by an insolvent debtor, not only the fact of preference must be shown, but also that the creditor receiving it had reasonable cause to believe a fraud on the bankrupt act was intended.

[Action by Henry A. Castle, assignee in bankruptcy of J. B. Perrin, against William Lee.] Perrin, the bankrupt, engaged in the lumber business, and owning a saw-mill and conducting a country store, became embarrassed and sold out his business, including a stock of goods, December 1, 1873, to Evans & Bass. According to his testimony he expected to become a partner with the former and one Smythe, and to retain one quarter interest in the concern. This statement he made to the defendant, one of his creditors, who, at the request of Thompson, president of the First National Bank of St. Paul, also a creditor, and a personal friend of the bankrupt, induced the other creditors to take the bankable paper of Bass on six months' time for the amount due them from the bankrupt. The names of the creditors were given Lee, the defendant, by the bankrupt, and upon ascertaining the aggregate amount of indebtedness, it largely exceeded the gross amount in the notes to be given by Bass upon the purchase. The president withdrew the bank claim and consented to permit the bankrupt to apply the notes received from Bass in satisfaction of his indebtedness to the other creditors. It was discovered that in the list of debts given Lee by the bankrupt, the amount due Braden, a creditor, had been omitted, and when his attention was called to it, he said "he could take care of that amount, as he was to have one-fourth interest in the business," which would be remunerative with the new partners and the additional capital put in. The trade was consummated with Evans & Bass, with the consent of the creditors upon the list referred to, and the notes of Bass taken. Afterwards it was ascertained that Perrin had omitted to inform Lee in regard to a large amount of his indebtedness; and having been adjudged a bankrupt the assignee brings this suit to recover from Lee the amount of the Bass note which he took in payment of his debt, alleging that it was a preference, secured in fraud of the bankrupt act. There was some conflict in the testimony, but the above is the statement of facts upon which the court decided the case. The case was tried by the court without a jury.

Gilfillan & Williams, for plaintiff.
Gilman & Clough, for defendant.

[1] [Reprinted by permission.]

NELSON, District Judge. There can be no doubt about the insolvency of Perrin, within the meaning of the bankrupt law, at the time Bass & Co. made an arrangement with him which would cancel a certain amount of indebtedness. He could not meet his obligations as they matured, and in the language of a witness in the case, "I considered from his statement to me, that he would have to close up his business unless he procured some assistance outside." Lee, the creditor and defendant in this suit, at the instigation of the president of the First National Bank of St. Paul, undertook to aid the latter in relieving the bankrupt, and was instrumental in influencing other creditors to consent to take the notes on six months' time of Bass, one of the persons who was negotiating to get possession of the bankrupt's property or business. It is immaterial in this controversy, in the view taken by the court, to consider the motives that induced Lee or any of the creditors to consent to the arrangement, and it may be conceded that they believed that by consenting thereto their claims would be more secure. The assignee brings this action to recover from Lee, on account of a fraudulent preference, and in order to establish his asserted right must prove, not only the fact of insolvency on the part of the bankrupt, and a preference to the creditor by the transaction, having reasonable cause to believe the insolvency of the debtor, but also must show that the creditor had reasonable cause to believe the transaction was in fraud of the bankrupt act [14 Stat. 534].

An examination of the evidence will fail to show an intention to defraud any one. It is undisputed that the amount of the indebtedness exceeded the money to be advanced, or the notes to be given by Bass in case the negotiations succeeded; but the president of the bank who was acting as the friend of the bankrupt, when it was discovered that there might possibly be a failure, agreed to withdraw the claim of the bank, and consent that the other creditors should have the benefit of the arrangement with Bass & Co. There is nothing in the testimony to impeach the transaction, and it is apparent that the utmost good faith characterized all of the negotiations. The statement made by the bankrupt to Lee, according to his testimony, was that "he was getting into a copartnership with Evans & Bass, by which he could fix everything up." There was an apparent conflict between the testimony of the bankrupt and Lee in regard to the amount of the indebtedness; but when the list of creditors, who were settled with, is presented to the bankrupt, he states "that there must have been other names furnished him, but he can't swear that there was."

The list which Lee states was given him by the bankrupt footed up five thousand five hundred and eighty-one dollars and ninety-two cents. The latter thought it would foot up seven thousand dollars; but inasmuch as

he admits that there was quite a large indebtedness owing to other persons residing outside of St. Paul, which he states he never alluded to in any of his conversations with Lee, I am forced to the conclusion, in the face of the positive testimony of Lee, showing that the list of the creditors presented was furnished by the bankrupt, and he (Lee) had no knowledge of any other debts except a small one which was owing to Braden, that more creditors were omitted from the list than those outside of St. Paul. It is but justice to say, however, that no intention to deceive on the part of the bankrupt is deducible from the testimony. His evident desire to bring about a partnership by which he would be enabled to "fix up," led him to suppose that his success for the future was assured, and he could alone "fix up" all the creditors whose names were not on the list furnished, including the Braden claim, which, it was discovered, had been omitted also.

I think that a fraud on the act is not to be inferred, from the fact that Lee accepted payment of his debt under the circumstances, although he knew that the Braden claim of less than one hundred dollars was outstanding and unsettled. He was justified in believing, as did the bankrupt, that the arrangement was of benefit to him, and would secure his success in the future. Judgment must be rendered for the defendant.

Case No. 2,507.

CASTOR v. MITCHEL.

[4 Wash. C. C. 191.][1]

Circuit Court, D. Pennsylvania. Oct. Term, 1821.

JURISDICTION — DOMICIL — BREACH OF CONTRACT FOR SALE OF LAND—RIGHTS OF VENDEE.

1. As to change of domicil, as respects jurisdiction.

2. If upon a contract of sale, the purchaser pay a part of the purchase money, and give his bond for the balance, and agree to give a mortgage upon the property purchased to secure the payment of the bond, but fails to give it, and the vendor afterwards conveys the property to another person: the court will decree the repayment of the sum paid, and that the bond be delivered up cancelled.

[Cited in Dudley v. Hayward, 11 Fed. 546.]

In equity. The bill states that on the 2d of December, 1816, the defendant, William Mitchel, entered into articles of agreement with the plaintiff [David Castor] and his brother Daniel Castor; by which he bound himself to sell and convey to them, in fee simple, a tract of land in the state of New Jersey, belonging to the estate of his testator, John Mason, deceased, for the sum of $10,900; payable, $2,000 on the 1st of April following; $1,000 on the 1st of April, 1818, and the residue in three equal annual instalments, for which a mortgage was to be given on the premises; and a conveyance to be made, and possession to be delivered, on payment of the $2,000. That the plaintiff and the said Daniel Castor gave their bonds to the defendant, for the two sums of $2,000 and $1,000. That on the 10th of April, 1817, the plaintiff paid off the bond for $2,000, out of his own funds, and that a suit is now depending in the state court on the other bond. That the plaintiff was ready and willing to receive a conveyance of the land according to the articles of agreement, and to execute a mortgage for securing the payment of the residue of the purchase money; but that the defendant did not execute a conveyance for the said land, or tender the same. That the defendant, sometime in the autumn of the year 1818, executed a deed for the said land to the aforesaid Daniel Castor, excluding the plaintiff, and took a mortgage upon the same from the said Daniel Castor, to secure the payment of the sum of $7,900, being the balance of the purchase money. That the plaintiff of the said Daniel Castor took possession of the land under the articles of agreement, and that the plaintiff continued to hold the possession jointly with his brother, until the separate conveyance to his brother above mentioned, when he left the premises. The prayer of the bill is, that the defendant do repay the said $2,000, to the plaintiff, and also deliver up the bond for $1,000 to be cancelled.

The answer admits all the charges in the bill, except that the payment of the $2,000 was in separate money of the plaintiff, and that the plaintiff and the said Daniel Castor were ready to receive a conveyance for the land, and to execute a mortgage for securing the balance of the purchase money. As to the first, the answer states that the money was paid under the contract, and in discharge of the joint bond, and calls upon the plaintiff to prove the fact he asserts; if it be material, as to the second matter not admitted, the answer denies that the plaintiff and his brother were ready in April, 1817, or afterwards, to receive a deed, and to give the mortgage; but on the contrary, they evaded the same, though often urged. That in consequence of this neglect, the defendant conveyed the land to Daniel Castor, as stated in the bill. The defendant put in a plea to the jurisdiction, asserting that the plaintiff was a citizen of the state of Pennsylvania. The plea was argued at the last term, and witnesses then examined upon the point, when the court overruled the plea, but without prejudice to the question of jurisdiction being considered upon the evidence then given at the hearing. The plaintiff gave no evidence that was deemed satisfactory to prove that the $2,000 paid by the plaintiff were from his separate funds.

It was contended for the defendant, 1. That the removal of the plaintiff from Penn-

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

sylvania, whereof from his birth he was a citizen, to the state of New Jersey, was not a bona fide change of domicil; but that he still continued a citizen of this state in relation to the question of jurisdiction. 2. That the plaintiff having altogether failed to perform his part of the agreement by being ready to accept a conveyance, and to execute a mortgage for securing the balance of the purchase money, he has no equity to claim repayment of the $2,000, even if he had proved that it was his separate money, or to call upon the plaintiff to deliver up the bond for the $1,000 to be cancelled.

Mr. Peters, for plaintiff.
C. J. Ingersoll, for defendant.

WASHINGTON, Circuit Justice. Upon the question of jurisdiction, we have no doubt but that the plaintiff removed to the state of New Jersey, with the bona fide intention of changing his domicil, and making that state the place of his permanent residence. Apparently he had no other motive at the time he removed to that state; and as he could not then have anticipated this controversy, it is not to be presumed that he contemplated a fraud upon the jurisdiction of this court. On the contrary, the evidence in the cause furnishes reasons for his removal which are entirely consistent with the reality of a bona fide change of domicil. In December, 1816, he, together with his brother, purchased a farm in New Jersey, and in the month of March following, as soon as the season would well permit, they both removed to it, and continued jointly to occupy and to cultivate the land, until the separate conveyance made by the defendant to Daniel Castor in the autumn of 1818; when the plaintiff, being a single man, removed to the house of Mr. Denny, in Gloucester county, where he remained as a boarder until the latter end of November, 1819, after this suit was brought, when he returned to Philadelphia. During his abode with Denny, he occasionally visited his friends in this state, but his room was always reserved for him. So far as any inference can be made from his declarations to the witnesses, during his residence in New Jersey, he considered himself to be a citizen of that state. We are of opinion, upon the whole, that the objection to the jurisdiction is not supported by the proofs in the cause.

As to the relief, there is no doubt. Taking it as granted, that the plaintiff was not ready to complete the contract, and that he even refused to do so, there is no principle of law, or equity, upon which the plaintiff could found a claim to retain the money paid him by the purchasers, together with the evidence of a further sum to be paid as the consideration of the purchase, and also to hold the land, otherwise than as a security for the residue of the purchase, and still less to sell it to a third person. The defendant had clearly a right to compel the purchasers to perform their contract, by paying the balance of the purchase money; and his lien upon the land was quite as strong as if the mortgage deed had been executed. But, if he chose to put an end to the contract, if under all the circumstances of the case he could do so; the purchasers were surely entitled to be placed in the situation they would have been in if the contract had not been made. Had the defendant sued the purchasers in equity for a specific performance, it would have been an essential part of his case to show that he had made a conveyance, or was ready to do so; and the court would decree a conveyance as the condition of the payment of the residue of the purchase money.

These principles being premised, it follows, that, since the defendant has conveyed the land to Daniel Castor, and thus disqualified himself to perform his part of the contract, the plaintiff ought not to be exposed to the payment of the bond for $1,000, which was given in part consideration for the land. The decree of this court cannot affect the jurisdiction of the court where the suit upon that bond is depending. But it may operate in personam upon the defendant. As to the $2,000 paid by the plaintiff, there is no proof that it was the separate money of the plaintiff. It might as well have been the money of Daniel Castor, or of the joint purchasers, and the presumption is in favour of the latter. This being the case, and Daniel Castor not being a party to this suit, the court cannot decree this sum to be repaid to the plaintiff. We shall therefore decree the bond for $1,000 to be delivered to the plaintiff, cancelled; and shall dismiss the bill as to the $2,000, but without prejudice.

CASTOR (UNITED STATES v.). See Case No. 14,748.

Case No. 2,508.

CASTRO v. UNITED STATES.

[Nowhere reported; opinion not now accessible.]

Case No. 2,509.

CASTRO v. UNITED STATES.

[Hoff. Land Cas. 72.][1]

District Court, D. California. Dec. Term, 1855.

CONFIRMATION OF MEXICAN LAND GRANT.

Entitled to confirmation under the decision of this court in case number eighty-eight [U. S. v. Rodriguez, Case No. 16,184.]

Claim for one league of land in Santa Cruz county, rejected by the board, and appealed by claimant.

Jeremiah Clark, for appellant.
S. W. Inge, U. S. Atty., for appellees.

[1] [Reported by Hon. Ogden Hoffman, District Judge.]

[Before HOFFMAN, District Judge.]

The claimant in this case derives his title from a grant made to Antonio Buelna, on the second of May, 1839. This grant was also the foundation of the title claimed in case number eighty-eight, already decided by this court. The claim in that case was made in the name of the widow and heir of the original grantee, and was for a part of the land originally granted. The remainder, which is the subject of the present claim, had been sold to Castro, the claimant in this case, by the widow of Buelna. The conveyances to him are duly produced and proved. Both of these claims were rejected by the board, on the ground that there was no proof that the Maria Concepcion Valencia Rodriguez, the claimant in case number eighty-eight, was the grantor of the claimant in this case, and the widow and heir of the original grantee. Case number eighty-eight has already been decided by this court; the original grant has been found to be valid, and the claim of Maria Concepcion Valencia Rodriguez, formerly Buelna, has been confirmed to that portion of the land still retained by her. The only question, then, that remains is whether the grantor of the claimant in this case is the same person. This fact is admitted by the district attorney in a stipulation on file in this court. The original grant having thus been declared to be valid, and the right of the grantor of the claimant, as heir of the original grantee, having been also judicially recognized, no objection can now be taken to the confirmation of the present claim—the validity of the conveyances by the widow Buelna to the present claimant not being disputed. A decree of confirmation must therefore be entered for the land as described and bounded in the conveyances to the claimant, or to so much thereof as is comprised within the limits of the original grant.

CASTRO (UNITED STATES v.). See Cases Nos. 14,749–14,754.

CATALINO (BUSSARD v.). See Case No. 2,228.

CATARA (KLEINE v.). See Case No. 7,869.

Case No. 2,510.

The CATAWANTEAK.

[2 Ben. 189.][1]

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

SEAMEN'S WAGES—DESERTION—ENTRY IN LOG-BOOK.

1. Where a seaman shipped in New York for a voyage to Tampico and back, and, on the voyage back, the vessel put in at Key West for repairs, and, when she was ready to sail, he was not to be found, having gone ashore, without leave, to get some articles belonging to the vessel, which he had previously taken ashore to be washed, and the master shipped another man in his place and sailed without him, and he afterwards came to New York, brought the articles to the vessel, and demanded his wages: *Held*, that, on the facts, the libellant had no intention of deserting the vessel, and did not desert, so as to incur a forfeiture of his wages under the twenty-fifth section of the act of August 18th, 1856.

2. That, as neither the name of the seaman, nor the fact that he was absent without leave, were entered in the log-book, the libellant had not forfeited his wages under the fifth section of the act of July 20th, 1790.

In admiralty. This was a libel for seaman's wages. The libellant shipped by the name of Albert Wright, on the shipping-articles, as cook and steward, for a voyage from New York to Tampico, Mexico, and back to a port of discharge in the United States, on the 3d of July, 1867. He went in the vessel to Tampico, and thence to Key West, where the vessel put in in distress for repairs, and where she was detained for some time. On the 31st of October, 1867, when the vessel was ready to leave Key West for New York, the libellant could not be found, he having gone ashore, without permission, for the purpose of getting some articles belonging to the vessel, which he had previously taken on shore to be washed. It does not appear that he had the consent of the proper officers of the vessel to have the articles in question washed on shore, or that they knew of the fact. The libellant was advised that the vessel was to sail, and went on shore without leave, and without notifying any officer of the vessel of his intention, probably expecting to return before the vessel should leave. He was sought for on shore, but could not be found, and the master was obliged to ship another man in his place at Key West, and the vessel left without him, and he subsequently found his way to New York by another vessel. He brought with him the washed articles and restored them to the vessel, and demanded his wages.

A. Nash, for libellant.

Beebe, Donohue & Cooke, for defendant.

BLATCHFORD, District Judge. I think that the facts all go to show that, though the libellant went on shore without leave, and was left behind, he had no intention of deserting the vessel, and did not desert her in any such sense as to make him incur a forfeiture of his wages under the twenty-fifth section of the act of August 18, 1856 (11 Stat. 62). Nor, if he did desert, was the desertion noted on the list of the crew and officially authenticated, as required by that act, so as to make the forfeiture of wages operative.

The particular defence set up in the answer is, that the libellant left the vessel without permission, and remained away for the space of more than forty-eight hours, and that an entry of this was duly made in the log-book of the vessel on the day on which he absented himself, and that he there-

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

by forfeited his wages. The forfeiture thus set up is claimed under the fifth section of the act of July 20, 1790 (1 Stat. 133). But the defence is not made out. The statute must be strictly complied with, in order to make the forfeiture operative. The entry in the log-book must state the fact and date of absence, and the name of the seaman, and must show that his absence was without leave. The entry in the log-book, in this case, does not state the name of the seaman, or the fact that he was absent without leave.

The libellant is entitled to a decree for his wages, at thirty dollars per month, from the time his service on board commenced, until the 31st of October, 1867, less the payments and credits thereon to which the vessel is entitled. It is impossible for me to decide, from the evidence, what such payments and credits are, and, unless the parties agree, there must be a reference to a commissioner to ascertain them.

Case No. 2,511.

CATEAUX v. BARNEY.

[Cited in Tomes v. Barney, 35 Fed. 115. Nowhere reported; opinion not on file at the clerk's office.]

CATHARINA, The (THOMPSON v.). See Case No. 13,949.

CATHARINA MARIA The (JURGENSON v.). See Case No. 7,587.

CATHARINE, The (DICKINSON v.). See Case No. 3,897.

CATHARINE, The (UNITED STATES v.). See Case No. 14,755.

Case No. 2,512.

The CATHARINE AND MARTHA.

[11 N. Y. Leg. Obs. 225; 40 Hunt, Mer. Mag. 707.]

District Court, S. D. New York. June 4, 1853.

COLLISION BETWEEN SAILING VESSELS — RULES OF NAVIGATION—LOOKOUT — LESSENING EFFECT OF COLLISION.

1. A vessel sailing with a free wind is bound to get out of the way, or steer clear of one close-hauled.

2. The neglect to have a "lookout" stationed exclusively for the performance of that duty, and leaving the helm unattended, are reprehensible and serious faults.

3. The vessel having the privilege of keeping her course has the right to expect that the other will be steered clear of her.

4. When the vessel bound to give way does not to do so in time, the other may be so navigated as to avoid or lessen the effects of the apprehended collision.

In admiralty.

D. D. Field and J. S. Sluyter, for libellants.
Cochrane & Donahue, for claimants.

INGERSOLL, District Judge. On the evening of the 21st day of April, in the year 1852, at a little after 8 o'clock the schooner San Louis, of Haddam, in the district of Connecticut, and owned by the libellants, loaded with a cargo of stone, and bound to Philadelphia, at a place about twenty-five miles south of Sandy Hook, on the high seas, was run into by the schooner Catharine and Martha, Collins, master, bound from a port in South America to New York, by which the vessel of the libellants and her cargo, were lost and destroyed. And the question is, which of these vessels, if either of them has been in fault? And that question depends upon the rules of navigation which should have been observed by them, respectively, at the time of the collision, and upon the evidence as given in the case.

The rules of navigation applicable to the case under consideration are well settled. They were considered by the supreme court of the United States in the case of St. John v. Paine, 10 How. [51 U. S.] 557, and were then established and settled, so as to be now free from doubt. Among these rules thus established are the following: 1. A vessel that has the wind free, or sailing before or with the wind, must get out of the way of the vessel that is close-hauled, and sailing by or against it. 2. The vessel on the starboard tack has a right to keep her course, and the one on the larboard tack must give way or be answerable for the consequences. 3. When two vessels are approaching each other, both having the wind free, and consequently the power of readily controlling their movements, the vessel on the larboard tack must give way, and each pass to the right. 4. The same rule governs vessels sailing on the wind, and approaching each other, when it is doubtful which is to the windward. And it was remarked by the court that no one can look through the reports in admiralty in England without being struck with the steadiness and rigor with which these general nautical rules have been enforced in cases of collision, under the advice of the Trinity masters of that court, or fail to be impressed with the justice and propriety of such application, and the salutary results flowing from it. These rules have been often sustained and established by various courts of high authority in different states in the United States. The court in the case in Howard also say, that a competent and vigilant lookout, stationed at the forward part of the vessel, and in a position best adapted to descry vessels approaching at the earliest moment, was indispensable to exempt the colliding vessel from blame, in case of accident in the night-time, while navigating waters on which it is accustomed to meet other water craft. Bearing these rules in mind, and applying them to the facts as found in the present case, there is no difficulty in determining what the decree should be.

The San Louis, as appears in evidence, was a schooner of about one hundred and eleven tons burthen, properly manned, and on her

voyage, bound to Philadelphia, started from Jersey City on the 21st day of April, in the year 1852, at about two or three o'clock in the afternoon. The collision took place at a little after eight o'clock in the evening, at about twenty or twenty-five miles south of Sandy Hook, where vessels are accustomed to meet. The wind at the time was about south-west by west. It was not blowing heavy, but there was a good sailing breeze. She was close-hauled to the wind, on her starboard tack, and was and had been steering between south and south by west, along the shore, and was at the time about four or five miles distant from the same. It had been raining, but at the time it was starlight, with some flying clouds, and vessels could be seen from three-quarters of a mile to a mile distant. She had a man on the look-out forward, but no light, and the mate was at the wheel. The Catharine was heading in an opposite direction to that of the San Louis, with a fair wind on her larboard tack, bound to the port of New York, with no one on her lookout forward, but with a light. No one on board the Catharine saw or noticed the San Louis until the San Louis was just under her bows, and a moment before the collision took place. A short time before the collision, and when the San Louis could have been seen if there had been a lookout forward, there was no one on the lookout forward, and no one at the wheel. When the Catharine was so without a lookout, and without any one at the wheel, the crew were reefing her mainsail. The captain, who left the wheel, was not so engaged. But before the collision he returned to the wheel. When the Catharine was first discovered by those on board the San Louis, she was about half a mile off, heading a little east of north, in an opposite direction of the San Louis, from one to two points to the leeward, on her lee bow. The San Louis kept her course, close-hauled to the wind, until just before the collision, when, discovering that the Catharine had luffed, and that a collision would take place, in order to avoid it if possible, or to lessen the effects of it, the San Louis luffed, and the Catharine struck her on the larboard side, head on, about opposite the hatch, abaft the fore rigging, by which the San Louis was cut down below the water line, in consequence of which it was not safe to remain on board of her, and she was abandoned by the crew and lost. The San Louis, if she had not luffed, would have been struck by the Catharine.

Applying the rules of navigation, as established by the supreme court, to the facts as above found, there is no difficulty in determining what decree should be passed. The San Louis was close-hauled to the wind, on her starboard tack, with a lookout forward, and, judging from the whole testimony, was a little to the windward of the Catharine. The Catharine had a free wind, she was on her larboard tack, with no lookout forward, and was a little to the leeward of the San Louis. Both vessels were sailing in nearly opposite directions. Under these circumstances, according to the rules of navigation, as established by admiralty courts, it was the duty of the Catharine to have avoided the collision, and, as she did not, she must be answerable for the consequences. No fault is discovered on the part of those who were navigating the San Louis. The fault which occasioned the injury, is entirely attributable to the negligence of those who were navigating the Catharine. The nautical rules, as recognized by the supreme court, and applied by all admiralty courts, are salutary, and ought to be strictly observed. The injury complained of was occasioned by the Catharine's not regarding these rules. Several decisions in the district have also noticed and condemned emphatically the faults on board this delinquent vessel, and justified the navigation of the San Louis. Poole v. The Washington [Case No. 11,271]; The Emily [Id. 4,452]; Morgan v. The De Peyster [Id. 9,805].

The decree therefore is, that the libellants recover their damages sustained by the collision, and that it be referred to a commissioner to ascertain and report the amount of damages sustained by the libellants.

CATHARINE WHITING, The. See Cases Nos. 9,068 and 9,069.

CATHCART (ROBINSON v.). See Cases Nos. 11,946 and 11,947.

CATHCART (UNITED STATES v.). See Case No. 14,756.

CATHERINA, The (NORDLINGER v.). See Case No. 10,295.

CATHERINA MARIA, The (WEEKS v.). See Case No. 17,351.

CATHERINE, The. See Case No. 692.

CATHERINE, The (UNITED STATES v.). See Cases Nos. 14,756a and 14,757.

Case No. 2,513.

CATHERWOOD et al. v. GAPETE et al.

[2 Curt. 94.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1854.

STATE LAWS ABOLISHING IMPRISONMENT FOR DEBT —PROCESS OF FEDERAL COURTS.

1. The insolvent law of Massachusetts, which prohibits imprisonment in certain cases, is not a law abolishing imprisonment for debt, nor a law allowing it under certain restrictions and conditions, within the meaning of the act of February 28, 1839 (5 Stat. 321), and does not affect process out of the courts of the United States.

[Cited in Hanson v. Fowle, Case No. 6,041; U. S. v. Tetlow, Id. 16,456; Low v. Durfee, 5 Fed. 257, 258; Mallory Manuf'g Co. v. Fox, 20 Fed. 410.]

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

2. No state laws can, proprio vigore, affect the process of the courts of the United States.

[Cited in Rusch v. Des Moines Co., Case No. 12,142.]

3. The third section of the process act of May 19, 1828 (4 Stat. 281), applies only to state laws then existing.

[Cited in Low v. Durfee, 5 Fed. 257, 258.]

[At law. Assumpsit by Hugh Catherwood and others against Loton Gapete and others.]

Fiske, for the petition.

English, contra.

CURTIS, Circuit Justice. This is an action of assumpsit founded on two promissory notes, drawn by the defendants who are citizens of Massachusetts, payable to their own order, and indorsed by them to the plaintiffs, who are citizens of Pennsylvania. The defendants having been defaulted have filed a petition in writing, setting forth that they have been discharged under the insolvent laws of Massachusetts, and praying that any execution which may be issued on the judgment, may be so framed as not to run against the bodies of the defendants. It is admitted by the plaintiffs that the defendants have received a discharge under the insolvent laws of the state, but they deny that it protects the defendants from final process against their persons, issuing out of this court. In support of their petition the defendants rely on the act of February 28, 1839, (5 Stat. 321,) which is as follows: "That no person shall be imprisoned for debt in any State, on process issuing out of a court of the United States, where, by the laws of such state, imprisonment for debt has been abolished; and where, by the law of a state, imprisonment for debt shall be allowed under certain conditions and restrictions, the same conditions and restrictions shall be applicable to the process issuing out of the courts of the United States, and the same proceedings shall be had therein as are adopted in the courts of such state."

The first part of this act, which relates to states where imprisonment for debt has been abolished, has no application here, for it has not been abolished in Massachusetts. The question is, whether the seventh section of the insolvent law of Massachusetts (Stat. 1838, c. 183), is a law allowing imprisonment for debt under certain conditions and restrictions, within the meaning of this act of congress. That section provides, that a discharge granted to a debtor shall release him from certain contracts therein mentioned, and shall exempt him from imprisonment on any process, on account of any debt which might have been proved against his estate. The object of the act is, not to allow imprisonment for debt under certain conditions and restrictions, but to prohibit it in certain cases. It does not come therefore within the terms employed by congress, to describe the state laws intended to be referred to. Laws of prohibition of imprisonment are embraced under the first clause of the act of congress; but to come under it, those state laws must entirely abolish imprisonment for debt. If they permit it to take place in some cases and prohibit it in others, they do not abolish it, and the first clause of the act of congress does not apply. On the other hand the second clause assumes that it is still allowed, but conditions and restrictions imposed on its exercise, such as requiring an affidavit before an arrest, and restricting the duration of the imprisonment. And the purpose of congress was to ingraft such restrictions and conditions upon the process of the courts of the United States. But in a case where the state law prohibits imprisonment, it is plain the courts of the United States cannot find in that state law, any conditions or restrictions which they can impose on the exercise of the right. If they obey the state law, they must refuse altogether to allaw process of imprisonment, not restrict it, or impose conditions on it.

It is true the state of Massachusetts has power to abolish imprisonment for debt altogether, or in certain cases, and that such laws do not impair the obligation of the contract. But it is also true, that such laws of the state cannot, proprio vigore, affect the process of the courts of the United States. Beers v. Houghton, 9 Pet. [34 U. S.] 359.

It is necessary to find some act of congress, or some rule of this court, or the supreme court, adopted under the authority of an act of congress, adopting and giving efficacy to such state law. The process act of May 19, 1828 (4 Stat. 281, § 3), assimilates the process of the courts of the United States to the proceedings then used in the courts of the several states. But it was only state laws then existing, which were adopted, and the insolvent law of Massachusetts was enacted after 1828. There has been no rule of this court altering its final process to conform to the provisions of the insolvent law of the state, nor any such rule of the supreme court, applicable to final process in actions at law. It is necessary, therefore, to fall back on the act of congress of February 28, 1839; and as that, in my opinion, does not reach the case, the petition must be denied and the execution issue in the usual form.

Case No. 2,514.

CATLETT v. COLUMBIAN INS. CO.

[3 Cranch, C. C. 192.] [1]

Circuit Court, District of Columbia. Nov. Term, 1827.

MARINE INSURANCE—ADJUSTMENT OF LOSS.

In adjusting a loss upon a policy for $10,000 on a cargo from Alexandria, D. C. to St. Thomas and two other ports in the West Indies, and back to the U. S., the value of the cargo is to be ascertained at the port from which the vessel

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

last sailed before the loss, and if freight has there been earned and not paid, and is not chargeable upon the salvage, it is an addition to the value of the original cargo, upon which the loss is to be adjusted.

At law. This was an action upon a policy of insurance, dated February 16, 1826, whereby the defendants [the Columbian Insurance Company] insured the plaintiff [C. J. Catlett] $10,000, lost or not lost, at and from Alexandria to St. Thomas and two other ports in the West Indies, and back to her port of discharge in the U. S., upon all kinds of lawful goods and merchandise, laden or to be laden on board the ship Commerce, until the same should be safely landed at St. Thomas, &c. and the United States. The goods and merchandise to be valued as interest might appear. At the trial, a verdict was found, by consent, for the plaintiff, for $10.000, subject to the opinion of the court, upon a demurrer to the evidence. And it was further agreed, that if it should be the opinion of the court that the plaintiff was not entitled to recover the full amount of the insurance, but was entitled to an average loss, a reference should be made to an auditor to ascertain the average, and the verdict should be modified accordingly, subject to exceptions, &c. The reference was made and the report, among other things, charged the freight from Alexandria to St. Thomas upon the salvage; the freight being $2,041.25. It appeared from the demurrer to the evidence, that the ship sailed from Alexandria, on the 14th of February, 1822, having on board a cargo of 2,297½ barrels of flour, of the invoice price of $15,841.24. The ship and cargo were both owned by the plaintiff. She arrived safe at St. Thomas on the 21st of March, where she continued until the 30th of May, for the purpose of selling her cargo. During this period, the master, who was also consignee, sold by retail 509½ barrels. Being limited by his instructions, to $8 a barrel, and not being able to procure that price for the residue of the cargo, he sailed on the 31st of May, for Cape Haytien, with it, and 30 doubloons, amounting to $480, part of the proceeds of his sales at St. Thomas. The 509½ barrels of flour sold at St. Thomas according to the invoice price, amounted to $3,512.99, leaving the value of the cargo on board, exclusive of the doubloons, at the time of sailing from that port, according to the invoice, at $12,328.25. On the 6th of June, the ship was wrecked off Cape Haytien, and 155 barrels of flour were totally lost; 1,633 were landed; the greater part damaged, and the whole was sold. The gross amount of sales at Cape Haytien, was $9,391.34. The expenses of salvage, including commissions on sales, were $4,124.72. The proportion of the captain's expenses attaching on the cargo was $285.78. Of the proceeds of the sales at Cape Haytien, the sum of $4,953.89 was invested in coffee, which was shipped to Baltimore, where it produced only $3,517.40. Upon the auditor's report, the circuit court rendered judgment for the plaintiff, for $7,656.57, with interest from October 14, 1822. The defendants carried the cause to the supreme court of the United States, by writ of error, where the judgment was affirmed as to every point, except the charging the freight from Alexandria to St. Thomas against the goods saved, (a point not raised in the court below;) upon which point the judgment was reversed. Mr. Justice Johnson, strongly dissenting. [Columbian Ins. Co. v. Catlett, 12 Wheat. (25 U. S.) 383.] After the opinion of the supreme court was pronounced, it was discovered that the auditor's report was incorrect in some other particulars, and required a different adjustment, and the following additional opinion was subsequently delivered by the court.

"Mr. Justice Story. In consequence of the former opinion delivered in this cause, the parties have found it necessary to readjust the auditor's report in several particulars not suggested at the former argument. Indeed, upon that argument the parties assumed that the report was perfectly correct, except as to the item of freight. We have examined the report, and are satisfied that the original plaintiff is entitled to recover the sum of $6,626.18, with interest from the 14th of October, 1822, which is the residue of the sum of $10,000 insured by the company, deducting the premium note, and the proportion of salvage belonging to the underwriters, which has been received by the original plaintiff; and the judgment of the circuit court is to be reformed accordingly."

The judgment of the supreme court was as follows:

"This cause came on, &c. On consideration whereof, it is ordered and adjudged by the court, that there is error in so much of the judgment, as allowed to the said Catlett, as freight to be deducted from the salvage, the sum of $2,041.25. And it is further ordered and adjudged, that upon reformation of the auditor's report, required by the disallowance of the freight aforesaid, and otherwise, there is now due and payable to the said Catlett, the sum of $6,626.18, together with interest thereon, from the 14th of October, 1822, the said sum being the balance of the sum of $10,000 insured, after deducting the amount of the premium due on the policy, viz. $376, and also the proportion of the salvage belonging to the said Columbian Insurance Company, viz. $2,997.82, received by the said Catlett; and that the judgment of the circuit court, to the amount of the said sum of $6,626.18, and interest thereon from the 14th of October, 1822, be and hereby is affirmed; and as to the residue of the said judgment, be and is hereby reversed; and the cause is to be remanded to the said circuit court, with directions to enter judgment for the said Catlett accordingly; the parties in the court below to be

at liberty to open the auditor's report, so far as respects the item for $480, the proceeds of the doubloons; and the item for $719.37, paid over to Captain McKnight; and the judgment to be varied by the circuit court, as these items may be found for either party; execution, however, to be granted immediately for the balance of the judgment, deducting the said sum of $719.37."

A mandate was issued accordingly, and the cause was again brought before this court, when

CRANCH, Chief Judge, delivered the following opinion of the court:

The mandate, in this case, is understood, in effect, to require this court to render judgment in favor of Mr. Catlett, for $6,626.18, with stay of execution as to $719.37, part thereof; and that the auditor's report shall be opened, as to the item for thirty doubloons, equal to $480, and the item for $719.37, "paid over to Captain McKnight;" "and the judgment to be varied" by this court, "as these items may be found for either party." It appears, by the mandate, that the supreme court, in adjusting the loss, have charged Mr. Catlett $2,997.82, for the underwriter's share of the net proceeds of two hundred bags of coffee sold in Baltimore, and of the $480 for the thirty doubloons. The net proceeds of the coffee were $3,151.30, and the doubloons were $480; = $3,631.30. As $12,808.25, the whole risk, is to $3,631.30, the whole amount saved and received by Mr. Catlett, so is $10,000, the underwriters' share of the risk, to $2,835.13, the underwriters' share of the amount saved.

The supreme court did not take into the adjustment the balance of the net proceeds of the cargo, paid over by Thompson and Creed to Captain McKnight, at Cape Haytien, namely, $75.02 and $719.37; = $794.39. That sum ought to have been brought into the account, whether it was received by the underwriters or by Mr. Catlett. If received by Mr. Catlett, he ought to have been charged with the underwriters' share of it; if received by them, they ought to credit Mr. Catlett with his share of them. By the auditor's report Mr. Catlett was charged with that sum, as well as with the doubloons; the supreme court have only charged him with the latter. Yet they both stand on the same ground; they were both paid over to Captain McKnight. The auditor's report was acquiesced in by Mr. Catlett, in this court, and he seemed to be satisfied with the judgment which this court gave, confirming that report. But the auditor's report has been opened again, and we are now requested to disallow the charge against Mr. Catlett for the doubloons, because, it is said, they were stolen from Captain McKnight at Cape Haytien. Captain McKnight has been reëxamined upon that point. He says he expended part of the doubloons in paying the seamen's wages, and in disbursements and expenses concerning the ship; and that the residue, amounting to about $351, was stolen from him at the cape. If they were stolen, are the underwriters responsible? As Captain McKnight was the master of Mr. Catlett's ship, and the supercargo and consignee of Mr. Catlett's cargo, and as Mr. Catlett had accounts to settle with him for wages and compensation, as master, supercargo, and consignee, and as it is the general practice for the insured to receive the salvage in cases of abandonment, it is natural to suppose that Captain McKnight received not only the doubloons, but the balance of the proceeds of the cargo, as agent for Mr. Catlett. I think, therefore, that Mr. Catlett is answerable for whatever proceeds of the cargo were paid over to Captain McKnight. I think, also, that the twenty bags of coffee, purchased by Captain McKnight out of the proceeds of the cargo, and remitted to Baltimore with the two hundred bags, are to be considered as a remittance made on account of the underwriters; and that, as the proceeds came to the hands of Mr. Catlett, he is answerable for the net proceeds only, and not for the prime cost. But, with regard to these two points, the other judge, who heard the cause, has doubts; but they will not affect the judgment which we shall render. In order to adjust this loss, it is necessary to ascertain the value of the cargo when the ship sailed from St. Thomas for Cape Haytien. Upon the arrival of the cargo at St. Thomas, freight was earned to the amount of $1.25 per barrel.

The supreme court has decided, that the freight thus earned was not a lien upon the salvage of the cargo in the hands of the underwriters. When, therefore, the ship sailed from St. Thomas for Cape Haytien, the value of the cargo was enhanced by the whole value of the freight. This would not have been the case, if the freight had continued to be a lien upon the salvage of the cargo; for then the salvage would have been indebted to the exact amount of the benefit; but this cargo had received the benefit, and was relieved from the debt. So that it was really more valuable to the amount of the freight, as if the freight had been paid at St. Thomas, and added to the cargo. For the purpose of adjusting this loss, the voyage must be considered as commencing at St. Thomas. If half of the cargo had been sold at that island at a profit of one hundred per cent., and the proceeds invested in goods and laden on board the ship, and she had sailed with that cargo for Cape Haytien, and been lost, the value of the cargo must have been ascertained, at the time of her sailing from St. Thomas, in the usual mode; by adding to the invoice price all duties and expenses, and the premium of insurance, as well upon the new cargo taken in, as upon the remnant of the old cargo. One of the expenses allowed, in such cases, is the ex-

pense of transportation from the place where the prime cost was ascertained, or where the goods were purchased, to the place where the voyage is to commence. Marsh. Ins. 621, 622; Stev. Av. 53. Stevens says: "When the average is adjusted at the port of loading, and the freight has been paid there, the practice is to add it to the value of the cargo, in the same manner as any other charge incurred on the goods before putting them on board the ship; for the merchant has then an interest in the freight, by its being converted into a charge on the goods."

Mr. Catlett, therefore, had a fair right, in settling this loss, to add to the invoice price of the 1,788 barrels of flour on board, when the ship sailed from St. Thomas for Cape Haytien, $1.25 on each barrel, for freight from Alexandria. The flour, under the opinion of the supreme court, not being liable in the hands of the underwriters for that freight, was really worth so much more; and Mr. Catlett had as good a right, under the circumstances of this case, to charge it, as if he had paid it at St. Thomas.

Upon this principle, Mr. Catlett's interest in the cargo will stand thus:

1,788 barrels flour, according to invoice price		$12,328 25
Freight on 1,788 barrels, earned at St. Thomas, at $1.25		2,235 00
Thirty doubloons		480 00
		$15,043 25
At the risk of the underwriters	$10,000 00	
" " Mr. Catlett	5,043 25	
		15,043 25

The amount saved is as follows:

Net proceeds of 220 bags of coffee		$3,517 40
Thirty doubloons	$480 00	
Amount overpaid, by Thompson and Creed, on the ship	75 02	
Balance paid by them to Captain McKnight	719 37	
	$1,274 39	
Deduct prime cost of 20 bags coffee	$481 66	
Captain McK.'s expenses on cargo	285 78	
	767 44	
		506 95
Whole amount saved		$4,024 35

Then, as $15,043.25, the whole risk, is to $4,024.35, the whole salvage, so is $10,000, the underwriters' share of the risk, to $2,675.19, the underwriters' share of the salvage; leaving $1,349.16 for Mr. Catlett's share.

Ch. J. Catlett, in account with the Columbian Ins. Co.

	Dr.	
To net proceeds of 220 bags coffee		$3,517 40
" amount overpaid on ship		75 02
" balance paid T. and C. to Captain McKnight		719 37
" thirty doubloons		480 00
" premium note		376 00
		$5,167 79
Supra.	Cr.	
By your proportion of salvage	$1,349 16	
" prime cost of 20 bags of coffee	481 66	
" Captain McKnight's expenses on cargo	285 78	
" policy	10,000 00	
		$12,116 60
		$6,948 81
Deduct amount paid under the mandate		5,907 81
Balance due Ch. J. Catlett		$1,041 00

If, therefore, we were at liberty to vary the judgment for $6,626.18, which we were ordered by the mandate to enter, we should render judgment in favor of Mr. Catlett for $6,948.81, instead of $6,626.18, with directions to enter a credit of $5,907.81, with interest thereon from October 14, 1822, for which execution has already been ordered under the mandate, and should order execution now for the balance, being $1,041, with interest thereon from the 14th of October, 1822, till paid. But as the mandate seems to limit the judgment to the sum of $6,626.18, and execution has been ordered for $5,907.81, we can only order execution to be issued for the balance of the judgment already rendered, namely, $719.37, and interest thereon from the 14th of October, 1822, till paid. If the court is wrong, in adding the freight earned at St. Thomas to the invoice price of the cargo, the only difference in the above statement will be, that Mr. Catlett must have credit for his share of the salvage, $882.35, instead of $1,349.16. The difference is, $466.81, which, deducted from $1,041, leaves a balance still due to Mr. Catlett of $574.19.

Judgment was entered for	$6,626 18
Amount paid under the mandate	5,907 81
Execution ordered for with interest from October 14, 1822.	$719 37

Case No. 2,515.

CATLETT v. COOKE.

[2 Cranch, C. C. 9.] [1]

Circuit Court, District of Columbia. July Term, 1810.

JUDGMENT BY CONFESSION—FIERI FACIAS—DEATH OF PLAINTIFF.

In Virginia a judgment on confession is equal to a release of errors, and this court will not grant a writ of error coram vobis upon a suggestion of the death of the plaintiff, where the justice of the case does not seem to require it; nor will they quash a fieri facias issued in favor of the plaintiff's administrator upon a suggestion of the death of the administrator after the award of execution.

Motion by Mr. Swann, for the defendant [Leonard T. Cooke], for writ of error coram vobis, on the ground that the plaintiff died before judgment.

The judgment was confessed, and there had been a forthcoming bond, and an execution thereon by the administrator of Catlett, and a writ of error thereupon to the supreme court, where the judgment was affirmed, and the cause remanded by mandate.

This court refused to grant the writ of error (FITZHUGH, Circuit Judge, contra.) The confession of judgment by the act of assembly of Virginia of the 19th December, 1792, p. 113, § 43, is equal to a release of errors. It is not necessary for the justice of the case that the writ should be granted.

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

Mr. Swann then moved to quash a fieri facias issued by Manning, the administrator of Catlett, because Manning died after the award of execution.

THE COURT refused to quash it. (FITZHUGH, Circuit Judge, contra.)

Case No. 2,516.

CATLETT et ux. v. FAIRFAX.

[2 Cranch, C. C. 99.] [1]

Circuit Court, District of Columbia. April Term, 1814.

EQUITY PRACTICE—ENFORCING DECREE AGAINST EXECUTOR.

In Alexandria, an execution de bonis propriis, is the proper process against an executor, upon a decree in equity for the balance of his administration account.

This was a motion to quash an execution against the defendant, de bonis propriis, on a decree in equity against him as executor of the will of Lord Fairfax, for the balance due upon the settlement of his administration account, to the plaintiff's wife, daughter of the testator.

E. J. Lee, for the plaintiff, stated that the execution in this form was according to the practice in the court of chancery in Virginia, and produced a certificate, to that effect, from Mr. Henning, the register of that court.

Motion overruled. (THRUSTON, Circuit Judge, absent.)

Case No. 2,517.

CATLETT et al. v. PACIFIC INS. CO.

[1 Paine, 594.] [2]

Circuit Court, D. New York. Oct. Term, 1826.

CIRCUIT COURTS — JURISDICTION — CITIZENSHIP — PLEADING AND PROOF — RESIDENCE TO ACQUIRE RIGHT TO SUE—EVIDENCE — SHIP'S REGISTER—RECORD OF CONDEMNATION—MARINE INSURANCE — THE POLICY — CONSTRUCTION — EXTRINSIC PROOF—JOINT AND SEVERAL INTERESTS—WAIVER OF ABANDONMENT.

1. The averment of the citizenship of the parties, to give jurisdiction to a circuit court, is a necessary averment, and must be proved under the general issue. It is not necessary that a citizen, removing from a territory of the United States, or a state, into another state, should acquire all the rights of a citizen of the state into which he removes, by the laws of such state. It is sufficient if he acquire a domicil there. Yet the declaration must aver that he is a citizen of the state: not sufficient to aver that he is a resident. Difficulty in understanding the term citizen, as used in the constitution.

[Cited in Burnham v. Rangeley, Case No. 2,176; Prentiss v. Brennan, Id. 11,385; Smith v. Atlantic Mut. F. Ins. Co., Id. 13,005.]

2. If one make such removal with the avowed object of acquiring a right to sue in the circuit courts, but with the intention of a permanent residence, and not to return, it is not a fraud upon the law.

[Cited in The Garland, 16 Fed. 288.]

3. The register of a vessel is the only document which need be on board during a period of universal peace, in compliance with the warranty of national character.

4. It is the original register which is required by law to be transmitted, on the loss of a vessel, to the register of the treasury to be cancelled: And as it is the practice not to destroy the register after it is cancelled, it is a document required by law to be deposited in the register's office; and a duly certified copy is legal evidence.

[Cited in The Missouri, Case No. 9,653.]

5. The record of condemnation of a vessel, in a court of vice-admiralty, is not evidence per se. The seal does not prove itself, but must be proved by a witness who knows it; or the handwriting of the judge or clerk must be proved; or that it is an examined copy. The certificate of the American consul is not sufficient to authenticate it.

6. The testimony of the captain, that a survey was held on the vessel, and that the surveyors reported that she could not be repaired but at too great an expense, and that she was thereupon condemned on his application; although not evidence of these proceedings, was held to be evidence that he coincided with the surveyors in opinion.

7. An averment that the plaintiffs have an entire interest in themselves in the subject insured, cannot be supported by evidence of a joint interest with others.

[Cited in Howard Fire Ins. Co. v. Chase, 5 Wall. (72 U. S.) 511.]

8. Nor can an averment of a joint interest with others, be supported by proof of a sole interest.

9. The plaintiffs purchased, separately, each a moiety of the cargo, which was specie, and instructed their agent to get it insured on their joint account. The agent effected the insurance, but the policy was expressed to be on account of owners: afterwards, one of the plaintiffs transferred half his share to the person who was to go in the vessel as supercargo. *Held*, that the term "owners," was descriptive of the persons intended to be insured, and referring to matters out of the policy, was open to explanation by extrinsic proof.

10. As the underwriters understood, when they made the insurance, that it was on account of the plaintiffs only, it was *held*, that they could not set up that the supercargo became an owner before the commencement of the risk.

11. The bill of lading, on its face, and the other papers, showed that the interest of the three owners, after shipment, was joint: but there was an endorsement on the bill of lading, stating that one half the cargo was the property of one of the plaintiffs, and the other half, the property of the other plaintiff and the supercargo: *Held*, that the endorsement was intended only to show the extent of each owner's interest; and that the separate purchase of the cargo, together with the endorsement, did not prove that their interests were several.

12. Before the end of the voyage, it was broken up, and the insured abandoned on learning the fact. The instructions to the master and supercargo, showed that the rights and duties of the latter, as supercargo, were not to commence until the end of the voyage. On the loss of the voyage, the master delivered the specie to the agent of the supercargo, and it was invested in cotton. *Held*, that as the supercargo was not interested in the policy, his acts did not bind the other joint owners; and that his capacity of supercargo suspended whatever powers he might have had as a partner, and that the investment by him of the specie,

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

[2] [Reported by Elijah Paine, Jr., Esq.]

was as agent for the underwriters, and did not constitute an act of ownership, so as to waive the abandonment.

At law. This was an action of assumpsit [by Charles I. Catlett and James Keith, Jr., against the Pacific Insurance Company of New York], on a policy of insurance, on the cargo of the brig Sphinx. The questions decided arose on a motion for a nonsuit. The policy, which was in the common form, and dated on the 2d of February, 1818, purported to be effected by Le Roy, Bayard & Co., on account of the owners, upon all kinds of lawful goods and merchandises, laden or to be laden, on board the good American brig called the Sphinx, at and from Alexandria, Columbia, to Canton, and at and from thence back to Alexandria; beginning the adventure on said goods from and immediately following the loading thereof on board the said vessel at Alexandria, &c. The amount insured was 30,000 dollars. The declaration contained two special counts, the first of which, after setting out the policy, averred an undertaking of the company to insure the plaintiffs; and that 30,000 Spanish milled dollars were shipped at Alexandria on board the Sphinx; and an interest in the plaintiffs: That said vessel, on the 31st of March, 1818, sailed on her said voyage, in the course of which, she was, with the said goods, wholly lost. The averment of loss in the second count, was as follows: That the vessel having been disabled by the perils of the seas, was obliged to seek a port; and on the 31st of July, 1818, having reached the isle of France, a survey was held upon her, and the surveyors reported that she could not be repaired but at a cost of 20,000 dollars; whereupon the vessel was sold by a decree of the court of vice-admiralty, and the voyage broken up, and the plaintiffs abandoned to the defendants the part of the cargo insured by them.

The court having decided that the preliminary proof was sufficient, the plaintiffs introduced the following evidence, subject to exceptions: The policy, and invoice of the cargo. A copy of the register of the vessel, certified by Joseph Nourse, register of the treasury of the United States, to be a true copy of the original register on file, in the registry-office, which certificate was duly authenticated by the secretary of the treasury. The deposition of Peyton R. Page, the master of the vessel, taken under the act of congress. He testified that the cargo of the vessel, when she sailed from Alexandria, on the 31st of March, 1818, consisted of twenty-two kegs and seventeen boxes, containing 90,000 Spanish milled dollars, and of twenty-four barrels of ginseng. That on the 5th of April, the brig met with an injury in the Potomac, which it took until the 11th of April to repair. Proceeding on her voyage, she had bad weather, which caused the vessel to labour and strain very much, and the oakum worked out of her seams next the copper, in consequence of which she leaked considerably, and it was thought advisable to bear away for Madeira to repair. There she was calked, and on the 16th of May, proceeded on her voyage. From the 20th of June to the 16th of July, they had very heavy weather, and rough seas, the vessel labouring and leaking badly. On the 16th day of July, she encountered one of the heaviest gales of wind the deponent ever knew, and was so much strained, that the next day she made three feet water in fifteen minutes, and all the pumps kept her free with difficulty. The seams on the larboard side were open abreast and abaft the mainmast, the length of five feet. The stone ballast, guns, and spare spars were thrown overboard. The vessel worked in a frightful degree, so that the decks and beams were constantly in motion. The weather moderating on the 21st, the crew covered the seams with canvass, which diminished the leak, but the brig continued to work as if going to pieces. All hands were unanimous for making for the first port, and on the 29th of July, they arrived at the isle of France. A survey was held on the 31st of July, and the cargo having been landed by order of the surveyors, they again went on board on the 14th of August, and had the brig opened in various places, when it was found, deponent being present and seeing it, that eight of her puttocks were broken on her larboard side, and two or three on her starboard side. And the said surveyors reported, that the said brig could be repaired, but that it would cost to repair her there, as much as 20,000 dollars; upon which report, and upon the request of deponent, the court of vice-admiralty, in the isle of France, ordered the said brig to be sold, and she was sold accordingly. There was no opportunity to send on the cargo to Canton. Annexed to Page's deposition were the bill of lading, his letter of instructions, and the letter of instructions to Thomas R. Keith, the supercargo.

The bill of lading purported that 90,000 Spanish milled dollars, marked and numbered in the margin, 22 kegs, 17 boxes, were shipped on board the Sphinx, by Charles I. Catlett, James Keith, Jr., and Thomas R. Keith; to be delivered at Canton, to Thomas R. Keith, supercargo, on board, or his assigns. On the bill was the following endorsement:

45,000—say forty-five thousand dollars, the property of James Keith, Jr., and Thomas R. Keith.
45,000—say forty-five thousand dollars, the property of Charles I. Catlett.

$90,000

The letter of instructions to Captain Page, which contained all his instructions, was as follows: "Alexandria, March 28, 1818. Capt. Peyton R. Page, Dear Sir—You will please take command of the brig Sphinx, and proceed from hence to Canton, in China, where

you will deliver your cargo to Mr. Thomas R. Keith, supercargo on board. Mr. Keith will furnish you with a return cargo, with which you will please proceed from Canton, with all possible despatch, direct to this port, guarding against any deviation that might affect our insurance; and we wish you to be very particular to conform to the laws and customs of China.—Wishing you a pleasant voyage, we remain your friends and servants, Charles I. Catlett, James Keith, Jr."

The letter of instructions to Thomas R. Keith, the supercargo, was as follows: "Alexandria, March 26, 1818. Mr. Thomas R. Keith, Dear Sir—We have shipped on board brig Sphinx, Peyton R. Page, master, ninety thousand Spanish dollars, to your address, which we wish you to invest on your arrival at Canton, in the articles named in the annexed memorandum. If our money should not be sufficient to load the brig back, you are at liberty to negotiate a credit in Canton, for a sum not exceeding thirty thousand dollars; and for this object we hand you a power of attorney, and letters from our highly respectable friends, Messrs. James and Thomas H. Perkins, of Boston, and Le Roy, Bayard & Co., of New-York, which, we trust, will enable you to obtain a credit on the most favourable terms. As a compensation for your services, we agree to allow you three per cent. commission. Relying upon your best exertions to promote our interest, and wishing you a pleasant voyage, we remain your friends and servants, Charles I. Catlett, James Keith, Jr. P. S.—March, 28th, 1818.—If you cannot obtain freight, and find it necessary to fill up the brig, and can obtain credit upon such terms as you think favourable, you are at liberty to take a credit of sixty thousand dollars, instead of thirty thousand. Be careful to be placed upon the most favourable footing, as we shall be very careful to promptly comply with your engagements. Yours truly, Charles I. Catlett, James Keith, Jr."

The plaintiffs also gave Thomas R. Keith the following letter of attorney: "Know all men by these presents, that we, Charles I. Catlett and James Keith, Jr., of Alexandria, District of Columbia, have nominated and appointed, and by these presents, do nominate and appoint Thomas R. Keith, our agent and attorney, to transact our business in Canton. Also, to negotiate a loan, or purchase merchandise on a credit, hereby binding ourselves and our heirs to comply with all contracts made for our account in Canton, by said agent and attorney. Given under our hands and seals, the 28th day of March, 1818. Charles I. Catlett, James Keith, Jr. Sealed, &c. in the presence of A. Moore."

It appeared from this deposition, that after the vessel was condemned, Captain Page delivered the dollars to Mr. Bickham, the American consul at the isle of France, and the agent of Thomas R. Keith. He was selected by Page and Keith as the safest person they could get to take charge of it. Captain Page considering Keith as a part owner, thought himself justified in delivering the same to his agent, believing it to be the best course he could pursue for those who might be interested in the cargo. Not wishing to create any expense to the owners, in relation to himself, he engaged as a mate on board a ship, and left the isle of France. What became of the dollars he did not know, but had understood that they were laid out in cotton at that place. A copy of the proceedings, and condemnation of the vessel, in the court of vice-admiralty, at the isle of France, with a certificate of the American consul to authenticate it, was offered in evidence, without any other proof of its authenticity. The impression on the seal of the court was effaced.

The plaintiffs offered the following evidence, (besides the invoice, bill of lading and endorsement,) in relation to their interest in the policy: Charles I. Catlett and James Keith, Jr., each furnished a moiety of the 90,000 dollars, separately. After it was shipped, and between the 20th and last of February, James Keith, Jr., declared in the presence of Page and Catlett, that he had given to his brother, Thomas R. Keith, one-third of his interest in the shipment, and that he was to have one-third of the profits. James Keith, Jr., observed, that he presumed it would be an insurable interest, and Catlett agreeing with him said, that as they were short insured, he would write to Thomas H. Perkins, of Boston, to effect further insurance, and that Thomas R. Keith's interest should be insured in the Boston policy. Page believed that Thomas R. Keith had no interest in the shipment until about the time of this conversation. On the 4th of February, Perit & Cabot, of Philadelphia, gave Thomas R. Keith a letter to Messrs. Perkins & Co., introducing him as the supercargo of the Sphinx, belonging to the plaintiffs.

The letters to Le Roy, Bayard & Co., and to Thomas H. Perkins, directing the insurance to be made, were as follows:

"Alexandria, January 29, 1818. Messrs. Le Roy, Bayard & Co. Gentlemen—Will you have the goodness to effect insurance on joint account of Mr. James Keith, Jr., and myself, upon brig Sphinx, Captain Peyton R. Page, from Alexandria to Canton, and back to Alexandria, against all risks? Say on vessel 10,000 dollars, valued at this sum—On specie 70,000 dollars, provided it can be done in an office of unquestionable solidity, at or under six and a half per cent. The balance of the specie we can get insured here at that rate. The brig is in complete order, and will probably sale by the middle of February. Very respectfully your most obedient servant, Charles I. Catlett."

"Alexandria, March 5, 1818. Colonel Thomas H. Perkins. Dear Sir—If perfectly con-

venient, you may, if you please, effect insurance on specie out, and merchandise home, at and from Alexandria, to, at, and from Canton, back to Alexandria, with the usual privileges for trade and refreshments; say 26,000 dollars, per brig Sphinx, Peyton R. Page, master, for account of James Keith, Jr., Thomas R. Keith, and Charles I. Catlett, if to be done at six per cent. Mr. James Keith, Jr., and myself, have already had insurance effected on 80,000 dollars. With esteem and respect, your most obedient servant, Charles I. Catlett."

William Bayard, Jun. of the house of Le Roy, Bayard & Co., testified that he went with his father to the office of the defendants to get the insurance effected; that his father went into the office with Catlett's letter, directing the insurance to be made, and that it was their practice to show such letters to the underwriters.

A letter was introduced from Catlett to Le Roy, Bayard & Co., dated the 7th of February, acknowledging the receipt of a letter advising James Keith, Jun. and Catlett of the insurance on the Sphinx and cargo. Thomas H. Perkins & Co. effected the insurance in Boston, agreeably to the directions of Catlett, at the office of the Suffolk Insurance Company, who subsequently paid the loss. John Wheelwright, who was called to prove the residence of the plaintiffs, testified, that James Keith, Jun. was a resident of Virginia. In December, 1824, Catlett removed to Virginia, and still resides there. About the time of his removal, he informed witness that, as a resident in the District of Columbia, he could not sue in the United States courts, and that he meant to procure a residence elsewhere, to enable him to sue. He said he intended to leave Alexandria, and not return, and to reside permanently in Virginia. On his removal he took a lease of a house in Virginia for one year.

On this evidence the plaintiffs rested their case; and,

T. A. Emmet and G. Griffen for the defendants, moved for a nonsuit on the following grounds:

1. That Catlett, as a citizen of the District of Columbia, could not sue in this court, and that he had not acquired the right by his residence in Virginia. In support of this position it was contended, that Catlett, having removed to Virginia with the avowed object of acquiring a residence so as to enable him to sue in the circuit court, it was an act in fraudem legis, and the right to sue in such court could not be acquired by it. It stood on precisely the same ground as the assignment of a chose in action for the same purpose, which had been decided not to give the court jurisdiction. And it was held to be immaterial that the assignment of the chose in action was for a valuable consideration; the decision was on the ground that it was an attempt to deprive the state courts of their jurisdiction. What varies this case from that in principle? They are neither of them cases contemplated by the constitution.

2. That the plaintiffs had not proved the warranty that the Sphinx was an American vessel. The warranty of national character implies, that the vessel shall have the necessary papers on board to show such character. Phil. Ins. 127; 14 Johns. 314; 1 Condy, Marsh, Ins. 406. But no evidence has been offered to show that any such papers were on board during the voyage; and the vessel is not even proved to have been American. The transcript from the treasury department is but a copy of a copy, and as such cannot be evidence. It is not the original register which is sent to the treasury department when the vessel is lost. That remains with the collector.

3. That the loss of the property insured was not proved. The loss is not pretended to have been an actual total loss, and the plaintiffs have not made out such a technical total loss as the law considers equivalent to an actual one. There is no proof that the Sphinx could not have been repaired at the isle of France. What the captain says of the proceedings of the surveyors and court of admiralty is not evidence. He should have given his own opinion as to her being reparable, and at what expense. This he has not done; he only says that some of her puttocks were broken. Why was he not called upon to prove the report of the surveyors, and the other proceedings of the court at Mauritius? Why were not the surveyors themselves examined?—for even a copy of their report, if established in proof, would not be evidence of the facts contained in it. [Marine Ins. Co. v. Hodgson] 6 Cranch [10 U. S.] 206, 219. The record of a court of vice-admiralty is only evidence of the fact of condemnation; but in this case there is no survey proved and no condemnation. The proceedings of the court of vice-admiralty are not evidence per se; and no proof has been offered of the seal, which is effaced, of handwriting, nor any thing else. It was not a court acting under the law of nations, but a municipal court of the country. The condemnation binds the rights of no one, but is a mere justification of the acts of the master. The question whether the voyage was properly broken up, is a question of law for the court to determine. King v. Delaware Ins. Co., 6 Cranch [10 U. S.] 71.

4. That there was a non-joinder of parties, Thomas R. Keith, one of the owners insured, not having been made a plaintiff. All the owners should have been joined. 16 Johns. 34. The policy is on account of owners. It is immaterial who were the owners when the policy was made. The question is, who were the owners when the policy attached; that is, on shipment of the goods? The bill of lading shows that at this time Thomas R. Keith was an owner. And the evidence of Page does not prove that he was not an owner even before

the insurance was effected; and what he says, is of a conversation of the plaintiffs in the absence of the defendants, and not evidence. The letters from Catlett to Bayard & Co. and to Perkins are not evidence. It does not appear that the defendants knew when they insured that it was for the plaintiffs only. The letter from Catlett to Bayard is not proved to have been shown to them; and if it had been, parol evidence could not be admitted to alter the legal construction of the policy. All previous contracts and explanations are merged in the policy, and a court of equity—[Graves v. Boston Marine Ins. Co.] 2 Cranch [6 U. S.] 419—alone can rectify it. What is the legal construction? That all the owners at the time of shipment were intended to be insured. The insurance is on goods laden or to be laden on board, and the risk is to commence from the lading. Probably there was no interest in any one when the insurance was effected. If partnership property is insured, it is on account of all the partners, unless it clearly appear to be for account of only some of them.

5. That there was a variance between the declaration and proof: The declaration averred a joint interest in Catlett and James Keith, Jun. and the evidence showed that their interests were several. [Graves v. Boston Marine Ins. Co.] 2 Cranch [6 U. S.] 419; 3 Starkie, 1159; 5 Taunt. 208; 16 East, 141.

6. That the plaintiffs had exercised acts of ownership over the property insured after abandonment, by investing the specie in cotton. Thomas R. Keith was one of the insured, and a partner with the plaintiffs in the specie, and his acts at the isle of France are binding upon them. He received the property as owner. Phil. Ins. 453; [Chesapeake Ins. Co. v. Stark] 6 Cranch [10 U. S.] 272. And this view of the case is the most agreeable to justice. The investment of the specie in cotton was a speculation made by him for their joint benefit, and because it proved to be a losing one, the loss ought not to be thrown upon the defendants; they did not undertake to insure against the fluctuations in the market. This was such an act of ownership as waived the abandonment. 10 Johns. 177.

D. B. Ogden and J. Duer for the plaintiffs, insisted—

1. That the defendants could not avail themselves of the objection, that Catlett was not a citizen of Virginia under the general issue; they should have pleaded it in abatement. But he has been proved to be a citizen of Virginia, and the court cannot inquire into his reasons for becoming so. He has brought himself within the constitution and laws, and is by their provisions entitled to sue in this court; and what power have the court to say that his case forms an exception? The case of a chose in action is not analogous; in that case congress were obliged to pass an act specially providing against a fraudulent assignment; and if they had not expressly interfered by law, this court must have entertained a suit where the consignment had been made merely to give the court jurisdiction. And this is the strongest argument against this position of the defendant's counsel. In the case of the chose in action, cited from Dallas, the assignment was considered by the court as collusive and without consideration, and no interest passed by it. Here there has been a real bona fide removal. The motive was not merely to give the court jurisdiction; it was a permanent removal.

2. The only document necessary to prove the national character of the vessel, was her register. 14 Johns. 314. The voyage was in a time of general peace, and the documents required during war could not be wanted. Evidence of American ownership is enough prima facie (2 Serg. & R. 133) to prove this warranty.

3. The proof of loss is sufficient. At any rate there is enough to go to the jury. The testimony of Page shows the injuries the vessel had sustained, and it is a reasonable inference from his conduct, and what he says of the report of the surveyors, that his opinion coincided with theirs. If the proceedings of the court which condemned her are not themselves in evidence, the captain does prove the facts that a report of unseaworthiness was made by the surveyors, and that the vessel was condemned and the voyage broken up.

4. It is true that all the parties interested in the policy must be joined. But Thomas R. Keith, although interested in the shipment, had no interest in the insurance. The construction of the policy is not necessarily that it was for all the owners. "Owners" does necessarily mean sole owners. There can be no doubt that the plaintiffs had a right to insure their separate interest; and the only question is, for whom was the insurance made? It was effected by Le Roy, Bayard & Co. as agents. Agents for whom? Certainly for their employers, who were the plaintiffs. They paid the premium, and were the only parties to the contract. Thomas R. Keith had nothing to do with it, and can have no interest in it. Even if Thomas R. Keith had been an owner at the time the policy was effected, which he was not, it would have made no difference, so long as those who effected the insurance were agents for the plaintiffs alone.

5. The averment of joint interest in the plaintiffs is proved. Why, if their interests were separate, are there no marks upon the boxes? Suppose a loss, who would have borne it? There is nothing by which each could know his own property. The memorandum on the back of the bill of lading was only to show their shares in interest; and is this to be received to disprove a partnership positively made out?

6. The fact of the investment of the specie in cotton is not made out. But suppose it were: The specie was to be delivered to Thomas R. Keith at Canton, and not before; and until it reached Canton, he had no right to interfere with it as joint owner, supercargo, or in any other capacity, for the owners. The master was the sole and exclusive agent for the owners during the voyage, and the only person whose acts could affect their rights. No one in case of loss had any right to interfere with the cargo except the master. And the abandonment constituted him an agent for the underwriters. If a speculation was made it was for their benefit. It is immaterial that Thomas R. Keith made the investment. He could have no right to act for the owners; and if he had any agency, it was as a sub-agent for the underwriters through the captain. The captain by his letter of instructions could not deliver the specie to Thomas R. Keith until their arrival at Canton. It is a mere inference, that Thomas R. Keith did make the investment for the benefit of the owners; there is no proof of the fact. It is also an assumption that he acted in the capacity of joint owner. Suppose the master a joint owner. Would his duty to act for the insurers be taken away because he was owner as well as master? It is said, that it is to be inferred from the nature of the act that it was done by Keith as joint owner, and for the benefit of the owners. But why? It was necessary to transport the specie from the isle of France—it could not remain there; and the cotton, for aught that appears, could be as easily transported. That the investment was a judicious one is no evidence that he acted for the owners and not for the underwriters. If he was acting for the benefit of the latter, it is to be presumed he would have acted judiciously. And the investment was such an act as if made for them would have been good. 1 Marsh. Ins. 170; 1 Term R. 621n. But if the act was conclusive against himself it did not bind his copartners, if they were such. If there was a copartnership, the abandonment dissolved it.

THOMPSON, Circuit Justice. I regret that the counsel have not thought proper to adopt the course I suggested, of putting this cause into the shape of a special verdict, or a case subject to the opinion of the court, so as to afford me an opportunity of giving a more deliberate consideration to the several points that have been raised on the motion for a nonsuit, than is practicable in the hurry of a trial. But as this course has not been deemed expedient, I must proceed and dispose of these questions according to first impressions.

1. It has been objected in the first place, that the plaintiffs have not shown themselves entitled, under the constitution and laws of the United States, to bring their action in this court. There can be no doubt but that under the present pleadings it is necessary for the plaintiffs to prove that they are citizens of Virginia, and that the defendants are citizens of New-York. It has been said on the part of the plaintiffs that the question cannot arise upon the plea of the general issue, but must be raised by a plea in abatement. This proposition I think cannot be sustained. The citizenship of the parties is a necessary averment in the declaration, and the want of it is error for which the judgment would be reversed. And by the plea of the general issue, the proof of all necessary averments is thrown upon the plaintiff.

The question for consideration then is, whether, in the present case, this averment has been proved. There is some difficulty in understanding, precisely, the sense in which the term citizen is used in reference to this question. A citizen of the United States is, to many purposes, a citizen of each state; and I am not aware that it has ever been held, that where there is a permanent change of residence by a citizen from one state to another, the party so removing must acquire all the rights and privileges of a citizen of the state to which he removes, according to the state laws, before he can come into the circuit court of the United States. It has been held, however, that it is not enough for the party to aver, that he is a resident or inhabitant of the state, but there must be an averment in the language of the law and constitution, that he is a citizen. This presents some difficulty then, as to the proof that will sustain such averment. But I am inclined to think it is sustained by proof of a permanent and fixed residence, under such circumstances that it may be said, that he has his domicil there. A mere temporary residence for some special purpose might not be sufficient. In the present case there is no question with respect to Keith, one of the plaintiffs. The objection only goes to Catlett, the other plaintiff. And with respect to him, the proof is substantially, that he removed from Alexandria into Virginia in December, 1824, avowing that one of the objects of his removal was to enable him to prosecute this suit in the courts of the United States, at the same time declaring, that it was a permanent removal, never intending to return again to reside in Alexandria—that he leased a house in Virginia, and had lived there ever since his removal with his family. It has been said that his declaration, that one object he had in view by the removal, was to enable him to bring this suit, makes it a fraud upon the law. I do not think it can be considered in this light. If he had avowed that his sole object was to place himself in a situation to bring this suit, with an intention of returning to his former residence when it was ended, it might have been considered a fraud upon the law. But if he deemed the privilege of bringing a suit in the courts of the

United States of sufficient consequence to justify a bona fide change of residence, he cannot be charged with a fraudulent evasion of the law, so as to make the act void. Whether it was a bona fide, or mere colourable removal, is a question for the jury. It is incumbent also on the plaintiffs to show, that the defendants were citizens of New-York; as a corporation there can be no citizenship. Their liability to be sued in this court must depend upon the citizenship of the individual members. The proof, with respect to them, is not very satisfactory; but as they are a company incorporated by a law of this state, and transacting their business in this city, it may be enough prima facie, to warrant the jury in finding that they are citizens of this state.

2. The next inquiry is, whether the assured have shown a compliance with the implied warranty in the policy, that the Sphinx was an American vessel. That she was American built, and owned by American citizens, is fully proved, so far as parol proof may be admissible to establish the fact, that the vessel was American property. The testimony of the captain is full on this subject. But it is said that this warranty not only implies, that the vessel was American property, but that she was duly documented as such, so as to show her national character. It was intimated by one of the counsel, that other documents than the register were necessary for this purpose, but it was not distinctly pointed out what those documents were; and the objection to this extent has not been urged by the other counsel. And I understand it, therefore, to be conceded, that an American register, if on board, would have been a compliance with this warranty; and I am not aware of any other document that could have been required. There being a state of universal peace, and no treaty provisions applicable to the voyage, the register was all that could be necessary to show the national character of the Sphinx. No question of neutral or belligerent rights could arise. This objection, however, under the testimony that has been offered, divides itself into two branches: (1) Whether the register has been sufficiently proved? (2) Whether it was on board the vessel? The proof of the register consists of the official certificate of Joseph Nourse, register of the treasury of the United States, that the document produced in evidence is a true copy of the original register on file in his office, together with a certificate of the secretary of the treasury, under the seal of the department, that Joseph Nourse is the register, and that the document is duly authenticated. It is said, however, that this is at best but a copy of a copy, and therefore not evidence. If the fact were so, the objection might be well founded. But, according to the provisions of the registry act, as I understand it, this is a copy of the original. The register is a document issued from the office of the register of the treasury, signed by the secretary of the treasury, and under the seal of the department. It is sent in blank in many parts to the collector of the port where it is to be used, and by him filled up as occasion may require; of which he is required to keep a copy in a record for that purpose provided, and also to transmit a copy of the same to the register of the treasury to be recorded; and when any vessel is lost, as in the present case, it is made the duty of the master to send the original register to the register of the treasury to be cancelled. And the document now produced is a copy of the original so returned. No further provision is made by the act for the disposition of the register after it is cancelled; but I believe it is the practical construction given to the act, not to destroy the register so returned, but to keep it on file in the office. It may, therefore, be well considered a document required by law to be deposited in the register's office, there to remain; and if so, a copy thereof was admissible, and was duly authenticated. The proof that the register was on board the vessel, is not very satisfactory. There are, however, some circumstances affording such a presumption, and this is matter for the jury.

3. The next objection is, that there is not sufficient evidence of the loss of the vessel. The proof offered to show the loss, consists of the vice-admiralty proceedings, on the survey and condemnation of the vessel at the isle of France, and the deposition of the captain. These admiralty proceedings were not offered in evidence until after the motion for a nonsuit had been made, and were admitted subject to objection, without any opinion having been expressed by the court as to their admissibility. These proceedings purported to be under the seal of the court, certified by the register, and accompanied by a certificate of the American consul, under his seal of office, that he was such register. These proceedings I think are not so authenticated as to entitle them to be read in evidence. The seal does not prove itself. There is no impression from which any conclusion can be drawn, that it is the seal of that or any other court: And some proof aliunde is always required, either that it is the seal of the court by a witness who knows the fact, or by proof of the handwriting of the judge or the clerk, or by an examined copy, compared with the original in the proper office, or some other evidence of a similar character. They do not alone, unaided by extrinsic evidence, carry with them that verity as to make them evidence in foreign courts. I attach no credit to the consular certificate. It has been said that he is an officer recognized by the law of nations, and entitled to credit. The law of nations recognizes him only in commercial transactions, but not as clothed with any authority to authenticate judicial pro-

ceedings. These proceedings must, therefore, be laid out of view. There is evidence, however, in the deposition of the captain tending to show the loss, and which must be submitted to the jury for that purpose. He describes the injury which made it necessary to put into the isle of France to repair, and swears that no other vessel could be obtained to carry on the cargo, which affords a strong inference that the Sphinx could not be repaired at that place, so as to prosecute the voyage at a less expense than that estimated by the surveyors. I do not mean to intimate that his testimony proves, or is admissible to prove, the proceedings of the surveyor, any further than will warrant the conclusion, that he coincided with them in opinion; he making the report of the surveyors the basis of his application for a condemnation of the vessel as unseaworthy: All which affords a pretty strong inference that, in the judgment of the captain, the vessel could not be repaired at that place at a less expense than twenty thousand dollars. At any rate, this is testimony proper to be submitted to the consideration of the jury, and the court cannot say there is no evidence of loss.

4. The next objection is, that the averments in the declaration are not supported by the proofs in the cause—that the averment is, a joint interest in the plaintiffs in this cause, and that the proof shows that Thomas R. Keith was either jointly interested with them in the specie insured, or that there was no joint interest in the three, but a separate interest in one moiety in Catlett, and a joint interest in the other moiety in the two Keiths, and that in neither case does the evidence support the averment. This necessarily calls for the inquiry, in the first place, for whom was this policy effected, and whose interest does it cover? The policy is in the name of Le Roy, Bayard & Co. and on account of owners. And it is said on the part of the defendants, that this is on account of the owners at the commencement of the voyage, and when the policy attaches, and not the owners when the policy is effected. This perhaps would be the legal construction, in the absence of all proof, explanatory of the term owners as used in the policy. It is very well established by the evidence, that Thomas R. Keith had no interest in this specie when this policy was underwritten; and that in point of fact, the only interest intended to be insured, was that of the plaintiffs in this cause. There can be no question but that one or more joint owners may insure their interest in joint property. The only question to be determined is, whether it has been done in this instance. It is equally clear, that if the insured aver an entire interest in themselves, in the subject insured, such averment cannot be supported by evidence of a joint interest with others. Nor can an averment of a joint interest with others, be supported by proof of a sole interest. As I understand the declaration in this cause, it only avers a joint interest in Catlett and James Keith, Jr., to the extent of thirty thousand dollars, and not an exclusive interest in the entire cargo. Will the policy then admit of the construction, that the insurance is for the benefit of Catlett and James Keith, Jr., and not for the benefit of Thomas R. Keith? It must be borne in mind, that application for insurance was not made by the plaintiffs themselves, but through their agents, pursuant to instructions; and the policy was filled up in the name of the agents for account of owners. The term "owners," is only descriptive of the persons intended to be insured, and they cannot sue on the policy without bringing themselves within that description. It is equally important and necessary, that they should show for what owners the agent acted, or who were intended to be insured under that description. Owners may include all concerned in interest, but such a construction is not necessarily to be given to the instrument. It is a proper subject for explanation. It does not contradict the policy to show who were the owners intended to be insured. The term "owners," as here used, necessarily refers to matter out of the policy, and cannot be explained by any thing appearing on the face of the instrument. It must, of course, be open to explanation by extrinsic evidence.

It certainly does appear from the facts, that no property was intended to be covered but the property of Catlett and James Keith, Jr. Whatever may have been the interest of Thomas R. Keith, it is manifest that Catlett, in instructing his agent to insure, did not mean that he should insure Thomas R. Keith's interest, but only his own and James Keith, Jr.'s, for Thomas R. Keith had not, at that time, any interest in the specie. If the underwriters understood when they underwrote the policy, that it was the agent's intention to insure only for Catlett and James Keith, Jr., and not for Thomas R. Keith, they cannot now set up that he was one of the insured, because he afterwards became part owner; for they never undertook to insure his interest. Their contract was with Catlett and James Keith, Jr., and no one else. That such was the understanding of the underwriters, is very satisfactorily made out. It is objected, that under this policy Thomas R. Keith might recover as one of the insured. But, I think, that the letter of instructions to Le Roy, Bayard & Co. would always be an insuperable obstacle to any such recovery.

The next question is, whether the evidence shows a joint property in Catlett and James Keith, Jr., conformably to the averment in the declaration. No circumstance has appeared from which it has been attempted to infer that their interests were separate, except the endorsements on the bill of lading. The bill of lading, on its face, the invoice, and all the papers which bear on this question, show that their interest was joint. And I consider the endorsements as made merely

for the purpose of showing the extent of the interest of each owner, and not to contradict the bill of lading on its face. But it is said they furnished their proportions separately: It is certain that each purchased a moiety separately; but this proves only that they were separate owners before the specie was shipped; but it proves no more. When it was put on board. their joint interest commenced. The object was not to purchase it jointly, but to ship it jointly; and a joint ownership, after it was shipped, is sufficient. Besides this, there is no evidence of separate interests. There were no marks on the bill of lading to show that the plaintiffs intended to be separate owners, or to enable any one to identify the property of each. I disregard entirely the marks on the manifest, contained in the admiralty proceedings, as they have been entirely excluded, as not having been properly authenticated.

5. The only remaining objection that has been urged in support of this motion is, that on the breaking up of the voyage, at the isle of France, the specie was delivered by the captain to Thomas R. Keith, one of the part owners, and by him invested in cotton. This, it is said, exonerates the underwriters from all responsibility. The legal effect and operation of this act must depend upon the character in which Thomas R. Keith is to be considered as acting. If the view which I have taken of this case, under the last objection, be correct, he is not a party to this policy, and his interest in the cargo is in no manner covered or protected by it. And if the plaintiffs are to be bound or prejudiced by his acts, it must be by reason of their connexion as part owners. In all the cases which have been referred to, where the acts and interference of the owners, have been held to take away the right of abandonment. or to waive it, if made—they were the assured. In such case it is just and reasonable that the acceptance of the cargo, at any intermediate port, should discharge the underwriters. The master of the vessel, in whose possession the cargo is placed, is their agent, and they may revoke his authority, and take the cargo into their own hands. They are the only parties interested in the policy, and have the right to discharge it: But it by no means follows, that such authority is vested in one of the joint owners who has no interest in the policy. It has been said that the joint owners were partners, and that the law applicable to the rights of partners, must govern this case; and that the act of one, in judgment of law, is the act of all. There is no doubt, but in partnership transactions, all the partners are bound by the acts of each which fall within the scope of the partnership. But I cannot consider this such a case. The rights and authority of partners, whatever they might have been, were suspended and modified by the special arrangement between them, under which this property was shipped. One of the joint owners, who had no interest in this policy, was constituted supercargo, and as such, became the agent of the plaintiffs, so far as their interest was concerned. His rights and powers as partner, were suspended, and merged in his new character of supercargo; and he thereby parted with the possession and control of the property in transitu. His functions, as supercargo, did not commence until the arrival of the vessel at Canton. Upon the voyage the cargo was in the possession, and under the management and control of the master: He was the agent of the owners, and responsible to them under his bill of lading. It cannot be pretended that Thomas R. Keith, as part owner, would have had a right to demand of the master this specie, and to have invested it in cotton, or any thing else, if the voyage had not been broken up. A delivery of it to him would not have exonerated the master from his liability on the bill of lading; and if not, I am unable to see why the breaking up of the voyage should give to Thomas R. Keith any greater rights. The captain. thereupon, became the agent of the underwriters, and bound to them for the faithful discharge of his duty as such; and they became responsible for his acts. And the same rule applies to the supercargo; he becomes the agent of the underwriters. And the assured are not bound by his acts where there is a right to abandon. I do not, therefore, think that the plaintiffs' claim upon the underwriters is taken away by the acts of Thomas R. Keith, at the isle of France.

I have thus briefly noticed the several grounds which have been urged in support of the motion for a nonsuit, some of which are by no means free from difficulty; and I am not prepared to say, that I do not entertain doubts upon some of the questions that have been raised and discussed. From what has fallen from the bar, however, there is little reason to think that either party will be satisfied with the result of the trial here, but that the cause must ultimately go to the supreme court of the United States. Under such circumstances, I deem it most prudent and discreet, and best calculated to advance the ends of justice with as little expense and delay as practicable, to proceed in the cause, and have the whole merits of the case disclosed. And this course I should think advisable, even if I entertained stronger doubts than I do upon the questions which I have been called upon to decide. The motion for a nonsuit is accordingly overruled.

The defendants then proceeded with their defence, which was, that some of the stockholders of the Pacific Insurance Company were not citizens of New York. Having proved that three stockholders resided in other states. the court ordered the plaintiffs to be nonsuited.

CATLETT (SMITH v.). See Case No. 13,021.

Case No. 2,518.

CATLIN v. CURRIER.

[1 Sawy. 7.][1]

Circuit Court, D. Oregon. Jan. 17, 1870.

CHATTEL MORTGAGE—WHEN VOID—FORECLOSURE—RIGHTS OF THIRD PERSONS.

1. A mortgage of personal property, accompanied by an oral agreement or understanding between the parties thereto, that the property should remain in the possession of the mortgagor, and be disposed of by him in the course of his business, and the proceeds thereof applied to his own use, is a conveyance or assignment of such property in trust for the person making the same, and, therefore, void as against the creditors existing or subsequent of such mortgagor. Code Or. 655.

[Cited in Re Morrill, Case No. 9,821.]

2. A decree foreclosing a chattel mortgage does not affect the rights of third persons in the goods mentioned therein.

At law. This action was brought [by John Catlin, assignee of John A. Daly] to recover damages for the conversion by the defendant [William Currier], to his own use, of a stock of hats and hatter's tools, alleged to have belonged to the estate of Daly.

On the trial, the court, sitting without a jury, found the following facts:

1. That about the month of November, 1866, the defendant being then and ever since engaged in the business of a merchant tailor and clothier at number 103 Front street, Portland, formed a partnership with John A. Daly, a hatter, to carry on the hat business under the firm name of John A. Daly & Co., at the defendant's place of business aforesaid; and that the defendant, at the commencement of said partnership, advanced said firm the sum of $1,500 in gold coin; and on March 12, 1867, indorsed the note of the firm for the sum of $1,000 in gold coin, which he afterwards paid with interest to Ladd & Tilton, bankers, at Portland.

2. That Daly expended the $1,500 aforesaid, in the purchase of stock for the firm, and at the same time obtained about $2,500 worth of stock on credit, and that on December 24, 1867, said firm, by agreement of the parties thereto, was dissolved, and the stock of goods and fixtures on hand were turned over to Daly, who was to continue the business on his own account at the same place.

3. That the business of Daly & Co. yielded no profits, nor did the defendant receive any money from it as profits or otherwise, but that Daly during the existence of the firm drew out of the business from $50 to $75 per month for his support. That at the date of the dissolution aforesaid Daly & Co. were owing the defendant the sum of $2,546 in gold coin, for money advanced and paid by the defendant as aforesaid, for which sum Daly then gave his promissory note, payable on demand to the defendant or order, with interest at one per centum per month, to secure the payment of which note, Daly at the same time executed a mortgage to the defendant upon the stock and fixtures of the hat business aforesaid, then being and to remain at 103 Front street aforesaid, with condition that the same should be void upon the payment of $2,546 in gold coin, on or before December 24, 1868, with interest at the rate of one per centum per month; that the mortgage further provided that if default should be made in the payment of the principal sum, or any installment of the interest thereon, then the mortgagee was empowered to take the goods into his possession and sell the same by due process of law, or by agreement of the parties, and out of the money arising therefrom to pay the debt, interest, charges, etc., and until default be made as aforesaid, the mortgagor, or his assignees, were to remain in the possession of the goods and in the full and free use and enjoyment of the same.

4. That the mortgage aforesaid was duly filed in the county clerk's office of the proper county on December 27, 1867, but no affidavit was ever made or filed by the mortgagee, therein setting forth his interest in the mortgaged property. That Daly made default and failed to pay the principal sum mentioned in such mortgage and the installments of interest thereon, or any part thereof, although requested so to do, whereupon the defendant on or about November 25, 1868, took possession of all the stock and fixtures then in the possession of Daly, at number 103 Front street aforesaid.

5. That at the execution of the mortgage aforesaid it was orally agreed and understood between the parties thereto, that, notwithstanding said mortgage, Daly might dispose of the stock of goods in the course of his business, and that any new or additional stock which Daly might purchase to supply the place of that so sold, should be bound by and included within the terms and operation of said mortgage, and that in pursuance of such oral agreement, Daly sold from the original stock and added thereto by purchase; that when the stock was turned over to Currier as aforesaid, there was remaining on hand of the goods mentioned in the mortgage what was equal in value to $700 in gold coin, and of the fixtures so mentioned, what was equal in value to $100 in gold coin, and of goods that had been added by Daly to the original mortgaged stock what was equal in value to $975 in gold coin.

6. That on December 19, 1868, Daly was, by the district court for the district aforesaid, duly adjudged a bankrupt upon the petition of his creditors, and that on January 13, 1869, the plaintiff, being then duly qualified as assignee of the estate of the said Daly, duly demanded of the defendant the property above mentioned, whereupon the defendant delivered to the plaintiff all that part of the goods in his possession which had been purchased by Daly since the execution

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

of the mortgage; but as to the goods and fixtures then in his possession, and included and mentioned in said mortgage, the same being of the value of $800 in gold coin, the defendant refused to deliver the same to the plaintiff, but retained the same as his own property, under and by virtue of the mortgage, and the default of Daly in not performing the conditions therein.

7. That the defendant withdrew from the firm of Daly & Co. and transferred his interest in the stock and fixtures thereof, and received the mortgage as aforesaid, without any fraudulent intent, and without any intent to hinder, delay or defraud the creditors of him, the said Daly, but for the purpose of protecting his own interest and securing his debt.

8. That on December 1, 1868, defendant commenced a suit in the circuit court, for the county of Multnomah, to foreclose the mortgage aforesaid, and that on January 2, 1869, for want of an answer by the only defendant in said suit, the said Daly, said circuit court adjudged and decreed among other things, that the lien of said mortgage be foreclosed, and that the property mentioned therein be sold as by law provided, to satisfy the debt aforesaid, due from said Daly to said Currier, but that no sale appears to have been made of such property or any part thereof, by virtue of or in pursuance of such decree or otherwise.

9. That the decree aforesaid recites that the summons and copy of the complaint in such suit had been duly served upon the defendant therein, and that the time for answering such complaint had expired, whereas it appears from the original summons in such suit that the same was served by a person specially appointed by the proper sheriff to serve the same; but that the return of such person as to making such service is not proven by his affidavit, or otherwise than by his mere certificate.

And the court being then unadvised as to what conclusion of law should be drawn from the premises, directed the matter to be argued by counsel, after which the following conclusions of law were found:

1. That the writing executed by Daly on December 24, 1867, purporting to be a mortgage of a certain stock of goods and fixtures to the defendant herein, taken in connection with the contemporaneous oral agreement of said Daly and defendant as set forth in the findings of fact aforesaid, was and is a valid mortgage of said fixtures, but was and is not a mortgage of said stock of goods, but a conveyance or assignment by said Daly of the same to said defendant, in trust for the use and benefit of said Daly, and therefore was and is void and of no effect, as to said stock of goods, as against the plaintiff herein.

2. That the goods and fixtures aforesaid never having been seized or sold under the decree purporting to foreclose the mortgage thereon, the title thereto nor the rights of the parties to this action, therein, were and are in no way affected thereby, and therefore it is immaterial whether such decree was given before or after the commencement of the proceedings in bankruptcy against Daly, or whether or not the same is void for want of a sufficient proof of the service of the summons upon said Daly, or whether or not the same was obtained after the demand of the plaintiff herein for the possession of the property.

3. That the defendant herein, wrongfully converted to his own use the goods aforesaid of the value of $700, aforesaid, by refusing to deliver the same to the plaintiff herein when duly demanded thereto, wherefore the plaintiff is entitled to recover of and from said defendant the value of said goods so converted to his own use as aforesaid.

J. W. Whalley and M. W. Fechheimer, for plaintiff.

Lansing Stout and John H. Reed, for defendant.

DEADY, District Judge. The material question in this case is involved in the first conclusion of law stated in the findings of the court. Is the writing executed by Daly to the defendant, purporting to mortgage to the latter certain goods, when taken in connection with the contemporaneous oral agreement and understanding of the parties, a simple mortgage or a conveyance or transfer of the property in question, in trust, for the use and benefit of Daly, and therefore void as against creditors?

This question does not arise under any provision of the bankrupt act. While there is some reason for supposing that Daly was insolvent when he executed the so-called mortgage to the defendant, yet there is nothing in the case to show that he owed any other debts than the one due the defendant. Under these circumstances, even if Daly was insolvent, it could not be said that the writing was either executed or received, with an intention to give or receive a preference, or to hinder or delay existing creditors, or to evade or defeat any provisions of the bankrupt act [14 Stat. 534].

The question therefore turns upon the statute of the state and the general principles of law applicable to such a transaction. By the former it is declared that a mortgage of personal property unaccompanied by immediate possession creates a disputable presumption of fraud as against the creditors of the mortgagor, unless the same is duly filed or recorded as provided by law (Code Or. 339); and also that all conveyances and transfers of goods and chattels, in trust for the person making the same, shall be void as against the creditors, existing or subsequent, of such person (Id. 655).

A chattel mortgage is a pledge of personal property as a security for the performance of some act—such as the payment of an existing debt. The law allows the property

pledged to remain in the possession of the mortgagor if the mortgage is put on record as notice to the world. But if the mortgage be also coupled with a condition or agreement that the mortgagor may treat the goods as if he were the owner of them—may sell them at his option and receive the proceeds to his own use—such condition or agreement avoids the mortgage. The two cannot stand together. Such use of the mortgaged property by the mortgagor is utterly inconsistent with the idea of giving a pledge or security to the mortgagee. In legal effect it is a sham, a nullity—a mere shadow of a mortgage, only calculated to ward off other creditors—a conveyance in trust for the benefit of the person making it, and therefore void as against creditors.

In this case, it is shown by the finding of the court (and the testimony of the defendant was clear and unequivocal upon that point) that by the understanding between the defendant and Daly, the latter was to continue, not only in the possession of the goods, but to sell and dispose of them in the course of his business, at his option, and take the proceeds to his own use—and so he did with the knowledge and consent of the defendant until the defendant took possession near the close of the year 1868. As against the other creditors of the bankrupt, the defendant cannot claim anything in this property by such a transaction. In re Manly [Case No. 9,031], decided by Mr. Justice Leavitt of the southern district of Ohio, is a case on all fours with the one under consideration, and there the mortgage was held void as to creditors.

The case of Godchaux v. Mulford, 26 Cal. 316, cited by counsel for defendant, is not in point. In that case it was held, that in all mortgages of goods and chattels, whether accompanied by possession or not, there is a trust created in favor of the mortgagor, as to the surplus, if any, and that the statute of frauds which declares all transfers of goods made in trust for the party making the same, to be void as to creditors, does not apply to such a trust. That the trust as to the surplus is not the object of the transfer, but a mere incident, and does not bring the transaction within the purview of the statute. But in the case at bar, the trust created was something more than a mere legal implication that the surplus, if any, after paying the debt of the defendant, should be held by him for the benefit of Daly. As has been shown, it was an express agreement that notwithstanding the mortgage to the defendant, Daly might proceed to dispose of the goods as his own and receive the proceeds to his own use. This was an express trust in favor of Daly, as to all the mortgaged goods, which rendered the mortgage itself totally inoperative, so long as the goods were allowed to remain in Daly's possession. As the mortgage became forfeited within a month from its execution, for the want of payment of the first installment of interest on the debt, it was in the power of the defendant to have terminated this trust at any time thereafter, by taking the goods into his own possession. But he saw proper to leave them with Daly, with the power to use and dispose of them as his own, and now the law and good morals agree that the defendant should not be preferred to other creditors, who, it may be, trusted Daly upon the faith of this unqualified possession and apparent absolute ownership.

But it is said by the counsel for defendant, that the question of "fraudulent intent" under the statute is a question of fact (Code Or. 637), and that, as the court has found as a matter of fact that the defendant acted in the premises without any intent to defraud any one, the only conclusion of law proper to be drawn from the facts is in favor of the validity of the mortgage.

This argument, it seems to me, is based upon two erroneous assumptions. First, that the fraudulent intent of which the statute speaks as sufficient to avoid a mortgage is, in any case, the intent of the mortgagee; and, second, that the question of "fraudulent intent" is involved in this case at all.

The "fradulent intent" which by section 52 of the chapter on conveyances (Code Or. 637) is made a question of fact in all cases arising under titles 2, 3, and 4 of that chapter, is the intent of the grantor or vendor, and not that of the grantee or vendee. It is not found in this case whether Daly, the alleged mortgagor, acted in good faith or not. It is possible that he acted in bad faith, notwithstanding the defendant acted in good faith. But the fact is not material. Nor does section 52 of the chapter on conveyances include the provision of the statute (Code Or. 339) which furnishes the special rule as to when a sale or assignment or mortgage of personal property is to be deemed fraudulent and void as to creditors, because not accompanied by an immediate delivery and a continued change of possession.

As to the second error of the argument under consideration, it is sufficient to say, that such a mortgage or conveyance as this—a conveyance in trust for the party making it—is declared void as to creditors, as a matter of public policy, without reference to the intent of the parties thereto. The law assumes absolutely, and beyond doubt correctly, that in no circumstances can such a transaction be upheld in justice to creditors. That is this case, and whatever may have been the intention of the parties, the law for the protection of the general creditors of the debtor, declares the so-called mortgage void, because made in trust for Daly.

As to the second conclusion of law, the matter seems too plain for argument. The decree foreclosing the mortgage, at most only extinguished the right of redemption as between Daly and the defendant. There was no seizure or sale of the goods under the decree, and beyond extinguishing the

right of redemption, as stated, it had no effect upon the property in the goods, even between the mortgagor and mortgagee. But more than that, the plaintiff was not a party to this decree and the writing upon which it is based, however valid between the parties to it, is void as to the general creditors whom he represents.

There must be a judgment for the plaintiff for the value of the goods.

Case No. 2,519.

CATLIN v. FOSTER.

[1 Sawy. 37;[1] 3 N. B. R. 540 (Quarto, 134); 3 Am. Law T. 134; 1 Am. Law T. Rep. Bankr. 192.]

Circuit Court, D. Oregon. Feb. 14, 1870.

BANKRUPT, EMPLOYMENT OF BY BAILEE — BAILEE ENTITLED TO CREDIT FOR SERVICES — MUTUAL DEBTS OR CREDITS — ORDER EXPUNGING CLAIM WILL NOT PREVENT ITS BEING PLEADED AS SET-OFF — CONDITIONS PRECEDENT TO ACTION BY CREDITOR.

1. Where a bailee of an insolvent debtor's goods, prior to the filing of a petition in bankruptcy against such debtor, employed him to assist in the sale and management of such goods: *Held*, that such employment was not illegal and that the bailee, as against the assignee in bankruptcy, was entitled to a credit for the amount paid therefor.

2. Where a bailee of an insolvent debtor's goods bestowed labor upon and about them, with a knowledge that such debtor had committed an act of bankruptcy in making such bailment, he is entitled to a credit for the value of such services as against the claim of the assignee in bankruptcy for such goods or their value.

[Cited in Re City Bank of Savings, Loan & Discount, Case No. 2,742; Re Cohn, Id. 2,966; Re Kurth, Id. 7,948.]

3. What is a case of mutual debts or credits within the meaning of section 20 of the bankrupt act [14 Stat. 526.]?

[Cited in Re Cohn, Case No. 2,966.]

4. An order expunging a claim against the estate of a bankrupt, is not such an adjudication thereof as prevents the creditor from pleading it as a set-off in an action by the assignee for a claim due such estate.

5. Semble, that the proof of a debt before the register and the rejection thereof by the district court, and the appeal therefrom to the circuit court, are conditions precedent to the creditor's right to maintain an action against the assignee for the recovery of his debt, but do not constitute or have the effect of an adjudication upon or against such claim.

[Cited in Thistle v. Hamilton, Case No. 13,884.]

[At law. Action by John Catlin, assignee in bankruptcy, against John R. Foster.]

David Friedenrich, for plaintiff.

David Logan, for defendant.

DEADY, District Judge. This action was commenced July 26, 1869. The complaint states that on January 30, 1869, proceedings were commenced in the district court for this district, wherein said Randall & Sunderland were duly adjudged bankrupts, and that plaintiff is the assignee of their estate; and that the defendant from January 9th to the 30th aforesaid, had the possession of all the goods and chattels of said bankrupts, and that during said period said defendant sold and disposed of parcels of said goods and received sums of money due said bankrupts, in all to the amount of $1,525.74 in gold coin, and paid out of said moneys on account of said bankrupts the sum of $926.99, retaining in his possession $597.74 of said moneys; and that afterward, on July 7, 1869, the plaintiff, as assignee aforesaid, demanded the same of the defendant, and that defendant refused to deliver said moneys or any part thereof to the plaintiff and still detains the same: Wherefore the plaintiff prays judgment for the delivery of said money with interest in coin for the use thereof at the rate of ten per centum per annum since April 9, 1869.

The answer of the defendant admits the allegations in the complaint, except that it denies that the defendant received any greater sum than $1,514.73, and avers that he paid out $979.49, and denies that he retained or still retains any greater sum than $535.24, received by him for goods sold or debts collected, belonging to said bankrupts.

The answer also contains two counterclaims which the defendant offers to set off against the demand of the plaintiff. The first for the sum of $250, which the defendant's attorneys demand of him for legal services rendered the defendant while conducting and settling the business of Randall & Sunderland. The second is also for the sum of $250 for and on account of the services of defendant in and about the management of the business of said Randall & Sunderland.

On motion, the first of these counter-claims was stricken out, as it did not appear that the defendant had ever paid the amount to the attorneys, but only that they claimed that he was liable for it.

To the second claim the plaintiff replied—denying knowledge of defendant's services and that they were worth $250.

Also, that on January 9, 1869, Randall and Sunderland made an assignment to the defendant of all their goods and effects, under which assignment the defendant took possession of all the property of said bankrupts; that said assignment was made in fraud of the bankrupt act and was the act of bankruptcy upon which said Randall & Sunderland were adjudged bankrupts; and that defendant colluded and conspired with said bankrupts in said fraudulent act, and in fraud of the bankrupt act managed the business of the bankrupts until enjoined therefrom by the proceedings in bankruptcy on January 30, 1869.

Also, that on April 1, 1869, the defendant filed a claim against the estate of the bankrupts for the same services; that afterwards certain creditors of said estate filed objec-

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

tions to said claim and such proceedings were had thereupon, before the register on default of the defendant, that an order of this court was made expunging said claim from the lists of claims upon the assignees' record, which order still remains in full force.

In pursuance of the stipulation of the parties, the cause was tried without the intervention of a jury on January 25th, and reserved for decision.

On the trial the defendant was called as a witness by the plaintiff. The only other evidence introduced was the assignment and the papers and proceedings in the bankruptcy case.

The evidence of the defendant supported his answer as to the amount of money received and paid out by him on account of the bankrupts, during his possession of the goods, and as nothing was shown or appears to the contrary, the fact must be found accordingly.

Of the money so paid out, as it appears from the account stated by the defendant, which is a part of his testimony, there was paid to Sunderland, one of the bankrupts, on January 30, the sums of $31.50 and $21. On account of these payments being made to the bankrupt, the plaintiff objects to their being treated and considered as payments on account of the estate.

According to the testimony of the defendant the payments were made under these circumstances. The business of the bankrupts consisted of a retail boot and shoe shop, and some manufacturing up-stairs, with a stock of about $14,000. The defendant had the general superintendence of the business and employed Sunderland to oversee the manufacturing at $75 per month. Paid him sums on tag from time to time, amounting in all to the sum of the two payments, which were afterwards charged on January 30, and that such wages were less than a person not interested could be obtained for.

The fact of the payments, is in effect, denied in the pleadings, but on the trial, the objection insisted upon was the illegality of paying money to one of the bankrupts. But I do not perceive that the employment of Sunderland on fair terms to do what was necessary and convenient to be done about the business, is in any way contrary to law or good morals. Indeed, I suppose the defendant might have returned to R. & S., at any time prior to the injunction, all the property he received from them under the void assignment. Much more, it seems to me, might he pay S. reasonable wages for work and labor performed about the business and property while under his charge. In any view of the matter, the defendant is only liable to the plaintiff for what came into his hands from or through the bankrupts, and was not returned to them or their representative—the assignee in bankruptcy. The question is, was the payment or delivery of the $52.50 actually made to S. prior to the service of the injunction upon the defendant on January 30th, or not. If made after the service of the injunction—being in such case made in violation of it—I suppose it would be wrongful and the defendant would still be liable for the amount.

But, as has been suggested, the fact of the payments having been made as alleged, was not seriously contested on the trial. The testimony of the defendant is direct and positive to that effect, and it must be considered proven. This shows that the defendant has only $532.24 in his hands belonging to the estate of R. & S.

Is he entitled to set off his claim for services against a like amount of this sum?

The plaintiff's objection to the allowance of this set-off has been stated in his replication. From the evidence it appears that the defendant went into possession and control of the goods and business of R. & S. on January 10, 1869, under an assignment to himself, which was afterward, namely, on February 27th, adjudged void by this court, as being a fraud upon the bankrupt act, and an act of bankruptcy, and that he continued in such possession and control, and managed and conducted said property and business under said assignment, until enjoined by this court, on January 30, thereafter.

As to the alleged conspiracy and collusion between the defendant and R. and S., there is no direct proof. But from the circumstances shown the inference is reasonable that the defendant accepted the assignment and went into possession under it with a knowledge of the facts which, in contemplation of law, made such assignment fraudulent and an act of bankruptcy—namely, that R. and S. were insolvent and were by that means attempting to dispose of their property with intent to defeat and delay the operation of the bankrupt act.

On account of this knowledge the plaintiff claims that the defendant is not entitled to anything for his services under this illegal assignment; and that if he is, he should be required to prove his debt and take his pro rata with the other creditors, and not receive his pay in full by being allowed it as a set-off against the money of the estate in his hands.

The questions made by the objection of the plaintiff are not free from doubt.

By section 20 of the bankrupt act it is provided: "That in all cases of mutual debts or mutual credits between the parties, the account between them shall be stated and one debt set off against the other and the balance only shall be allowed or paid, but no set-off shall be allowed of a claim in its nature not provable against the estate; provided, that no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition."

This is the only provision in the bankrupt

act touching the subject of set-off, and it is substantially the same as that contained in 6 Geo. IV. c. 16, § 50; but the English act further provides that such set-off may be made "notwithstanding any prior act of bankruptcy committed by the bankrupt before the credit given or debt contracted by him. * * * ; provided, that the person claiming the benefit of such set-off, had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed."

But for this proviso, it seems to have been holden in the English courts, that a debtor to a bankrupt could only be called upon to pay the balance after deducting what the bankrupt owed him, whether the credit was given to such bankrupt after notice of an act of bankruptcy committed by him or not. 1 Bac. Abr. 647.

This proviso not being in our act, nor any equivalent of it in legal effect, I conclude upon this authority, and indeed upon general principles, that although the defendant had notice of the act of bankruptcy committed by R. and S. when he rendered the service, he is entitled to set off the value of the same against what he owes them or their assignee, provided, the transaction amounts to a case of mutual credit between the parties, and the defendant's "claim in its nature is provable against the estate."

The term "mutual credits" in the bankrupt acts is more comprehensive than the term "mutual debts" in the statutes of set-off. The term "credit" is synonymous with "trust," and the trust or credit need not be of money on both sides, but if one party entrusts the other with goods or value it will be a case of mutual credit. 7 Bac. Abr. 170.

By section 42 of the bankrupt act of April 4, 1800 [2 Stat. 33], when a mutual credit was given before a party became bankrupt a set-off was allowed between the parties. Under this act it was decided that where the acceptor of a bill of exchange paid it after bankruptcy of the drawer, he might set off the amount of the same in an action by the assignee of the drawer for the value of certain goods consigned to the acceptor after the acceptance, and by him converted into money before the bankruptcy. This was held to be a case of mutual credit before the bankruptcy, although the defendant did not pay the debt set off until after the bankruptcy; and although under that act the debts, for that reason, could not have been proved against the estate. Marks v. Barker [Case No. 9,096].

In the case of Rose v. Hart, 8 Taunt. 499, cited 7 Bac. Abr. 650, it was ruled that where cloth was deposited with a fuller to dress by a party who afterwards became bankrupt, that there was a case of mutual credit to the value of the services for dressing the cloth, but not for a general balance due from the bankrupt; and in that case the general rule was laid down that the credits intended by the act were only such "as must in their very nature terminate in cross debts; as where a debt is due from one party and credit given by him on the other, for a sum of money payable at a future day and which will then become a debt; or when there is a debt on one side and a delivery of property with directions to turn it into money on the other; but where there is a mere deposit of property, without authority to turn it into money, no debt can ever arise out of it, and therefore it is not a credit within the meaning of the statute."

Within the rule laid down by these authorities there can be no doubt but that this was a case of mutual credit—at least to the value of the defendant's services. The defendant received the goods and accounts and undertook in the course of the business to convert them into money. His skill and labor in this respect have some value. R. & S. credited—trusted—him with the property and with the money he might realize from it, and the defendant credited them for his services—yet to be rendered. Therefore the credits were mutual—and were also such credits as must result in cross debts.

The debt of the defendant is also provable under the act. Section 9 provides: "That all debts due and payable from the bankrupt, at the time of the adjudication in bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest was payable by the terms of the contract, may be proved against the estate of the bankrupt."

In the case under consideration the adjudication was made on February 27th, and on January 30th, the debt due the defendant for his services was both due and payable; and if it had then only existed, but been payable at a future day, would still have been provable.

What is the value of the services? In his answer the defendant claims that they are worth $250 in coin. On April 1, 1869, he swore to the proof of debt before the register for these same services, in which he stated that R. & S. were justly indebted to him on that account "in the sum of $125 * * * for labor and services * * * from January 9th, 1869 to January 30th, at the rate of $200 per month in legal tender." At that time $125 in currency was about equal to $100 in coin. On the trial the defendant being asked by his counsel if $250 in coin was a reasonable compensation for his services, did not answer yea or nay, but said—"I don't think it very extravagant."

The service was a general superintendence of a retail boot and shoe shop for twenty days, with the assistance of Sunderland, one of the former proprietors and assignors.

I think $5 per day in coin a fair compensation. That is what the defendant estimated the value of his services at, in his proof of debt before the register last April, and no reason is shown for the increase of 150 per centum since that time.

Allowing the defendant a set-off of $100 in coin and deducting that sum from the debt due the plaintiff, leaves the sum of $423.24. Add to this interest on the same since July 7—seven months—makes $458.88—which is the sum due the plaintiff in coin.

But the plaintiff also objects to the allowance of this set-off, on the ground of an adverse prior adjudication as set forth in his replication.

The facts concerning the matter are these: On April 1, 1869, the defendant proved a debt for these services of the sum of $125 in legal tender. On objection by some of the creditors, and a motion to expunge the claim from the list of proven debts, the matter was referred by the court to the register. In the meantime, it may be presumed that the defendant, acting upon the advice of his counsel, concluded not to press his claim to payment by the assignee, but to rely upon having it allowed in full as a set-off against the sum then in his hands belonging to the estate—at least he did not appear before the register, but allowed the matter to go by default. Thereupon the register reported as a conclusion of fact that said claim was for services rendered under a fraudulent and void deed of assignment to the defendant, and as a conclusion of law that it ought not to be allowed. Upon motion, and without argument, there being no opposition, on August 16, this court confirmed this report and made an order expunging the claim from the list of debts. There the matter rested until the plaintiff brought this action, when the defendant pleaded the claim as a set-off.

Before proceeding to consider whether that order amounts to a final judgment against the claim of the defendant, it is proper to state, that the conclusion of the register against the legality of the claim was predicated upon the case of Leavitt v. Yates, 4 Edw. Ch. 205, cited in 5 Abb. Dig. 273, as deciding: That where a trust deed is pronounced void, as being contrary to law, the trustee cannot be allowed any compensation for services under it. Upon the strength of this authority, this court made the order of August 16, rejecting the claim. I now think that order was erroneous, and upon examination of the original report of the case of Leavitt v. Yates, I find that it does not decide any such thing as stated in the digest. The vice chancellor refused to allow the trustees the salary provided in the void trust deed, but did allow the necessary expense of taking care of and managing the property, while in the hands of the trustees.

These services were rendered by the defendant at the request of R. & S., before the petition filed in bankruptcy, and unless there is some established rule of law or positive statute prohibiting the payment or allowance of such a claim, I cannot now see upon what ground the right to have it allowed as a set-off is to be denied. If the defendant had notice of the act of bankruptcy—as I presume he had—under the bankrupt act of 6 Geo. IV., the claim could neither have been proved against the estate nor allowed as a set-off in an action by the assignee; but there is no such provision in the American act, and the court must administer the law as it finds it.

I have come to the conclusion, that the order rejecting the claim of the defendant, is not such an adjudication as prevents the defendant from pleading it as a set-off in this action. The provisions of the bankrupt act bearing upon the question, are substantially as follows:

Section 22 [14 Stat. 527] provides for each creditor's making proof of his debt; and presenting the same to the assignee; it also gives the district court power "to reject all claims not duly proved, or where the proof shows the claim to have been founded in fraud, illegality, or mistake." Section 8 gives the right of appeal from the district to the circuit court, to "any supposed creditor whose claim is wholly or in part rejected." Section 24 enacts in effect that such supposed creditor, upon entering such appeal in the circuit court, shall file a pleading as plaintiff in an action at law containing a statement of his claim, and thereafter the controversy shall proceed to determination as an ordinary action at law.

Taken together, these provisions of the act amount to this, and nothing more:

A creditor cannot demand payment of his debt until he makes and presents to the assignee, the proper proof thereof. This provision is analogous in purpose, and proceeding to the probate of debts against the estate of a decedent, before being presented to, or allowed by the administrator. When this is done, parties interested may object to the claim, and the court—the district judge, without a jury, in a summary manner—may reject the claim, as not being duly proved, or as being founded in fraud, illegality, or mistake. Then, and not before, the supposed creditor may bring an action in the circuit court against the assignee, and have his right to payment regularly tried. But this action can only be maintained by the creditor first taking an appeal from the order rejecting his claim. This appeal must be taken within a limited time, in a particular manner, and to a particular court. The right to sue the assignee is postponed and limited to the happening and performance of these precedent circumstances and conditions. But they are not adjudications, but only proceedings preliminary to adjudication. But suppose the assignee to bring an action upon a demand due the bankrupt, cannot the defendant plead a set-off to more or less of such demand, although the same has not been proved and presented to the assignee, and rejected by the judge, and appeal taken to the circuit court? It seems to me that he can. The cross-demand of the defendant in such case is proved on the trial, or it will not be allowed.

The case of Marks v. Barker, supra, is an

instance in point where a party was entitled under the bankrupt act of 1800, to be allowed a claim as a set-off, which, for a technical reason, he could not have maintained an action to recover.

In this case, the defendant not having brought his action in the circuit court within the term prescribed after the rejection of his claim, has lost his right to maintain a suit upon it: but, notwithstanding this, I think the better conclusion is that he may still plead it as a set-off, by way of defense to an action by the assignee. On the other hand, it may be said that a party who elects to prove and obtain his demand in the mode prescribed in sections 22, 24 and 8, must pursue that mode to the end, and if he fails or neglects to do so, cannot afterwards have the same demand allowed as a set-off. Not that the order of rejection is an adjudication between the parties in any proper sense of that term, but that the party having elected to obtain his demand in that way, is precluded from litigating it in any other. There is force in this argument. On this point I am not confident that my conclusion is the proper one, and the question may be considered an open one in this court, if parties wish to be heard upon it in any case that may arise hereafter.

The set-off of the defendant to the amount of $100 in coin will be allowed, and the plaintiff must have judgment for $458.88 in coin, with costs and expenses of the action.

Case No. 2,520.

CATLIN v. GLADDING.

[4 Mason, 308.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1826.

CIRCUIT COURTS—JURISDICTION—CITIZENSHIP.

A native citizen of Rhode Island, whose father was dead, but whose mother lived on the family estate in Rhode Island, went to New York to reside as a merchant, and there failed, and afterwards returned to his mother's family, and resided there, being unmarried. At the time when the suit was brought he was in a store in Connecticut, acting as a clerk there for his brother. He was sued as a citizen of Rhode Island. There being no proof, that he intended a permanent residence in Connecticut, it was held by the court, upon these facts, that he was a citizen of Rhode Island.

[Cited in Waring v. Clarke, 5 How. (46 U. S.) 481.]

At law. Assumpsit [by John M. Catlin against Samuel Gladding] on a promissory note. Plea to the jurisdiction, that defendant is not a citizen of Rhode Island, as set forth in the writ, and issue thereon. [Judgment for plaintiff.]

At the trial it appeared in evidence, that the defendant was a native citizen of Rhode Island; and that his mother (his father being dead) still resided in Providence, in that state, on the family estate. The defendant is a young, unmarried man, and was in partnership in New York, for some time. His commercial house in New York failed in June last; and upon that failure he returned and resided with his mother at Providence. At the time of the service of the writ, he was engaged as a clerk in the store of his brother in the state of Connecticut. But he made frequent visits to his mother in Providence; and no acts appeared to show any intention of a permanent domicil in Connecticut.

Mr. Searle, for plaintiff.

Richard W. Greene, for defendant.

STORY, Circuit Justice. The opinion of the court is, that the defendant is a citizen of Rhode Island, and that the plea is not maintained. His birth was in that state; the family estate is there, and his mother remains on it. The defendant is unmarried. While he was resident at New York in business, he may be deemed to have acquired a cititizenship there, as he probably intended a permanent domicil. But when the house failed, he gave up his residence in New York, and returned to his mother's family. Under such circumstances he must be presumed to have regained the family domicil, and to have returned to his native allegiance. The native character and domicil easily reverts; and fewer circumstances are necessary to establish it, than that of a foreign domicil. Upon his return from New York, he re-acquired his native citizenship. What evidence is there, that he has since changed it? It does not appear, that he had any intention of becoming a citizen of Connecticut. For aught in the case, his engagement may be merely temporary, until he can get other business, and without any intention of changing his domicil. The case might have been different, if he had had a family, and removed with them into Connecticut. Such an act would afford prima facie evidence of a change of permanent domicil. The judgment must therefore be for the plaintiff. Judgment accordingly.

Case No. 2,521.

CATLIN v. HOFFMAN.

[2 Sawy. 486; 9 N. B. R. 342; 21 Pittsb. Leg. J. 159] [1]

Circuit Court, D. Oregon. Jan. 5, 1874.

CONVEYANCE BY INSOLVENT DEBTOR — JUDGMENT AGAINST INSOLVENT DEBTOR—NOTICE OF ACT OF BANKRUPTCY — JUDGMENT AND LIEN WITH IMPLIED CONSENT OF DEBTOR — PREFERENCE PRESUMED TO HAVE BEEN INTENDED.

1. A conveyance by an insolvent debtor to his creditor of property, upon which said creditor has a lien to a greater amount than the value thereof, is not void, as being within the purview

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

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 21 Pittsb. Leg. J. 159, contains only a partial report.]

of the first clause of section 35 of the bankrupt act [14 Stat. 534].

2. Section 35 of the bankrupt act does not declare void a judgment obtained against an insolvent debtor under any circumstances; and the same, if obtained without fraud or collusion with the debtor, is as conclusive evidence of the claim and its amount, as if given against a solvent debtor.

3. Notice to creditor of an act of bankruptcy does not affect a transfer to him, otherwise than as it tends to show that he had reason to believe that such transfer was made in fraud of the bankrupt act.

4. Where a judgment is obtained, for want of an answer, against an insolvent debtor, and such judgment is docketed in the lien docket so as to become a lien upon the real property of such debtor: *Held*, that such lien being created with the implied consent of the debtor, it was in effect a transfer by him to the creditor, and void under the first clause of section 35 of the bankrupt act.

[Cited in U. S. v. Griswold, 8 Fed. 502.]

5. A transfer of property which necessarily gives a preference to one creditor over another, is presumed to have been made with a view to such preference, and in fraud of the provisions of the bankrupt act.

[In bankruptcy. Suit by John Catlin, assignee in bankruptcy, against Mark Hoffman, to set aside a conveyance as an unlawful preference.]

John W. Whalley and M. W. Fechheimer, for plaintiff.

Richard Williams, for defendant.

DEADY, District Judge. This suit is brought to set aside a certain conveyance made by the bankrupt, F. Stadler, to the defendant, of a parcel of land at Cornelius, in Washington county, Oregon, because the same was made and received contrary to the bankrupt act, and is a cloud upon the assignee's title.

The following facts are admitted or satisfactorily established by the evidence:

I. On January 13, 1873, a petition in bankruptcy was filed in the district court against said Stadler, upon which, on January 24, he was duly adjudged a bankrupt; and on February 11 the plaintiff was duly appointed assignee of said bankrupt's estate, and received a deed of assignment thereof from the register.

II. On March, 1872, said Stadler purchased of one Philips the property in question, the same being one acre and twenty-two rods in quantity, for the sum of $106, of which sum $6 was paid down and a mortgage given on the premises to secure the remainder; and in October, 1872, said mortgage was duly foreclosed and a decree given against Stadler and in favor of Philips for the sum of $123.45.

III. On October 21, 1872, the defendant obtained a judgment in the circuit court for the county aforesaid, for want of an answer, against Stadler, for the sum of $625, with costs of action, one half of which sum was for building materials furnished Stadler, to use on the premises, and the other for goods sold and cash loaned Stadler; and that prior to obtaining such judgment the defendant caused the said premises to be attached as the property of Stadler, upon the allegation that he was about to dispose of his property, with intent to delay and defraud his creditors.

IV. On December 14, 1872, Stadler being the owner of the premises, and being indebted to the defendant in a sum exceeding $700, to wit: the judgment aforesaid and the decree in favor of Philips, then assigned to defendant, the latter took from Stadler and wife a conveyance thereof, in payment of said indebtedness, and for the sum of $60 cash; and that at the date of said attachment, judgment and conveyance Stadler was insolvent, and without other property or assets, all of which was known to the defendant.

The defendant controverts the plaintiff's right to the relief asked upon the ground that at the date of the conveyance in question, by means of the judgment and decree aforesaid, he had a lien upon the property for more than it was worth, and therefore the conveyance, although taken with knowledge of the insolvency of Stadler, worked no preference to the defendant or hindrance or injury to any one, or any fraud upon the provisions of the bankrupt act.

Upon the question of the value of the property at the time of the conveyance, the evidence is conflicting, but taking the mean of the statements of the witnesses, it was not worth to exceed $700.

No case directly in point was cited on the argument, but I do not think that a conveyance by an insolvent debtor to his creditor of property, upon which said creditor already has a lien to a greater amount than the value thereof, is within the purview of the first clause of section 35 of the bankrupt act, and therefore void.

In such a case two of the four things necessary to bring it within said clause, as laid down by Mr. Justice Field in Toof v. Martin, 13 Wall. [80 U. S.] 46, do not exist: namely, 1. Intent to give a preference; and, 2. That the conveyance was made in fraud of the provisions of the act.

No preference is given by such a conveyance, and no other creditor is deferred or injured thereby. Unless some creditor is deferred or defrauded by such conveyance, no one can be preferred by it. The effect of the transaction is merely to pass the dry legal title to the property to the creditor who already has the beneficial interest therein and extinguish the right of redemption under the statute, which in such a case is valueless.

But in the case at bar it appears that the creditor paid $60 in money for the conveyance, in addition to the release of the debts due him. It may be said, that so far, this was a sale of the property under circum-

stances forbidden by the second clause of section 35 aforesaid, and therefore void. But the debts being greater in amount than the value of the property, the more reasonable inference is that the money was paid to obtain the conveyance rather than as a consideration for the property. The evidence is very meagre upon this point, and only shows the fact of the payment at the time of the conveyance. What was the particular inducement for it is left to inference. The defendant may have thought it cheaper and more convenient to pay Stadler for this conveyance than to obtain one by sale of the property on execution, or he may have paid for it, to induce the wife of the bankrupt to join in it, and thereby bar her right of dower in the premises.

If the special relief prayed for in the complaint—that this conveyance be set aside as fraudulent and void—is denied upon the ground that the defendant's lien upon the property at the time of such conveyance amounted to more than its value, then the plaintiffs make the further point that the judgment and decree aforesaid are invalid, and therefore insufficient to support such conveyance, because the same were taken within four months of the filing of the petition against Stadler, with knowledge of his insolvency, and in fraud of the provisions of the act, and with intent on the part of Stadler to prefer the defendant.

The first clause of section 35, under which this case falls, does not specify a judgment as one of the prohibited means of giving a preference. The language of the clause is: "If any person being insolvent, etc., within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, etc., procures any part of his property to be attached, sequestered or seized on execution, or makes any payment, pledge, assignment, transfer or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer or conveyance, or to be benefitted thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment or conveyance is made in fraud of the provisions of this act, the same shall be void," etc. There is nothing in this language which expressly or impliedly prohibits the taking or obtaining a mere judgment against an insolvent debtor. The judgment alone only serves to establish the claim of the creditor and fix its amount; and if obtained without fraud or collusion with the debtor is as conclusive evidence of those facts as if the debtor had been solvent.

I know the authorities often speak of a judgment being an illegal preference, or attempt to get one. But upon examination, I believe it will be found in every instance, that there was also a lien acquired upon the property of the debtor by means of the judgment, and that the illegal preference consisted in this lien, and not in the mere judgment itself.

But it is argued that this Hoffman judgment is void because taken by defendant with notice that Stadler had committed an act of bankruptcy; namely, the suffering of his property to be attached by the defendant. Doubtless this was a suffering "his property to be taken on legal process," and therefore an act of bankruptcy as defined in section thirty-nine of the bankrupt act. But if I am correct in the conclusion that the mere taking of a judgment against an insolvent debtor is not prohibited under any circumstances, then it matters not whether the defendant had this notice or not.

The fact that a creditor receiving a payment, pledge, assignment, transfer, etc., from an insolvent debtor, did so with notice of the commission of an act of bankruptcy by him, may be evidence that he received the same in fraud of the provisions of the act, but such notice does not itself render such transaction void, under the act of 1867, as it did under the bankrupt act of 1841, where it was held to be "the test of the mala fides which vitiates the transaction." Shawhan v. Wheritt, 7 How. [48 U. S.] 645.

By a law of this state judgment is not a lien upon personal property at all, nor upon real property until it is docketed in the judgment lien docket in the county where the property is situated. Code Or. 206. The judgment, as such, is complete without being docketed, and may be enforced by execution as soon as entered. Id. 208. The docketing is simply a means provided by statute by which the judgment creditor may, at his option, acquire a lien upon the judgment debtor's real property for the security of his judgment, without resorting at once to the extreme measure of an execution and levy.

The above cited clause of section 35 of the act, declares void, under the limitations there mentioned, any transfer of property directly or indirectly by an insolvent debtor. The lien of a judgment upon real property binds it for the payment of the claim for which it is given as effectually as a mortgage made by the debtor for that purpose would. Indirectly it works, causes or makes a transfer of the property upon which it operates from the judgment debtor to the judgment creditor. It may be said, however, that although the effect of the lien may be to transfer the property to the judgment creditor, still it is not a transfer made by the debtor, when, as in this case, he does not procure the judgment, but remains passive, and therefore is not within the act.

When a judgment is taken under the Code for want of an answer, as in this case, the debtor, by implication, distinctly consents to it. The summons contains a notice that if the defendant does not answer the complaint, the plaintiff will take judgment

against him for a given sum. Under the circumstances this amounts to a proposition to confess judgment for the sum named, and a failure to answer is an implied acceptance of such proposition, and a consent that the judgment be given, and at the option of the creditor, docketed, and become a lien upon his real property, and be thereby transferred to the judgment creditor. The lien of this judgment being in effect, a transfer of so much of the property of the insolvent debtor to a creditor with knowledge of such insolvency, it is void, if it was also made or acquired with an intent to prefer such creditor, and in fraud of the provisions of the bankrupt act.

Upon these points the supreme court in Toof v. Martin, supra, says: 1. "It is a general principle that every one must be presumed to intend the necessary consequences of his acts. The transfer, in any case, by a debtor, of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him in such case, and not upon the assignee or contestant in bankruptcy." 2. "The act of congress was designed to secure an equal distribution of the property of an insolvent debtor among his creditors, and any transfer made with a view to secure the property, or any part of it, to one, and thus prevent such equal distribution, is a transfer in fraud of the act." Upon the first point, see, also, In re Sutherland [Case No. 13,638]; In re Randall [Id. 11,551].

It follows necessarily from the facts stated and the rule laid down in Toof v. Martin, that this transfer was made with a view to give Hoffman a preference, and that Hoffman had reasonable ground to believe that it was made in fraud of the bankrupt act, because such was the necessary consequence of the transaction. Although, as far as appears, this judgment is valid, the lien of it having been acquired in contravention of the act, is void. In re Mallory [Id. 8,991].

The lien of the decree is valid, it being in effect, merely a continuation of the lien of the mortgage for the purchase money, the latter being merged in the former. It follows that the deed of December 14, 1872, in so far as the consideration therefor was the Hoffman judgment, was made in violation of the first clause of section 35 of the bankrupt act, and is therefore void. A decree will be entered declaring the lien of the judgment and the conveyance void, as against the assignee and setting them aside, and that the defendant prove his claim as he may be advised.

Case No. 2,522.

CATLIN v. SPRINGFIELD FIRE INS. CO.

[1 Sumn. 434.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1833.

INSURANCE — CONDITIONS IN POLICY — CONSTRUCTION — NOTICE OF LOSS — SUFFICIENCY — WARRANTY AND REPRESENTATION — LEGAL DESIGN — WHEN IMPUTABLE — SEASONABLE OBJECTION TO EVIDENCE.

1. Among the conditions which were printed on the same sheet with a policy of insurance against fire, was one requiring, that "all persons insured, and sustaining loss or damage by fire, should forthwith give notice thereof to the company, and as soon after as possible deliver in a particular account of such loss or damage, signed with their own hands, and verified with their oath or affirmation, and also, if required, by their books of account and other proper vouchers." *Held*, that the particular account required by the above condition is a particular account of the articles lost or damaged, and does not refer to the manner and cause of the loss. See 2 Phil. Ins. 519.

[Cited in Perry v. Phoenix Assur. Co., 8 Fed. 646; Gauché v. London & L. Ins. Co., 10 Fed. 353.]

2. In stating a loss, it is sufficient to show it to have been occasioned by a peril within the policy, without negativing the exceptions of losses from design, invasion, public enemies, riots, &c., which are properly matters of defence. See 1 Phil. Ins. 634.

3. Conditions are to be construed strictly against those for whose benefit they are introduced, when they impose burdens on other parties.

[Cited in Ward v. New England Screw Co., Case No. 17,157; James v. Lycoming Ins. Co., Id. 7,182.]

4. The words in a policy against fire described the house, as "at present occupied as a dwelling-house, but to be occupied hereafter as a tavern, and privileged as such." *Held*, that this is not a warranty, that the house should, during the continuance of the risk, be constantly occupied as a tavern; but that it is, at farthest, a mere representation of the intention to occupy it as such, and a license or privilege granted by the underwriters, that it might be so occupied.

5. Where no objection was taken at the trial to the absence of evidence, which it might have been in the power of the party to supply, it is too late after the verdict to take it.

[Cited in Gauché v. London & L. Ins. Co., 10 Fed. 354.]

6. Where underwriters agree to make good any loss or damage "by fire originating in any cause, except design in the insured, invasion," &c., *held*, that the exception of losses by design admits all losses not by design; that, therefore, where the plaintiff negligently left the premises insured derelict, and intruders came and burnt them, without any co-operation or knowledge on the part of the plaintiff, it is a loss within the policy.

[Cited in Levi v. New Orleans Mut. Ins. Ass'n, Case No. 8,290.]

7. Legal design is imputable, where the consequences naturally flow from the act, and not merely follow it. They must be connected with it, as a cause, and not as an occasion.

At law. Assumpsit on a policy of insurance. Plea, the general issue. By the policy in the present case, dated on the 30th of

[1] [Reported by Hon. Charles Sumner.]

May, 1825, the defendants insured the plaintiff [Guy Catlin] for the space of six years from that date, "against loss or damage by fire to the amount of nine hundred dollars, on a dwelling-house, barn, and shed, situate, &c. in the town of Burlington, (Vermont,) owned by Lemuel Hayden and Harvey Hobart, of Burlington aforesaid, at present occupied by one Joel Rodgers, as a dwelling-house; but to be occupied hereafter as a tavern, and is privileged as such. Said buildings are made of wood, and are mortgaged to the said Guy Catlin to secure the payment of his debt, against the said Hayden and Hobart, of $1,146.20, and are more particularly described in a survey, dated May 30th, 1825, containing proposals of the insured, by him subscribed. On the dwelling-house $750, on the shed $100, and on the barn $50." And by the terms of the policy, the defendants agreed "to make good unto the assured any loss or damage, not exceeding in amount the sum insured, which shall or may happen to the property insured by fire originating in any cause, except design in the assured, invasion, public enemies, riots, civil commotion, or military or usurped power." And certain conditions and proposals annexed to the policy are agreed to be referred to, to explain the rights and obligations of the parties. The conditions and proposals thus alluded to are printed on the same sheet with the policy. They contain, among other things, the classification of certain risks, and rates of premium therefor; and a statement of the classification of goods into those not hazardous, those hazardous, and those extra-hazardous. And among those whose trades and occupations are deemed hazardous, are enumerated tavern-keepers. Among the conditions one (the eighth) is, that "all persons insured, and sustaining loss or damage by fire, are forthwith to give notice thereof to the company, and as soon after as possible to deliver in a particular account of such loss or damage, signed with their own hands, and verified with their oath or affirmation, and also, if required, by their books of account and other proper vouchers;" and also to "procure a certificate under the hand of a magistrate, notary public, or clergyman, most contiguous to the place of fire, and not concerned in the loss, or related to the insured or sufferers, that they are acquainted with the character and circumstances of the person or persons insured; and do know and verily believe he, she, or they really and by misfortune, and without fraud or evil practice, hath or have sustained by such fire loss and damage to the amount therein mentioned. And until such proofs, declarations, and certificates are produced, the loss shall not be deemed payable; also, if there be any fraud or false swearing, the claimant shall forfeit all claim by virtue of this policy."

The dwelling-house so insured was burnt down and totally destroyed on the evening of the 22d of February, 1830; and, on the 24th of the same month, the plaintiff addressed a letter to the defendants, informing them of the loss, which was duly received. The letter stated, that "the house was burned on the evening of the 22d instant, and totally destroyed." And it also contained a declaration, that the plaintiff had no other insurance, and had "sustained a loss full equal to the amount insured on the house. The shed and barn were not destroyed." And the plaintiff at the bottom of the letter, took a solemn oath before a justice of the peace, "that the statements therein made were true." The other preliminary proof of a certificate was furnished to the defendants, who declined paying the loss; and by a letter, dated on the 30th of March, 1830, in reply to that of the plaintiff, stated as a reason, that "the building was insured to be occupied. When burnt it had been a long time vacant, often deserted, derelict; and was destroyed by foul means. Had the house been occupied, as when insured, it is very clear the loss could not have occurred from the cause which destroyed it." No objection whatever was stated to the preliminary proofs of loss. At the trial the plaintiff had a verdict for $604.83.

C. G. Loring and Fay for the defendants, now moved for a new trial, which was opposed by Fletcher for the plaintiff.

STORY, Circuit Justice. A motion has been made and argued for a new trial upon various grounds. In the first place, that the court instructed the jury, that the letter of the plaintiff to the defendants, giving notice of the loss, was a sufficient compliance with the eighth condition above stated, requiring "a particular account of the loss or damage." The argument is, that the particular account here referred to should contain not only a statement of the amount of the loss, but of the manner and cause of the loss, verified by the oath of the party, so that it should appear, that it did not fall within any of the exceptions of the policy. But it seems to me very clear, that this is not the true interpretation or object of the clause. If we look at the policy, it will be seen, that the insurance company contemplate not only insurance upon houses, but upon goods and machinery. In cases of insurance upon goods, and in partial losses of all sorts, the particulars of the nature, quality and quantity of the goods, and of the damage or loss sustained, are most important to enable the company to decide on, and ascertain the damage or loss; and as these particulars are generally and almost exclusively within the knowledge of the assured, his oath or affirmation thereto, is required as preliminary proof. The underwriters rely on, and address the interrogatory to his conscience. But it surely could not have been expected, that the assured should, in all cases, swear as to the mode

and cause of the loss; for in many cases it would be impossible for him so to do, from the want of due knowledge or means of knowledge. He might know the fact of the loss by fire; but as to the precise mode in which the fire was kindled, he might be and ordinarily would be wholly ignorant. Surely, it could not have been required, that any person should swear to facts or causes of loss, which he could not know; and thus put his conscience in jeopardy, or lose his insurance, although the whole was a case of sheer misfortune, without the slightest suspicion of fraud.

But, if we examine the context, it seems to me that every doubt must vanish; for it may be truly said, in such a case, "noscitur a sociis." The "particular account" is to be verified by the oath or affirmation of the assured, and "also, if required, by their books of account, and other proper vouchers." Now, this is all very natural, if the meaning be, as the court suppose it to be, a particular account of the articles lost or damaged; but it is wholly without meaning, if applied to the mode or cause of the loss or damage. No person could suppose, that the books of account of the party, or other proper vouchers, could or would furnish the slightest proof of such facts. And yet the argument is just as strong, applied to the case of such books and vouchers, as it is to the requisites of the oath or affirmation; for in each case they are required ad idem. And I cannot but think, that the company understood this clause, as the court does. For in their reply they placed their defence upon an entirely different ground, not suggesting this, as in all fairness they ought, if they meant to insist upon it. And then, again, as has been well observed at the bar, the oath of the party is not required, as an expurgatory oath, negativing fraud or design on the part of the assured. For these reliance is positively placed upon a more disinterested source, upon the certificate of some magistrate, notary, or clergyman, that the loss was real, and by misfortune, and without fraud or evil practice. As to negativing by oath the exceptions in the policy, it is nowhere required by any express stipulation in the conditions; nor can it be inferred from any reasonable presumption of intent. It is true, that it is said, that "if there be any fraud or false swearing, (in the alternative,) the claimant shall forfeit all claim by virtue of this policy." But this is mere matter of defence by the company, and constitutes no part of the preliminary proofs of the plaintiff. And, as to the exceptions of losses from design, invasion, public enemies, riots, &c., they constitute matter of defence, and are referrible to the trial, and are not to be negatived on oath in the preliminary proofs; because the plaintiff must at the trial prove a case prima facie not within them. It might as well be contended, that the plaintiff was bound to state under oath every other fact, upon which his recovery should depend. The true answer to all these suggestions is, that the stipulation is not in the contract; and no court is authorized to add a single term to conditions in their own nature sufficiently onerous. Conditions are to be construed strictly against those, for whose benefit they are reserved, when they impose burdens on other parties. The language of the clause is, that the party is to "deliver a particular account of such loss or damage," in the alternative. He is to state an account of the loss, that is, of the thing or value lost; or of the damage, that is, of the amount of the injury sustained. But he is not required to state, how the loss happened, or the cause or occasion of it. It is also said, that the notice and statement of the loss must show it to be a loss within the risk of the policy; and that it is always so done in marine policies. Certainly, the loss must be shown by the notice to be by a risk within the policy; and it is so shown here, for the loss is stated to be by fire. But in the notice of a loss under a marine policy, no one ever supposed that it was necessary to state more than a loss by a peril insured against. Must the plaintiff go on, and negative all exceptions, express or implied by law, which constitute the defence of the other side? Must he state, that a loss by perils of the seas has been without any fraud, negligence, deviation, or non-compliance with warranties? Practically speaking, I have entire confidence that allegations of this sort have never hitherto been deemed essential or pertinent.

The next objection is, that the court instructed the jury, that the words in the policy, "at present occupied as a dwelling-house, but to be occupied hereafter as a tavern, and privileged as such," did not import on the part of the plaintiff a warranty, that they should be so occupied during the continuance of the risk. What the court did say to the jury on this point was, that these words did not constitute a warranty, that the house should, during the continuance of the risk be constantly occupied as a tavern; but that the language was, at farthest, a mere representation of the intention to occupy it as a tavern, and to secure for it the privileges of the policy as such. And I am, upon farther reflection, clearly of opinion, that the direction was right. We must interpret these instruments in a reasonable manner, from the nature and objects of the parties. Here the assured was the mortgagee of the house; and he is so described in the policy. In the ordinary course of things, he could not be presumed, as mortgagee, to intend to take possession of the property and occupy it as a tavern; and of course, if occupied as a tavern, it must be by or under the mortgagers. In point of fact, as the survey, made by the company's own agent, and on which the policy itself was underwritten, states, it "was to be occupied, in the course of two or three days by the

said Hayden and Hobart for the purpose of keeping a tavern." In the mouth of the mortgagee, then, if the language were to be treated as his, it could fairly be understood to import no more than a representation, that it was to be occupied as a tavern. And if so, then, as taverns are enumerated in the conditions of the company as among the hazardous risks, for which an extra premium is to be paid, it would follow, that the policy would be void for a fraudulent concealment, unless the fact were disclosed, and the house privileged as a tavern. But the language cannot in strictness be treated as the language of the mortgagee. It occurs in an instrument executed by the company, and purporting therefore to contain their engagement. It occurs in the descriptive part of that instrument. Of the property insured, the company say, that they insure the house now occupied "as a dwelling-house, and to be hereafter occupied as a tavern, and privileged as such." Privileged by whom? Clearly by the company,—to be used as a tavern. The company agree to take this hazardous risk, and permit the policy to attach, notwithstanding the house may be changed from a common dwelling-house to a tavern. They could have no motive for insisting, that the house should always be, as it is classed by the survey, in the sixth class of hazards. If it had continued to be occupied as a common dwelling-house, the risk would have been far less, while the premium would have remained the same. It was not, then, a warranty of the assured, that it should be at all times during the risk occupied as a tavern; but a license or privilege granted by the company, that it might be so occupied. The case is entirely different from that of a policy on a vessel to be engaged in the whale fisheries; for there the nature of the voyage ascertains and limits the language of the policy. Unless the vessel sails on a whaling voyage, the policy does not attach; and, if she engages during the voyage in other traffic, it is a deviation from the voyage. But, suppose a policy were on a coasting vessel generally for a twelvemonth, with liberty to engage in the whale fisheries; would that amount to a warranty, and tie up the policy to an employment solely in that trade? Or, suppose a policy on a vessel from Boston to Leghorn, and back, with the privilege of cruising as a letter of marque; would that amount to a warranty that she should so cruise? Certainly not in either case. The construction would be, not that the words restrained, but that they enlarged the general words of the policy. Let me put another case. Suppose a policy against fire, underwritten on the house of A in Boston, described as a dwelling-house, or as occupied as a dwelling-house; would the policy be void, if the house should cease for a time to have a tenant? Such a doctrine has never to my knowledge been asserted; nor should I deem it maintainable.

The interpretation put by the court upon the words of the policy, "privileged as such," seems now admitted by the counsel for the defendants to be the true one, although at the trial it was contended, that the meaning was, that the house was licensed by the municipal authorities, as a tavern; and it constituted one of the grounds in support of the motion for a new trial. That point is now abandoned.

Another objection is, that there was no evidence, that there ever was any intention to occupy the house as a tavern. It may have been so; but no objection was then taken to the absence of such evidence; and it is quite too late after a verdict to take it, when the deficiency might have been within the power of the party to supply. But in fact, if the ground of defence was misrepresentation, the onus probandi was on the defendants. The plaintiff was not bound to prove the representation, if any was made, to be true; but the defendants were to show, that it was false, and false in a point material to the risk.

The last objection is to a supposed instruction of the court on the point, what constitutes a loss by design within the meaning of the policy. I state it in this form, because the written motion does not accurately present the instruction of the court, or the language of the court, although it doubtless intended so to do. The line of argument in the defence at the trial did not impute to the plaintiff any direct or positive co-operation in the actual setting fire to the house, or any knowledge or connexion with the parties who did it. But it was to this effect, that if the plaintiff, by his negligence, and by leaving the house derelict, thereby exposed it to such destruction by mere trespassers, and was not unwilling, that it should be so destroyed, that such negligence and laches avoided the policy, and constituted a loss by design within the meaning of the policy. The court in commenting on this part of the case, said, that the case was as clear, and lay in as narrow a compass on this point, as any which had ever come before it. The language of the policy is, that the company will make good any loss or damage "by fire, originating in any cause, except design in the assured, invasion," &c. So that the company make themselves liable for losses by negligence, as well as by accident; for the exception of losses by design admits all losses not by design. I do not say, that the defendants would be liable for every loss occasioned by the gross personal negligence of the plaintiff; for it might under circumstances amount to a fraudulent loss. But the English decisions clearly are, that on policies against fire generally, losses by the negligence of tenants are within the risks taken. And it is still more clear, that losses by the negligence of tenants, or by the criminal wantonness, or misconduct of mere trespassers, or intruders, or felons, are within

the common policies against fire. But in the present policy there is no room for doubt on this point. The losses excepted are, not losses by design generally, but "losses by design of the assured." The case, then, is reduced to the consideration of what constitutes a loss by design in the assured, within the meaning of the policy. I say, that it is not a loss by the mere negligence or laches of the party, where he has left the property exposed to the peril, but has not co-operated directly or indirectly with those, who produced the loss. Design imports plan, scheme, intention, carried into effect. The loss, to be by design of the assured, in the sense of the policy, must be by incitement, connivance, or co-operation of the assured, directly or indirectly, with the persons, who were the agents in the act. It is not sufficient, that he is negligent in leaving the premises derelict, and thus exposing them to the wanton or criminal acts of intruders. Negligence is not design. We are here, as in other cases of insurance, to look, not to the remote cause, but to the proximate cause of the loss; "causa proxima, non remota spectatur." How can it be truly said, that the negligence of the plaintiff in this case was, in any just sense, the proximate cause of the loss, if he had no co-operation, knowledge, or part in the act? Unless, then, the jury can from the evidence clearly see, that the plaintiff was, not merely negligent, but was directly or indirectly connected with the act, I am of opinion, that it cannot be correctly deemed to be a loss by design of the assured. The defendants do not themselves impute to the plaintiff active co-operation, or connexion with the persons, who set the house on fire. On the contrary the argument supposes, that it was set on fire by mere transgressors or felons, who were utter strangers to him, and of whose designs he was ignorant. It imputes to him only negligence, and wishes or motives for the event, and undue exposure to the perils.

Such was in substance the direction to the jury. And now upon the farther argument, which has been had, I deliberately adhere to it. It appears to me, that the doctrine contended for in the defence is untenable and dangerous, and would take away all security under policies of this sort. It in reality attempts to engraft upon the words of the policy a new term, and to exempt the underwriters from all losses, which can be traced, however remotely, to the neglect or laches of the assured. If the latter were to leave open the front door of his house by night by gross negligence, and felons should enter and set it on fire, I do not perceive, how the loss upon the argument could be recoverable. It might then be said, as it is now said, that he had his motives, wishes, and expectations, though he was wholly ignorant of the design of the felons. I cannot but think, that under such circumstances policies of this sort would hold out false lights and false securities to the assured; and would seduce them into the false confidence, that design meant something widely different, and contradistinguished, from negligence.

Legal design, it is said, is to be imputed to a party where the consequences naturally flow from the act. That is true; but then they must naturally flow from it, not merely follow it. They must be connected with it, as a cause, and not as an occasion. The act and the negligence must be knit together by an indissoluble bond. The law properly holds, that every man is presumed to intend, what are the natural consequences of his act. But it does not presume, that he intends every thing, which may possibly follow from his negligence, or be remotely occasioned thereby. The case of The Squib (Scott v. Shepherd), 2 W. Bl. 892, stands upon the very verge of the law, upon a sort of metaphysical subtilty; and, whether rightly or wrongly decided, it was decided, not upon mere negligence, but upon a direct and positive act, which gave rise to an action of trespass, as a mediate, if not an immediate act of force. In Percival v. Hickey, 18 Johns. 257, there was a direct and immediate act of force by running down the vessel of the party; and so the case of Guille v. Swan, 19 Johns. 381, was treated by the court.

But it is said, that the court did not leave the question to the jury, whether there was fraud on the part of the plaintiff, or such gross negligence as was presumptive of fraud. No such ground is suggested in the written motion for a new trial; and of course it cannot, according to the rules of this court, be now taken notice of. But I may say, that, if not put to the jury, it was because the point was not distinctly put by the defence for the consideration of the jury. The court certainly is not to be expected to supply matters of defence, which the counsel do not choose to insist upon at the trial. Upon the whole, my judgment is, that the motion for a new trial ought to be overruled; and it is accordingly overruled.

Case No. 2,523.

CATLIN v. UNDERHILL.

[4 McLean, 190.] [1]

Circuit Court, D. Indiana. May Term, 1847.

EVIDENCE—COPY OF RECORD—AUTHENTICATION.

1. To make a sworn copy evidence, the witness must state that he compared the copy with the original.

2. A surrogate acts as a clerk in certifying his proceedings, and as he also acts in the capacity of judge, he must certify as to the authentication under the act of congress.

[See U. S. v. Biebusch, 1 Fed. 213.]

[At law. Action by the executor of Lynde Catlin upon promissory notes.]

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

Mr. O'Neal, for plaintiff.
Mr. Yandees, for defendant.

OPINION OF THE COURT. This case is brought before the court, by consent of the parties, to submit certain questions on the admissibility of evidence.

Charleston Farris being sworn, says, that the annexed exhibit A contains the letters testamentary, the copy of the will, the certificate of the surrogate and the proofs thereon, and a certified copy of the oath taken by the witness upon taking out said letters testamentary. Witness states that he has acted as such executor ever since he was so qualified, and still continues to act. This, it was contended, proved the will and other papers as sworn copies. But the witness does not swear that he compared the copies with the record; and, therefore, they can not be received as sworn copies. The surrogate before whom the will was proved, and who granted the letters testamentary, certified under his official seal, to a copy of the will, letters, etc., and proof of the will. But there was no certificate of the presiding judge, that the attestation was in due form, and for this defect the copies are objected to. The surrogate acts as his own clerk, and certifies under his seal, but he also acts in the capacity of judge, and, consequently, had a right to certify. He keeps a record, and the court held that copies must be authenticated in the form required, to make them evidence.

The act of congress of 1790 provides, "that the records and judicial proceedings of one state shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice or presiding magistrate, as the case may be, that the said attestation is in due form." The papers offered, not having the required authentication, can not be admitted in evidence.

[NOTE. For what appears to be the trial of this case, see the next following case, No. 2,524.]

Case No. 2,524.

CATLIN v. UNDERHILL.

[4 McLean, 337.] [1]

Circuit Court, D. Indiana. May Term, 1848.

SURVIVORSHIP — ADJUSTMENT WITH EXECUTOR OF JOINT CREDITOR.

1. Where a debt is due to two individuals, both of whom die before the amount was adjusted, and the settlement was made after the death of both, with the executor of one, and two notes were given to him for the balance, it may be recovered in his name.

2. The doctrine of survivorship, does not apply to a single transaction of this character.

3. It is not doubted, however, that had only one of the parties died, the survivor might have sustained his action for the amount due.

[At law. Action by the executor of Lynde Catlin upon promissory notes.

[For disposition of a question as to the admissibility of certain evidence, which apparently arose in this case, see the next preceding case, No. 2,523.]

Mr. O'Neal, for plaintiff.
Mr. Yandes, for defendant.

OPINION OF THE COURT. This action is brought on two notes, each for two hundred and eighty dollars, thirty-five cents, dated 29th September, 1843, one payable in one year, and the other in two years, with interest. The case was submitted to the court on the following facts: Elijah Farris and Lynde Catlin, loaned the defendant one thousand dollars. This was before Catlin's death, who died in 1833, and the plaintiff was appointed his executor. Elijah Farris died in 1842, and Charleston Farris was made his executor. Payments had been made on the loan, but the account was not closed until 1843, when the above notes were executed. Both of the principals being dead, the adjustment was made with the executor of Lynde Catlin. The notes were given for the balance due, and two notes were given that one might be handed to the estate of Elijah Farris. As both notes were given payable to the executor of Catlin, he refused to deliver one of the notes to Charleston Farris' demand, on the alleged ground that the estate of Farris had received its full share of the loan.

This is not the case of an ordinary copartnership. It was a loan made jointly to the defendant by Catlin and Farris. It was a single transaction, and no presumption of debts can arise, as in a case of ordinary copartnership, where the survivor is held responsible. From the nature of the transaction, it is impossible that the doctrine of survivorship can apply. No debts were contracted by the parties, jointly or separately, in making the loan. The reason, therefore, which applies to a partnership, can have no application to this joint contract. In making the adjustment, therefore, with the executor of Catlin, no principle was violated nor was any interest or policy disregarded.

In [Wallace v. Fitzsimmons] 1 Dall. [1 U. S.] 248, it is said, that a payment to an executor or administrator can be no satisfaction to a surviving partner, who has the sole right of suing for and of receiving the money due to the company. The law makes the surviving partner liable for the joint debts, consequently he has the exclusive control over the partnership effects; and every action founded on a joint transaction, must be brought in his name. It is therefore contended that this action can not be maintained. At the time the balance due was

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

ascertained, and the notes were given, both of the principals were dead. That there was fraud or unfairness in the act of adjustment, is not pretended. Two notes were given that each executor might have one half of the balance, but as both notes were payable to the executor of Catlin, and suit became necessary, it would seem to be better that the notes should be payable to one executor, so that one suit only would be necessary. The executor of Catlin will be responsible to the other, should it be found that he did not receive his share of the loan.

Where a promise is made to pay two persons, and one of them dies, there can be no doubt that the survivor may maintain an action on the promise. And it is proper that the action should be in his name. But when both principals are dead, and there can be no liability growing out of the transaction, and notes have been given to the executor of the individual who first died, we think the action may be maintained in his name, because the reason on which the rights and responsibilities of a surviving partner do not apply. In such a case, it is unnecessary to inquire which of the individuals died first. Judgment for plaintiff.

CATO, The (RYAN v.). See Case No. 12,184.

CATO, The (TAYLOR v.). See Case No. 13,786.

CATON (UNITED STATES v.). See Case No. 14,758.

Case No. 2,525.

CAUJOLLE et al. v. FERRIE et al.

[5 Blatchf. 225;[1] 2 Abb. Pr. (N. S.) 3.]

Circuit Court, S. D. New York. Nov. 22, 1864.

DISTRIBUTION—PRIOR ADJUDICATION OF STATE COURT.

To a bill filed by the next of kin of a deceased person, against his administrator, for distribution of his estate, the administrator pleaded, in bar of the suit, the adjudication of a surrogate's court, determining that the administrator was the next of kin of the deceased, the adjudication being made on a contest between the administrator and the plaintiff, as to the grant of letters of administration: *Held*, that such adjudication was not conclusive on the question of distribution, and that the plea was bad.

[Overruled in Caujolle v. Curtiss, 13 Wall. (80 U. S.) 465.]

[See note at end of case.]

In equity. The bill in this case was filed by the plaintiffs [Benoit Julien Caujolle and others], who claimed to be the next of kin of Jeanne Du Lux, deceased, against her administrators [John P. Ferrié and Cyrus Curtiss], for distribution of her estate. The defendants pleaded, in bar of the suit, the adjudication of the surrogate's court of the city and county of New York, determining that Ferrié, one of the defendants, was the next of kin of the deceased. The adjudication was made on a contest between Ferrié and the plaintiffs, as to the grant of letters of administration.

[The estate is large, some $70,000, which is principally invested in bonds and mortgages upon property in this state.][2]

[Previous proceedings had in this case are reported in 4 Bradf. 28, where the decision of the surrogate, referred to below, is stated. That decision was affirmed on appeal in 26 Barb. 177, and again in 23 N. Y. 90.]

NELSON, Circuit Justice. No cases have been referred to, nor am I aware of any in this state, or, indeed, in any of our sister states, adjudging the point in question. Different opinions seem to be entertained, by eminent judges in England, as to the conclusiveness of the decision of the ecclesiastical court, on a question of administration, upon a court of equity, in a suit for distribution, as may be seen from the case of Barrs v. Jackson, decided by Vice Chancellor Knight Bruce, in 1842 (1 Younge & C. Ch. 585), and the same case on appeal (1 Phil. Ch. 582). The opinion of Lord Lyndhurst on the appeal may, perhaps, be regarded as settling the question in England, in favor of the conclusiveness of the adjudication of the ecclesiastical court, though that may be doubted. It is not material, however, to go into this inquiry, for, admitting it to be so, the decision could not be allowed to control the question as presented under our system of administration. We regard the question of next of kin, under our system, as preliminary and incidental, before the surrogate, and simply with a view to ascertain the proper person, as prescribed by the statute, to be admitted to take letters of administration. This is the sole purpose and object of the inquiry; and it is made without any reference to, or consideration of, the question of distribution. The question of the admission to take letters of administration is of much less importance, and an error in the proceedings is much less prejudicial in its consequences, than the question involving the distribution of the estate. If a competent person is appointed, in the former case, to administer upon the assets, though he may not be the right person, the interests of all concerned may be safe. But, in the latter, the right of property in the assets is concluded. Hence, the right to letters of administration is not usually severely contested. It may be added, also, that the surrogate is not concluded by his own adjudication in the matter. He may revoke the appointment, for imposition or fraud, or displace the administrator for cause and appoint another. The plea in this case must, therefore, be overruled, and the defendants have leave to answer.

[NOTE. The defendants answered. There was a reply, and a decision for the defendants

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

[2] [From 2 Abb. Pr. (N. S.) 3.]

upon the merits. Case unreported. Complainants appealed to the supreme court, which affirmed the circuit court decree, but held, per Mr. Justice Davis, that the judgment in the suit for administration in New York was pleadable in bar, and that on that ground alone the bill should have been dismissed. Caujolle v. Curtiss, 13 Wall. (80 U. S.) 465.]

CAULKINS (SIMPSON v.). See Case No. 12,880.

Case No. 2,526.

CAUSEY v. The SHARK.

[New York Times, May 4, 1862.]

District Court, N. D. New York.

COLLISION—DARK NIGHT—SPEED—BOTH VESSELS IN FAULT.

[Where a collision between two schooners was caused by the failure of both to maintain such lookouts as the darkness of the night, the locality, and the speed of the vessels required, the resulting damage should be apportioned between them.]

In admiralty. This was a libel filed by [Peter F. Causey and others] the owners of the schooner Ship Carpenters, to recover the loss occasioned by her being sunk in a collision with the Shark, on the night of Dec. 1, 1860. The Ship Carpenters was bound up the coast from the Capes of Delaware, and the Shark was bound down the coast from New York. The testimony was very contradictory as to the facts of the collision. The Ship Carpenters was on the larboard tack. The witnesses differed as to the direction of the wind, but the court came to the conclusion, on the evidence, that it was W. N. W. to N. W. by W., and that the course of the Ship Carpenters was N. by E., thus making her close-hauled, while the Shark had the wind about three points free. The Shark was running about seven to eight knots an hour, and the Ship Carpenters five or six, and perhaps seven knots. The night was so dark and thick as to require unusual care in a locality where vessels are constantly meeting. On board the Ship Carpenters only the mate and the man at the wheel were on deck. The mate testified that he was forward of the foremast on the lookout; that he saw light ahead which he supposed was three points off their starboard bow; that he could not then see the hulk or sails of the vessel; that he immediately went aft and asked the man at the wheel how he was steering and was told north by east; that he looked at the compass and found it was so, and said to the wheelman, "You see that light?" and he said he did; that immediately after this, and while he was yet aft, he made out the sails of the vessel, which was then about four lengths or 320 feet off. The mate of the Shark testified that he looked at the compass about three minutes before the collision; that he then went forward on the lee side as far as the mainmast, and paused there and looked out; saw nothing at first, and then all at once a light came in sight, and he sung out, and the lookout forward sung out at the same time; that he went forward pretty quick, as far as the foremast, when he made the vessel's sails standing across his bow, and about fifty feet off. A good deal of other testimony was given as to this lookout on the Shark.

Platt, Gerard & Buckley, for libelants.

Benedict & Beebe, for claimants.

HALL, District Judge, held that the evidence of the mate of the Ship Carpenters is enough to show that no proper lookout, such as was required by the darkness of the night, the speed of the vessel, and the number of vessels known to be in that neighborhood, was kept on board the Ship Carpenters. That she was not, therefore, free from fault. That as to the Shark, the testimony showed that the collision occurred very soon after the watch was changed; that for a short time before and during and after the change of watch, no very careful lookout was kept; that when the light of the Ship Carpenters was seen, it was seen almost simultaneously by the mate, who was nearly amidships, and by the lookout, who was near the jib; that it came suddenly upon the vision of both, and that they saw the sails almost at the same instant, and when the vessel was but a very short distance off, so short that nothing could then be done to avoid the collision. That all this is inconsistent with the keeping of such a lookout on board the Shark as her speed, the darkness of the night, and the locality required. That the Shark, therefore, was also in fault in this respect. That the speed of both vessels, if not entirely unjustifiable, was such as to require the most extraordinary vigilance of the most effective and constant lookout. The Pepperill, 1 Swab. 12; Union S. S. Co. v. New York & V. S. S. Co., 24 How. [65 U. S.] 307, 314. That both vessels being in fault in this case, the damages must be apportioned between them, without costs to either party.

Case No. 2,527.

CAUSIN v. CHUBB.

[1 Cranch, C. C. 267.][1]

Circuit Court, District of Columbia. Dec. Term, 1805.

MARSHAL'S FEES ON CA. SA.

If the plaintiff has received the debt and costs the marshal cannot detain the defendant upon a ca. sa. for the poundage.

Ca. sa. returned cepi. The marshal brought in the defendant. The plaintiff admitted he had been paid the full amount of debt and costs. The plaintiff did not call upon the marshal to bring in the body; nor, upon the marshal bringing him in and offering him to

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

the plaintiff, did he pray him in commitment.

THE COURT decided that the marshal had no right to hold the defendant upon the ca. sa. for the poundage, it being no part of the judgment. See Acts Md. 1779, c. 25, §§ 4, 5; Acts 1790, c. 59, § 2.

CAUSIN (UNITED STATES v.). See Case No. 14,759.

CAVALIER, The (BLANCHARD v.). See Case No. 1,508.

Case No. 2,528.

In re CAVAN.

[19 N. B. R. 303.]

District Court, E. D. Michigan. Feb. 17, 1879.[2]

BANKRUPTCY—CONDITIONAL COMPOSITION—RECORDING.

1. Mere delay in obtaining the requisite number of signatures to a composition, unaccompanied by laches, will not justify a refusal to record the composition.

2. A resolution proposing a composition of seventy cents, to be paid within thirty days after recording the resolution, upon condition that all the property of the bankrupts be surrendered to them, and all pending suits discontinued, is not improper.

Upon objections to the recording of a resolution of composition of the creditors.

Don M. Dickinson, for objecting creditors.
William H. Wells, for composition.

BROWN, District Judge. Three objections were interposed to the recording of the composition in this case.

First. That the proceedings have been unreasonably delayed. In evidence of this, it appears that the resolution was passed and adopted at a meeting of the creditors, on the 22d day of May, 1878; but that the signatures of the requisite number of creditors were not all obtained, nor the required notice given for the objecting creditors to come in and oppose a confirmation, until December. It further appears, however, that on the 9th day of March certain creditors of the bankrupts began suits against them, and caused writs of garnishment to be issued against certain insurance companies which were largely indebted to the bankrupts; that, subsequent to the filing of the petition in bankruptcy, which was in April, application was made on behalf of the bankrupts to the attorneys of these creditors, to discontinue such suits, in order that the expense and delay of appointing an assignee in bankruptcy, who could move for their dismissal, might be avoided; that some correspondence was had with these attorneys and with other persons, which was continued until about the 17th day of July, to which date the meeting of the creditors for the election of an assignee had been from time to time adjourned, and upon which day an assignee was finally chosen, and on the 26th of July an assignment was made to him by the register; that shortly prior to this the judge of the court left the city, and did not return until late in September; that, within a few days after his return, application was made to the court for a dismissal of these suits, which was granted, and, from that time, proper diligence was used in collecting the amounts due the bankrupts' estate from the insurance companies, and in the prosecution of the composition proceeding. I do not think that mere delay, unaccompanied by laches, is any ground for refusing to record this composition. I think the delay in this case is excusable, and that I ought not to refuse to record the composition upon that ground.

Second. That the composition is conditioned upon contingencies beyond the control of the creditors, and which are unreasonable and unlawful. The resolution submitted to the creditors proposed a composition of seventy cents, to be paid within thirty days after the recording of the resolution, "upon the condition that all the property of the said bankrupts be surrendered to them, and all pending suits be discontinued." Postponement of payment for thirty days is obviously no objection. These resolutions frequently provide for payment in installments at different periods, and such provisos have been uniformly sustained. The condition that all the property of the bankrupts be surrendered to them is no more than the law would imply if the resolution had been silent upon this point. In re Reiman [Case No. 11,673]. In any event it is mere surplusage, and may be disregarded. In re Van Auken [Id. 16,828]. The learned judge held, in that case, that such a condition bound no one, neither the creditors nor the court, and that, upon the application of any creditor, a warrant of seizure might issue, notwithstanding the terms of the composition as to the retention by the debtors of their assets. The condition that all pending suits be discontinued was solely for the benefit of the bankrupts. If the tender of the seventy per cent. was made within the thirty days, the creditor would not be at liberty to refuse it because pending suits were not discontinued, as he would get no more than the seventy per cent. if they had been discontinued. It was a condition with which he had practically nothing to do. If the tender were not made within the thirty days, the composition would fall through, and cease to be operative. The bankrupts could not compel their creditors to receive the dividend, nor could the creditors compel the bankrupts to pay it. There would be no want of mutuality, since the composition would cease to exist at the expiration of thirty days. Until the expiration of the time limited by the resolution,

[1] [Reprinted by permission.]

[2] [Affirmed by the circuit court (case unreported).]

the composition is regarded as still pending. In re Hinsdale [Id. 6,526]. After the expiration of the thirty days, the proceedings become a nullity, and the assignee may proceed to settle the estate.

Third. That a confirmation of the resolution by the signatures of the creditors was secured by the purchase of claims, and not by a free and full expression of the wishes of the creditors. The only evidence of that is contained in the affidavit of one Jones, the agent of one of the creditors, who says that, some time during 1878, he visited Houghton, and was there informed by Cavan that he had purchased the claims of other creditors against them, at a less price than their face, affiant believing that such claims were voted in favor of the composition contrary to law. In rebuttal of this, it appears that all claims against the estate were proved by the creditors in person, who made the usual oaths that they were the bona fide owners of the claims, and that no agreement had been made or entered into on their behalf to dispose of the claim, or to receive any consideration whereby their vote should be in any way affected, influenced, or controlled. It further appears that, on the 10th of December, 1878, the bankrupts appeared before a notary public at Houghton, and answered certain interrogatories propounded by the register, in which they declared that they had not paid, or offered to pay, or promised to pay any creditor any sum other than that specified in their proposed compromise, in order to induce the creditor to accept it; that they had never entrusted to any attorney, or other agent, any money or property for the purpose of being employed to induce any creditor to accept the composition; and that they had never authorized any attorney or agent to promise any money or property to induce any creditor to accept the composition. It seems to me this objection is not made out. I think the composition should be recorded, but that the bankrupts' estate should not be surrendered to them until the expiration of the thirty days.

On appeal to the circuit court (Judge Baxter) this decision was affirmed.

CAVAN v. The D. S. GREGORY. See Cases Nos. 4,099–4,103.

CAVAROC (BENJAMIN v.). See Case No. 1,300.

Case No. 2,529.

CAVAROC v. COLLECTOR.

[1 Woods, 172.][1]

Circuit Court, D. Louisiana. Nov. Term, 1871.

CUSTOMS DUTIES—"WINE IN BOTTLES"—ASSESSMENT.

Under section 16 of the act (16 Stat. 262), C. imported a lot of wine in bottles, each bottle containing more than a pint and less than quart; *held*, that the rate of duty was controlled by the actual cost of the wine and not by its cost estimated on the supposition that each bottle contained an entire quart.

This was an action brought to recover of defendant, James F. Casey, who was collector of customs at the port of New Orleans, the sum of $532, duties alleged to have been illegally imposed and collected by him from plaintiff. A jury was waived and the cause submitted upon an agreed statement of facts, which sufficiently appears in the opinion of the court.

Charles Case and J. D. Rouse, for plaintiff.

J. R. Beckwith, U. S. Atty., for defendant.

WOODS, Circuit Judge. The law controlling the case is found in 16 Stat. 262, § 21, and is as follows: "There shall be levied, collected and paid, the following rates of duties, that is to say, on all wines imported in casks, containing not more than twenty-two per centum of alcohol and valued at not exceeding forty cents per gallon, twenty-five cents per gallon; valued at over forty cents and not exceeding one dollar, sixty cents. * * * On wines of all kinds imported in bottles, and not otherwise herein provided for, the same rate per gallon as wines imported in casks; but all bottles containing one quart or less than one quart shall be held to contain one quart, and all bottles containing one pint or less than one pint shall be held to contain one pint and shall pay in addition three cents per bottle." The plaintiffs imported 507 cases of white wine in bottles, each bottle containing more than a pint and less than a quart. The wines were entered at the custom house at the quantity of three gallons per case. The cost of the wine was one dollar, fourteen cents and eight mills per case, commissions included. If the cost per case be divided by three, the number of gallons per case as entered, then the cost per gallon is less than forty cents and the duty imposed by law thereon is twenty-five cents per gallon and three cents per bottle. But the collector ascertained by measurement the quantity contained in each bottle to be one-fifth of a gallon or two gallons and two-fifths of a gallon per case, and if the cost per case be divided by the latter number, the actual quantity, then the cost per case exceeds forty cents per gallon, and the duty is sixty cents per gallon and three cents per bottle. The defendant decided that this was the lawful method of estimating the cost and imposed duties at the latter rate upon the wine, estimating the quantity to be one quart per bottle or three gallons per case. The plaintiffs claim that by this method of deciding upon the rate of duty the collector has imposed duties to the amount of $532.35 over and above what the law authorized.

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

The question presented for decision is, therefore, was the collector right in the method adopted for estimating the value of the wine; in other words, was he or not bound, in estimating the value of the wine, to hold that each bottle contained a quart? We think the method adopted by the collector was the correct one. The law is express that wines valued at not exceeding forty cents per gallon shall pay twenty-five cents, and valued at over forty cents and not over one dollar per gallon, sixty cents per gallon. There is no dispute that this wine actually cost over forty cents per gallon. It is, therefore, liable to pay a duty of sixty cents, unless the collector is bound, in estimating the value, to consider each bottle as holding an entire quart. To adopt the rule claimed as correct by plaintiffs, would be to allow the importer and not the law to fix the rate of duty. For by changing the size of his bottles he could reduce the duty from sixty to twenty-five cents per gallon without any change in the quality or cost of the wine. The provision, that each bottle containing more than a pint and less than a quart, shall be held to contain a quart, is intended only to fix the quantity on which the duty is to be imposed; the value of the wine is intended to be its actual and not a fictitious or arbitrary value.

The policy of the law is to impose the same uniform duty on the same article, and not to leave the duty to be regulated by the importer. It was not the purpose of the law to impose sixty cents on wine put up in bottles holding a quart, and twenty-five cents on the same wine put up in bottles of a smaller size. Any hardship resulting from the application of this rule may be avoided by the importer by the simple process of importing his wines in pint and quart bottles. He cannot be allowed to escape a part of the duties by changing the size of his bottles. Let a judgment be entered for defendant.

CAVAROC (EAMES v.). See Case No. 4,238.

CAVAZOS (BROWNSVILLE v.). See Case No. 2,043.

CAVE (UNITED STATES v.). See Case No. 14,760.

Case No. 2,530.

CAVENDER v. GROVE.

[4 Biss. 269.][1]

Circuit Court, D. Indiana. Oct., 1868.

JUDGMENT — HOW ASSIGNABLE — PAYMENT TO ASSIGNEE — SATISFACTION — DEFENSE — BURDEN OF PROOF.

1. In Indiana, judgments are assignable by indorsement on the records of them, attested by the clerk.

2. Judgment may be assigned otherwise than of record. But in such case any payment or satisfaction of the judgment made to the assignor before the defendant has notice of the assignment, is valid.

3. No agreement for the full satisfaction of a judgment, made in consideration of the payment of a less sum than the amount of the judgment, is a full satisfaction of it.

4. On a motion to enter satisfaction of a judgment, nothing can be heard in support of it which might have been set up as a defense to the action in which the judgment was rendered. But if such defense is omitted to be pleaded to the action, and if it might be the subject of a cross action against the party recovering the judgment, the matter of such defense may, by agreement of the parties, furnish sufficient consideration for a contract between them to satisfy the judgment.

5. When a judgment creditor executes a written acknowledgment of the satisfaction of his judgment, and this is duly shown in evidence on a motion for satisfaction to be entered, the burden of proving that such acknowledgment is void for want of consideration or otherwise devolves on the creditor; and if he fails to make such proof, satisfaction of the judgment will be entered.

Hanna & Knefler, for the motion.

Charles E. Marsh, contra.

McDONALD, District Judge. In a proceeding in admiralty in this court, on the 28th of February, 1868, Stephen Grove obtained a judgment by default against Anthony J. Cavender for four hundred and fifty-nine dollars and twenty-five cents. Execution has been issued upon this judgment, and levied on Cavender's property. Cavender now moves for an entry of satisfaction of this judgment.

Among other things, Cavender, in support of his motion, produced a paper signed by Grove, dated June 26, 1868, acknowledging full satisfaction of the judgment, and directing the marshal to return the execution. Cavender also showed in evidence the clerk's receipt in full for one hundred and thirty-eight dollars and fifty-seven cents, including all costs in the case, dated July 17, 1868.

There was evidence in support of said acknowledgment of satisfaction by Grove, to the effect that Cavender had complained, after the judgment was rendered, that it was given for a far larger sum than was due; that deductions by way of payment, or set-off, or counter-claim, should have been credited on the claim, and were not; and that in the making of the settlement, at the time when the acknowledgment of satisfaction was executed, these deductions were taken into the calculation and allowed by Grove, as well as certain payments made by Cavender after the rendition of the judgment. And I think these facts are sufficiently established. It is certain that at no time after the judgment was rendered did Cavender pay on the judgment anything like the amount of it.

In opposition to the motion, it was proved that, in consideration of five dollars, Grove, on the 5th of March, 1868, and before his acknowledgment of satisfaction, assigned the judgment to David D. Doughty. This assignment was not made on the record of the case as required by the statute of Indiana, but on

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

a separate paper which was filed among the papers of the case July 1, 1868. Doughty, as well as Grove, appears by counsel and resists the motion.

The evidence further shows that Cavender, soon after this assignment, heard a rumor of it, and applied to Doughty and to the attorney of Grove for information on the subject; and that they told him it was assigned, but would not tell him to whom the assignment was made, because, as they allege, they did not want to be pestered by him about it. The attorney, however, informed him that if he would make arrangements to pay a part of it, he would tell him who was the assignee. All this happened before the date of the acknowledgment of satisfaction. Other evidence was given on both sides, on the question whether at the time of execution of the acknowledgment of satisfaction, Cavender had notice of the assignment. I think that such notice is not established by the evidence; and I think that, under all the circumstances, the failure of Doughty to inform Cavender that he, Doughty, was the assignee, estops him from now alleging that Cavender had notice. Fair dealing required that when Cavender asked Doughty for information touching this assignment, he should have told him the whole truth. It might indeed have been otherwise, if Cavender had, from any other source, had satisfactory information of the assignment before the settlement with Grove. But, though there was some evidence leading to that conclusion, it was too vague to establish it. Upon the whole, therefore, I conclude that Cavender, when he took the acknowledgment of satisfaction, had no legal or equitable notice that Doughty was assignee of the judgment.

Since, then, Doughty did not procure the assignment of record, as required by the statute; and since Cavender, when he settled the judgment with Grove, was not aware that Doughty was the owner of it, Doughty must be considered as holding it subject to all equities. Robeson v. Roberts, 20 Ind. 155. And I thus conclude the more readily and willingly, when I consider that he gave only five dollars for it—less than one-ninetieth of the face of it. I cannot think that a purchaser under such circumstances is entitled to the favorable consideration of any court. And, upon the whole, I think that I ought to regard the claim of Doughty as entirely out of the question in considering the present motion.

Then, the only point for inquiry is, whether as between Grove and Cavender this judgment ought to be deemed satisfied. The written acknowledgment of satisfaction shown in evidence is certainly sufficient prima facie proof. It has been attempted, however, to overthrow the prima facie case thus made by other evidence showing clearly enough that but a small portion of the judgment has been paid since its rendition. As already stated, it appears by the evidence that after the judgment by default was rendered, Cavender complained that the judgment was for too large a sum; and that Grove ought to have credited his claim with divers items, and only taken judgment for a small balance; whereas, he took it for the whole claim without these credits. And it appears further by the evidence, that in the negotiation which resulted in the execution of the acknowledgment of satisfaction, these credits were insisted upon by Cavender, and probably allowed by Grove. Though in relation to this whole matter, the evidence is very vague and unsatisfactory.

It is certain that the payment of a sum less than the amount due on a judgment or other debt cannot operate as a full satisfaction thereof, even though it is agreed between the parties, at the time of such payment, that it shall so operate. And it is equally clear that, on a motion to enter satisfaction of a judgment, nothing can be heard in support of it which might have been set up as a defense to the action on which the judgment was rendered. But I deem it equally clear that if such a defense is omitted to be pleaded to the action, and if it might be the subject of a cross action against the party recovering the judgment, the matter of such defense may very well, by agreement of the parties, furnish a sufficient consideration for a contract between them to satisfy the judgment. Such, I think, was the case. Cavender paid some money to Grove after the judgment was rendered. He had a claim against Grove in relation to the subject matter of the action before the judgment was rendered. This claim Grove afterward recognized as valid and subsisting, and the settlement of which he seems to have taken as a part of the consideration upon which he executed the acknowledgment of satisfaction of the judgment. I think that this was all right; and that I ought to hold him to his bargain.

It has been urged, indeed, in opposition to the view above expressed, that the facts from which the conclusion is deduced are not well proved. It must be admitted that the evidence of these facts is by no means satisfactory. But it should be remembered that Cavender, by the production in evidence of the written acknowledgment of satisfaction of the judgment, prima facie established all that was necessary to sustain his motion. The burden then devolves on Grove to overthrow the prima facie case thus made. It did not devolve on Cavender to prove that the acknowledgment of satisfaction was founded on a sufficient consideration; but it devolved on Grove to prove that the consideration on which the acknowledgment was founded was insufficient. On this point arises the uncertainty of the evidence. It was for him to remove that uncertainty; and I think he has not done it. On the contrary, I am inclined to think that I may safely deduce from the evidence, vague though it be, the facts which I have above stated.

It follows that the judgment must be entered satisfied.

Consult The Lulie D. [Case No. 8,602], and cases there cited.

Case No. 2,531.

CAWOOD v. NICHOLS.

[1 Cranch, C. C. 180.] [1]

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

ACTION BY EXECUTOR—PLEADING ISSUANCE OF LETTERS TESTAMENTARY.

The declaration need not state by whom the letters testamentary were granted.

[At law. Action by Cawood, executor of Blacklock, against Edward Nichols.]

Demurrer to the declaration, because it does not state by whom letters testamentary were granted. Cur. ad. vult. See Chiberton v. Trudgeon, Cro. Jac. 556, which seems in support of the demurrer. Quaere, whether there is not a difference between letters testamentary and letters of administration. See Graysbrook v. Fox, Plow. 279; Temple v. Temple, Cro. Eliz. 791; Morgan v. Williams, Id. 431; and Gidley v. Williams, 1 Salk. 38; which is strong in support of the demurrer as to letters of administration. Executors are by will, not by the ordinary. None of the forms of declarations by executors state by whom the letters testamentary were granted; but all the forms by administrators state by whom they were granted. "The right of action is in him before probate, for that gives him no interest; but the right he hath is by virtue of the will." Swinb. Wills, 434, cites Russel's Case, 5 Rep. 27, and 1 Inst. 292. "He cannot have an action unless he prove the will before he declares. If the action be brought before probate; if he concludes his declaration with a profert hic in curia literas testamentarias, it is well enough." Id.; cites Duncomb v. Walter, 1 Vent. 370; Raym. 479, 3 Lev. 57. "If a man have goods in divers dioceses or provinces, and makes his executor of his goods in one of the provinces, and dies intestate as to his other goods: if the ordinary commit administration of the goods, which are in the other province, to the said executor, then is he both executor and administrator, and the party died both testate and intestate." Swinb. Wills, 440, 441; 35 Hen. VI. fol. 36.

CRANCH, Chief Judge, after mentioning the above authorities, said, "Upon the whole and upon examination of precedents, I am of opinion that the declaration is sufficient."

THE COURT, at December term, being of the same opinion, advised the defendant to withdraw the demurrer, which he did, and confessed judgment.

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

Case No. 2,532.

The CAYENNE.

[2 Abb. (U. S.) 42.] [1]

District Court, D. Delaware. Oct. Term, 1870.[2]

SALVAGE—CASES OF DERELICT.

The true rule for awarding salvage in cases of derelict is this: Divide the proceeds which remain over all costs and disbursements of the salvage suit equally between the salvors and the owners of the rescued property, giving to each of these two interests a moiety.

[See note at end of case.]

Libel in admiralty in a cause of salvage. The libel in this case was filed by John W. Hall and others against the bark Cayenne, of Bordeaux.

HALL, District Judge. I have no difficulty in this case concerning matters of fact. According to my view, there need be no controversy in this respect. The captain and crew of the sloop Joseph P. Comegys, returning from Boston to her port in Delaware, and being on Sunday, September 17, near the capes of the Delaware, observed the bark, the subject of this libel, in a place in the ocean where, to use the captain's words, it ought not to be. He, in consequence, approached it, to learn the cause. On coming near, it was hailed, and, returning no answer, the mate and one of the crew boarded it, and found it abandoned; no person on board. Its sails were set, the bowsprit broken off near to the hull, and with the sail hanging down over the prow, and the vessel drifting at the rate, as supposed, of two miles and a half an hour, by tide and wind, toward shoals distant about eight miles. It was young flood; and the captain believed it would be thrown by that tide upon the shoals unless prevented. I make no scrutiny of the grounds of this belief. If the captain and crew of the Comegys had not taken possession of this bark, Captain Marshall of the pilot boat might, and if the bark had not been taken by either of them, it might not have gone upon the shoals that tide. But this is needless conjecturing. If it had not been taken up by some salvor, it must have been lost. As respects the claimants, it is a saving by a salvor in a case of total abandonment; they doing nothing, attempting nothing, to save it; and, left in that condition, destruction was certain and soon; it might have been delayed a short time. I enter into no consideration of hardship or exposure on the part of the salvors. They have taken this abandoned bark and brought it into safe port, turning aside from their proper business, and incurring some inconvenience, exposure, and trouble.

This brings me to the question of allowance. The question has given me anxiety

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission.]

[2] [Modified in Case No. 5,941.]

in every case of the kind before me, and I have decided it with distrust. I may add that the most satisfactory judgment I ever formed, I mean most satisfactory to myself, and which I trusted might be a precedent against extravagance preying upon the hard earnings of useful industry in misfortune, was reversed, and the allowance enhanced three-fold. It was the case of Virden v. The Caroline [Case No. 16,956]. She was a coaster from Maine. On February 1, 1857, she was lying within the Delaware breakwater. It had been a hard winter; the ice was breaking up in the river; the water was covered with floating ice. On February 1, one of the crew of the Caroline discovered a small leak in the starboard lumber port hole; it was found on examination that the shutter of this port hole had been injured, and it was believed necessary for the safety of the brig to repair this to secure it from being staved in by the ice. But the port hole was under water, and to repair it the lading of the brig must be shifted so as to raise this port hole above water. The flood tide had just begun. While it was running up there was no danger to the brig, but when running down it might drive the ice against this port hole, and the shutter could not stand heavy blows. The repair must be done during the running up of that tide, or soon after, before it became strong, running down. The crew of the brig could not shift the lading so as to raise the port hole above water in that time. They signaled a vessel near for help. She could not afford it. The steam tug America was lying near. She had been there several days, having gone there for employment in aiding vessels in need, and making profit by charges for assistance rendered. They signaled this tug for assistance, and she was alongside the brig in fifteen minutes. The day was pleasant; the water calm and smooth, and covered with floating ice. The crews of the tug and of the brig went to work to arrange the lading so as to raise this port hole above water; they threw heavy hogsheads of bone-dust into the water; removed some goods, value one thousand nine hundred and thirty-two dollars, on board the tug; they very soon perceived that they could easily raise the port hole above water in the necessary time. The tug had two calls during the day from vessels for assistance; these were attended to, the tug going to them, giving the required relief, and returning to the Caroline. About the middle of the afternoon the port hole was raised, one of the brig's crew repaired it, and the tug returned to her anchorage. There was no hurry, exposure, difficult work, nor any manner of danger, the working as comfortable as on a house floor—on the deck of a stationary vessel.

The first question on the facts was, whether this was salvage service, or common work in kind of service, which the tug had gone to the breakwater to render, and was profitably employed in rendering, as the reason why she was there and why she stayed there; the work being done under no present danger, but merely to guard against an evil which would happen unless prevented, and to prevent which this work was done in harbor, in fair, pleasant weather, on calm, smooth water. I came to the conclusion it was a salvage service, but of little merit, and I allowed six hundred and fifty dollars as compensation, more than three times the worth of the work and service. The decree was reversed, and about eighteen hundred dollars allowed.

This case, as all those cited, shows how judges differ, when they have no guide but their sound discretion, bringing vividly to mind the eloquent exclamation of Lord Camden: "The discretion of a judge is the law of tyrants." It is very important to have some rule to guide the judgment. It is not safe to be left at large to utter at random ten or twenty, as the words happen to come up.

There is certainly force in the reasoning of the counsel of the libelants, upon service rendered in the way of business, setting themselves apart to find employment in such service. This may have led to what is said to be the abrogation of the rule of allowing a moiety in cases of abandonment; but I do not feel it necessary to enter into any special discussion of this point. There may be cases of abandonment, in which much less than a moiety should be allowed.

Salvage involves various considerations and principles indicating the allowance in the particular case. In that of the brig Caroline, at the breakwater, the service was mere work and labor in shifting the lading to raise a port hole above water, for repairs; requiring no exposure, hardship, or skill, but elevated to salvage by this repair being necessary for the safety of the vessel; mere work in the line of employment of those doing it, without exposure or danger.

Another class of cases is of vessels in peril, where life must be periled to succor them. I have had such a case before me. A vessel driven without a person on board out of the Delaware bay, into the ocean, toward shore, in a frightful state of waves, under a tempest. A boat of pilots boarded her and saved her in those circumstances. The allowance was to remunerate exposure and boldness, and to encourage like service.

In no case is salvage a compensation for service on the principle of its value, quantum meruit. The case of the brig Caroline came the nearest to that rule. I allowed three-fold the value of the actual service, and the chief justice of the United States increased the allowance from six hundred and fifty dollars to eighteen hundred dollars.

In the case before me, the governing element is the abandonment of the bark, in connection with the fact that it was taken

up and brought safely into port by the libellants; turning aside from their proper business certainly, with inconvenience and exposure, and more or less hardship,—the service being fairly and honestly rendered, and the bark and cargo saved. I make no estimate of the danger to the bark from her drifting toward the shoals. It has very little bearing in the case, nor has the probability that she must be taken up. Captain Marshall of the pilot boat would have taken her if the Comegys had not; and if neither had taken her, it is very probable some other salvor would. I cannot see any effect on the determination of this case from such considerations. The claimants, or any one interested in the vessel or cargo, would not have recovered the property; they were not seeking it; so far as they are in the case, the bark and cargo would have been a total loss, if some salvor had not saved it. It was a total abandonment, and in that abandonment there would have been a total loss, if some salvor had not interposed; it is of no concern who that salvor may be; what the claimants receive will be as clear a gain to them as what the salvors receive will be to them; the claimants, what, so far as they were concerned, was abandoned to destruction; the salvors, their portion for saving the whole. This view indicates the principle of allowance: divide what remains over all costs and disbursements equally between the parties—to each a moiety. I think this is satisfactory to common sense and feeling of propriety.

It is argued, that principle of allowance has been overruled. I do not assert it as applicable to every case of abandonment, but as proper in this case—property abandoned to certain loss if not rescued by a salvor. Judges most highly respected have applied it. But Post v. Jones, 19 How. [60 U. S.] 150, is cited for this clause of the opinion of the court delivered by Judge Grier: "We agree with Dr. Lushington, that the reward in derelict cases should be governed by the same principles as other salvage cases, namely, danger to property, value, risk of life, skill, labor, and the duration of the service;" "and that no valid reason can be assigned for fixing a reward for salving derelict property at a moiety or any given proportion; and that the true principle is adequate reward according to the circumstances of the case." To show how vague such rules are, I consider the principle on which I decide the amount precisely that of Dr. Lushington; I relying upon the circumstance, that this property was abandoned to total loss which, but for a salvor, must have occurred a governing circumstance. But when it is said "danger to property, value, risk of life, skill, labor, and the duration of the service," are governing considerations as in all salvage cases, let us look at this case of Post v. Jones. The ship Richmond, with a very valuable cargo of whale oil, the fruit of nearly three years' privation, exposure, and toil, was stranded on an uninhabited shore; the cargo must be lost unless three other vessels would take it home, distant twenty-seven thousand miles. These vessels, instead of generosity to distress, force a mock auction sale, where there was not a buyer but themselves, and purchase this cargo of oil, take it on board, bring it home, and insist on keeping it at their auction price. The court set aside this auction sale, declare the three vessels that took and brought home the oil salvors, allow a moiety for salvage, and also freight for bringing home the moiety of the Richmond. Who does not see that the principle of allowance was the loss of the Richmond's cargo in the condition it was, and saving it by the other vessels, when otherwise it would have been a total loss. The transferring of the oil to those vessels, and then transporting it home, was without danger, and required neither labor of any amount nor skill in any degree, and although there was a long distance, they must go home, and the taking of this oil accelerated their departure and diminished their exposure and danger, while freight on the Richmond's moiety was a source of clear profit. The conduct of the salvors, always of weight, was oppressive. The decision approves itself to our sense of justice; but it certainly does not overrule any decision of our judges. If I mistake not, it countenances the principle which I rest upon for the allowance I make. I add, I regard the decision of our judges upon their elaborate investigations worthy of deference, and to be followed in cases in this country in preference to the authority of a British court of admiralty. Decree accordingly.

[NOTE. The claimants appealed to the circuit court, which modified the decree herein by reducing the award to the salvors to $2,000. See Case No. 5,941.]

[NOTE. Even as early as 1806, it was said by Judge Peters that the old rule allowing one-half as salvage, in cases of derelict, without regard to the character and circumstances of the service, "has been long since exploded." Taylor v. Goods Saved from The Cato, Case No. 13,786. The rule has gradually given way, in this country as well as in England, to the practice of awarding a fair compensation, in view of all the circumstances, as in other cases of salvage. Post v. Jones, 19 How. (60 U. S.) 150; 210 Barrels of Oil, Case No. 14,297; The Ida L. Howard, Id. 6,999; The Georgiana, Id. 5,355; The Lovetand, 5 Fed. 105; The B. C. Terry, 9 Fed. 920; The Edwards, 12 Fed. 508; The Annie Henderson, 15 Fed. 550; The Sybil, Case No. 4,824. In 1818, however, Judge Story was of opinion that the old rule "ought still to be considered as a subsisting, but flexible, rule, and that prima facie the salvors were entitled to a moiety; and that it was incumbent on the claimant to establish that, under the special circumstances of the case, a different measure ought to be applied." Rowe v. The Brig, Id. 12,093. In this statement of the rule he was followed by Judge Benedict as late as 1865. The Charles Henry, Id. 2,617. It is doubtful, however, whether even this doctrine would be acquiesced in at the present day; for the

courts now seem to exercise a sound discretion, with little regard to the moiety rule in any form. See The Anna, Case No. 398; The George Nicholaus, Id. 13,578; The Hyderabad, 11 Fed. 749; The Fairfield, 30 Fed. 700; The Flower City, 16 Fed. 866; The Agnes Manning, 59 Fed. 481; Cargo from Wreck of The Edwards, 12 Fed. 508; The William Smith, 59 Fed. 615. The salvage is not limited to one-half, and in the two cases last cited 70 per cent. was allowed. See, also, Sprague v. 140 Barrels of Flour, Case No. 13,253. The fact that the derelict is in a position where she would probably have been rescued by other vessels, had she not been saved by the salvors, is to be considered in fixing the amount of salvage. Hall v. Paquet Bot De Cayenne, Case No. 5,941; The Ida L. Howard, Id. 6,999; The Georgiana, Id. 5,355; The Lovett Peacock, Id. 8,555; Hilmer v. The Boweer, Id. 7,322.]

Case No. 2,533.

The CAYENNE.

[The case reported under above title in 7 Phila. 550, is the same as Case No. 5,941.]

Case No. 2,534.

Ex parte CAYLUS et al.

In re HOLBROOK.

[1 Lowell, 550.][1]

District Court, D. Massachusetts. March, 1871.

BANKRUPTCY—MUTUAL CREDITS—EVIDENCE OF FORMER DEALINGS TO VARY CONTRACT.

1. It seems, that the rule laid down in Rose v. Hart, 8 Taunt. 499, that a deposit of goods by a contract which will result in a debt, brings the case within the mutual credit clause of the bankrupt act, so that the bailee can set off his debt against the value of the goods, is the true rule under our bankrupt law.

2. Where a bailee of goods had been the original vendor of them, and supposed that he had a lien and an immediate right of sale, and agreed with the bailor to hold the goods for six months longer, and not to sell within that time, except for a certain price, but that afterwards he might sell and reimburse himself, *held*, this was a valid contract whether there were an antecedent lien or not, and after bankruptcy the bailee could have the goods sold and apply the proceeds towards the payment of his debt and prove for the deficiency.

3. A former course of dealing between A. and a broker, cannot be given in evidence to vary or explain a contract between A. and B., made through the same broker, if unknown to B. and not founded on a general usage of trade.

Bankruptcy. The bankrupt [C. L. Holbrook] was a clerk who had sometimes speculated in merchandise through the agency of his friends R. H. Green and Sons, merchandise brokers, of New York. On the 29th July, 1868, Messrs. Green bought for his account from Caylus, De Ruyter, & Company, importers, of New York, one hundred casks of French madder of a particular brand, to be thereafter shipped from France in the December and January following, to be delivered on the dock in New York in good order, and of prime quality, for fifteen cents per pound in gold, payable in thirty days after delivery. The bought and sold note disclosed Holbrook as the principal. The madder arrived early in 1869, and was delivered to the brokers, but was not paid for in thirty days, and had not been paid for at the date of the bankruptcy, June 28, 1870. It was then in the hands of the petitioners, Caylus, De Ruyter, & Co., the original vendors, having been consigned to them for sale in December, 1869, as presently to be stated; and since the appointment of the assignee the madder has been sold by order of court on consent of the parties, who now submitted the question whether the proceeds of sale which are less than the original price, belong to the assignee, or may be applied by the petitioners towards the payment of their debt, with leave to them to prove for the deficiency. The correspondence of the parties, and the oral evidence in the case tended to show that the goods had been delivered to Green & Co. on their arrival in New York. The petitioners offered to prove that by the course of dealing between them and the brokers, the latter were to hold the goods as agents for both parties, and to apply the proceeds of sale to the payment of their account.

LOWELL, District Judge. I cannot admit a course of dealing between other parties, even if they were represented by the same brokers, to qualify the delivery which the contract calls for, unless it amounts to a general usage of trade, or is in some way brought home to Mr. Holbrook.

After the madder had been delivered, it was pledged by the brokers to a trust company, and the money thus raised was advanced to the petitioners, but not in payment of their account for the madder; and they afterwards advanced the money to Green to repay the trust company, and took the pledged goods into their own possession. Soon after this, they wrote to Holbrook, December 2, 1869, reminding him that the bills for the madder had been rendered more than eight months before, and offering if he would pay the interest and expenses and consign the goods to them for sale at a commission of two and a half per cent, to "carry" the goods for his account and risk for ninety days. They wrote that in this way they could get advances on them, &c., and closed thus: "We think this arrangement the best for all concerned, as putting this long pending matter in the way of settlement, and carrying the goods over to a time when sales may reasonably be expected to be made, and avoiding the necessity which would otherwise occur of realizing on the goods at an unfavorable moment." Upon receipt of this letter, which came through Messrs. Green & Co., as usual, Mr. Holbrook referred the matter to them, and an agreement was arrived

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

at as appears by a letter of 31 December, 1869, from Holbrook to the petitioners, and their answer, January 3, 1870, by which the petitioners in consideration of the payment of the interest, storage, expenses, and insurance, to 31 December, and of the goods being consigned to them for sale, agreed not to sell for six months without Holbrook's consent, unless they could obtain sixteen cents a pound in gold. The letter of the petitioners accepting the terms, says that after six months they are to sell at the best price they can obtain for Holbrook's account. To this letter there was no reply. As the six months were about to expire, some negotiations were had looking to a further extension, but nothing was arranged, and a few days before the time was out Holbrook filed his petition in bankruptcy.

G. O. Shattuck & W. A. Munroe, for petitioners.

The petitioners never lost their lien as vendors; or if they did, it revived when they again obtained possession of the goods. Bing. Sales, 580; Stephens v. Wilkinson, 2 Barn. & Adol. 320; Gillard v. Brittan, 8 Mees. & W. 575. The goods having been consigned to the petitioners for sale, they have a right of set-off under the mutual credit clause of the bankrupt act, even if they had no lien. Rose v. Hart, 8 Taunt. 499; Naoroji v. Bank of India, L. R. 3 C. P. 444; Murray v. Riggs, 15 Johns. 591; Demmon v. Boylston Bank, 5 Cush. 194.

H. D. Hyde, for assignees.

A factor has a lien only for his advances or for general balance of account as factor, and not for what may be due him in some other capacity. Houghton v. Matthews, 3 Bos. & P. 485; 2 Kent, Comm. 645; Smith, Merc. Law. 516. If Holbrook had chosen to revoke the agency, the petitioners could not have objected, and as the bankruptcy occurred before sale had been made of the goods, the assignee may revoke, and take them for the general creditors.

LOWELL, District Judge. Our bankrupt law has adopted the language which had been used in former statutes for a long time, in reference to cross-demands between the assignee of a bankrupt and a creditor of the estate, that "in all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid." After some diversity of opinion, the leading case of Rose v. Hart, 8 Taunt. 499, appears to have been accepted as settling the law of England, that where a creditor has goods or choses in action of the bankrupt put into his hands before bankruptcy by a valid contract, by the terms of which the deposit will result in a debt, as if they are deposited for sale or collection, the case of mutual credit has arisen within the meaning of the bankrupt act; but where there is a deposit for some other purpose, as in the leading case itself, where goods were left with a fuller to be dressed, he can claim nothing beyond such lien as the common law gives him. See Rose v. Hart, 2 Smith, Lead. Cas. 172, and the American notes which cite cases in this country quite as liberal in favor of an equitable set-off, even when the statute is silent.

Under this rule the petitioners would have a right to set off the price of these goods against the demand of the assignee for the value of the goods, by virtue of the consignment of December, 1869, independently of any question of the revival of their lien as vendors, or of the intermediate pledge by the brokers. But this inquiry I do not pursue beyond the mere statement of a rule which seems to be indisputable, because the facts establish a right to hold the goods by the very terms of the contract. Whether the petitioners had a lien or not, it is plain that both parties thought they had one, and that the last agreement between them was made on that basis, the petitioners undertaking for a valuable consideration, to "carry" the madder for six months, and at the end of that time to be at liberty to sell it for the best price they could obtain, and reimburse themselves. This was accepted as a concession on their part, and to save a sacrifice; and throughout the correspondence, the talk is of "margins," and of "carrying" the goods for the benefit of Mr. Holbrook, all of which imports a right in the merchants to insist on a sale, and a holding of the goods as security for the purchase-money. I find, therefore, that the evidence clearly shows a lien by contract, whatever may have been its supposed origin, and a lien on which the parties have so acted and dealt with each other that the bankrupt and his assignee cannot now deny it. It was founded on the valuable consideration of a forbearance to sue.

Order that the petitioners have leave to apply the proceeds of sale of the madder towards the payment of their debt, and to prove for the deficiency.

Case No. 2,535.

The CAYUGA.

[2 Ben. 125.][1]

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

DAMAGES IN COLLISION CASES—FERRY-BOAT—DEMURRAGE—SUPERINTENDING REPAIRS.

1. Where a ferry-boat was injured in a collision, and was withdrawn for repairs, her place being supplied by a boat taken off from another ferry belonging to the libellants, whose place was in its turn supplied by a spare boat, but it was not shown that the injured boat could

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

[2] [Affirmed in Case No. 2,537.]

have been chartered for any sum for the time she was so laid up, but proof was given of the value of her use, based on her receipts while running on the ferry: *Held*, that the use of the ferry-boat was valuable;

[Approved in The Favorita, Case No. 4,694. Cited in the Mary Steele, Case No. 9,226.]

2. The case of Williamson v. Barrett, 13 How. [54 U. S.] 112, holding that the market value of a vessel is the criterion of her value in collision cases, does not apply where it appears that no such thing as a market price exists.

3. There being no market price, a judgment as to her value, given by men having experience upon the ferries, founded upon their knowledge of the business, is the natural way to ascertain the loss.

[Cited in The Transit, Case No. 14,138.]

4. Where the owners of a ferry-boat repaired her themselves, and charged, in addition to the pay of the laborers, an addition of twenty-five cents a day, which was proved to be usually charged for the use of the tools and yard, &c., and also made a charge for the services of two men in superintending the repairs: *Held*, that these items were recoverable as part of the damages.

[Cited in The May Flower, Case No. 9,345; The Alaska, 44 Fed. 500.]

In admiralty. This was a libel for collision filed by the Hoboken Land and Improvement Company, owners of the ferry-boat [James Watt], to recover damages for a collision between her and the Cayuga. The court held the Cayuga in fault. [See Case No. 2,536.] On the reference to ascertain the damages, it appeared that the libellants themselves repaired the boat. Exceptions were taken to the report of the commissioner. The questions raised on the exceptions sufficiently appear in the opinion.

W. J. A. Fuller, for libellants.

C. Van Santvoord, for claimants.

BENEDICT, District Judge. This case comes before me upon exceptions to the commissioner's report of the damages caused by the collision in the pleadings mentioned. The main exception is to the allowance by the commissioner of demurrage at the rate of seventy-five dollars per day for the time the injured vessel was undergoing repairs. This exception is based upon the ground, that there is no evidence that the vessel could have been chartered for that or any sum per day, at the time in question. The evidence showed that the vessel was a ferry-boat, at the time of the injury engaged in making the regular trips of the Hoboken ferry; that she was necessarily withdrawn from the ferry during the repairs, and her place there supplied by another ferry-boat belonging to the same company, which was taken off from the Christopher street ferry for that purpose, the place of the latter being in turn supplied by a spare boat.

For the use of vessels of this class there is no such thing as a market price fixed by various transactions between various persons. Ferry-boats are not general ships, up for charter or hire in open market, and it is impossible to refer to any such market to show the value of the use of such a vessel at the time in question. But it is said that the supreme court, in Williamson v. Barrett, 13 How. [54 U. S.] 112, have laid down the rule that the only criterion by which this value can be ascertained is a market price. I do not so understand the decision of that court. The rule there laid down can only be intended to be applied in cases where there is such a market to refer to, but not in a case where it is made to appear that no such thing as a market price exists. In the absence of a market price to refer to, some other evidence must be allowable in a case like this, for the use of the injured vessel was clearly valuable. She was, when injured, in constant, permanent employment, engaged in making regular but short voyages, transporting almost the same number of passengers each day, all for a fixed price, and all for cash, and her owners had a monopoly of the route. It would seem, then, that the actual value of her use for seventeen days could be ascertained more nearly than that of most other classes of vessels. Two witnesses of large experience upon the ferries were called to prove this value, and they testify to the amount which the commissioner has reported. This it seems to me is one way, and, when the witnesses are in a position to know the actual result of the employment of a ferry-boat for any given period, not an unsatisfactory way to prove the damages arising from the detention of such a vessel.

In the absence of a market price, the judgment of such persons, founded upon knowledge of the business, is the natural way to ascertain the loss occasioned by such an interruption. It was competent to show the inaccuracy of the estimate by proof of the actual receipts and expenses of a ferry-boat upon such a ferry, or by counter estimate. In the absence of any such opposing evidence, the estimate of the witnesses must be deemed an accurate statement of the value of the use of the vessel in question, and as such was properly allowed. Exception is also taken to the item of $43.75, which is an addition of twenty-five cents per day made to the wages actually paid to the laborers engaged in the repairs, for the use of tools, rent of yards, &c. The item I think properly allowed upon the evidence, as forming part of the actual cost of the repairs. As a profit it could not be allowed, but the evidence shows that the use of tools, yard, &c., when furnished, is by usage estimated at that sum, and compensated for in that way. Another item objected to is a charge for the services of two persons who superintended the repairs. These persons performed the service, and I see no reason for refusing a proper compensation for it, notwithstanding the proof that they were in the employ of libellants upon a salary. The libellants, by reason of the collision, lost the use of the services of these two men for the period they were engaged on the repairs, and should be allowed a proper sum to compensate for such loss. No fair objection is raised

upon the evidence to any other items of the report, and it must accordingly be confirmed.

[NOTE. The Hudson River Steamboat Company, claimant, appealed to the circuit court, which affirmed the district court decree (see Case No. 2,537), and the decree of the circuit court was affirmed in The Cayuga v. Hoboken Land & Imp. Co., 14 Wall. (81 U. S.) 270.]

Case No. 2,536.

The CAYUGA.

[1 Ben. 171.][1]

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

COLLISION IN HUDSON RIVER — FERRY BOAT AND STEAMBOAT—VESSELS CROSSING.

1. Where a steamboat was coming down the Hudson river, and approached the track of a ferry boat which was crossing from Hoboken to New York, and stopped her engine, but started it up again when the ferry boat was directly ahead of and close to her, and struck the ferry boat on her port quarter, and the pilot of the steamboat testified that he made no attempt to swing his bow to starboard, although a swing of ten or fifteen feet would have carried him clear, and excused his doing nothing by saying he had not time to do anything, while other witnesses testified that he did shift his wheel and was swinging to west at the time of the blow. *Held*, that the ferry boat, upon seeing the steamboat stop her engine, was entitled to consider that she intended to allow the ferry boat to pass her bows, and to act accordingly. The ferry boat was therefore free from fault in keeping on.

2. The starting of the steamboat's engine again in such circumstances, was a fault on her part.

3. If the pilot's excuse for not sheering be held good, it shows the vessels in such close proximity as to make clearly manifest the impropriety of his starting the engine. If it is not held good, then he was in fault in not attempting to sheer; and if, as stated by other witnesses, he did sheer, his statement, on which the claimant chiefly relies, is discredited.

In admiralty.

W. A. Fuller, for libellants.

C. Van Santvoord, for claimant.

BENEDICT, District Judge. This is a case of collision. The libellants are the owners of the Hoboken ferry boat, James Watt, and proceed against the Hudson river towboat Cayuga, to recover for injuries received by the ferry boat on the 13th of June, 1866.

The place of the collision was near the middle of the Hudson river, about opposite Robinson street. The tide was ebb. The weather was clear, and the time was about four o'clock in the afternoon. The course of the Cayuga had been from her berth at the foot of Desbrosses street on the New York side down to Hubert street, when she rounded up the river, expecting to pick up a boat there, but the boat being unable to get out, the Cayuga again rounded out and down the river on her way to the Battery, to make up her tow. Shortly after heading down, she came in contact with the ferry boat, which was proceeding upon one of her regular trips from Hoboken to New York, striking the larboard quarter of the ferry boat some ten or fifteen feet from the stern.

The claim on the part of the Cayuga is, that when she rounded out and down from Hubert street, the ferry boat was further up the river and going at a greater speed than the Cayuga; that the ferry boat came down upon the Cayuga's starboard quarter, and then straightened down upon a course parallel with that of the Cayuga, and about two lengths outside of her; that this course was held by the ferry boat until her stern was even with the Cayuga's bow, when she sheered sharp to east across the course of the latter, and so close that there was not time for the Cayuga to reverse her engine or swing to west, and consequently the vessels came in contact.

On the part of the ferry boat it is claimed that the two vessels were approaching upon converging lines, the ferry boat crossing from Hoboken and the Cayuga heading for the Jersey side just below Jersey City; that the ferry boat was at the outset farther down the river than the Cayuga, but that the latter was going the faster of the two; that the ferry boat held a straight course, headed for about the foot of Liberty street, and as she was outside of and upon the starboard hand of the Cayuga, it was the duty of the latter to avoid her; that the Cayuga accordingly did stop her engine when the boats were at such distance apart as would have enabled the ferry boat to pass, but started it again before the ferry boat was out of the way, and so ran into her.

The voluminous, and in many aspects contradictory, testimony introduced in support of these respective theories has been examined with care, but as I view the case it is necessary to consider only a single feature of it. I consider it to have been satisfactorily shown that after the Cayuga had rounded out and down the river from Hubert street, and when the ferry boat was in plain sight crossing the river upon a regular and known trip from Hoboken to New York, the engine of the Cayuga was stopped and again started when the ferry boat was directly ahead of and close to her.

Now, whether the courses and speed of the two vessels up to this point had been as contended for by the libellant or the claimant, the ferry boat being, as she was, a ferry boat and in plain sight, upon seeing the Cayuga stop her engine, became entitled to consider that the Cayuga intended to allow her to pass upon her trip, and to act accordingly. There was therefore no fault on the part of the ferry boat in keeping on and passing the bows of the Cayuga. Such a course was to have been expected

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

[2] [Affirmed in Case No. 2,537.]

when the Cayuga stopped, and it would have entailed no danger of a collision had not the Cayuga started her engine again before the ferry boat had fairly passed. This starting up of the Cayuga when she did, brought the two into close proximity, and it was manifest when the Cayuga thus started up, that at the best she must shave the ferry boat very closely. The two vessels were by this movement brought into dangerous proximity, and the boat attempting the manoeuvre must be held responsible for the failure to successfully accomplish it. Furthermore, the statement of the pilot of the Cayuga is, that he made no effort at all to swing his bow to west when the danger of collision became imminent, although the ferry boat was moving past his bow, and although a swing of ten or fifteen feet would have carried him clear. The excuse of the pilot for this inaction is, that it would have required two full turns of the wheel to swing the bow of the Cayuga ten feet, and that there was not time to make these turns. If such be the fact with regard to this boat, it makes clearly manifest the impropriety of starting her engine when within such a short distance of a vessel ahead. If such be not the fact, it was an additional fault in the pilot not to attempt to shift his wheel, while, if, as is stated by some of the witnesses, he did shift his wheel, and was swinging to west at the blow, the positive denial of the fact by the pilot casts doubt upon the claimant's theory of the case, resting so largely as it does upon his testimony.

My conclusion therefore is that the collision in question was caused by the fault of the Cayuga, and that the libellants are entitled to recover of her the amount of their loss. Let a decree be entered accordingly, with an order of reference to ascertain the amount.

[NOTE. For decision overruling the commissioner's report as to damages, see Case No. 2,535. The Hudson River Steamboat Company, claimant, appealed to the circuit court, where the final decree of the district court was affirmed. See Case No. 2,537. From the decree of the circuit court the claimant appealed to the supreme court, which affirmed the decision of the circuit court. The Cayuga v. Hoboken Land & Imp. Co., 14 Wall. (81 U. S.) 270.]

Case No. 2,537.

The CAYUGA.

[7 Blatchf. 385.] [1]

Circuit Court, E. D. New York. June 18, 1870.[2]

COLLISION BETWEEN STEAM VESSELS — CROSSING COURSES — FOURTEENTH SAILING RULE — DAMAGES—USE OF INJURED VESSEL—EVIDENCE.

1. The 14th rule of the act of April 29, 1864 (13 Stat. 60), which requires, that, if two ships under steam are crossing, so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other, and the 18th rule of the same act, which requires that, where one of the two ships is, by the 14th rule, to keep out of the way, the other shall keep her course, applied.

[See note at end of case.]

2. A ferry-boat was disabled by a collision with another vessel, through the fault of the latter. To guard against interruption of the public use of the ferry from such or like causes, the owners of the ferry kept always ready for service a spare boat, which was idle except when some other boat was disabled, and which immediately took the place of the disabled boat. There was, by reason of the special character of the business of ferriage and of the boats used therein, no general demand in the market for such boats, but witnesses experienced in such business stated the value of the use of a boat such as the one that was injured: *Held*, (1.) That the owners were entitled to recover the fair value of the use of the injured boat during the period required for her repair, notwithstanding her place was supplied by such spare boat, which might otherwise have been idle; (2.) That it was not erroneous to estimate the value of such use at the rate or amount stated by witnesses experienced in the special business of ferriage in the waters about the city of New York, where the disabled boat was employed.

[Cited in The Favorita, Case No. 4,695; The Favorita v. Union Ferry Co., 18 Wall. (85 U. S.) 603; The Potomac v. Cannon, 105 U. S. 632; Coffin v. The Osceola, 34 Fed. 921; New Haven Steamboat Co. v. Mayor, 36 Fed. 718; The Margaret J. Sanford, 37 Fed. 152; The Emma Kate Ross, 46 Fed. 874.]

[See note at end of case.]

[In admiralty. Libel by the Hoboken Land & Improvement Company, owner of the steam ferry-boat James Watt, against the steamer Cayuga to recover damages caused by collision. There was a decree for libellants in the district court (see Cases Nos. 2,535 and 2,536); and the Hudson River Steamboat Company, claimants of the Cayuga, appeal.]

William J. A. Fuller, for libellants.
Cornelius Van Santvoord, for claimants.

WOODRUFF, Circuit Justice. The ferry-boat James Watt, owned by the libellants, left her slip at Hoboken, bound for her slip at the foot of Barclay street, on the opposite side of the river. Her course was obliquely downward across the river. At about the time, or very soon after, she left her slip at Hoboken, the steamer Cayuga left the slip at the foot of Desbrosses street, on the New York side of the river, rounded to, opposite Hubert street, and then took a course down the river. The two vessels collided opposite or above Chambers street.

There is some conflict of testimony in regard to the precise heading of the Cayuga, as she proceeded down the river. I think the preponderance of the testimony is, that she was headed in the direction of the docks of the Central Railroad Company, on the west side of the river, below Jersey City—a direction across the river. though less oblique thereto than the course of the James

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

[2] [Affirming Case No. 2,536. Decree of circuit court affirmed in The Cayuga v. Hoboken Land & Imp. Co., 14 Wall. (81 U. S.) 270.]

Watt, crossing from the west side. I do not, however, deem this conflict of testimony very important, because, whether the Cayuga's course was a little more or a little less inclined to the westward, it was perfectly certain that the courses of the two vessels were inclined to each other, and must and did cross each other. Each vessel was seen from the other at about the same time; and the fact that their respective courses crossed each other, was necessarily obvious to any intelligent observer. The Cayuga had the James Watt on her starboard side, and the 14th of the rules of navigation (Act April 29, 1864; 13 Stat. 60) is explicit. that, "if two ships under steam are crossing, so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other;" and the 18th rule requires, that, when one of the two ships is, by the above rule, to keep out of the way, the other "shall keep her course." If the situation and courses of the two vessels were such as to bring them within these two rules, then it was the clear duty of the Cayuga to keep out of the way of the James Watt, and permit her to keep her course, which, on the other hand, it was the duty of the latter to do.

(1) They were crossing. Neither could proceed to her destination down the river without crossing. Both knew that their courses were crossing. The Cayuga knew that the James Watt was a ferry-boat running on the Hoboken ferry, obliquely across the river, from Hoboken to Barclay street. She, therefore, knew that she could not pass down, whether in the line of the current or obliquely to the westward, without crossing the track of the ferry-boat; and the James Watt knew, with like certainty, that she could not go to Barclay street without crossing the course of the Cayuga.

(2) Was there risk of collision? It was perfectly certain that, if each kept its course, one of three things must happen—the Cayuga must cross the bow of the James Watt; or the James Watt must cross the bow of the Cayuga; or that must happen, which, in fact, did happen, namely, the boats must collide. Whichever of the two boats was moving with the greater speed, whether the Watt, when first seen from the Cayuga, was a little farther up stream than she was or not, it is, I think abundantly established by the testimony of the witnesses, that, from the time the vessels had approached within three hundred yards of each other, there was obvious risk of collision, if neither changed her course. Not such risk that there was instant peril, nor a danger which might not have been avoided, but just that risk which the 14th rule contemplates, and which brought that rule to bear upon both vessels, making it the duty of the Cayuga to keep out of the way of the Watt, and not merely permitting, but requiring the Watt to keep her course.

The proof in the district court was deemed to warrant the conclusion, that, when nearing the point of intersection, the Cayuga stopped, and then, and after she had misled the Watt into the belief that there was no further danger, started ahead and ran into the Watt. It is claimed, that the additional proofs taken in this court on behalf of the Cayuga show that no such stopping and then starting ahead took place after the Cayuga left the docks opposite Hubert street. I do not deem it necessary to settle that disputed point, although the testimony that such stopping did take place at a time when, if it had continued but for less than a minute longer, no collision could have occurred, is very strong and explicit. But, taking the statement of the Cayuga's witness, it only places the Cayuga in a category hardly less desirable, namely—she did absolutely nothing to keep out of the way—she kept her course—she completely reversed the rule, expecting, as her witnesses say, that the Watt, which they allege was moving at the greater speed and was already ahead of her, measuring by a line at right angles across the river, would give way, slow, and go under her stern. This is precisely what the Cayuga's witnesses say they expected, and what some of them say the Watt ought to have done; and yet some of them testify that the Watt was moving faster than themselves and that her position was in advance of the Cayuga, if judged by a line drawn directly across the river.

I do not deem it important to determine which of these boats was moving at the greater speed. Great stress is laid by the counsel for the Cayuga on the testimony that her speed was less than that of the Watt. I think the balance of evidence is the other way. But the rule of navigation above referred to is not dependent on that question. It has no such qualification as that the vessel having the other on her own starboard side shall keep out of the way of the other, provided such other is moving at a less speed than herself. Indeed, if the Cayuga saw the Watt approaching on a track that crossed her own, as above stated, as she certainly did, and also thought, as her witnesses now testify, that the speed of the Watt was greater than her own, the stronger and more conclusive was the reason why she should not attempt to cross the bow of the Watt, and the greater, also, was the propriety and urgency of the rule mentioned and the more obvious its application.

But it is earnestly insisted that the Watt, in pursuing her way down, had come into a course parallel with that of the Cayuga, in which position there was no danger, and that, in such circumstances, the Watt, having, also, the greater speed, is to be regarded as a vessel overtaking another, to which another and opposite rule (rule 17th) applies, and that, under this rule, it was the duty of the Watt, the overtaking

vessel, to keep out of the way of the other. I am constrained to say, after a pains-taking examination of the proofs, that the balance of testimony is against the facts upon which this theory rests; and that the Watt can, in no just sense, be regarded as overtaking the Cayuga. It is quite possible that, in turning an entire circle, as the Cayuga did at or near Hubert street, the Watt was at one time in view over her starboard quarter. So, it is quite possible, that, afterwards, as the Cayuga proceeded obliquely down the river, the Watt appeared to be relatively in advance. But the evidence satisfactorily shows, that the Watt at no time had the Cayuga ahead of her, in view of any of the persons on board the Watt, so as to be herself either following or overtaking the Cayuga; and I think it fully proved that the Watt did not change her course. She did undoubtedly cross the bow of the Cayuga; and great stress is laid on that by the counsel for the claimants. But this was because her course crossed that of the Cayuga, and it was her duty to keep her course, so that she might not mislead the other, but leave her to keep out of the way, as the law required.

The testimony is very voluminous, and the case for both parties has been argued with great ability and zeal. The counsel for the claimants has exhibited unusual ingenuity and skill in presenting the best possible excuse for the Cayuga in setting the rules of navigation at defiance, and relying on an expectation that the Watt would give way and pass under the Cayuga's stern; but, in my judgment, the situation and course of the two vessels was plainly within the 14th rule, and the collision was solely due to a neglect of its observance by the claimants' vessel.

On the question of damages, the only exception argued on the appeal is, whether the allowance of $75 per day, for the loss of the use of the ferry-boat during the period required for repairing her, was properly allowed. There is no demand, in the general market for ferry-boats. They are built for a special use, and generally adapted, in some degree, to the particular ferry upon which they are intended to run. The libellants did not hire, and possibly might have been unable to hire, another ferry-boat to take her place on the ferry. These very reasons have compelled the libellants to build and keep another boat, which they can use when accident or other cause disables one which they have in daily use.

It is quite obvious, that there is neither justice nor equity in allowing to a tort-feasor the benefit of this large outlay made by the libellants to enable them to serve the public and run their ferry without interruption; and yet that is the effect of yielding to the argument that, because such spare boat was already in the libellants' possession, and was used, therefore the libellants sustained no pecuniary loss by the delay. If it be conceded that a just allowance for the necessary cost of another boat, hired at its fair value to perform the service, would be necessary to the indemnity of the libellants, there is no sound reason, I think, for withholding such allowance when the libellants furnish the substituted boat themselves. True, the libellants have chosen to submit to the loss of the use of their substituted boat during that portion of the year when their other boats are not disabled; but that is not and ought not to be made a premium to tort-feasors whose wrongful acts compel the libellants to incur such loss in order to the satisfactory conduct of their business. In the case of The Rhode Island [Case No. 11,744], an allowance of a sum which would have enabled the libellant to supply the place of an injured vessel, was affirmed by Mr. Justice Nelson, although, in fact, the place of the injured vessel was not supplied at all. The principle of indemnity is uniformly recognized as just, and its measure must be the same, whether a substitute is furnished by the libellant or procured from another. The difficulty in this particular case arises from the peculiarity of the business and the want of demand for such boats; and, in such case, I am not satisfied that the view of the subject taken by the judge of the district court is erroneous. My sense of justice wholly approves it. To withhold compensation is, to my mind, obvious injustice. Where the proof of what such a boat could have been let for upon hire or charter is practicable, as in the cases relied upon by the claimants, that is a just measure. The whole subject has been much debated, and no rule which is adapted to every supposable case can be deemed established. It is not true that the use of this boat has, in fact or in law, no value. The testimony of witnesses conversant with the subject, and of long experience, proves the contrary. The case is special and peculiar, and I think the allowance just and reasonable. The decree must be affirmed, with costs. 1 Ben. 171, and 2 Ben. 125 [Cases No. 2,536 and 2,535].

[NOTE. The Hudson River Steamboat Company, claimants of the Cayuga, appealed to the supreme court, where the decree of the circuit court was affirmed, Mr. Justice Clifford delivering the opinion. The ground of the affirmation is stated to be that even if the Cayuga did nothing to mislead the Watt, as claimed by libellants, yet it was clear that she did not keep out of the way, as required by the 14th sailing rule, which provides that, "if two ships under steam are coming so as to involve risk of collision, the ship which has the other on her starboard side shall keep out of the way of the other;" that the circuit judge was correct in deciding that under all the circumstances the rule was applicable in this case, and that, consequently, the fault of the collision lay with the Cayuga. Furthermore, the court held that the exceptions to the commissioner's report were properly overruled, and that the allowance of $75 per day while the Watt was undergoing repairs was properly made. The Cayuga v. Hoboken Land & Imp. Co., 14 Wall. (81 U. S.) 270.]

CAZARES (UNITED STATES v.). See Case No. 14,761.

CAZE (LAMALERE v.). See Cases Nos. 8,002 and 8,003.

Case No. 2,538.

CAZE et al. v. REILLY.

[3 Wash. C. C. 298.][1]

Circuit Court, D. Pennsylvania. April Term, 1814.

GENERAL AVERAGE—CONTRIBUTION—LOSS OF VESSEL.

1. The schooner Julia, on her voyage from France to Philadelphia, being chased by a British frigate, and her capture being deemed inevitable by the captain, he, with the advice of the officers and crew, ran her on shore at Long Branch, in New-Jersey; and before the enemy could board her, a large part of the cargo was saved; after which she was burnt. The master claimed to retain the goods saved, as subject to freight, general average, and expenses.

[Cited in Barnard v. Adams, 10 How. (51 U. S.) 302; The Congress, Case No. 3,099; Shoe v. Low Moore Iron Co., 46 Fed. 128.]

2. The Rhodian law de jactu, is the parent of the law of maritime contribution. The principle to be deduced from the Rhodian law, and from the general maritime law of nations, is, that if the cargo or ship, or any part of either, be voluntarily sacrificed, or exposed to danger, for the common safety, the part saved shall contribute to repair the loss sustained, provided the object for which the sacrifice was made be attained.

[Cited in Mutual Safety Ins. Co. v. The George, Cases Nos. 9,981, 9,982; Patten v. Darling, Case No. 10,812; The Star of Hope v. Annan, 9 Wall. (76 U. S.) 232; Sonsmith v. The J. P. Donaldson, 21 Fed. 674.]

3. An intention to consign to inevitable loss goods thrown overboard, forms no part of the reason assigned by the Rhodian law for contribution; and is not necessary to authorize the claim.

[Cited in Barnard v. Adams, 10 How. (51 U. S.) 304.]

4. The object always is, to incur a partial loss, and to risk a minor or contingent danger, to avoid the more probable or certain loss of the whole.

5. It is sufficient to justify a claim to contribution, if the danger sought to be avoided be so imminent, that the measure adopted may be beneficial to all.

6. If the exposure of the vessel be made for the common safety, and be successful in relation to a part of the cargo, it is immaterial whether her total loss was produced immediately by the stranding, or consequentially, by placing her in a situation which effected her destruction.

[Cited in Columbian Ins. Co. v. Ashby, 13 Pet. (38 U. S.) 343.]

7. If the ship be lost, there can be no contribution, because the object for which the jettison was made was not attained. In case of a general shipwreck, there can be no contribution, because it was not voluntary.

At law. This was a replevin, to recover a quantity of goods saved from the wreck of the Julia. The following case was agreed to stand for a special verdict. The schooner Julia, owned by the defendant, and laden with a cargo of merchandise, departed from Bordeaux on the 23d of February, 1813, bound for Philadelphia. On the 8th of April in the same year, while proceeding up Delaware bay, she was chased by a frigate of the enemy, then forming the blockade of that bay and river, and was compelled to bear away for New-York. The chase continued in the direction of New-York until the 9th of April, when a seventy-four of the enemy endeavored to cut the schooner from off the land, and not succeeding, joined the chase; but having gone so far on her course as Long Branch, in New-Jersey, the schooner was headed by another frigate of the enemy. The master then deliberated, and consulted with his officers and crew, and by their advice, for the purpose of avoiding capture, and for the common benefit of all concerned, voluntarily ran the schooner on shore at Long Branch aforesaid. After saving sundry cases and packages of merchandise, and part of the furniture and rigging of the vessel, the enemy compelled the master, officers, and crew, of the schooner, to leave her; and then boarded, set fire to her, and left her. On the 10th of April, the schooner having burned to the water's edge, the master and officers, with the assistance of sundry fishermen, succeeded in saving other parts of the cargo, together with several spars, anchors, and other parts of the vessel's furniture and rigging; but so much of the hulk as was not burned, was washed upon the shore and lost. The merchandise saved, consisted of such dry goods as lay near at hand, and could be gotten out before the enemy boarded; and such wines, brandies, and other articles not liable to injury, as were in the bottom of the schooner. The gross value of the schooner at the time of said stranding, was 10,000 dollars. The gross value of her entire cargo, at the same time, including duties and freight, amounted to 101,193 dollars. The duties would have been 19,950 dollars. The gross freight of the whole cargo was 12,745 dollars. The value of the tackle and furniture of the vessel saved, amounted in gross, to 752 dollars. Expenses of saving, 262 dollars. The value of goods saved, gross, was 51,468 dollars, including duties, 8,622 dollars. Other expenses 1,504 dollars, and freight. Value of freight saved, 4,736 dollars. The plaintiffs' goods saved, amounted, gross, to 10,727 dollars, on which the duties were 1,531 dollars; freight, 367 dollars; and expenses of saving, 187 dollars. The defendant, as owner of the vessel, detained the plaintiffs' goods for freight, general average, and expenses, after the plaintiffs had tendered a sufficient sum to cover freight and expenses, but not general average. He afterwards, at the request of the plaintiffs, sold them at public auction; and delivered over the proceeds, after re-

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

taining 4,300 dollars, a sum deemed sufficient to cover the general average.

The questions submitted to the court are —1. Whether the goods of the plaintiffs, which were saved, as above, are bound to contribute to the loss of the schooner by way of general average? 2. Whether they are bound to contribute to the goods and freight lost, or either of them, by way of general average? If the court shall be of opinion, upon either of these points, in the affirmative, judgment to be entered for the defendant; and the parties to abide by an adjustment of the general average, made by such person, and on such principles, as the court shall direct. If the opinion should be in the negative on both points, judgment to be entered for the plaintiffs; and the amount due by the defendant to the plaintiffs, if any thing, to be settled by referees to be appointed by the court.

The first question only was argued.

Duponceau, for plaintiffs, cited the following cases, to prove that where the ship is lost, it is not a case of general average: Park. 170, 171; 1 East, 120; Weynsteen, 218; Rhod. Law; 3 Law J. 14–19; Bynk. 424; 1 Magen, Ins. 52, 53, 64; Sea Laws, 326; 2 Vatt. Law Nat. 173, 204, 209, 205, 165, 168; Spanish Ord. 179, 180; Vinn. 262; Marquard, § 36; Locc. 1006; Kurick, 781, 788; Am. Lex. Mercat. 286; 4 Prussian Code, pp. 218, 226, §§ 1820, 1821; 2 Magen, Ins. 97, 332; 1 Emerig. Ins. 614, 616, 408; 9 Johns. 9; Poth. Average, § 113, p. 106. To prove that the Sea Laws contain a spurious statement of the Rhodian law, de jactu, and that the only true statement of it is in the digest, as set forth in 3 Am. Law J. 14 et seq., he cited 2 Bynk. 89, c. 8; 1 Azuni, Mar. Law, 282.

Binney and Chauncey, for defendant, cited the following cases: Abb. Adm. 331, 333, 335 [The Indiana, Case No. 7,020]; Sea Laws, 93, 104, 107, 110, 135; 2 Magen, Ins. 15, 200; Voetius, 690; 2 Brown, Civ. Law, 199; 1 Emerig. Ins. 602, 612, 408; Roc. N. 60, 99; 2 Marsh. Ins. 537; Gurdon, c. 5; 1 Emerig. Ins. 615.

The second question was not argued, and of course no opinion was given on it.

Mr. Duponceau, for plaintiffs.
Mr. Rawle, for defendant.

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

WASHINGTON, Circuit Justice, delivered the opinion of the court.

It seems to be universally admitted, that the Rhodian law, de jactu, was the parent of maritime contribution. That law, however, provides only for certain cases, in which contribution is to be allowed, and does not lay down any general rule. But it recognizes, in relation to maritime contribution, a great and striking principle, within the equity of which, every possible case of contribution may by fair deduction be brought. This law declares, "that if goods be thrown overboard, for the sake of lightening the vessel, as it is done for the good of all, all must come into contribution for the same." The principle of this rule is, that where a common benefit is received, by the voluntary sacrifice of a part, the loss sustained should be borne by the property saved. And although no other case is provided for, but the jettison of goods, and partial injuries to the vessel, yet the principle being a voluntary sacrifice for the common safety, contribution to repair the loss sustained, is equally within the equity of the law. The ordinances of other countries, having the Rhodian law for their basis, and the construction given to that law, by learned jurists, have extended the principle of it to so many cases of contribution, that it could scarcely have been supposed that one could arise, which had not been provided for. Thus, if the ship and cargo be ransomed from pirates, by a sacrifice of part of the cargo, or by a ransom bond—if, in the act of making a jettison, the ship, or other parts of the cargo receive injury—if the goods are not consigned to apparent destruction, but are put into lighters, for the relief of the ship, and the lighters perish—if the ship be damaged, by cutting the cable and masts, whereby she incurs a loss for the common good—or, if the deck or sides be cut, in order to facilitate a necessary jettison—these, and many other cases, which might be enumerated, are considered as cases of contribution, by all the maritime countries of the world. But to constitute a claim to contribution, the jettison must be designedly made, with a view to the common safety, and must be successful, at least in part; for if the ship be lost, by the peril which the sacrifice was intended to avert, there is no contribution due. The principle fairly to be extracted from the general maritime law of nations, upon the subject of contribution, is, that if the cargo or ship, or any part of either, be voluntarily sacrificed, or exposed to danger, for the common safety, the part saved shall contribute to repair the loss sustained, provided the object for which the sacrifice was made was obtained. This principle is not inconsistent with the rule contended for, by the plaintiffs' counsel, that if a jettison be made, and the ship saved, there shall be contribution; but if the ship be lost, there shall be none. That rule is correct in all its parts, when applied to a mere case of jettison. But the principle of it is equally applicable to a loss voluntarily incurred by the ship, for the common safety, if safety be thereby attained.

Let us now examine the correctness of the principle—1st, by the reason of it; and 2d, by authorities:

1st. The reason assigned in the Rhodian law, why contribution should be made, in case of a jettison of goods, is so entirely applicable to that of loss, or injury incurred by the vessel, under the same circumstances, that it becomes those who would distinguish them, to point out the difference. That reason is, that all should contribute to a loss, occasioned by the jettison, for the sake of lightening the vessel, because it was done for the benefit of all. If so, and the ship expose herself to loss, for the sake of obtaining safety for all, and in consequence of such voluntary exposure, she is lost, why should not all contribute to repair the loss?

The reasons assigned by the plaintiffs' counsel, are, that the loss of the vessel was not contemplated, as the consequence of the stranding; that the act of stranding, exposes the common interest equally to destruction; that it cannot be certainly ascertained, that the loss of the ship resulted from the stranding; and, lastly, that the principle of contribution, the safety and prosecution of the voyage, cannot be effected, if the vessel be totally lost. Let these reasons be examined in detail: The loss of the vessel was not intended. An intention to consign the goods thrown overboard, to inevitable destruction, forms no part of the reason assigned by the Rhodian law for contribution; and was not considered to be deducible from it, by those jurists who undertook to apply that law to other cases of contribution; otherwise, goods put into lighters, could never be entitled to contribution. As to these, the probability is, that they will be saved. The plaintiffs' counsel contends, that this is an excepted case; but he has not shown it to be so, and it is clearly within the reason of the general principle. So, injury sustained by the fall of a mast, is contingent, and not foreseen or intended. Even goods thrown overboard may be saved—and if saved, they belong to the owner at the time of the jettison—if not saved, the loss is to be repaired by contribution. The truth is, that it is the motive for the act, in relation to the rest of the property, and not the intention of the jettison in relation to the fate of the thing sacrificed or exposed to danger, which gives rise to the law of contribution.

2d. The stranding exposes the cargo, as well as the vessel, to the risk of loss. If this reason were sound, then, a vessel stranded with a view to the common safety, would not be entitled to contribution, even for the purpose of repairing and floating her, if her situation admitted it; and yet it is clear, that by the universal maritime law, the expenses incurred for these purposes, are a subject of general average. But if this reason were admitted, it might produce very unsatisfactory results; for, it cannot be said, with any degree of confidence, that the loss of the anchor by the cutting of the cable, or the loss of the masts, may not expose the whole to danger. But the object is to incur a partial loss, and to risk a minor or contingent danger, to avoid the more certain loss of all. And this applies strictly to the voluntary stranding of the ship. Injury to her is certain—a total loss probable. The escape of the persons on board from the dangers of the storm or of an enemy, and the safety of the cargo, if not certain, are considered to be more so than by continuing at sea; and with this calculation the measure is adopted. A certain injury, therefore, with a probable total loss, is voluntarily incurred by the ship for the common safety; and consequently, she is entitled to contribution.

3d. It cannot be certainly ascertained, whether the loss of the ship resulted from the stranding, or from some other cause. Neither can it be certainly ascertained, that the loss resulted from that cause, in case the damage sustained should be short of a total loss; in which case it is throughout admitted, that such damage must be repaired by a general average. It is sufficient, if the danger sought to be avoided, be so imminent that the measure adopted may be beneficial to all. Besides, the difficulty of proving that the immediate loss resulted from the stranding, would afford an insurmountable objection to the reason here assigned. For, although she may be burned, as she was in this case by the enemy, or may lie on the strand exposed to subsequent tempests, still, it would be impossible to say, whether her loss was not irremediable independent of these new causes. If the exposure of the vessel be made for the common safety, and be successful in relation to a part of the cargo, it is of no consequence whether her total loss was produced, immediately, by the stranding; or consequentially, by placing her in a situation by which her destruction was effected.

4th. It is contended, in the last place, that the principle upon which contribution is allowed, is the safety and prosecution of the voyage; which cannot be effected if the vessel be totally lost. This reason appears to be entirely fanciful; it has no authority of any kind to rest upon, and is inconsistent with other cases where the vessel is lost, and yet contribution is allowed. It can scarcely be denied, that in cases of such imminent danger as to justify the desperate remedy of stranding the vessel, the great object of all the parties who advise the measure, must be, first, the preservation of the lives or the liberty of those on board; and in the next place, the safety of the cargo, and possibly of the vessel. All hope of the further prosecution of the voyage, must in general be abandoned; although there is a possibility that it may be resumed. But, if this reason be a sound one, what will be said in a case where a jettison is made of the whole of the cargo, or so great

a part of it as to render the further prosecution of the voyage not worth pursuing? The voyage would be lost to all the parties concerned; and nothing would remain for any of them, but a compensation by way of general average, which might as well be adjusted at the nearest port, without the formality of proceeding unnecessarily to the original port of destination. And what seems to be conclusive is, that if the ship survive the danger which the jettison was made to avert, and is totally lost even the next day, the goods saved shall contribute to the loss of the part thrown overboard, notwithstanding the entire destruction of the voyage. The owner of the goods saved, might, with equal propriety, in that case, as in this, complain that he should be called to contribution, when, by the loss of the vessel, the voyage is terminated, and the object for which the sacrifice was made eventually defeated.

Second. We now proceed to examine the authorities, premising that they ought to be strong and uniform, to bear down the reasons upon which the equity of contribution is founded, in a case like the present. The ordinance of Louis XIV. (2 Valin, Comm. 168, 205, 207, 209) enumerates, in the 6th article, five distinct cases of contribution; amongst which, is the expense of lightening and getting the ship afloat; and the 18th article declares, that if the ship be opened in order to draw out the goods, those goods shall contribute to the repairs of the damage thus occasioned to the ship. It is to be remarked, that this ordinance does not, in any part of it, notice the case of a voluntary stranding of the ship. But Valin, in his commentary, states, that if to avoid a total loss by shipwreck or capture, the master runs his vessel ashore, the damage which he shall suffer, on that occasion, and the charge of putting her afloat again, are general average; all having been done for the common safety. The argument founded upon this ordinance, and upon the comments of Valin, is, that as the expenses incurred for repairing the vessel and putting her afloat, are alone provided for; and since all the foreign ordinances agree in this, that unless the ship be saved, there shall be no contribution; it follows, that if the vessel, in consequence of a voluntary stranding, be totally lost, the law of contribution ceases; the rule "save who save can," or in other words, "every man for himself," applies. Now, this conclusion is altogether inadmissible. The enumeration of certain cases, to which a general principle is applied, can never exclude any other case which may fairly be brought within the same principle. On the contrary, the rule is, that where there is the same reason, there is the same law. If the damage which a vessel sustains by a voluntary stranding for the common advantage, although that damage should be nearly equal to the value of the vessel, is declared to be a case of contribution; the reason which dictates such a law, will command the extension of it to the case of a total loss of the vessel. As to the rule contended for, that there can be no contribution where the vessel is lost, it is totally misapplied in this argument. It relates altogether to an ineffectual jettison, and to a general or involuntary shipwreck. In the first case, if the ship and the remainder of the cargo, for the preservation of which the jettison was made, be lost, and the goods thrown overboard, or put into lighters, be saved, there can be no ground for contribution; because the jettison was made, not for the sake of those goods, but for the safety of the ship and the rest of the cargo. But, if the object of the jettison be attained by the safety of a ship, at the expense of the goods thrown overboard; then, the law of contribution applies to repair the loss sustained by the owner of the goods thus sacrificed for the common good. Neither is it a case of contribution, if the ship being lost in the same storm in which the jettison was made, a part of the cargo is saved; because the purpose for which the sacrifice of the goods thrown overboard was made, has not been attained. See 2 Valin, Comm. 205; Weytzen, p. 237; Guidon, 133. In the case of a general shipwreck, the essential principle of contribution is wanting, there being no act voluntarily done for the common safety of the whole. Consequently, every man must take care of what belongs to him, and must depend upon his own exertions to save it. Ord. Louis XIV. art. 17; Valin, Comm. 209, 237. It is unnecessary to notice particularly, those parts of the marine ordinances of Bilboa, Wisbuy, Rotterdam, Copenhagen, the Code Napoleon, and the modern Prussian Code, promulgated in 1791 and 1794; which were quoted and relied on by the plaintiffs' counsel, because they apply either to an involuntary shipwreck, or to a jettison, or to damages sustained by a voluntary stranding, and not to a total loss of the ship; and are all susceptible of the same explanations which we have just given, of the ordinance of Louis XIV., which they resemble. It is admitted, that neither the Rhodian law, nor any of these ordinances, have noticed the case of a voluntary stranding, for the common safety, followed by the total loss of the ship.

We meet with but two decisions, which have ever been given upon the very point presented to the consideration of this court. The first was made by the maritime judges of Amsterdam, in the year 1661, and is reported by Bynkershoek (2 Bynk. 1, 4, c. 24, p. 424). They decided, "that if a cable is cut in a storm in order to save the ship, whereby the anchor is lost, the cargo is not bound to contribute, because there was no voluntary jettison." These judges then add, "for the same reason, if a vessel be voluntarily run ashore, the goods unladen from her while she is lying aground, are not to contribute any thing; also, because no contribution is due, unless the ship

is saved;" and the Rhodian law, 4, is cited. Now, if this case be truly reported, which may well be doubted, it is, upon the face of it, too absurd to merit the least respect. The reason assigned, why, if the cable be cut in a storm in order to save the ship, contribution shall not be made to repair the loss of the anchor, is, that the jettison was not voluntary; and yet the case supposes, that the anchor was voluntarily sacrificed to save the ship. Neither can there be any doubt, but that the law is different from what this case states it to be, in relation to the loss of the anchor. Abb. Adm. 219 [The Joshua Barker, Case No. 7,547]. In like manner, one of the reasons assigned by the judges in this case, why, if the vessel be stranded and lost, there shall be no contribution, is, that the stranding was not voluntary; and yet the case states, that the vessel is voluntarily run ashore. The other reason assigned is, that there is no contribution, unless the vessel be saved; and this reason is founded on the Rhodian law, 4, which relates to goods put into a lighter to save the ship, but without effect; in which case it is truly said, that there can be no contribution, except where the vessel is saved by the jettison. In the one case, the goods are ineffectually lost or exposed, in order to save the ship; and therefore, the object not being attained, there is no contribution. In the other, the ship is effectually exposed and sacrificed to save the cargo. The converse, therefore, of the rule, applies. With these observations, we shall leave this case to the merited censures of Bynkershoek, who condemns and exposes it throughout. We approach, with infinitely more respect, the case decided in the supreme court of New York, cited from 9 Johns. 9. It is that case alone, which has produced any hesitation in our mind. The great law learning of that court, is respected by none more highly than ourselves; and we should upon all occasions see the propriety of examining very thoroughly, any opinion which we might form, differing from a decision of that court, before we should feel ourselves safe in entertaining or expressing it. This we have faithfully done in the present instance; and we can only add, that the course of reasoning which our mind has suggested, forcing us to a different conclusion, we must follow where it leads.

We come now to the consideration of the opinions of foreign jurists, relied upon by the plaintiffs' counsel, to show that this is not a case of general average. Vinnius, 262, commenting on the Rhodian law, 5, says, that in case of shipwreck, (alluding obviously to an involuntary shipwreck, as do the Basilicks to which he refers,) there shall be no contribution; but he adds, that the damage suffered by a sacrifice made for the good of all, to avoid a common danger, is to be made good by the contribution of all. Now, this is the precise doctrine which we adopt, and is the basis on which our opinion is formed. The whole of the quotation from this author proves, that he considered the question of contribution, as turning upon the fact of voluntary shipwreck for the good of all concerned, or involuntary, and not upon that of the partial or total loss of the ship. The damage for which contribution is to be made, is stated by this author without limitation; and whether it be to the whole amount of the vessel, or to a half, or a greater or smaller proportion of her value, forms no part of the principle upon which his opinion is formed. Weytzen, 237; Locc. De Jure Mar. 1006; Kuricke, 781; Marquardus, 393; and Pothier, 106,—all speak upon this subject in reference to an ineffectual jettison, or of an involuntary shipwreck, and lay down the same doctrine as Vinnius.

Emerig. (Ins. 408, 614, 616) is the only writer upon the subject of average, who intimates an opinion, that in the case of a voluntary stranding, followed by the total loss of the vessel, there shall be no contribution. "If," says he, "the stranding was done voluntarily for the common safety, it would be general average, provided always that the ship be again set afloat; for, if the stranding be followed by shipwreck, then it is, save who can." There is no writer upon maritime law, whose opinions are more to be respected, in general, than those of Emerigon. But, after all, it is only an opinion in this case; in support of which, he quotes no law, ordinance, or decision, and does not even condescend to assign a single reason. Immediately after the opinion just cited, he refers to what he afterwards says, in respect to a jettison which does not save the ship; as if he intended to illustrate, by this latter case, the opinion he had given in the case of a voluntary stranding and loss of the ship. Now, it is most obvious, that no two cases can be more unlike in principle. In the one, an ineffectual sacrifice of goods is made to save the ship. And in the other, an effectual sacrifice of the ship is made to save the cargo. In the former, the property demanding contribution, has no merit, and is therefore entitled to no compensation. In the latter, the converse holds good throughout. Nevertheless, we should be greatly embarrassed by this naked opinion of Emerigon, if it stood uncontradicted by other writers, equally respectable. The opinions of these jurists, we shall now proceed to state.

Voet. B. 14, tit. 2, § 5, in his Commentary on the Digest, says, "if the ship lies aground without the fault of the master, and he, having made jettison in order to save the ship, has thought it most prudent to save the goods by means of lighters, and if the greatest part of the goods being saved, a storm shall arise and the ship be broken, this damage being incurred for the sake

of averting the common danger, shall be suffered in common; for, the goods do not appear to have been put into the lighters, for the sake of lightening the ship in order to save her and the goods remaining on board; but rather the ship itself has been exposed to accident, that the goods should be saved by means of the lighters;—analogous to this, is the following case—If, by the common advice of the best informed men on board, the ship has been wilfully run ashore, and thus has perished, the goods being saved." Here the writer assigns the reason of his opinion, and founds it upon the distinction between an ineffectual jettison where there is no merit, and an effectual sacrifice of the ship where there is; and denies contribution in the former, and allows it in the latter, upon the reason of that distinction. 2 Bynk. p. 424, in his criticism upon the decision of the Dutch judges, before alluded to, condemns that opinion throughout; and assigns unanswerable reasons, in our opinion, for his censure. "It is one thing," he says, "if the tempest alone drives the ship ashore, and there breaking the armament of the ship, the masts, &c., in which case the ship owner is like the smith, who, while he is performing his duty, breaks his anvil or hammer. It is another thing, if by the advice of a majority of the crew, that the lives and the goods may be saved, the vessel is run ashore; or by their advice, the mast is cut away, or the cables and anchors are cut. Therefore, theirs is the best opinion, who answer, that if the masts or cables are cut, that the vessel and goods may be saved from the storm, there shall be contribution; and surely the same, of a vessel voluntarily run ashore, as of any of her instruments cast overboard on account of danger, is clearly ordained." Here it is obvious, that Bynkershoek is speaking of a vessel run ashore and totally lost; because he is commenting upon the opinion of the Dutch judges, which is given upon that case; and because he resembles the case of the mast or cable cut and lost, to that of the stranded vessel. His opinion, therefore, is given upon the very question now under consideration.

To these authorities, we add, with great confidence, the opinion of a distinguished judge of the supreme court of the United States, intimated in one of his notes upon Abbott, a work in itself of great merit, and which is rendered still more valuable by the labours of the learned editor.

We shall conclude this opinion, by stating, that the ordinance of Koenigsberg, the only one which provides, in express terms, for the case of a loss by the stranding of the ship for common safety; declares, that in such a case, the goods saved shall contribute. 2 Magens, Ins. 200. Upon the whole, therefore, we are of opinion, that the law is in favour of the defendant.

Case No. 2,539.

CAZENOVE v. DARREL et al.

[2 Cranch, C. C. 444.][1]

Circuit Court, District of Columbia. Nov. Term, 1823.

JUSTICE OF THE PEACE—REDUCTION OF CLAIM TO CONFER JURISDICTION.

A creditor has no right to give a false credit upon a note so as to reduce it to the jurisdiction of a justice of the peace.

[Cited in Maddox v. Stewart, Case No. 8,934.]

Appeal from the judgment of a justice of the peace.

The note was for $56.84. The warrant was for $50. Cazenove at the trial admitted payment of $6.84. The defendants Darrel and Groverman refused to accept the credit, and pleaded to the jurisdiction; but the magistrate overruled the plea, and gave judgment for $50 and costs, from which judgment the defendants appealed.

Mr. Wise and Mr. Swann, for the defendants, contended that they had a right to have the case tried, originally, in this court, and that it was not in the power of the plaintiff to deprive them of that right, by giving a fictitious credit without their consent. It requires the same authority to discharge as to bind. There must be mutual consent. In England, "if a contract be for four pounds, and a plaintiff, to give an inferior court jurisdiction, will split it into several actions, a prohibition shall go." Catchmade's Case, 6 Mod. 90.

Mr. Fendall, contra, contended that a creditor has a right to throw away his debt, or to extinguish it. No man has a right to the law's delay; it is no part of the contract. It was the practice in Virginia, under the petition law, to throw away part of the claim, and have a summary remedy for the residue. This practice must have been known to the legislature, and not having provided against it, they have sanctioned it. The matter in dispute is the criterion of jurisdiction; here $50 only were in dispute. U. S. v. McDowell, 4 Cranch [8 U. S.] 316; Wise v. Columbian Turnpike Co., 7 Cranch [11 U. S.] 276.

MORSELL, Circuit Judge. Can consent give jurisdiction? If, in order to give original jurisdiction to this court, the parties should agree that the debt was 56 dollars, when the real debt was less than 50 dollars, could the jurisdiction of this court be supported?

THE COURT (THRUSTON, Circuit Judge, absent) said they still considered the real debt, in this case, to be $56.84, and that the judgment must be reversed, and judgment of nonsuit entered with costs.

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

C. B. CHURCH, The (UNITED STATES v.). See Case No. 14,762.

C. D., The (LALLANDE v.). See Case No. 8,000.

C. D., JR., The (INSURANCE CO. v.). See Case No. 7,051.

C. DURANT, The (GOODWIN v.). See Case No. 5,552.

Case No. 2,540.

In re CEASE.

[5 Law Rep. 408.]

District Court, W. D. Virginia. March 15, 1842.

INDEBTEDNESS OF BANKRUPT IN A FIDUCIARY CAPACITY.

Where it appeared, that a petitioner to be decreed a bankrupt was owing debts in a fiduciary capacity, it was *held*, that the petition must be dismissed, although he was owing other debts, which had not been so contracted in a fiduciary capacity.

[In bankruptcy. In the matter of Hezekiah B. Cease.]

PENNYBACKER, District Judge. On the fifteenth of February last, Hezekiah B. Cease, of the town of Staunton, in the county of Augusta, filed his petition, praying to be declared a bankrupt. It appears that the petitioner is owing debts, some of which were created while acting in a fiduciary capacity, and others not. The old act was before the legislature when the new one was passed. Seeing that so important a provision as the latter clause of the sixty-second section of the old act was left out of the new one, it is fair to presume, that the new act was intended to have a correspondingly different effect. If, then, the debts due the government, and to the persons who, by the laws of the United States, might have a preference, in consequence of having paid money as the sureties of the bankrupts, and the wages of the laborer, in the service of the bankrupts, which are, unquestionably, the debts the most favored by the act, would not be excepted from the effect of the discharge, whether those debts should be proved or not, it is hard to conceive why other debts of a less favored nature should have been intended to be excepted from the operation of the act; and if this be so, it would seem to be conclusive, that the words "owing debts," &c., were not intended to be descriptive of debts which should be excepted from the operation of the act, but only of persons who might, or might not, become voluntary bankrupts. Here the investigation may close, and the question may be asked, is the petitioner described by the statute? Is he a person owing debts which have not been created while acting in any fiduciary capacity? The answer cannot be in the affirmative. All that can be said upon the subject, is what the petitioner has himself said in his petition: that he is owing debts, some of which were created while acting in a fiduciary capacity, and others not. But this is not a full answer to the question; and as he must answer that question fully, before he comes within the description of the statute, his petition must, for that reason, be dismissed. To say, that because he comes partly within the description of the act, and partly not, he is yet entitled to the benefit of the act, would be pretty much the same with saying, that a part is equal to the whole, which is absurd.

CELESTE, The MARY. See Case No. 9,202.

Case No. 2,541.

The CELESTINE.

[1 Biss. 1;[1] 4 Am. Law J. (N. S.) 164; 1 Leg. Int. 6.]

District Court, D. Wisconsin. Sept. Term, 1851.

MARITIME LIENS—DOMESTIC VESSELS—EFFECT OF STATE STATUTE—SEIZURE UNDER STATE LAW—JURISDICTION EXCLUSIVE.

1. The statute of the state of Wisconsin for the collection of demands against domestic boats and vessels, confers no lien.

2. The district court in admiralty has, therefore, no jurisdiction in rem against a domestic vessel at the suit of a domestic creditor.

3. A vessel may be seized under the state law, and from that time the state court and its officers have exclusive jurisdiction and control. A creditor can not in this court obtain any control of the property, or share in the proceeds.

4. The doctrine is well settled that when a court has jurisdiction, it has a right to decide every question arising in the case, and its judgment, until reversed, is binding upon every other tribunal.

5. When the jurisdiction of one court has attached, other creditors must submit their claims to its consideration, or await its disposition of the case.

6. Numerous cases cited and commented upon.

In admiralty. This vessel was attached by the marshal, in pursuance of process issued from this court, upon the libel herein filed, praying a condemnation and sale, to satisfy the demand of this libellant, for materials furnished and work done, in necessary repairs at the port of Racine within this district. The sheriff of Racine county, without submitting himself to the jurisdiction of this court, filed his petition in the form of an answer, setting forth, that previous to the service of the process in this case by the marshal, he had attached and reduced into his possession this vessel, by virtue of an attachment or warrant issued from a court of this state in the county of Racine, at the suit of one Thomas W. Secor in pursuance of a law of this state for the collection of debts and demands against boats and vessels navigating the waters thereof; that the several demands of said

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

Secor and of this libellant were contracted within this state; and that both these persons are citizens of this state; and that this vessel was built and is owned within this state. He therefore prayed that the vessel be surrendered into his possession. These facts were conceded by the parties at the trial.

Bush & Sanders, for libellant.
J. R. Doolittle, for respondent.

MILLER, District Judge. The question, whether the law of this state, for the collection of demands against boats and vessels, confers a lien for the debts or demands therein specified, is here properly presented to this court. A similar question has been mooted in this court, and in the courts of other districts, in regard to this law, and similar laws of other states. In the states of New York, Pennsylvania and Maine, local laws exist, creating a lien in favor of material-men and mechanics, upon domestic vessels. In the statutes of New York and Maine the lien is expressly conferred; by the Pennsylvania statute vessels are made liable and chargeable, for materials and work in their construction, until they sail or leave port; and these demands must be first paid. Davis v. New Brig [Case No. 3,643]; Harper v. New Brig [Id. 6,090]. The statute of this state provides that "every boat or vessel, used in navigating the waters of the state, shall be liable for all debts contracted by the master, owner, agent or consignee thereof, on account of supplies furnished for the use of such boat or vessel; or on account of work done or services rendered on such boat or vessel; or on account of labor done or materials furnished by mechanics, tradesmen or others in and for building, repairing, fitting out, furnishing or equipping such boat or vessel; for all sums due for wharfage or anchorage of such boat or vessel within the state; for all demands or damages accruing from the non-performance or mal-performance of any contract of affreightment; or any contract touching the transportation of persons or property entered into by the master, owner, agent or consignee of the boat or vessel on which such contract is to be performed; and for all injuries done to persons or property by such boat or vessel."—"Any person having a demand as aforesaid, instead of proceeding for the recovery thereof against the master, owner, agent or consignee of a boat or vessel, may, at his option, institute suit against such boat or vessel by name;" by filing in the clerk's office a complaint against such boat or vessel by name, and obtaining therefrom a warrant commanding the sheriff to seize the boat or vessel mentioned. Justices of the peace are also authorized to administer this law in cases within their jurisdiction. This law creates a liability on the part of boats and vessels navigating the waters of the state, to suits for the demands therein stated, and limits those suits to one year after the cause of action shall have accrued.—Neither the term lien, nor a term of like import, as chargeable, occurs in the statute. The laws of the states referred to create a lien for supplies, but this law extends to demands for damages accruing from the non-performance or mal-performance of contracts of affreightment, and contracts touching the transportation of persons and property, and injuries done to persons or property by a boat or vessel. If the demands of the material-man and mechanic were alone provided for, as in these other state laws, it would be right and proper to construe this statute as favorably as possible for their protection; but their demands are in the same category with all the other causes of liability.

It has always been the policy of the courts of this country to discourage secret or uncertain liens, as prejudicial to the transfer of property, and to the interests of trade and commerce. Laws creating liens, either upon real estate or personal property, provide for their record, so that the world may be notified of them. There can be no doubt but the design of this statute was to provide additional means for the recovery of the several debts or demands therein specified; but before I should go further and declare all such debts to be liens, I must be thoroughly satisfied, both as to the statute itself, and that the legislature had the power to enact such a statute.

The state laws before alluded to limit the liens to the sailing of the boat or vessel, or to twelve days thereafter; this law limits the commencement of suit to one year after the cause of action shall have accrued. These laws are correct in policy, and can be administered without prejudice to any one. They are confined to domestic vessels, and domestic creditors, and to contracts on shore. Furnishing materials and doing work on domestic vessels are as notorious as the furnishing materials and performing work in the erection of a building. This law does not stop here, but includes all boats and vessels used in navigating the waters of the state, as well foreign as domestic; and also damages arising upon contracts of affreightment, and for injuries done by such boats or vessels to persons or property without regard to locality. Now, neither the policy of this law, nor of the laws of the country, nor the understanding of the people, nor the interests of trade and commerce, favor a secret or unknown lien upon a boat or vessel for uncertain or unliquidated damages. A foreign boat or vessel may be used in navigating the waters of this state; but can the legislature of the state create a lien on such boat or vessel before she enters a port of the state?—This statute does not provide for bringing into court any lien-creditors; nor that any such creditors may inter-

vene for their interests; nor for any notice of the attachment; nor for the sale of the boat or vessel, so as to vest in the purchaser an unincumbered and indefeasible title thereto. It authorizes an order to sell the boat or vessel; which order should be executed and returned in the same manner as executions. And it further provides that "whenever an order of sale shall be made for the sale of a boat or vessel, with its tackle, apparel, and furniture, the sheriff or constable shall have power to sell such part thereof, or such interest therein, as shall be necessary to satisfy the amount of the judgment rendered in favor of the plaintiff, and all the costs that may accrue." It is questionable whether the officer is authorized to sell more than an interest in, or part of, the boat or vessel, under this statute. It would be preposterous to allege, that under the statute, an officer could sell a boat or vessel, with her tackle, apparel, and furniture, worth thousands, upon an order of sale for a comparatively inconsiderable sum; and that such purchaser should hold such boat or vessel clear of all liens. A lien given by the maritime law is preferred to a bona fide purchaser without notice, and is even preferred to a claim of forfeiture on the part of the government of the United States. The Chusan [Case No. 2,717]; The St. Jago De Cuba, 9 Wheat. [22 U. S.] 409. In the admiralty, all persons having demands against boats or vessels, or interested therein, are permitted to intervene and are presumed to have notice of the proceeding; for this reason a sale in pursuance of a decree in the admiralty confers upon the purchaser an indefeasible title against the world, discharged of all liens whatsoever. Not so under this statute. A purchaser of a boat or vessel or of a part of, or of an interest in, a boat or vessel, under this statute, is in no better condition in regard to liens given by the maritime law, than the original owner. The sale of a part, or of an interest in the boat or vessel is inconsistent with a lien on an entire boat or vessel. A lien enforced in the admiralty requires the sale of the entire vessel, not of a part, or of an interest therein.

As liens on vessels cannot be created by the laws of a state in cases of contract or tort, without the territorial limits, the exigencies of commerce required the summary process of the admiralty, in cases of steamboats and vessels afloat, or employed in business of commerce and navigation on the lakes. For this reason congress passed an act, extending the jurisdiction of the district courts of the United States to certain cases upon the lakes or navigable waters connecting the same. This act was passed February 26, 1845 [5 Stat. 726], and confers quasi admiralty jurisdiction upon the federal courts of contracts and torts arising in, upon, or concerning steamboats and vessels employed in business of commerce and navigation on the lakes. This act was passed in pursuance of the power vested in congress by section 8 of the constitution of the United States, to regulate commerce with foreign nations and among the several states. The statute of this state, providing for the collection of debts against boats and vessels, was enacted in the year 1838; and was transferred into the present Revised Statutes. As congress had not conferred upon the federal courts the jurisdiction contemplated by the constitution, until the enactment of February, 1845, and as this was a territory, the statute may have been proper until that time, or even until the admission of this state into the Union; but whether it is now operative, or to what extent, under the saving clause of the act of congress of 1845, in regard to foreign vessels navigating the lakes, or demands arising out of the state, is not to be determined at this time, this case not requiring a decision. I merely advert to the point to avoid any misunderstanding of this opinion. I shall merely remark that, generally, where the constitution of the United States confers power of legislation upon congress, state laws become inoperative upon the legislation of congress on the same subject. And state laws have not extra-territorial operation or effect. The case under consideration is in regard to a domestic vessel and domestic creditors, which are proper subjects of state legislation. It is the duty of the state legislature to enact statutes for the control of property belonging to the state, and for the protection of the interests of citizens of the state. From the examination here given of the present statute, I am well satisfied, that it is entirely insufficient for these great purposes. The statute itself does not create "a lien upon boats and vessels, used in navigating the waters of this state;" but the first lien or security created or allowed is upon the service of the attachment. Such is the decision, in the district court of the United States for the northern district of New York, upon a similar statute of the state of Ohio. The Globe [Case No. 5,484].

It is clear that the state court had jurisdiction, full and complete, of the proceeding referred to, and that this vessel was rightfully and legally attached by the sheriff of Racine county before the filing of the libel or the service of the monition in this case. If, as has been shown, the state law had created a lien, whereby this court can acquire jurisdiction by admiralty process in rem, then there would be concurrent jurisdiction in both courts; and in that case the right to maintain the jurisdiction must attach to that tribunal which first exercises it and takes possession of the thing in litigation. In order to avoid a clashing of jurisdiction, this course is indispensable, and has been enforced in the national courts, in numerous instances. The authority of the sheriff to attach, and right to hold, this vessel, by virtue of the process in his hands, can not

be questioned. This vessel was in the custody of the law, and the marshal had no right to remove it from the possession of the sheriff. In such cases the marshal or sheriff should either retain the process until the first case is disposed of, or should return it not served on account of a previous attachment or levy, so as to avoid conflict of jurisdiction. The proceeding in the state court is in the nature of a suit in rem, and the necessary result of such proceeding or suit, is, that the thing in litigation is in the custody of the law. It must necessarily be in the possession or under the control of the court, and the court has a right to order it to be taken into the custody of the law. The Robert Fulton [Id. 11,890]; Jennings v. Carson, 4 Cranch [8 U. S.] 2; Peck v. Jenness, 7 How. [48 U. S.] 612. This is not applicable, however, to the case of the paramount right of a libellant to enforce a maritime lien, in preference to an attachment or execution against the owner of a vessel for a simple debt.

The attachment of property, by an officer, presupposes a right to take the possession and custody of that property, and to make such possession and custody exclusive. If the officer attaches upon mesne process, he has a right to hold the possession to answer the exigency of the process. If he levies under an execution, he is bound to sell according to the command of the writ. In Hagan v. Lucas, 10 Pet. [35 U. S.] 400, the sheriff had levied an execution on personal property, which was subsequently levied on by the marshal. Mr. Justice McLean, in delivering the opinion of the court says: "The first levy, whether it were made under the federal or state authority, withdraws the property from the reach of the process of the other. Under the state jurisdiction, a sheriff, having executions in his hands, may levy on the same goods; and, where there is no priority, on the sale of the goods, the proceeds should be applied in proportion to the sums named in the executions. And where a sheriff has made a levy, and afterwards receives executions against the same defendant, he may appropriate any surplus that shall remain after satisfying the first levy, by the order of the court. But the same rule does not govern, where the executions, as in the present case, issue from different jurisdictions. The marshal may apply moneys, collected under several executions, the same as the sheriff. But this cannot be done as between the marshal and the sheriff. A most injurious conflict of jurisdiction would be likely, often, to arise between the federal and the state courts, if the final process of the one could be levied on property which had been taken by the process of the other. The marshal or the sheriff, as the case may be, by a levy, acquires a special property in the goods, and may maintain an action for them. But if the same goods may be taken in execution at the same time by the marshal and the sheriff, does this special property vest in the one, or the other, or both of them? No such case can exist; property once levied on remains in the custody of the law, and it is not liable to be taken by another execution in the hands of a different officer, and especially by an officer acting under a different jurisdiction." This opinion is reiterated in Brown v. Clarke, 4 How. [45 U. S.] 4. In Knox v. Smith, 4 How. [45 U. S.] 298, the property levied on by the marshal was taken from his possession by the sheriff, upon an injunction and process from a state court, similar in effect to a writ of replevin, at the suit of a third person claiming under a deed of trust. A bill filed in the United States court, on the chancery side, to set aside the sheriff's levy, was not sustained because there existed a plain remedy at law. The marshal might have brought trespass against the sheriff, or applied to the United States court for an attachment. In Peck v. Jenness, 7 How. [48 U. S.] 612, an attachment was issued from the state court and served, which, according to the laws and practice of the state of New Hampshire, was a lien on the goods attached. The defendants in the attachment afterwards obtained a discharge under the bankrupt law, and their assignee claimed the goods previously attached. Mr. Justice Grier, in the opinion, says: "It is a doctrine of law too long established to require a citation of authorities, that where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and, whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and, that where the jurisdiction of a court and the right of a plaintiff to prosecute his suit in it have once attached, that right can not be arrested or taken away by proceedings in another court. These rules have their foundation not merely in comity but in necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice. In the case of Kennedy v. Earl of Cassillis, 2 Swanst. 313, Lord Eldon at one time granted an injunction to restrain a party from proceeding in a suit pending in the court of sessions, in Scotland, which, on more mature reflection, he dissolved; because it was admitted, if the court of chancery could in that way restrain proceedings in an independent foreign tribunal, the court of sessions might equally enjoin the parties from proceeding in chancery, and thus they would be unable to proceed in either court. The fact, therefore, that an injunction issues only to the parties before the court and not to the court, is no evasion of the difficulties that are the neces-

sary result of an attempt to exercise that power over a party who is a litigant in another and independent forum." The district court was not permitted to oust the state court of its jurisdiction and custody of the property attached. In the case of Slocum v. Mayberry, 2 Wheat. [15 U. S.] 1, replevin was sustained in the state court against a revenue officer, by the owner of goods that were seized without process, and were not such goods as were authorized by law to be seized; as the common law tribunals of the United States were closed by law against such remedies, they being cognizable alone in the admiralty. But in this case and in Gelston v. Hoyt, 3 Wheat. [16 U. S.] 246, it is determined that an action will not lie against the seizing officer in any common law tribunal until a final decree is pronounced in the admiralty upon the proceeding in rem. In the former case, Marshall, C. J., remarks that—"The judiciary act gives to the federal courts, exclusive cognizance of all seizures made on land or water. Any intervention of a state authority, which, by taking the thing seized out of the possession of the officer of the United States, might obstruct the exercise of this jurisdiction, would unquestionably be a violation of the act; and the federal court having cognizance of the seizure might enforce a re-delivery of the thing, by attachment or other summary process against the parties who should divest such a possession. The party supposing himself aggrieved by a seizure, can not, because he considers it tortious, replevy the property out of the custody of the seizing officer, or of the court having cognizance of the cause." "This, however, being an action which takes the thing itself out of the possession of the officer, could not certainly be maintained in a state court, if, by the act of congress, it was seized for the purpose of being proceeded against in the federal court." Goods or vessels attached or levied on, in pursuance of process issued from a court of competent jurisdiction, are thereby reduced into the custody of the court for the purpose of being proceeded against in satisfaction of the process, or of the debt or demand of the plaintiff or libellant, and can not be taken from the possession of the officer making such attachment or levy, upon process emanating from another and different tribunal.

In all cases of concurrent jurisdiction, the court which first has possession of the subject must determine it conclusively. Smith v. McIver, 9 Wheat. [22 U. S.] 532. The party at whose suit property is attached has a constitutional and legal right to the law of the court issuing the process. If, according to the law of the court issuing the process, the property attached is found to belong to the defendant, the plaintiff claims from that court, through its officer, satisfaction of his demand, out of that property. A court of another government and different jurisdiction can not interpose between that plaintiff and the property attached, and transfer the legal possession, or vest the legal title in a third person, or assume the exclusive custody or disposition of the property. When a party issues his process and attaches property, he is presumed to know his right to do so, according to the law of the court in which he becomes a suitor; and that court is bound to dispose of his cause according to its law. But to compel a suitor in one court to follow the property attached into the forum of a different government, and there contend for satisfaction of his demand according to its law and rulings, would be a grievance and an abuse not to be tolerated; would create a serious conflict of jurisdiction, which should always be avoided by well-regulated courts and all good citizens. Goods and chattels in the possession of a defendant are liable to attachment or levy; and when attached or levied, they are in custody of the law, and control of the court; and must there remain, either in substance or by the substitution of a bond or security according to the law and practice of the court, until the subject be conclusively determined.

A court may allow subsequent and additional attachments and levies on the same property by its own officer; and may permit goods attached or levied on by one officer to be replevied by another officer, for it still retains control of the several writs, and the custody of the goods, either in kind or by the substitution of a bond in replevin, upon the service of the writ. But this can not be done by different and independent courts. Either one or the other must have custody of the goods,—both courts can not have it; nor can the officers of both have the possession of them. It is altogether a mistake to suppose that a party may claim goods in the custody of the law, and transfer them into the custody of another court, on the plea that he has a demand against them, or that they have been wrongfully taken from him. He must submit his case to the consideration of the court having custody of the goods, or wait until a final disposition be made of them, as in the case of conflicting executions. In D'Wolf v. Harris [Case No. 4,221], replevin was maintained, in the circuit court of the United States against the marshal, for goods seized by him.

A state court has no authority to enjoin a judgment or execution, or restrain a party in a court of the United States; neither can the United States courts interfere with proceedings or suitors in the state courts. McKim v. Voorhies, 7 Cranch [11 U. S.] 279; 3 Story, Const. §§ 1751, 1752; U. S. v. Peters, 5 Cranch [9 U. S.] 115; McClung v. Silliman, 6 Wheat. [19 U. S.] 598; Ex parte Dorr, 3 How. [44 U. S.] 103; Diggs v. Wolcott, 4 Cranch [8 U. S.] 179; Ex parte Cabrera [Case No. 2,278], and many other authorities. Injunctions being specially granted, on con-

sideration of a bill, upon notice and hearing, are not so likely to prejudice a party or embarrass a judicial proceeding, as an attachment, execution or replevin, which are issuable by the clerk upon an affidavit or praecipe. Nor may it work so much injustice by merely restraining the action of a party for a time, as the other writs, which in their nature sweep from him his secured lien. Upon the writ of attachment the officer attaches goods and retains them in possession to satisfy the plaintiff's demand, or delivers them to the defendant on his bond. Upon an execution the officer makes sale—upon replevin he delivers the goods to the plaintiff on his giving bond for a return, or the value, with damages, without any judgment of a court on the question of title or any inquisition by the officer, or writ de proprietate probanda. The party or person obtaining possession by process of law has the legal possession. The possession of the party served with the process is transferred to him, and the security of the original plaintiff in the goods is gone. Lowry v. Hall, 2 Watts & S. 129; Morris v. De Witt, 5 Wend. 71.

The pendency of a replevin in a state court, to settle the right of property in a vessel, is a bar to a libel in the admiralty, to settle the same right between the same parties; not technically a bar as a plea of lis pendens, but effectively so to prevent conflict of jurisdiction. Taylor v. The Royal Saxon [Case No. 13,803]. And an attachment for the debt by the process of a state court, after the commencement of the suit for the recovery of that debt in a court of the United States cannot affect the right of the plaintiff to recover in the suit. Wallace v. McConnell, 13 Pet. [38 U. S.] 136; Campbell v. Emerson [Case No. 2,357].

The governments of the United States and of the several states are sovereign and independent within their respective limits as prescribed in their several constitutions. Equally so are the courts of the respective governments independent of each other. One court has no power to supervise, or enjoin, or interfere with the proceedings in the other, excepting where authorized in pursuance of provisions contained in the constitution of the United States; in cases of decisions in state courts against the constitution, or a treaty, or law, or authority, or officer of the United States; and in the removal of causes to the circuit courts, or district courts having circuit court powers, by aliens or non-resident defendants; and where citizens of the same state claim lands under a grant from another state.

I have investigated this case sufficiently to satisfy my mind that this court has no jurisdiction in admiralty; and that, if it had, this vessel, being previously attached by the sheriff of Racine county and in the custody of the law, could not be subsequently attached by the marshal. It is thereupon ordered, that this libel be dismissed, and that the marshal return this vessel to the possession of the sheriff of Racine county.

NOTE [from original report]. Later rulings of the supreme court maintain the jurisdiction in rem under state laws in certain cases. The St. Lawrence, 1 Black [66 U. S.] 522, and cases there cited. It is there ruled that the change in the 12th rule in admiralty, meant merely that various considerations made it advisable not to permit that particular form of process to be used by persons who might claim it on the sole ground that the state law gave them a lien, where none was given by the maritime code. Where the lien is claimed as arising out of private contract with the owner, it will be enforced against a domestic vessel. The Kalorama, 10 Wall. [77 U. S.] 204. Or where there is a possessory lien at common law. The Marion [Case No. 9,087]. That the state law of Kentucky creating liens on domestic vessels does not confer jurisdiction on the courts of the United States was decided in Roach v. Chapman, 22 How. [63 U. S.] 129, citing People's Ferry Co. v. Beers, 20 How. [61 U. S.] 393. For the proper rules in cases where conflicting claims are set up under state and federal jurisdiction, see the following cases, elaborately argued and decided: Taylor v. Carryl, 20 How. [61 U. S.] 583; Freeman v. Howe, 24 How. [65 U. S.] 450. Where a vessel had been seized under process from a state court, proceedings under a libel are irregular. A seizure by the marshal when the vessel was in the actual and legal possession of the sheriff, does not give jurisdiction in rem. The admiralty jurisdiction of the United States courts, though exclusive on some subjects, is concurrent on others. Taylor v. Carryl, 20 How. [61 U. S.] 583; see also The John Richards [Case No. 7,361]. But the possession of the sheriff does not defeat the operation of the revenue laws. U. S. v. The Reindeer [Id. 16,144]. As to effect of state statute, see opinions of Sherman, J., in Re Dwight Scott [Id. 12,517]; also of Longyear, J., in Moir v. The Du Buque [Id. 9,696]. That liens on domestic ships given by a state statute, in cases maritime in their nature may be enforced in admiralty, is declared in The Richard Busteed [Id. 11,764]. See, also, Peyroux v. Howard, 7 Pet. [32 U. S.] 324. The district court, however, exercises the jurisdiction, thus acquired, according to the mode of proceeding in admiralty, not according to the state law. Davis v. New Brig [Case No. 3,643]. See, also, Boon v. The Hornet [Id. 1,640]; Tree v. The Indiana [Id. 14,165].

Contra. A court of admiralty has no jurisdiction in rem to recover for work, labor, and materials furnished in building a ship, even though the state law gives a lien upon the vessel. The Norway [Case No. 10,359]. In the American Law Review (volume 5, p. 581) will be found an able and elaborate article by R. H. Dana, Jr., reviewing the whole subject of admiralty jurisdiction and the successive decisions on the question. The statute of California, declaring vessels subject to liens for materials or supplies, is valid and operative even in its application to a vessel supplied in her home port, so far as to entitle the claimant to payment out of surplus remaining in the registry after the satisfaction of maritime liens in preference to a mortgagee of the vessel. Francis v. The Harrison [Case No. 5,038], where the successive decisions of the supreme court concerning the enforcement of such liens by proceedings in rem are reviewed and explained. The supreme court of Indiana holds that the statute of that state, for the enforcement of liens upon domestic craft is, under the rulings in The Hine v. Trevor, 4 Wall. [71 U. S.] 555, void; that, the jurisdiction of the federal courts being exclusive, the state courts can entertain no jurisdiction. Ballard v. Wiltshire, 28 Ind. 341; Vaughan v. McCullough, Id. 359; Claycomb v. Cohn, Id. 483. In each of these cases, the court directed the case to be dismissed.

Case No. 2,542.

The CELLA.

[3 Ben. 168.][1]

District Court, S. D. New York. March, 1869.

COLLISION OFF LONG ISLAND — STEAMER AND SCHOONER — PORTING HELM — DAMAGES BY STRANDING AFTER COLLISION.

1. A schooner, heading about east southeast, on her starboard tack, with the wind from the south, on a bright starlight night, discovered a steamer's lights about two points on her port bow, and kept her course till a collision between the vessels was inevitable, when her helm was put to port. The steamer discovered the two colored lights of the schooner at from one and a half to two miles' distance, half a point on her starboard bow, and her helm was at once ported. The port bow of the steamer struck the port bow of the schooner, and carried away all the rigging on that side, so that she could not be brought up into the wind, for fear of losing her masts, and she was anchored, and the next morning went ashore on Long Island: *Held*, that, as the schooner did not change her course till the collision was inevitable, she was free from fault, and, no excuse having been shown by the steamer for not having avoided the schooner, the steamer must be held liable;

2. The manoeuvre of the steamer, in porting her helm, was faulty. Under the circumstances, she should have starboarded;

3. The steamer was liable for the damages, including those consequent upon the stranding of the schooner.

In admiralty.

Scudder & Carter, for libellants.

Beebe, Dean & Donohue, for claimants.

BLATCHFORD, District Judge. This is a libel filed by the owners of the schooner Nellie Bowen, to recover for the damages caused to that vessel, and her cargo, by a collision between her and the steamship Cella, which occurred about midnight, on the 3d of December, 1866, some seven miles or more to the southward of Fire Island light, on the coast of Long Island. The schooner was on a voyage from Boston, Massachusetts, to Richmond, Virginia, with a cargo of ice, fish, furniture, &c. She had her proper lights set, and a proper lookout. The wind was fresh from the south, and she was beating against the wind, and was on her starboard tack, heading about east southeast, thus lying within about six points of the wind. She discovered the lights of the Cella, about two points on her port bow, a long distance off. The Cella was on a voyage from London to New York. The steamer came on, and, when she had approached so near to the schooner that, to the view of those on board of the schooner, a collision was inevitable, the helm of the schooner was put to port, for the purpose of luffing, but it does not appear that her sails shook at all. The port bow of the steamer struck the port bow of the schooner, about at the cathead, and the steamer, raking aft, carried away all the fore rigging and main rigging of the schooner on her port side, and did other damage, and thus rendered her perfectly helpless, with great danger that her masts, thus left without support on one side, would snap. The crew of the schooner made all proper effort to secure her masts, and to put up temporary rigging. To do this, it was necessary to keep the vessel before the wind till she could anchor with safety, for the wind kept increasing so much that it was deemed imprudent, for the safety of her masts, to bring her to anchor, which would require, in the operation, the bringing her head to the sea and the wind. Efforts were made to bring her head to the wind, but, having fallen off, at the time of the collision, she could not, in her shattered condition, be brought around, through the trough of the sea, to the wind, without danger of her masts going overboard, and they were heard to crack, in the attempts that were made. She drifted on, until, by steadying her masts, and getting down her sails, she was anchored and brought up. But she struck adrift, as the wind increased, and was brought up by a second anchor. Then temporary rigging was set up, and, after sunrise the next morning, an effort was made to get her under way, but her anchors could not be got up, and she dragged them, and struck the bottom, and was then headed on shore, and went on the beach, opposite Hempstead.

The answer admits, that the night was a clear, bright starlight one, and that the Cella saw the two colored lights of the schooner at from one and a half to two miles' distance. The only defence set up in the answer is the stereotyped one, that the schooner changed her course. There is not a particle of proof to sustain this defence. On the contrary, the testimony of the witnesses for the claimants, as well as of those for the libellants, shows that the schooner kept her course, as it was her duty to do, until just at the moment of the collision, when, to ease the impending blow, she ported her helm. This movement of the schooner, in the moment of danger, is not imputable as a fault. The pilot of the Cella (for she had a Sandy Hook pilot on board) says, that he first saw a light on the schooner half a point on the starboard bow of the Cella, and judged it to be a mile and a half or two miles off; that he then ported his wheel, and kept the light in sight till it got to bear two or three points on his port bow; that he had scarcely altered the position of the Cella, before he saw the two lights of the schooner; and that they remained in view until a second before the collision, when the green light was hid, and the red light alone remained in view. This testimony corroborates the evidence of those on board of the schooner, that she kept her course until almost the moment of collision, and then ported to luff, which would have thrown her green light out of view. So, also, the mas-

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

ter of the Cella says, that he first saw the lights of the schooner ten minutes before the collision, when they were half a mile off, and at that time saw her green light and her red light from one and a half to two points on the port bow of the Cella, the wheel of the Cella being then hard a-port; that the green light of the schooner was hid a moment before the two vessels struck each other; that up to that time both of the lights of the schooner were in sight from the Cella; and that he saw no luffing on the part of the schooner from the time her lights were made until the collision. It appears, by the testimony of the witnesses from the Cella, that the red light alone of the schooner was first made on the Cella, a point on the starboard bow of the Cella by the compass, and that the helm of the Cella was at once put hard a-port, but that, notwithstanding that, the bearing of the lights of the schooner kept closing in on the Cella all the time till the collision, an interval of nearly ten minutes. Perry, a seaman on the Cella, who assisted in putting her wheel to port, and who saw the two lights of the schooner just as the steamer's wheel was put to port, says that he kept his eyes on the two lights of the schooner up to the time the vessel struck, and that a very short time, not many seconds, before the contact, the schooner hid her green light. The protest of the Cella, made on the 6th of December, 1866, and signed and sworn to by the master, the first mate, the carpenter and two of the seamen of the Cella, and by her pilot, states that the schooner was steering, according to their best observation, east by south, or east southeast, and that, from the appearance of her lights, from the time she was first seen from the Cella, until the collision, she had not changed her helm.

There having been no fault on the part of the schooner, and it having been the duty of the Cella to avoid her, it follows that, as no excuse is established by the Cella, she must be held liable. Under these circumstances, it is of no consequence to account for the collision, or to speculate as to how it could have happened. And yet, on the evidence, it is quite manifest where the particular fault of the Cella was. She made two colored lights on her starboard bow, which, with the wind south, and the Cella heading west half north, clearly indicated that the lights belonged to a sailing vessel which was sailing on the wind. The Cella at once ported her helm. This seems to be the universal practice of a steamer, in meeting a sailing vessel, whether it be the proper manoeuvre or not to enable the steamer to fulfil the duty, imposed upon her by law, of keeping out of the way of the sailing vessel. In this case, the manoeuvre was faulty. The Cella ought to have starboarded her helm, and there would have been no collision. In the first place, she made no allowance for the leeway which the schooner would make in sailing on the wind, with the wind as it was. In the second place, the testimony of the master of the Cella shows, that, with the wind fresh from the south, as it was, and the Cella down by the head, as she was, the wind catches her stern and keeps her head to the wind, that is to port, as she was then heading, and tends to counteract the usual effect of porting the wheel, and that, if her engines had been stopped, she would, even with a port helm, have come around with her head to the wind, that is, to port. This manifestly shows that her mistake was in porting, instead of starboarding. That, with the leeway of the schooner, brought the vessels together. If the Cella had starboarded, her helm, with the effect of the wind on her stern, would have brought her head around rapidly to port, even though her machinery had not been stopped, and, with the leeway of the schooner, each vessel would have passed a wide distance on the starboard side of the other.

The steamer is responsible for all the damages which ensued, from the collision, to the schooner and her cargo, including those consequent upon the running in shore and the stranding of the schooner. There must be a decree for the libellants, for such damages, with the costs of the suit, the damages to be ascertained by a reference.

CELLULOID HARNESS TRIMMING CO. (ALBRIGHT v.). See Case No. 147.

Case No. 2,543.

CELLULOID MANUF'G CO. v. GOODYEAR DENTAL VULCANITE CO.

[13 Blatchf. 375;[1] 2 Ban. & A. 334; 10 O. G. 41.]

Circuit Court, S. D. New York. June 7, 1876.

PATENTS — SALE OF INVENTION — RIGHTS OF PATENTEE — SUIT TO LIMIT PATENT OR HAVE ITS EXTENT DETERMINED — SUIT FOR INFRINGEMENT — PARTIES DEFENDANT — ENJOINING LIBEL OF BUSINESS.

1. The owner of a useful invention has the right to sell it to all who will purchase, subject only to restraint from some party having a conflicting patent. He holds the right from the general law of the land, and needs no act of congress to enable him to make or vend his article, and obtains no such right from congress. He obtains from the patent laws only the power to restrain another from unlawfully making, using or vending his invention.

[Cited in Rein v. Clayton, 37 Fed. 356. Applied in Strait v. National Harrow Co., 51 Fed. 820.]

2. Injuries to the trade or profits or business of a manufacturer do not fall within the preventive scope of the patent laws, but only injuries to the right of the patentee to exclude others from the manufacture, use, or sale of the article for which he has a patent.

[Cited in Flint v. Hutchinson Smoke-Burner Co., 38 Fed. 547.]

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

3. A junior private patentee, who alleges that his patent does not conflict with a prior patent, and asks the court so to adjudge, cannot sustain a bill asking the court to decide that the plaintiff and his licensees are not infringers of the defendant's patent.

4. A suit in effect to limit a patent, or to declare that it does not extend to a certain class of cases, and, pro tanto, to have it adjudged void, can only be sustained by the attorney general, in behalf of the United States.

5. A patentee has the right to sue any one of several alleged infringers of the patent, and to omit others, in his discretion. He cannot be compelled to enforce his right, against his wish.

6. A junior patentee or an alleged infringer cannot reverse this position, and, by making the elder patentee a defendant, compel him to assert his rights as against him.

7. A bill to prevent the publication of a libel injurious to the plaintiff's business can be sustained only when it appears that the statement is malicious as well as false. If made to advance the party's own sales, and upon the reasonable claim that he has the right which he asserts, the action must fail.

In equity. The allegations of the bill were, in substance, as follows:

(1.) On the 7th of June, 1864, letters patent were issued to John A. Cummings for "an improvement in artificial gums and palates." Such letters were reissued on the 10th of January, 1865, and again on the 21st of March, 1865, and, by assignment, the same are now the property of the defendant.

(2.) After becoming such owner, the defendant commenced a great number of suits against dentists, in the various courts of the United States, for alleged infringement of the said letters patent, and which suits are still pending and undetermined in the circuit courts of the United States.

(3.) On the 12th of June, 1870, letters patent No. 105,338 were issued to John W. and Isaiah S. Hyatt, for an "improvement in treating and moulding pyroxyline." The same were surrendered and reissued June 23d, 1874, as No. 5,928.

(4.) This substance is useful, among other purposes, as a holder for sets of artificial teeth.

(5.) On the 28th of March, 1871, letters patent 113,055 were issued to the Albany Dental Plate Company, as assignees of Hyatts and Perkins, an "improvement in dental plates from pyroxyline."

(6.) The plaintiff is the holder, by assignment, of said letters Nos. 5,928 and 113,055.

(8.) The plaintiff is largely engaged in manufacturing blanks, to be used as holders for teeth, under said patents. The substance produced under the patents the plaintiff denominates "celluloid," and the plaintiff is selling large quantities of such holders throughout the United States, together with licenses to use the same.

(9.) The said rights were of great advantage to the plaintiff until interfered with and infringed by the defendant; and its rights have been acquiesced in and recognized by the public generally, and the plaintiff has invested a large amount of capital in the business, which will become valueless unless its exclusive character can be sustained.

(10.) Of the great number of suits brought as aforesaid by the defendant, for alleged infringement of its patent, the great majority have not been defended; but the defendants therein have allowed decrees pro confesso to be taken against them, and the same are still pending before masters, under the usual order of reference.

(11.) In none of said suits has the defendant averred in its bills that the use of celluloid, as a substitute for a vulcanite plate, is an infringement of the Cummings letters patent, nor, except in two instances, have the defendants in such suits ever pleaded that the use of celluloid was not such infringement; nor has such fact, or the question of law involved therein, ever been presented for legal decision, except as hereinafter stated.

(12.) In a suit against one Wolf, commenced in 1872, in an affidavit and answer filed in opposition to a motion for an injunction, Wolf alleged that he used metal or celluloid bases, and that the same were not an infringement of the plaintiff's patent. The court made an order that the defendant be restrained from the use of vulcanite artificial gums and palates, and that the plaintiff have leave to amend its bill. No amendment was ever made, but, as unamended, the bill was, on the 13th of July, 1875, taken as confessed.

(13.) In July, 1875, the defendant and one Josiah Bacon commenced an action against one Eben M. Flagg, upon a printed bill in substance like that in the suit against Wolf and the other suits referred to, containing no allegation that the use of celluloid blanks was an infringement of the Cummings patent. Annexed to the bill was a copy of the specification of 113,055, various affidavits, and a copy of the deposition of Henry J. Fisk, given in a suit of Goodyear Dental Vulcanite Co. v. Preterre [Case No. 5,595], and sets of celluloid teeth and of vulcanite teeth. There was, also, upon all of these papers, a notice of motion for preliminary injunction. Flagg had purchased his celluloid blanks of the plaintiff, and was using them in his business. The plaintiff assumed the defence of Flagg's suit, to the knowledge of the defendant. The motion was heard upon the issue presented by the letters patent of the plaintiff and defendant in this suit, and, on the 7th of December, 1875, Judge Blatchford made an order denying the motion, on the ground that it was not sufficiently clear that the defendant's process was embraced in the plaintiff's claim, to warrant the granting of an injunction, until one should be granted as the result of a final hearing of the case. Certain allegations were made by the present defendant on the application, that proofs in a suit against

William H. Dwinelle were on file, and that they were identical with the proofs taken in a suit against Daniel H. Smith, and that the record against Smith constituted a part of the proofs on that motion, and that the question of the conflict between the patents now in question would thus be presented as a question of law, and plaintiff supposed the suit against Flagg would be proceeded in, and the question now at issue would thus be presented for decision, but, on the 23d of December, 1875, the plaintiff in that suit discontinued it by an order, reciting as reasons, that Flagg had demurred to the bill on account of the misjoinder of Bacon as a plaintiff therein, and also the great pressure of business and delay of hearing in this circuit court.

(14.) Such discontinuance was not made for the reasons mentioned, but was illusory, and to prevent the entry of an order on Judge Blatchford's decision, to prevent a final hearing, and to enable the defendant to initiate a new means of harassing the dentists who purchased under the plaintiff's patent, and to restrict and impair the plaintiff's income therefrom.

(15.) Since Judge Blatchford's decision, the defendant has caused notice to be given to the dentists using the celluloid blanks, not to use the same; that such use was an infringement of the Cummings patent; and that, if persisted in, such persons would be prosecuted as infringers. Such notice was given to dentists residing in various states and circuits, who communicated the same to the plaintiff, asking protection against such claim, and this plaintiff has agreed to afford such protection. To do this would involve the plaintiff in a multitude of suits in various circuits, would subject it to great expense and annoyance, and would practically involve such enormous costs as would render the plaintiff's patents valueless.

(16.) Since Judge Blatchford's decision, the defendants have moved in the circuit courts in Maryland, Pennsylvania, and Michigan, for references to masters, and commenced the taking of accounts in suits in which the defendants have suffered the bill to be taken pro confesso. Such defendants are not of sufficient ability to defend such suits, but yield a ready assent to any request that may be made of them, the infringement being ostensibly proved and admissions procured in evidence of the Preterre suit and also of the Smith suit in Massachusetts. In a suit brought by defendant and Bacon against Jared Kibbee, the master made his report, which contains, among other things, an admission of the printed record in the Preterre case referred to, and reports damages to the amount of $220. The plaintiff had no knowledge of the Kibbee suit. Kibbee was not represented by counsel, was ignorant of his rights, and the evidence by the said records, and also of the celluloid blanks which he had used, was illegal and incompetent. The only question referred to the master was, whether Kibbee had sold vulcanite dental plates in infringement of the Cummings patent, and the question whether the use of celluloid blanks was an infringement of the Cummings patent was not passed upon prior to the order of reference, and was not referred to the master; and whether the use of celluloid did constitute such infringement, could only be passed upon at the final hearing in a suit brought for that purpose.

(17.) In another suit, brought by the same parties against one Hoopes, in Maryland, he allowed a decree to go against him for the use of vulcanite dental plates. He had been, and, so far as plaintiff knows, was, at the time of instituting said suit, an agent of the defendant, and a stockholder in its company. Hoopes was summoned to appear before the master. The plaintiff's counsel attended at the day appointed, and found that Hoopes had, on the previous day, consented to the admission of the records in the Preterre and Smith cases. Plaintiff's counsel then stated to the master the position of the case, whereupon the said Bacon, who was present, stated that they would make no claim against the defendant for the use of celluloid blanks, and an entry to that effect was made in the proceedings.

(18.) The Preterre suit was commenced in December, 1874, for his having manufactured, used, and sold vulcanite dental plates. Preterre was defended by counsel not of plaintiff's employment, who were not acquainted with its rights, nor with the facts in relation to celluloid, as hereinbefore stated, and who made defence solely on the ground of the invalidity of the Cummings patent; and they did not bring in issue the question between celluloid plates and vulcanite plates. Fisk was examined as a witness. Preterre endeavored to establish that the plates he used, which were testified to be vulcanite, were in truth celluloid, and on this point Fisk was examined as a witness. Preterre afterwards abandoned his attempt to prove a similarity between the two substances, and, in June, 1875, he requested Hyatt to appear as a witness in his behalf. Renwick was afterwards examined as a witness against Preterre, and this plaintiff requested its counsel, Mr. Baldwin, to appear and cross-examine him; and this plaintiff made no other appearance in that case than that one of its counsel conducted such cross-examination. Preterre did not assume to present the right under this plaintiff's letters patent, nor the state of the art. The defendant's counsel in that case was also induced to admit in evidence the record in the Smith case.

(19.) The production of the Preterre record before the master is for the purpose of establishing an identity between the vulcanite and the celluloid plates, and the introduction of the same under the pretence that this plaintiff was a privy to the same, is a fraud and an attempt to create a belief that that record

is a full presentation of this plaintiff's case, and an attempt to gain an unjust advantage.

(20.) This defendant caused the record in the Kibbee case, after Kibbee had consented as aforesaid, to be printed continuously with the Preterre case, and to be served upon Mr. Baldwin, this plaintiff's counsel, for the purpose of binding this plaintiff thereby; and similar proceedings have been taken in other cases.

(21.) The legal rights of the plaintiff, as herein averred, have not been properly presented to any tribunal, save in the Flagg case, and an attempt to create the impression that they have been before the court is unfounded. This plaintiff has offered to waive the misjoinder of Flagg, and has requested this defendant to proceed in that suit, which it refuses to do.

(22.) By other suits plaintiff is needlessly subjected to great loss in conducting the same, and in loss of revenue; and, by reason thereof, many dentists are deterred from purchasing celluloid blanks, and thereby this defendant obstructs and retards the plaintiff in the legal use of its exclusive privilege.

(23.) The defendant claims that the celluloid blanks are an infringement of its patent, and that it has a legal right to arrest the manufacture of the same. The plaintiff avers and insists that such claim is unfounded.

(24.) The plaintiff is lawfully engaged in prosecuting the said business, and its right is invaded and infringed by the written and verbal threats of the defendant to prosecute those who make purchase of said blanks, and by its illegal prosecution of such multiplicity of suits, and by giving notice of its intention to hold responsible those who use the celluloid blanks, by reason whereof the plaintiff is injured in its business.

(25.) The Cummings patent is void for the various reasons set forth.

(26.) The rights of the parties are solely under the patents referred to, and depend upon whether the Cummings patent is valid, and, if so, whether the same interferes with the letters patent of the plaintiff; and such questions should properly be decided in a suit between the owners of the respective patents.

Wherefore the plaintiff prays: 1. That this court will entertain jurisdiction of this suit, to determine whether the Cummings patent is valid, and, if it is, whether the defendant is entitled to interfere with the celluloid dental blanks, as an infringement thereof; 2. that, in case it shall be held that celluloid is not an infringement of the Cummings patent, a final decree be entered, enjoining the defendant from commencing or prosecuting any actions against this plaintiff, or any dentists purchasing celluloid blanks from it; 3. that, in the event of such decree, an account may be taken of the profits it has made by such obstruction and interference with the plaintiff's business, and of the profits it has made by the sale of vulcanite plates to those who had theretofore been the customers of the plaintiff in the use of celluloid blanks, and of the profits which the defendant has made and the plaintiff has lost by means of the acts aforesaid; 4. that a preliminary injunction may issue restraining the defendant and its agents, during the pendency of this suit, from making threats of prosecution for using celluloid blanks, or sending letters or circulars cautioning against the use of celluloid blanks, and from proceeding in any suit now pending for the use of celluloid; 5. for costs and such other or different relief as to the court may seem meet; 6. for a subpoena in the usual form, and for a preliminary injunction during the pendency of this action, as hereinbefore prayed for. The defendant demurred to the jurisdiction of the court, setting forth the following causes: 1. The bill is filed by a citizen of New York against a citizen of the same state; 2. the United States are not parties plaintiff, or petitioners; 3. the suit does not arise under the constitution or laws of the United States; 4. the bill is not brought in the name of the United States, or its attorney general; 5. the bill contains no equity whereon relief can be given; 6. the plaintiff has an adequate remedy at law, if the facts stated in the bill constitute any cause of action.

William D. Shipman, Clarence A. Seward, and E. Luther Hamilton, for plaintiff.

Edward N. Dickerson and Benjamin F. Lee, for defendant.

HUNT, Circuit Justice. This case comes before the court in a double aspect. It is presented, first, in the form of a motion for a preliminary injunction, which is based upon the bill of complaint, and upon affidavits and documents furnished by the respective parties. It is presented, secondly, upon a demurrer to the bill of complaint. The question upon the equity of the bill has been fully argued, as has also the propriety of issuing a preliminary injunction, upon the case made by the additional evidence. The question that presents itself first, in the natural order of things, is upon the sufficiency of the bill; in other words, is the demurrer well taken?

The plaintiff alleges itself to be the owner of a useful invention, in the manufacture of plates for holding artificial teeth. By the general laws of the land, state as well as national, it has the right to sell that improvement to all who think it of sufficient value to induce them to purchase it, subject only to restraint from some party having a conflicting patent. So far as its own use or manufacture is concerned, it needs no act of congress to enable it to make, use and vend the article, and it obtains no such right from congress. The benefit of the patent laws is, that the plaintiff may prevent others

from making, using or vending its invention. To itself, to its own right to make, use or vend, no right or authority is added by those statutes. When a stranger shall thus make, use or vend its manufacture, the patent laws enable it to restrain such use, and to recover damages therefor. Do the subjects of complaint in the bill set forth fall within this right of action given by the patent laws? Are not the injuries complained of injuries to the trade, the profits and the business of the plaintiff, as carried on by itself, for which it has and needs no patent authority, rather than injuries to the right of the patentee to exclude others from such sale or manufacture? It is to this latter class only that the patent laws apply, and for injury to those rights only that actions under the patent laws can be sustained. See Hawks v. Swett, 4 Hun, 149, 150, where this principle is fully set forth.

The bill contains a prayer that the defendant's patent may be adjudged to be void and of no effect. On the argument it was, however, conceded, that, for the purpose of the present proceedings, that patent must be held to be valid. It has been adjudged to be valid, in numerous cases in the circuit courts, tried before different judges, and, until held otherwise by the supreme court, must be taken to be a valid patent.

The plaintiff is the owner of certain other patents issued to the Hyatts and to Perkins, for an "improvement in dental plates from pyroxyline." These are commonly called celluloid plates. In the 24th section of the bill of complaint it is averred that the defendant claims that the use of the celluloid blanks is an infringement of the Cummings letters patent. This claim, it is alleged, has no lawful foundation, and it is averred that the true construction of the Cummings patent does not support the same, or give to the defendant any right to interfere with or arrest proceedings under it. Notwithstanding this allegation, the plaintiff insists, and such is the object of its bill, that the court shall decide whether, if the plaintiff or those who hold its licenses shall make or vend its articles patented, it would amount to an infringement of the defendant's patent. In my judgment, such an action cannot be sustained. No case has been cited to me, nor do I think any can be found, sustaining an action by a junior private patentee, who alleges that his patent does not conflict with the prior patent, and who asks the court so to adjudge. It is, in substance, a suit to limit the effect of a patent, to declare that it does not extend to a certain class of cases, and, pro tanto, to have it adjudged to be void and of no force. Such an action can only be sustained by the attorney general, in the name and on behalf of the United States. Mowry v. Whitney, 14 Wall. [81 U. S.] 434.

To allow the action is to reverse the proper position of the parties. Whoever receives letters patent from the United States receives thereby a prima facie right to maintain an action against every infringer of the right given by such letters. While it is true that such right is prima facie only, and that the holder must be prepared to maintain it in the courts when attacked, it is still a right on his part to sue such alleged violators. The present action would convert the right to sue into a liability to be sued, which is quite a different thing. The defendant holds the Cummings patent. It finds that the patent is infringed and its rights injured by A., B. and C., in the state of New York, and E., D. and F., in the state of New Jersey, and so on through the alphabet. The defendant has a right of action against each one of these individuals. It has a right to sue the whole of them. It has the right to sue any one of them, and to allow the others to go undisturbed. While it would not be a high-minded theory, I know of no principle that, as matter of law, would prevent its seeking the feeblest of them all, the one least able to defend himself, and to make a victim of him. If that individual shall appear to have infringed upon this defendant's patent, he is liable to the damages, although he may be poor, unable to defend himself, although others have offended in a greater degree, and although we may condemn the spirit which selected him as the particular defendant. On principle, this cannot be doubted. But, the plaintiff seeks to reverse this action, by making the elder patentee a defendant, at the suit of a particular offender, and to compel him, whether he chooses or does not choose, to assert his rights as against him.

Again, such a suit gives no practical result in the settlement of the question. Suppose it to be decided in this suit, that the celluloid preparation is not an infringement of the Cummings patent. Nothing is settled except as between the two parties present as litigants. If the defendant should afterwards sue a dentist in Michigan for infringing its patent, the judgment in the present case would be no evidence against it, to show that there was no infringement. It would be inter alios acta and not competent; and so, if the judgment should be the other way, the defendant could not have the benefit of the decision, as against another alleged infringer. Each plaintiff and each defendant can litigate his own case, and is not bound by decisions in other cases, to which he was not a party, and which he had no opportunity to litigate. Such is the rule of law, and its necessity, to avoid collusive judgments and fraudulent combinations, is too obvious to need defence.

The cases of Axmann v. Lund, L. R. 18 Eq. Cas. 330, and Rollins v. Hinks, L. R.

13 Eq. Cas. 355, give countenance to the suggestion that the bill in this case may be sustained, to prevent the publication of libels injurious to the plaintiff's business. The case of Prudential Assur. Co. v. Knott, 10 Ch. App. 143, is a subsequent case, and is to the contrary. It is to be said further, in answer to these cases: 1st. They were based upon the theory that the defendants made their claim and published their injurious circulars, but refused to bring suits to sustain them. The record here shows that numerous suits have been brought, and that at least four suits, to wit, those against Silliman, Kibbee, Hoopes and Greene, are specifically proved by the evidence, in the first two of which the defendant has obtained decrees that the celluloid is an infringement of the Cummings patent, and in the other two the proceedings are still pending before the masters. 2d. No such action at law or in equity can be maintained unless it is established that the publication is malicious and for the purpose of injuring the other party. If made to advance the publisher's own sales, and upon a reasonable claim that he has the right which he asserts, the action must fail. Wren v. Weild, L. R. 4 Q. B. 730.

Upon the same point is the case of Hovey v. Rubber-Tip Pencil Co., 57 N. Y. 119, which was an action to restrain the defendant from publishing notices injurious to the plaintiff's business. It was a case of alleged conflicting patents, in which the defendant cautioned all persons against using the plaintiff's invention, alleging his intention to prosecute all infringements. The court held: 1st. That the questions presented arose directly upon the patent laws of the United States, and hence were not within the jurisdiction of the state courts; citing Dudley v. Mayhew, 3 N. Y. 9, and Middlebrook v. Broadbent, 47 N. Y. 443; considering, also, Gibson v. Woodworth, 8 Paige, 132, and Burrall v. Jewett, 2 Paige, 134. 2d. That, to justify the action as a slander of title, the proceedings must appear to have been unfounded not only, and the statements false, but malicious. If the defendant believed its statements to be correct, it merely discharged a moral obligation and satisfied the demands of fair dealing, in making the publication.

It is contended, also, that ground for filing the bill is found in section 4918 of the Revised Statutes of the United States, in relation to interfering patents. That section is as follows: "Whenever there are interfering patents, any person interested in any one of them, or in the working of the invention claimed under either of them, may have relief against the interfering patentee, and all parties interested under him, by suit in equity against the owners of the interfering patent; and the court, on notice to adverse parties, and other due proceedings had according to the course of equity, may adjudge and declare either of the patents void in whole or in part, or inoperative, or invalid in any particular part of the United States, according to the interest of the parties in the patent or the invention patented. But no such judgment or adjudication shall affect the right of any person except the parties to the suit, and those deriving title under them subsequent to the rendition of such judgment." The sixteenth section of the act of July 4, 1836 [5 Stat. 123], and the act of July 8, 1870 [16 Stat. 207], make corresponding provisions on this subject. To give the plaintiff the benefit of this statute, it must abandon the allegation of its bill, that the celluloid is not an infringement of, or interference with, the Cummings patent. It must assume the ground there imputed to the defendant, that these two patents do conflict and interfere, and there unqualifiedly denied by the plaintiff, and must assume the position there imputed to the defendant, of the identity of celluloid or collodion dental plates with the subject of the defendant's patent. The argument of the defendant is, that celluloid or collodion was a well known agent when the plaintiff's patent was obtained, known as an equivalent for vulcanite in the manufacture of dental plates, and that there could, therefore, be no patent lawfully issued for the application of collodion to dental plates. The Cummings patent is upheld upon the theory that the vulcanite possessed qualities not found in any other material used for that purpose, and that the mode of manufacture was different from that in which any other artificial set of teeth had been made. The Hyatt dental patent, it is argued, exhibits no novelty in the quality of the result produced or in the mode of manufacture. Until the plaintiff shall be prepared to assert that the two patents are substantially for the same invention, that its patentee is the real discoverer of the invention therein set forth, and that the defendant has wrongfully and improperly appropriated the fruits of his invention, I do not see how the statute respecting interfering patents can be invoked. See Curt. Pat., last chapter.

In reaching this conclusion, I do not assume either that the plaintiff's patent is void, or that it is an infringement of the Cummings patent. No opinion is intended to be intimated upon those points. Under this branch of the case, the suggestion is, simply, that a case of interference is not presented, where the plaintiff avers that there is no interference. An averment that the defendant claims an interference, and a denial of such claim by the plaintiff, cannot authorize the plaintiff to ask a settlement as for an interference. The prayers and the relief to be afforded to the plaintiff must be upon the facts as it claims them to exist,

not as the defendant claims and which the plaintiff denies.

It is said, lastly, that jurisdiction to sustain the present controversy is found in section 1 of the act of March 3, 1875 (18 Stat. 470), which provides as follows: "The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens, or subjects." The jurisdiction of the federal courts, under the constitution and laws of the United States, depends upon two points—First, as arising from the subject-matter of the controversy; and, second, as dependent upon the character of the parties. Cohens v. Virginia, 6 Wheat. [19 U. S.] 378. See Matthews v. McStea, 20 Wall. [87 U. S.] 646; Littlefield v. Perry, 21 Wall. [88 U. S.] 222. The act of 1789 made the jurisdiction of the circuit courts dependent upon the character of the parties. The act of 1875 has altered this rule, and gives to that court jurisdiction in all cases in law and equity arising under the laws and constitution of the United States. It cannot be doubted that controversies arising upon conflicting claims to or under patents issued under the laws of the United States are cases arising under the laws of the United States. It is upon this theory that the circuit courts have, from the foundation of the government, entertained jurisdiction of patent cases. This principle has been assumed in the previous parts of this opinion, and its existence does not relieve from the difficulty now pressing upon us. The objection is not, that, in its subject-matter, the case does not present one of federal jurisdiction, to wit, the adjustment of conflicting claims under the patent laws of the United States, or the awarding of damages for an infringement of such patents, but the question is, whether, in the form in which the facts are presented, the plaintiff can sustain his bill or is entitled to an injunction. The act of 1875 does not touch this point.

Upon the principles already laid down, I am of the opinion that this action cannot be sustained, and that the demurrer must be upheld. It follows, that the motion for the injunction must be denied. A preliminary injunction cannot be granted when it is conceded that the plaintiff must finally fail in his action.

Case No. 2,544.

The CEMENT ROCK and The VENTURE.

[8 Ben. 443.] [1]

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

COLLISION IN THE KILLS—TUG AND TOW—VESSEL AT ANCHOR.

1. A schooner lying at anchor in the Kills was struck by a barge which was being towed by a propeller. The tide, which was flood, gave the barge a set towards the schooner. The propeller, in defence, set up that the barge was not properly steered after the propeller, which passed the schooner at a proper distance. The barge, in defence, set up that she followed the propeller, which went close by the schooner, and that the schooner took a sheer in the tide and ran into the barge: *Held*, that the allegation of the barge, that the schooner sheered, was not proved.

2. The allegation of the propeller, that the barge was not steered after the propeller, was not proved.

3. As the tide set the barge towards the schooner, the propeller should have taken great care not to go so near the schooner that a sheer of the barge might carry her into the schooner.

4. The propeller was in fault in going too close to the schooner, and in not keeping a proper lookout astern, and was solely liable for the collision.

In admiralty.

D. McMahon, for libellants.

Butler, Stillman & Hubbard, for propeller.

Beebe, Wilcox & Hobbs, for barge.

BLATCHFORD, District Judge. This libel is filed by the owners of the schooner J. B. Bleecker, against the steam propeller Cement Rock and the barge Venture, to recover for the damages caused to the schooner through a collision which took place between the barge and the schooner, on the morning of the 5th of October, 1873, after sunrise. The schooner was lying at anchor in the Kills, off Port Johnson, in a proper place, on the north side of the channel, and with abundant room between her and the south side of the channel for passing vessels to go by her in safety. The propeller was going to the westward with the barge in tow on a hawser. The barge was heavily laden with railroad iron. She struck the starboard bow of the schooner, as she was being towed past by the propeller.

The libel alleges that the schooner had her head to the east; that the tide was flood; and that the collision was caused as well by the carelessness, negligence and want of seamanship on the part of those having charge of the propeller, in approaching too near with her tow to the northerly side of the channel, where the schooner lay at anchor, and in not properly looking out ahead, and in not slowing and stopping in time, but in going at too great a speed and taking a sudden sheer, as by the negligent acts of those on the barge,

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

in not watching or minding their helm, and was not caused or contributed to by those in charge of the schooner.

The answer of the propeller alleges that the propeller passed the schooner at a distance of about 220 feet; that, after the propeller had passed the schooner, the barge struck the schooner; that the propeller was going in a straight course towards the northwest, at the time, the schooner being headed to the southward; that the tide was flood and had a set in towards the land in the direction of the schooner, which caused the barge to sheer in towards her in passing, unless prevented by the helm, which was not done; and that the collision was occasioned solely by the fault of those in charge of the barge, in not having a hand stationed at the helm to prevent the barge from sheering, and was not owing to any negligence or want of skill on the part of those in charge of the propeller.

The answer of the barge alleges that the captain of the barge took charge of her wheel, and steered her in the wake of the propeller; that the propeller passed the schooner in close proximity to her, on her starboard side, the barge following carefully in the wake of the propeller; that, when the barge had reached a point about abreast of the schooner, there being at the time no one either at the wheel or on the deck of the schooner, the tide being flood, the schooner took a sudden sheer ahead and out of the course on which she had been heading, and came in contact with the barge, and thus caused the damage; that, if any fault is chargeable on the propeller, it is that she did not take the barge alongside of her, and did not give the schooner a wider berth in passing her; and that the schooner was in fault in not having a man on deck and at the wheel to break the sheer of the schooner.

There is no evidence that the schooner took any sheer or was at all in fault. Therefore, the fault was with both or one of the other vessels. It is shown that the flood tide, at the place of this collision, sets over towards the place where the schooner was at anchor; and, as the barge was heavily laden, and was being towed astern, great care and watchfulness were required on the part of the propeller, to see that the barge was towed by, so far off from the schooner as not to be liable, on taking a sheer with the tide, to hit the schooner. There was abundance of room to the southward, and I am satisfied, from the evidence, that the propeller went too near to the schooner. Although she herself cleared the schooner, she dragged the barge so near, that the tide, sheering the barge, sent the barge against the schooner, before the sheer was stopped. Moreover, the persons in charge of the propeller were bound to know the set of the tide and the liability of the barge to sheer with it, and to keep a proper lookout astern. But they kept no lookout astern, and only noticed the sheer of the barge when the barge had nearly reached the schooner.

The remaining question is as to whether the barge also was in fault. The testimony of two witnesses who were on board of the propeller is to the effect that the man on the barge had left his wheel and did not return to it until after the barge had taken the sheer and had got very near to the schooner, and when it was too late to break the sheer. On the other hand, the man on the barge, who, in giving his evidence, impressed me as being a truthful witness, and as telling an honest and straight story, testifies that he never left his wheel for a moment, and that, as soon as he noticed the schooner, and at a time when the propeller was just about abreast of the barge, he put his wheel hard-a-starboard, and kept it so till after the collision. I regard this evidence as the more reliable. The witnesses from the propeller are evidently mistaken in saying that the wheel of the barge was forward of her cabin and not aft of it. They place it in a position where they could the more easily see it. As it was not in that position, the more proper conclusion from the evidence is, that the witnesses from the propeller are mistaken in saying that they saw the man on the barge away from the wheel at the time in question.

There must be a decree for the libellants against the propeller, with costs, with a reference to ascertain the damage caused to the libellants by the collision, and the libel must be dismissed, with costs, as against the barge.

Case No. 2,545.

CENTENNIAL BOARD OF FINANCE v. PATTERSON, et al.

[34 Leg. Int. 29; 3 Wkly. Notes Cas. 307; 15 Alb. Law. J. 106; 2 Cin. Law. Bul. 7; 24 Pittsb. Leg. J. 107.] [1]

Circuit Court, E. D. Pennsylvania. Jan. 19, 1877.[2]

CENTENNIAL EXHIBITION OF 1876—APPROPRIATION BY THE UNITED STATES—REPAYMENT.

The act of congress of February 16, 1876 [19 Stat. 4], appropriating $1,500,000 to the Centennial Exhibition, does not provide that the said sum shall be repaid to the United States before the stockholders of the said exhibition shall be repaid the amount subscribed for their stock. It only provides that it shall be repaid before any dividend or percentage of profits is paid to the stockholders.

[See note at end of case.]

[In equity. Bill by the Centennial Board of Finance against Joseph Patterson, Henry Lewis, John Gill, George Eyster (assistant treasurer of the United States at Philadelphia), the National State Bank of Camden, the International Exhibition Company, and the State of New Jersey, to determine the

[1] [Reprinted from 34 Leg. Int. 29, by permission. 15 Alb. Law J. 106, gives syllabus only.]

[2] [Reversed by the supreme court in Eyster v. Board, 94 U. S. 500.]

disposition of moneys remaining in its hands.]

Wm. Henry Rawle, for Centennial Board of Finance.

B. Williamson, for the state of New Jersey.

Robert N. Willson, for International Exhibition Co.

John K. Valentine, Dist. Atty., for the United States.

STRONG, Circuit Justice. This is a bill for an interpleader. The complainants have in hand the sum of about $2,000,000, of which they are trustees for distribution, and to which there are conflicting claims. The state of New Jersey, the International Exhibition Company, Joseph Patterson, and numerous other private persons, are stockholders of the corporation created by the act of congress of June 1, 1872 [17 Stat. 203], under the name of the "Centennial Board of Finance," and they claim that the whole fund should be distributed among the stockholders. On the other hand, the United States, represented by the assistant treasurer, claim that, before any payment to the stockholders, the sum of $1,500,000 should be paid into the United States treasury. The case is a proper one for the adjudication of this court. The parties litigant are before us, and they have answered the bill, asserting their claims. Though all the stockholders are not parties of record, they are all represented, and the United States has submitted the matter in dispute to our determination.

The rights of the contending parties grow out of several acts of congress to which we shall refer. On the 3d of March, 1871 [16 Stat. 470], an act was passed by the preamble of which it was declared, that it behooved the people of the United States to celebrate by appropriate ceremonies the centennial anniversary of the Declaration of Independence, and that it was fitting the completion of the first century of our national existence should be commemorated by an exhibition of the natural resources of the country and their development, and of its progress in those arts which benefit mankind, in comparison with those of other nations, and that as the exhibition should be a national celebration, in which the people of the whole country should participate, it should have the sanction of the congress of the United States. It was therefore enacted that a commission, consisting of not more than one delegate from each state and territory, should be appointed by the president of the United States, on the nomination of the governors of the states and territories respectively, whose duty it should be to prepare and superintend the execution of a plan for holding the exhibition in Philadelphia. The commission was also required to report to congress a suitable date for opening and closing the exhibition, a schedule of appropriate ceremonies, a plan or plans of the buildings, a complete plan for the reception and classification of articles intended for exhibition, and the requisite custom-house regulations for the introduction into the country of the articles from foreign countries intended for exhibition. Provision was also made for notice to the diplomatic representatives of foreign nations, and of the regulations that might be adopted by the commissioners by a proclamation of the president, in order that the time and place of holding the exhibition, and the regulations therefor, might be published in their respective countries. This act, though it declared the United States should not be liable for any expenses attending the exhibition, or by reason thereof, plainly recognized it as a national celebration, in which the whole country should participate, and gave to it the sanction of congress. 16 Stat. 470. It was followed by another act, approved June 1, 1872 (17 Stat. 203), which, after premising that such provision should be made for procuring the requisite funds, as would enable all the people of the United States to aid in the preparation and conduct of the exhibition and memorial celebration, created the complainants a body corporate, to be known as "The Centennial Board of Finance," to continue to have corporate existence until the object for which it was formed should be accomplished. The corporators were taken from every state and territory. A capital stock, not exceeding $10,000,000, divided into shares of $10 each, was authorised, and stock certificates, prepared by the secretary of the treasury, were directed to be issued to the subscribers for the stock. The proceeds of all such subscriptions were ordered to be used for the expenditures required in carrying out the objects of the act of March 3, 1871; and the corporation was empowered to borrow money, to issue bonds therefor, not in excess of its capital stock, and to secure the payment of the same, principal and interest, by mortgage upon its property and prospective income. By the 10th section it was enacted "that, as soon as practicable after the said exhibition shall have closed, it shall be the duty of said corporation to convert its property into cash, and, after the payment of all its liabilities, to divide its remaining assets among its stockholders, in full satisfaction and discharge of its capital stock;" and it was made the duty of the Centennial Commission to supervise the closing up of the affairs of the corporation, to audit its accounts, and to submit to the president a report of the financial results of the Centennial Exhibition. Thus, it plainly appears, not only that the exhibition was a national one, set on foot and sanctioned by congress, but that the Centennial Commission and the Centennial Board were made the agents of the government in preparing and conduct-

ing it. Under this legislation the corporation was authorised, and stock subscriptions, for which certificates were issued, to the amount of about $2,400,000 were made, which are still outstanding. The subscriptions were made in reliance upon the provisions of the act of congress. The number of subscribers was very large, and they are scattered all over the United States, holding the stock in various amounts, from one share to ten thousand; the number held by the state of New Jersey.

Such had been the action of congress, and such were the rights of stockholders when the act of February 16, 1876 [19 Stat. 4], was enacted, out of which arises the controversy in this case. Its preamble is significant. After referring to the act of March 3, 1871, and the act of June 1, 1872, and after reciting that the president of the United States in compliance with a joint resolution of congress, approved June 5, 1874 [18 Stat. 53], had extended to foreign nations, in the name of the United States, an invitation to take part in the international exposition to be held in Philadelphia, under the auspices of the government, and after reciting that the governments so invited, to the number of thirty-eight, had accepted the invitation, and were making extensive preparations to embrace the courtesy so extended to them, "thereby rendering proper arrangements for the coming ceremonies, on the part of the government of the United States, a matter of honor and good faith," the preamble asserted that the preparations designed by the United States Centennial Commission, and in part executed by the Centennial Board of Finance, were in accordance with the spirit of the acts of congress relating thereto, and on a scale creditable to the government and people of the United States. It was therefore enacted as follows: "That the sum of $1,500,000 to complete the Centennial buildings and other preparations, be and the same is hereby appropriated out of any moneys in the United States treasury not otherwise appropriated, which shall be paid on the drafts of the president and treasurer of the Centennial Board of Finance, one-third immediately after the passage of this act, and the remainder in four equal monthly payments, provided, that in the distribution of any moneys that may remain in the treasury of the Centennial Board of Finance, after the payment of its debts, as provided for by the tenth section of the act of congress, approved June 1, 1872, incorporating said Centennial Board of Finance, the appropriation hereinbefore made shall be paid in full into the treasury of the United States, before any dividend or percentage of the profits shall be paid to the holders of said stock. Provided, also, that the government of the United States shall not, under any circumstances, be liable for any debt or obligation of the United States Centennial Commission or the Centennial Board of Finance, or any payment in addition to the foregoing sum."

The appropriation was avowedly made to complete the necessary preparations for a celebration and exhibition which congress had declared national, and under its sanction, in which other nations had been invited by the government to join, and the proper arrangements for which the preamble to the act declared to be a matter of honor and good faith on the part of the government of the United States. It was, therefore, meeting at least an honorable obligation, and that it was so considered may be inferred from the closing words of the section, which declared the United States should not be liable for any obligation or payment "in addition to the sum" appropriated. A careful inspection of this act, under which alone the United States asserts a claim to any portion of the funds in the hands of the complainants, makes it evident that congress did not intend thereby to create the relation of debtor and creditor between the Centennial Board of Finance and the United States. The language used is the ordinary language of an appropriation, not of a loan. No evidences of debt were required from the board. Bonds were not exacted for the return of the money, though by the act of 1872 the board was empowered to borrow money and give bonds therefor, and though the president of the board was required by the second section of this act to execute a bond with sufficient security in the sum of $500,000, conditioned for the safe-keeping and faithful disbursement of the sum appropriated. Were it not for the proviso relative to the distribution of any moneys that might remain in the treasury of the board, or (as they are called in the act of 1872) "remaining assets," after the payment of all its liabilities, there could be no pretence that the act was anything more than a mere appropriation demanded by the honor and good faith of the government. But even the proviso repels the idea that the board became a debtor by receiving the sum appropriated. It reserves no right to the United States until the debts of the board shall have been paid. It is only "after the payment of its debts," not after the payment of its other debts, but after all its debts shall have been satisfied, that any payment into the treasury of the United States is required to be made. If the appropriation was intended to be a loan merely, it created a debt, and was demandable as such, without adding the words, "after payment of its debts." It would be an absurd meaning to attribute to congress that they intended to say that after the payment of its debts the board shall pay another one of its debts. And if it had been intended the board should be a debtor for the amount of the appropriation, but that its payment should be postponed till the other debts were paid, the language used would have been, "after its other debts

are discharged," or words equivalent. It seems plain, therefore, even from the reading of the proviso, that is was not the purpose of congress to assume for the government the position of a creditor. That was carefully avoided. Congress had in view the fact that at the close of the exhibition, its agent, the corporation, would wind up, and, after paying its debts, would distribute its remaining assets, and the proviso reserves nothing more than a right to be a possible distributee of a portion of those assets. It was not known how large they would be; whether they would suffice to repay what the stockholders had paid in, and profits on their investment, or not. It may have been supposed the exhibition would yield profits on the investment.

If then the appropriation was not intended to have the character of a loan, creating a debt of the board, and to be paid as a debt, the stockholders who subscribed for the stock have, by the tenth section of the act of 1876, a clear right to the "remaining assets," at least to the extent of their capital invested. The section enacted, as we have seen, that after the close of the exhibition it should be the duty of the board to convert its property into cash, and after the payment of all its liabilities (or debts as they are called in the act of 1876), to divide its remaining assets pro rata among its stockholders, in full satisfaction and discharge of its capital stock. The stockholders were thus entitled to a satisfaction of their stock out of whatever assets remained after the payment of the debts of the corporation. It is not to be assumed that congress intended to take away the right without the consent of the stockholders. The directors of the corporation could not bargain it away. And there are no words of repeal in the later act; nor is there any necessary implication of an intent to repeal. The proviso, therefore, must receive a construction, consistent, so far as possible, with the provisions of the act of 1872. Its direction is, that after the payment of the debts of the Centenial Board, the appropriation shall be paid in full, into the treasury of the United States before any "dividend or percentage of the profits shall be paid to the holders of the stock." What is meant by "dividend or percentage of profits"? It is observable that in all the legislation respecting the Centennial Exhibition, the word "profits" here first appears. In the act of 1872, the residue after payment of the liabilities, was called "remaining assets," and in a former part of this act it was called "moneys that remain." But when the fund is mentioned, to which the United States may resort, in case there is such a fund, it is called "profits." The phraseology is changed, and with it, we think, the meaning. So far as the United States has rights as a distributee, the subject for distribution is "profits," not "remaining assets," not capital. Before any dividend or percentage, or proportion of the profits may be paid to the stockholders, the appropriation must be paid into the United States treasury. If there are no profits the government has no claim. Now, what are the profits of a corporation that has a capital stock? Very plainly, only what has been gained beyond the stock. They are always acquisitions beyond the investment or expenditures. Nobody would think a tax on the profits of a bank or an insurance company, or, indeed, of any corporation, was a tax on its capital, or a tax on its entire property, if that property had been converted into cash in the process of winding up. Congress, in the proviso, is speaking of the profits of a corporation, and it is to them, and them only, it sets up a claim. But in this case there were no profits. The assets remaining after the payment of debts, and now for distribution, are only remnants of the capital, and insufficient to return what the stockholders paid in. We think the word "dividend," as well as the word "percentage," points to profits and not to capital. They are synonyms, as here employed. That the word "dividend" is sometimes used to describe a distribution of capital may be admitted, but such an use is abnormal. It is more commonly used to denote a division of profits, and very evidently it was so employed in this proviso. It was not said dividend unqualifiedly, or dividend of the remaining assets, or dividend of moneys that remain after payments of debts, but it was used in connection with profits, "dividend or percentage of the profits—that is, as we understand the phrase, dividend, portion, or percentage of the profits." If it was intended to embrace a division of all the moneys remaining in the treasury of the board why were the words "or percentage of the profits" added? If the amount appropriated was meant to be paid before the stockholders could get anything, those added words were totally unnecessary and unmeaning. The introduction of the word "profits" could have had no other object than to designate the subject of the dividend or percentage. If it was intended to give the United States a prior claim on the entire remaining assets, it would have been sufficient to have said before any dividend or division shall be made among the stockholders—and we are not at liberty to say the added words have no meaning.

For these reasons, we are of the opinion that the fund in the treasury of the Centennial Board of Finance should be distributed pro rata among the stockholders of the corporation as directed by the tenth section of the act of 1872 [17 Stat. 210], and as it is insufficient to pay the stockholders the full amount invested by them as stockholders, as no part of it is made up of profits, the case contemplated in the proviso has not arisen, and the United States is entitled to no part of the funds. Let a decree be prepared accordingly.

And now, January 19th, 1877, this case having been heard upon the bill and answers, and having been argued by counsel, whereupon, in consideration thereof, it is ordered and decreed that the complainants do pay and distribute the fund in their hands to and among the several and respective stockholders of the complainant, pro rata, according to the true intent and meaning of the act of congress, approved the 16th day of February, 1876, and it appearing that the said fund is not sufficient to pay to the said stockholders the full amount invested by them, it is ordered that no part of the said fund be paid into the treasury of the United States. And it is further ordered that upon such payment and distribution among the said stockholders being made, the complainant do stand discharged of and from all liability in the premises. And it is further ordered that the costs in this cause be paid out of the said fund.

[NOTE. George Eyster, the assistant treasurer of the United States at Philadelphia, appealed from the decree of the circuit court. The supreme court reversed the decree, and held, per Mr. Chief Justice Waite, that the act of 1876 did not change the order of distribution provided by the act of 1872, and that consequently, on distribution of the assets of the board on the closing up of its affairs, the United States was entitled to repayment of the congressional appropriation of $1,500,000 before there could be any division of the assets among the stockholders. Eyster v. Board, 94 U. S. 500.]

Case No. 2,546.

CENTENNIAL CATALOGUE CO. v. PORTER et al.

[3 Cent. Law J. 460;[1] 2 Wkly. Notes Cas. 601.]

Circuit Court, E. D. Pennsylvania. 1876.

COPYRIGHT NOT ASSERTABLE IN A PROJECTED WORK—INJUNCTION TO PROTECT.

[1. There can be no copyright of an inchoate intended publication.]

[2. The book is the subject of copyright, not the subject.]

[3. Injunction will not lie to protect a projected publication.]

An injunction was asked for to restrain the defendants, who, it was alleged, were about to issue a catalogue of the exhibitors at the Centennial Exhibition at Philadelphia. The bill set forth that the commission had partly written, and were causing to be written with as much expedition as possible, manuscripts of the official catalogues of the several departments of the exhibition; that on the 25th Sept., 1875, they deposited in the office of the librarian of congress the titles of separate books, in the following form: "United States Centennial Commission. International Exhibition, 1876. Official Catalogue of the Department of Mining, Metallurgy, Manufactures, Education and Science. All rights reserved. Philadelphia, 1876;" together with similar titles for the departments of agriculture, horticulture, machinery and art; the rights whereof they claimed as proprietors under the copyright laws of the United States; that on Nov. 1st, 1875, the centennial board of finance, with the consent of the commission, granted the exclusive right of publishing said catalogues to the assignors of complainants, and that portions of the catalogues had been already printed by complainants. The plaintiffs' book was in a form called a dummy, i. e., a book containing a few printed leaves followed by blank ones. The plaintiffs contended that although subject-matter open to all the world cannot be copyrighted, as a general principle, in this particular case it was different, because the information from which alone a catalogue could be prepared had been expressly reserved to the commission and their assigns, and all exhibitors and visitors were subject to the reservation by the published regulations. The objection was to the publication by the defendants of a list of leading exhibitors. They further maintained that by taking the initiatory steps in recording the title, they became entitled to protection, and the congressional librarian in his pamphlet of instructions declares that a copyright may be secured for a projected as well as for a completed work, and cited 2 Morgan, Lit. 232; Pulte v. Derby [Case No. 11,465]; Roberts v. Meyers, 13 Month. Law Rep. 401; Boucicault v. Wood [Case No. 1,693]; Abernethy v. Hutchinson, 1 Hall & T. 28; Prince Albert v. Strange, 2 De Gex & S. 674; Rev. St. §§ 4964, 4970.

CADWALADER, District Judge, considered that the plaintiffs were not in a condition to make such a book as shown in the application. It was something new to him that copyright was applicable to an inchoate and intended publication. Assuming that a manuscript could be copyrighted, the question was whether it must not be in the form in which it is to be printed. The difficulty was that the plaintiffs had no copyright in the subject but only in the work. If there is anything but literary piracy, their remedy is in the state courts. There is no remedy in the United States court until it comes to infringement of literary property. The plaintiffs go upon the ground of literary property, not in print and only partly in manuscript. The jurisdiction of the court is only over printed matter. The mere threat to print a book does not give it jurisdiction. The act says a book, not an intended book. The injunction was therefore refused.

[1] [Reprinted from 3 Cent. Law J. 460, by permission.]

Case No. 2,547.

In re CENTRAL BANK.

[6 N. B. R. (1873) 207.] [1]

District Court, E. D. New York.

BANKRUPTCY—RESTRAINING ASSIGNEE FROM PROSECUTING SUIT IN STATE COURT.

A petition was filed by a creditor to restrain the assignee in bankruptcy from prosecuting a certain action of law in the supreme court of New York state to recover the payment of money made contrary to the provisions of the thirty-ninth section of the bankrupt act, [14 Stat. 536], claiming to recover back the amount so paid. *Held*, that said act is the law of the state courts as well as of the national tribunals, and if by virtue of that act the state court has no jurisdiction in the action brought against the petitioners, it will so decide upon proper plea and that no reason appears to compel the assignee to resort to the national tribunals instead of those of the state.

[Cited in Payson v. Dietz, Case No. 10,861.]

In bankruptcy.

A. W. Gazzam, for Chatham Bank.

BENEDICT, District Judge. This case came before me on a petition filed on behalf of the Chatham National Bank, in which they seek to obtain from the court, an order restraining the assignee in bankruptcy of the Central Bank from prosecuting in the supreme court of this state, a certain action of law which he has there commenced against the petitioners, to recover of them the amount of a payment of money which the assignee claims to have been a preferential payment, made contrary to the provisions of the thirty-ninth section of the bankrupt act, and which he therefore claims to recover back by virtue of the provisions of the bankrupt act. The application is based upon the ground that the state tribunals are without jurisdiction to entertain such an action as the one referred to. I do not so understand the law. The provision of the second chapter of the bankrupt act does indeed confer upon the district and circuit courts jurisdiction of certain actions, but I have never supposed the effect of that section to be to oust the jurisdiction of the state courts. Moreover, in such a case as the one under consideration, the bankrupt act is the law of the state courts as well as of the national tribunals, and if by virtue of that act the state court has no jurisdiction in the action brought against the petitioners, it will so decide upon proper plea. I think the question of jurisdiction should be there decided, and that no reason appears for the exercising of the restraining power of this court over the assignee, to compel him in a case like this to resort to the national tribunals instead of those of the state.

CENTRAL BANK (PATRICK v.). See Case No. 10,803.

[1] [Reprinted by permission.]

Case No. 2,548.

CENTRAL BANK v. TAYLOE.

[2 Cranch, C. C. 427.] [1]

Circuit Court, District of Columbia. Oct. Term, 1823.

PRODUCTION OF BOOKS AND PAPERS—INCORPORATION OF BANKS IN DISTRICT OF COLUMBIA—MISNOMER OF CORPORATION—PLEA IN ABATEMENT.

1. Upon motion of the plaintiff, and notice, the court will order the defendant to produce books and papers on a certain day before the trial, that the plaintiff may have an opportunity to inspect them.

[Cited in U. S. v. Youngs, Case No. 16,783.]

2. The act of congress of the 3d of March, 1817 [3 Stat. 383], entitled "An act to incorporate the subscribers to certain banks in the District of Columbia, and to prevent the circulation of the notes of unincorporated associations within the said district," is a public law; and the corporate name of the bank incorporated by the 23d section thereof, is "The Central Bank of Georgetown and Washington," and not "The President and Directors of the Central Bank of Georgetown and Washington."

3. Quaere, whether the misnomer of a body corporate must be pleaded in abatement.

Assumpsit [by the Central Bank of Georgetown and Washington against John Tayloe] upon an open account, and for moneys lent and advanced.

Mr. Jones, for plaintiff, having given notice, now moved the court for an order on the defendant to produce his bank-book and surrendered vouchers, by a certain day before the trial.

Mr. Hay, for defendant, objected, that under the 15th section of the judiciary act of 1789 (1 Stat. 73), the party can only be compelled to produce books and papers in the trial, not before the trial. Geyger's Case, 2 Dall. [2 U. S.] 332.

THE COURT, however, on the 29th of December, 1823, ordered the defendant to produce his bank-book and vouchers on the 5th of January following, for the inspection of the plaintiff's counsel, in the presence of the defendant's counsel, if he wished to be present.

On the trial, Mr. Hay, for the defendant, contended that the plaintiffs had not sued by their corporate name, which he contended was "The President and Directors of the Central Bank of Georgetown and Washington," and not simply "The Central Bank of Georgetown and Washington," by which they had sued. He also contended that the act of March 3, 1817, was a private act, and must be shown and proved. He thereupon moved the court to instruct the jury that it was necessary that the plaintiffs, suing as a corporation, should show and prove that they had a legitimate existence, and by the name in the declaration mentioned.

Mr. Marbury, for the plaintiffs, suggested that if it was a misnomer it must be pleaded in abatement. 1 Chit. Pl. 440; Mayor, etc., v. Bolton, 1 Bos. & P. 40.

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

THE COURT (nem. con.) instructed the jury that the act of congress of the 3d of March, 1817 (3 Stat. 383), entitled "An act to incorporate the subscribers to certain banks in the District of Columbia," &c., was a public law of which the court and jury were bound to take notice, and that the plaintiffs, by that law, were incorporated by the name in which they prosecuted the present action.

THE COURT did not decide whether, if it had been a misnomer, it could have been taken advantage of upon the general issue; but CRANCH, C. J., and THRUSTON, J., inclined strongly to the opinion that it must be pleaded in abatement. MORSELL, J., inclined to be of a contrary opinion. The court did not say whether it was necessary that the plaintiffs should prove that they were incorporated by the name in the declaration mentioned.

Case No. 2,549.

In re CENTRAL BANK OF BROOKLYN.

[8 Ben. 114; 12 N. B. R. 286; 7 Chi. Leg. News, 371; 1 N. Y. Wkly. Dig. 55.][1]

District Court, E. D. New York. May, 1875.

BANKRUPTCY—ASSIGNEE'S LIABILITY — JUDGMENT OF A STATE COURT.

H., having obtained judgment in a state court against the assignee of the bankrupt above named, in an action in which the assignee appeared and defended, the judgment providing that the judgment be paid out of the assets of the bankrupt in the assignee's hands; and having thereafter obtained a supplemental order in said action, directed to the bank which had been made the repository in which the funds of the bankrupt had been deposited, for the payment of such judgment out of the funds of the bankrupt on deposit in such bank, presented to this court a petition that this court would countersign the proper check for such payment by the assignee. On a reference being ordered, to take proofs, he produced a record of the judgment, and gave no other proof. *Held*, that such judgment did not furnish to this court legal grounds for directing the payment of the amount of it by the assignee.

The Central Bank of Brooklyn was adjudged a bankrupt on October 27th, 1870, and S. B. Dutcher was thereafter duly appointed assignee. On the 1st day of August, 1870, Joseph H. Havens, the petitioner herein, deposited in the bank a check for $3,125. On the 2d day of August, an injunction was issued against the bank as being insolvent, and a receiver was appointed. On the 3d of August, Havens demanded the return of the check, which was refused. On the appointment of the assignee in bankruptcy, the proceeds of the check were turned over to him, with the other property of the bank, and thereafter a suit was commenced in the supreme court of the state of New York by Havens against Dutcher, as assignee, to compel him to pay to Havens the amount of the check. The assignee appeared, and defended the action, which resulted in a judgment that Havens recover of the assignee the amount of the check, with interest and costs, amounting to $4,282.85, "the same to be paid out of the assets of said bank now in the possession of said defendant, as assignee, as aforesaid, or out of any assets that may hereafter come to his possession as such assignee as aforesaid." Thereafter Havens filed this petition in the bankruptcy court, praying that the court would countersign the proper check, to enable the assignee to pay him the amount of the said judgment. A reference was ordered to take proofs on the petition, and he produced as such proof only a record of the judgment.

E. L. Sanderson and John H. Bergen, for petitioner.

Tracy, Catlin & Brodhead, for assignee.

BENEDICT, District Judge. Joseph H. Havens presents to this court his petition, wherein he prays this court to countersign the proper check to enable Silas B. Dutcher, assignee of the Central Bank of Brooklyn, a bankrupt, to pay him the sum of $4,282.85.

In support of this petition, there has been exhibited to this court the record of an action, brought by the petitioner in the supreme court of the state of New York, wherein, on the 10th day of January, 1873, it was by said court adjudged that Havens, the petitioner, recover against Silas B. Dutcher, assignee as aforesaid, the sum of $3,657, together with the sum of $350.85 interest, and $275 costs, amounting in all to the sum of $4,282.85, "the said sum to be paid out of the assets of said Central Bank, now in possession of said defendant as assignee as aforesaid, or out of any assets that may hereafter come into his possession as such assignee as aforesaid."

The said record also shows that it was made to appear to the said supreme court that the National City Bank of Brooklyn held the moneys which had been received by the assignee of the Central Bank; whereupon, as also appeared by said record, on the 25th day of September, 1874, the said supreme court, in the action aforesaid, ordered "that the said National City Bank pay, within three days after service of a copy of this order, to E. L. Sanderson, the plaintiff's attorney, out of the twenty thousand dollars on deposit as aforesaid, the sum of four thousand two hundred and eighty-two dollars and eighty-five cents ($4,282.85), together with interest on that sum from the 22d day of May, 1874, amounting in the aggregate to the sum of four thousand three

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission. 1 N. Y. Wkly. Dig. 55, contains only a partial report.]

hundred and eighty-four dollars and fifty-three cents ($4,384.53); and upon said E. L. Sanderson delivering or tendering to said National City Bank a proper satisfaction of the judgment referred to in these proceedings, for which payment so to be made this order shall be the receipt and voucher of said bank."

The National City Bank, referred to in the above order, does not appear by said record to be a party defendant in the action brought by the petitioner; but that bank is a depository designated by this court, under the provisions of the bankrupt law of the United States, and of general order No. 28 issued by the supreme court of the United States, which requires the designation, by the district court of the United States, of a depository where all moneys received by the assignees shall be deposited, and which further provides "that no moneys so deposited shall be drawn from such depository unless upon a cheque or warrant signed by the clerk of the court, or by an assignee, and countersigned by the judge of the court, or one of the registers designated for that purpose, stating the date, sum, and the account for which it was drawn; and an entry of the substance of said check or warrant, with the date thereof, the sum drawn for, and the account for which it was drawn, shall be forthwith made in a book kept for that purpose by the assignee or clerk; and all cheques or drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate." This record is the only matter produced in evidence before me, and upon it the petitioner claims that he is entitled to ask the court to direct the payment to him of the amount of the said judgment out of the assets of the Central Bank. To this claim I cannot accede.

The judgment rendered by the supreme court of the state in the action brought by the petitioner, and upon which he makes his right to depend, is in excess of the jurisdiction of court of the state. The power of a state court to determine the liability of an assignee in bankruptcy by reason of his acts, where the assignee appears without objection and submits himself to the jurisdiction of the court, is not the question here; nor is the application by an assignee in bankruptcy for relief from the effects of a judgment against him, obtained in an action in the state where he properly appeared, and which he properly defended. Here the application is by a third party, who bases an application to be paid out of the funds of this court, as a court of bankruptcy, solely upon a judgment of a court of the state, directing that his demand be paid out of such funds. The proof of such judgment affords no legal ground for the action of this court. The prayer of the petitioner must therefore be denied.

Case No. 2,550.

CENTRAL OHIO RAILROAD et al. v. THOMPSON.

[2 Bond, 296.][1]

Circuit Court, S. D. Ohio. Oct. Term, 1869.

DECLARATION ON BILL OF EXCHANGE—SUFFICIENCY—NONRESPONSIVE PLEA—DUPLICITY—PLEADING TORTIOUS INJURY TO PROPERTY OF THIRD PERSONS.

1. A declaration, stating as the cause of action that the plaintiffs are the holders of certain bills of exchange, drawn by the agent of the defendant, and accepted by him, pursuant to a special agreement for that purpose between the parties, averring that the bills were drawn on a sufficient consideration, and were duly accepted by the defendant, and were protested for non-payment, is good on demurrer.

2. As the case in equity between these parties was appealed to the supreme court, and the decision by that court was that the plaintiffs' remedy was by action at law, and that the case must be remanded to this court for trial at law, the plaintiffs' right thus to sue can not be controverted.

3. It is no objection to the declaration, that the plaintiffs set forth, as the consideration on which the defendant agreed to accept and pay the bills, that the plaintiffs had agreed to transport mules and horses for the defendant, and had transported them according to agreement, and had drawn the bills in question as payment of the freight of the animals, whereby their right of action had accrued.

4. The material question in this case arises on the demurrer to the third special plea of the defendant, stating as a defense certain special agreements between the parties relating to the transportation of the animals, and averring a failure of the consideration on which the bills in question were drawn and accepted, by reason of the careless, negligent, and tortious manner of transporting the animals, whereby the defendant suffered damage in excess of the sum for which the bills were drawn. This plea is defective in not responding to the cause of action as set out in the declaration.

5. The cause of action set out in the declaration is substantially on the undertaking and promise of the defendant to accept and pay the bills as drawn, pursuant to the agreement between the parties, and his failure to perform that agreement.

6. Nothing is set forth in the plea in avoidance of the defendant's liability on his special agreement to accept and pay the bills; and as a commercial transaction his refusal to pay the bills, and suffering them to be protested, is a good cause of action against him by the holders.

7. The plea is also demurrable in that, while in its structure it is a plea in bar to the action, it sets up, by way of set-off, a claim to a judgment for a large amount, as damages sustained by the defendant for the alleged wrongful and tortious conduct of the plaintiffs in the transportation of the animals. This subjects the plea to the objection of duplicity.

8. If intended as a claim for unliquidated damages, it must be set forth in a separate plea.

9. The plea is also fatally defective in its showing that the alleged damage sustained by the defendant was for the wrongs or torts to property, of which he was only interested with other parties; and is no response to the dec-

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

laration setting out a breach of the defendant's separate and individual promise.

10. If the parties who were interested in, or owners of, the animals have sustained the damages asserted, by the wrongful or tortious acts of the plaintiffs, their remedy must be by a separate action against the plaintiffs on that basis.

11. The defendant can not maintain his right to set up the defense that the plaintiffs were guilty of torts to the property of Thompson and Groom, and other parties, on the ground that he was the bailee of the property.

[At law. Action by the Central Ohio Railroad Company and the Steubenville & Indiana Railroad against Harrison Thompson, upon certain drafts given in payment for the transportation of stock for Thompson and Groom. The action was commenced in the state court, and was removed to the federal court by the defendant. In the latter court, complainants, having first obtained leave, filed a bill in chancery as a substitute for the petition filed in the state court. Defendant answered, setting up damages by reason of the negligent performance of the contract of transportation, and praying affirmative relief. Complainants replied, denying the negligence, sought discovery, and demurred to so much of the answer as sought affirmative relief. Defendant demurred to so much of complainants' pleading as prayed for a discovery, and on hearing in the circuit court the demurrer of complainants was sustained, that of defendant overruled, and a decree entered for complainants for the amount of the drafts. From this decree defendant appealed to the supreme court, which reversed the decree of the circuit court on the ground that complainants had mistaken their mode of procedure in the federal courts, and should have proceeded at law, and not in equity, there being nothing in the case to invoke equity jurisdiction; and the cause was remanded, with directions to dismiss the bill without prejudice. Thompson v. Central Ohio R. Co., 6 Wall. [73 U. S.] 134. Complainants, in accordance with this decision, recommenced their proceedings at law.]

H. H. Hunter, for plaintiffs.

A. F. Perry, for defendant.

OPINION OF THE COURT. The questions now before the court arise on a special demurrer to the third plea of the defendant. The declaration, in four separate counts, sets forth the grounds on which the plaintiffs seek a recovery. The first and second counts aver that the plaintiffs are the holders and owners of the drafts or bills described in said counts, alleged to have been drawn by the defendant through his agent on himself, payable at one day's sight at the Bank of the Metropolis, in the District of Columbia, with exchange on New York. These drafts, it is averred, were drawn on a sufficient consideration, and were duly accepted by the defendant, and not being paid, were protested, whereby the defendant became liable to pay to the plaintiffs the amount of said several drafts. The third count is on another draft or bill, drawn in the same manner as those described in the first and second counts, and for a like consideration; but not accepted or paid by the defendant. The fourth is a general count, averring an indebtedness to the plaintiffs for the transportation of horses and mules for the defendant, and at his request, with the usual averment of a promise to pay.

As introductory to the plaintiffs' right of action on the bills or drafts described in the first, second, and third counts of the declaration, and explanatory of their ownership of and legal right thereto, the declaration avers, in substance, that on October 1, 1861, in consideration that the plaintiffs, before that time, at the instance and request of the defendant, had transported a large number of mules from and to the places named in the declaration, the defendant was indebted to the plaintiffs in the several sums stated in the several counts, agreed and undertook to pay the same by drafts, to be drawn by his agent or himself, to be accepted by him as already stated. There is no averment, however, that the mules transported were the property of the defendant; and the basis of the plaintiffs' right to a recovery in this action, is the promise and undertaking of the defendant to accept and pay the bills or drafts drawn on him by his agent, and his neglect or refusal to do so. As the demurrer to the defendant's third plea, by a familiar rule of pleading, reaches to the declaration, it will be proper here to inquire preliminarily whether the plaintiffs, in the case made by them, have shown a right to maintain an action to recover the sums stated in the first, second, and third counts, on the several bills or drafts described, upon the averment that they are the holders and owners of the same, without indorsement to them. This can not be a question on this demurrer, for the reason that the supreme court of the United States, in the case in chancery between these parties appealed from this court, adjudged that the remedy of the plaintiffs was not in equity, but by action at law, and therefore remanded the case to this court to be tried in an action at law. [Thompson v. Central Ohio R. Co.] 6 Wall. [73 U. S.] 134. And there seems to be no room for a doubt that the averments of the declaration show a promise and undertaking by the defendant, creating a legal liability, for which an action may be sustained. There is set forth a promise, upon an alleged consideration, to do an act which the defendant has failed to perform, by reason of which a right of action has accrued to the plaintiffs.

The only inquiry for the court on this demurrer is, therefore, whether the third plea of the defendant sets forth legal and sufficient grounds to defeat the plaintiffs'

right to a recovery in this action. Without reciting in detail the defendant's third plea, which is of great length, and seemingly obnoxious to the charge of prolixity, it will be sufficient to state its substance. It begins with an averment that the several causes of action stated in the declaration are all parts of one and the same transaction, growing out of the same contract, in which the promises of the defendant were conditional and dependent on obligations to be performed by the plaintiffs, which they did not, and would not, perform. The plea then avers that on August 30, 1861, and prior and subsequent to that date, the plaintiffs were two railroad companies, each constituting a part of a through line for the transportation of live stock and other property from Cincinnati, to Pittsburg, Harrisburg, Baltimore, and other places; that the joint agent of the two companies at Cincinnati on the said August 30, 1861, submitted a proposition in writing, by which the railroads offered to transport all the horses and mules that Thompson and Groom, and such other persons as they might be interested with, might wish to transport within the next forty days from Cincinnati, by way of Columbus, Steubenville, or Bellair to Pittsburg and Harrisburg, or Baltimore, at certain rates for each car-load, as named in the proposition. And after other stipulations, not material to notice, the written offer of the agent proposed, that for the transportation of horses and mules, William Stuart, as agent of the plaintiffs at Pittsburg, should be authorized to draw on the defendant at the Bank of the Metropolis, in Washington, D. C., at one day's sight for each shipment, separately, as forwarded from Pittsburg, the drafts to be paid promptly in exchange on New York. The plea then avers, that on the same day, and as a part of the same transaction, the defendant accepted in writing the said offer of the plaintiffs' agent, signing the name of Thompson & Groom. The plea then sets forth, that, at the same time, the defendant, in his individual name, signed a written stipulation to the effect that, in pursuance of the foregoing agreement, he authorized William Stuart, as his agent at Pittsburg, to draw on him at one day's sight, at the Bank of the Metropolis, Washington City, payable in exchange on New York, for each shipment by Thompson & Groom, as the same should be forwarded from Pittsburg. The plea then avers, that pursuant to this arrangement large numbers of horses and mules were offered to the plaintiffs for transportation and were received by them; and that, although some were transported under said agreement, in relation to other portions of the animals the plaintiffs were guilty of sundry wrongful acts of commission and omission whereby the animals were greatly injured, and the owners suffered damage to an amount exceeding $24,000, and largely in excess of the sum claimed in this action as due to the plaintiffs. These alleged tortious acts on the part of the plaintiffs are set forth at great length and with great particularity in the plea; but, for the purposes of the question on this demurrer, it is unnecessary to notice them in detail.

This statement presents, in brief, the grounds of defense set up in the third plea. It purports to be, in its main features, a plea in bar. It is certainly somewhat peculiar in its structure, and has not been drawn with a very strict reference to the rules of special pleading still in force in this court. It is not proposed to notice the numerous points made by the counsel for the plaintiffs in his very elaborate argument in support of the demurrer. There are two objections to the plea which seem to be decisive, and these will be noticed very briefly. The first is, that the plea, without denying the material allegations of the declaration on which the plaintiffs base their right to recover, avers, in avoidance of the defendant's liability, the failure of the plaintiffs to perform another agreement between other parties, the performance of which is alleged to be a condition precedent to any liability by the defendant on his promise or undertaking as set out in the declaration. As before stated, the contract obligation of the defendant, as averred, is, in substance, that in consideration that the plaintiffs had agreed to transport horses and mules at the rates stated, for Thompson & Groom and the persons with whom they might be associated, from and to the places named, the defendant authorized Stuart, as his agent, to draw on him for each shipment made from Pittsburg; the bills so drawn to be in exchange in New York. The declaration avers, that shipments were made from Pittsburg, in consideration of which the defendant's agent drew the several bills in payment described in the declaration, two of which were accepted by the defendant but not paid—the third not accepted or paid. Then follows the averment of the defendant's liability to pay these bills, in virtue of his agreement to accept and pay them. There would seem to be no ground for a doubt that the facts averred in the declaration show a good cause of action against the defendant. His promise to accept and pay the bills to be drawn by his agent is clearly a valid promise, and his failure to do so imports a liability to the plaintiffs as the owners and holders of the bills. The only question, therefore, arising on the demurrer is, whether the matters set forth in the plea are a legal and valid ground of objection to the plaintiffs' claim. And it seems clear, that the plea does not respond to the cause of action asserted by the plaintiffs. It does not deny that shipments of animals were made pursuant to the agreement between the parties, for which the bills were severally drawn; but avers that, under the agree-

ment to transport horses and mules for Thompson & Groom and their associates, the plaintiffs failed to perform their agreement and were guilty of sundry torts, whereby they sustained great injuries. But there is no averment in the plea of any non-performance or tort in reference to the shipments for freight of which the bills were drawn. In a word, there is no averment in the plea of any facts in avoidance of the defendant's liability on his separate, individual promise that the bills should be drawn, accepted, and paid by him; that in making this promise the defendant incurred an individual responsibility distinct from any liability by him as a member of the firm of Thompson & Groom, is a legal inference from the facts set out in the declaration. In the written acceptance of the offer, by the plaintiffs, to transport stock for Thompson & Groom and the persons with whom they might be interested, he had signed the name of that firm of which he was a member. But as no mode of payment for freight was provided for in the plaintiff's proposition or the written acceptance of the firm, the defendant in his own name, took upon himself the responsibility of agreeing to accept and pay bills to be drawn on him for each shipment from Pittsburg.

It seems to the court, therefore, that the plea is defective in not responding to the allegations of the declaration, which assert the cause of action against the defendant. There is, also, as it seems to the court, another still more obvious objection to the plea. While it sets forth, as a bar to the action, substantially the non-performance of a condition precedent, it avers, by way of set-off, counterclaim, or recoupment of damages, a claim for a large sum, based on the alleged tortious acts of commission or omission by the plaintiffs in the transportation of the animals, and claims judgment for a large sum against the plaintiffs on that ground. The amount thus claimed, as before noticed, largely exceeds the sum claimed by the plaintiffs in this action. There is no rule of pleading known to the court, by which such a claim can be set up in a plea in bar of the action. If there is a basis for such a claim, it must be set forth in a separate plea of set-off, or by notice of special matter. Its insertion in this plea clearly subjects it to the charge of duplicity. And upon this ground, if upon no other, the demurrer must be sustained. But the court cannot perceive, that in any way the matter set forth in the plea can be available to the defendant, as a matter of set-off, counterclaim, or recoupment. The alleged tortious acts of the plaintiffs affect, not the property of the defendant, but the property of Thompson & Groom, and the unknown persons with whom they were associated. If, on the theory assumed by the court, the plaintiffs have set out a good cause of action against the defendant, it is clearly not competent for the defendant, in avoidance of his liability, to assert a claim against the plaintiffs for tortious acts affecting the property, not of himself, but of Thompson & Groom, and other persons. It needs no citation of authority in support of this proposition. It is not necessary to decide, whether, as a claim for unliquidated damages arising from alleged torts, it can, under any circumstances, be set up as a set-off to a claim founded on .contract. If Thompson & Groom, or other parties interested in the property injured by the torts of the plaintiffs, have a ground of action against the plaintiffs, their redress is open to them in a suit for that purpose. But, clearly, the defendant can not set off in this suit a claim for damages accruing to property of other persons. And this objection, as it seems to the court, is not obviated by the averment of the plea that the defendant was the bailee or factor of the owners of the animals alleged to have been injured, and as such had a qualified interest in them, and a right to maintain an action in his own name for the tortious acts of the plaintiffs. It is argued, that if he had such right to sue, he may defend in this suit by setting up the injuries sustained by the owners, on account of his interest in the property as bailee or factor. If such a plea were sustainable, it is not perceived how it could be available to the defendant, as asserted in this third plea. It would seem to be incongruous with other allegations and grounds of defense set up in the plea, and therefore subjecting it to the charge of duplicity. But if separately pleaded, it is liable to objection. In the first place, the defendant, as the partner of the firm of Thompson & Groom, had a proprietary interest in the property, and I do not perceive that in any legal sense he can be held to be a bailee or factor. And again, his liability to plaintiffs, as set forth in the declaration, is based on his individual contract, liability, or promise, in answer to which he can not assert, by way of set-off or otherwise, that he was bailee or factor for the owners, and that the property was injured by the wrongful acts of the plaintiff in its transportation.

These are all the points which it is deemed material to notice. In passing on this demurrer, I have not supposed it necessary to enter on a more elaborate consideration of the points adverted to, for the reason that the more important of them were brought to the notice of the court and decided when this case was before it, as a suit in chancery, prior to its removal to the supreme court. In that case, the court expressed the opinion, that if the allegations of misfeasance and malfeasance against the railroads, in the transportation of the animals in question, could be sustained by evidence, the owners had a plain remedy by suit for the injuries alleged, but that a recovery for these injuries is not available to the defendant, as a defense to his liability on the special contract or promise set up by the plaintiffs. The demurrer is sustained.

Case No. 2,551.

CENTRAL PAC. R. CO. v. BENITY.

[5 Sawy. 118;[1] 10 Chi. Leg. News, 147; 5 Reporter, 229.]

Circuit Court, D. Nevada. March 18, 1878.

EJECTMENT BY RAILWAY COMPANY FROM RIGHT OF WAY.

The act of congress of July 1, 1862 [12 Stat. 491], granting a right of way to the extent of two hundred feet on each side of its track to the Central Pacific Railroad Company, gives that company a right to the possession of the ground over which the grant extends, exclusive in its character, and the company may recover, in ejectment, the possession of a portion of the same from one who has wrongfully entered thereon.

This is a demurrer [by the defendant, Adolphus Benity] to a complaint in ejectment. The complaint states that by virtue of the act of congress of July 1, 1862 [12 Stat. 491], plaintiff is entitled to the possession of a certain tract of land (describing it) for railroad purposes, "being that portion of plaintiff's right of way, situated," etc. Section 2 of the act referred to provides: "That the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line; * * * said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands." The point raised by the demurrer is that the plaintiff's interest in the land is a mere easement, for the recovery of which ejectment will not lie.

J. B. Marshall and Harvey Brown, for plaintiff.

Boardman and Varian, for defendant.

Before SAWYER, Circuit Judge, and HILLYER, District Judge.

BY THE COURT (HILLYER, District Judge). We think it clear that the plaintiff, under his grant, has a right of entry upon and possession of the land in question, and that this right of possession is necessarily an exclusive right, as against all certainly, besides the United States, and gives the plaintiff such a legal interest in the land as enables it to maintain an action like the present, to recover the possession from one who has wrongfully entered thereon. The obstacles to this suit, such as they are, are entirely technical. If the plaintiff is entitled to actual possession of the land, for the purpose of effecting the object in view when the right of way was granted, it can recover such possession in some judicial proceeding. The mere form of the action has ceased to be of any importance in this court.

There is now but one form for all the common law actions. In every action the complaint contains a statement of the facts of the case, and is held sufficient, if the facts stated entitle the plaintiff to the relief demanded. We think this complaint does state a good case. It may be admitted that for the obstruction of a mere easement the recovery of the possession of the land itself would not be the proper remedy. But in order that the plaintiff in the case at bar may make such use of the land as the grantor intended it should under the grant of a right of way, it becomes necessary to take and keep an actual possession of the land. It must also be a possession exclusive of all other persons. This is obvious enough as to all the land upon which a track, a depot or other superstructure, is placed, and we think the same is true of the whole two hundred feet on each side of the track. The grant is a right of way to the extent of two hundred feet on each side of the track, and the plaintiff is entitled to possess and use the whole quantity.

This right of possession is a legal right, and will support an action to recover possession when there has been an ouster. It has been held that it would support such an action against the owner of the fee. City of Winona v. Huff, 11 Minn. 119 (Gil. 75); Dummer v. Den, 1 Spencer [20 N. J. Law] 86. On the other hand, it has been held that the owner of the fee could not recover the possession from a city entitled to use land as a public square, because the actual possession could not be delivered to him. Cincinnati v. White's Lessee, 6 Pet. [31 U. S.] 431. This case does away with the idea that the owner of the fee may recover possession of the land dedicated to a public use, subject to the easement.

What has been said in reference to the character of the possession acquired by the plaintiff under its grant, is, if correct, an answer to the further objection of defendant to the complaint that it does not allege a present necessity for the use of the precise portion of the right of way occupied by the defendant. The right of the plaintiff to possess the land in dispute springs, not from an actual necessity for its use at any given point of time, but from the grant of the right of way to the extent of two hundred feet on each side of the track, a grant which, as we view it, carries with it necessarily a right to the possession of all the land within the limits named. Moreover, it might materially interfere with the plaintiff's enjoyment of the right granted, if obliged to permit third persons to occupy all such portions of its right of way as it was not at the moment using. Whenever needed, the delay necessary for ejecting an occupant might cause inconvenience.

Demurrer overruled.

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

CENTRAL PAC. R. CO. (CODY v.). See Case No. 2,940.

Case No. 2,552.

CENTRAL PAC. R. CO. v. DYER et al.

[1 Sawy. 641; 14 Int. Rev. Rec. 139; 6 Am. Law Rev. 385.][1]

Circuit Court, D. Nevada. Aug., 1871.

EQUITY PLEADING—MULTIFARIOUSNESS — ACTION TO DETERMINE ADVERSE CLAIM — RAILROAD GRANT—CONSTRUCTION.

1. The plaintiff, the Central Pacific Railroad Company, a corporation created under the laws of California, files a bill against a large number of persons, who are citizens of the state of Nevada, to determine the estate and interest claimed by them in land in that state over which the line of the railroad constructed by the company runs. In the bill the plaintiff avers, that on the first day of July, 1862, congress passed an act to aid in the construction of a railroad from the Missouri river to the Pacific ocean [12 Stat. 491], and by its provisions the plaintiff was authorized, after completing its road across the state of California, to extend its construction through the territories of the United States eastwardly until it should connect with the road which the Union Pacific Railroad Company, a corporation created by the same act, was authorized to construct westwardly from a designated point in the territory of Nebraska; that, by the same act, the right of way was granted to the plaintiff through the public lands of the United States for the construction of the road, to the extent of two hundred feet on each side of the track, with the right to take from the public lands adjacent all needed earth, stone, timber, and other materials, including all necessary ground for stations, buildings, workshops, depots, machine-shops, switches, sidetracks, turn-tables and water stations which the plaintiff might require for the use and maintenance of the road; that under the right and authority thus conferred, the plaintiff had laid out and constructed a railroad from the city of Sacramento to the eastern line of the state of California, and from that line eastwardly in the territory, now state of Nevada, a distance of forty-seven miles, and had expended in the construction of this portion of the road in Nevada, more than two millions of dollars; that all the lands through which it passes, were at the time of the passage of the act of congress, and the location of the road, public lands of the United States, and subject to the grant of the government for the use of the railroad; that the plaintiff is in its possession, maintaining and using it in the transportation of passengers, freight and the mails of the United States; that the plaintiff has erected near the line of the road and within two hundred feet of the track on either side, at convenient places and points, divers work-shops, machine-shops, sidetracks, turn-tables, water stations and depots; and has made various excavations and taken wood, stone, earth and other material, and has used the same in the construction of the road; that the defendants claim and each of them claims to own some estate or interest in the land over which the road passes and upon which the track is laid, and in the public lands adjacent thereto, and the portions upon which the work-shops, side-tracks, turn-tables and switches have been constructed, and the stations and depots have been established, adverse to the interest and title of the plaintiff, which estate and interest they claim, and each of the defendants claims to have acquired by purchase from the government of the United States, subsequent to the grant to the plaintiff; and that they claim the land over which the road passes, and their estate and interest in the same, in distinct parcels or quantities; but that the particular quantities claimed by each are unknown to the plaintiff; that they threaten and intend to bring distinct actions at law, based solely upon such pretended purchases, to recover damages from the plaintiff, for alleged trespasses upon and injuries to the property, and thus to involve the plaintiff in a multitude of suits; and that the estate and interest claimed by the defendants and each of them are invalid and subordinate to the grant to the plaintiff, and the rights the grant conferred: *Held*, on demurrer, that the bill was not subject to the objection of being multifarious because it averred that the defendants claimed separate and distinct parcels, all of them being alike interested in defeating the claim of prior right to the land made by the plaintiff under the grant of the government. The determination of the principal question involved, equally concerned all of the defendants.

[Applied in Gillespie v. Cummings, Case No. 5,434. Cited in The Debris Case, 16 Fed. 32.]

2. A statute of the state of Nevada declares that an "action may be brought by any person in possession, by himself or tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate or interest." The term "action" in that state includes not merely proceedings at law, but suits for equitable relief: *Held*, that the statute enlarges the class of cases in which the jurisdiction of equity was formerly exercised in quieting the title and possession of real property. It dispenses with the necessity of the previous establishment of the right of the plaintiff by repeated judgments in his favor in actions at law; and to that extent it confers upon the possessor of real property a new right, which enables him, without the delay of previous proceedings at law, to draw to himself all outstanding inferior claims. That right the national courts will enforce in the same manner in which they will enforce other equitable rights of parties.

[Cited in Wells v. Miner, 25 Fed. 536; A. & W. Sprague Manuf'g Co. v. Hoyt, 29 Fed. 428; Hyman v. Wheeler, 33 Fed. 630.]

3. The grant of the right of way to the plaintiff through the public lands of the United States, made by the second section of the act of congress of July 1, 1862 [12 Stat. 491], was a present grant, operating immediately upon the passage of the act, without reservation or exception, and was subject to no conditions except those which were subsequent, or necessarily such as that the road should be constructed within the period specified, and be afterwards maintained and used for the purposes designated. All acquisitions of land over which this right of way was thus granted, made subsequent to the passage of the act, were subject to the exercise of this right.

[Cited in Sanger v. Sargent, Case No. 12,319; Southern Pac. R. Co. v. Dull, 22 Fed. 493; Southern Pac. R. Co. v. Orton, 32 Fed. 479.]

4. The reservations and exceptions found in the third section of the above act apply only to the grants of the land therein mentioned, and do not apply to the grant of the right of way made in the second section.

5. The provision of the seventh section of the above act requiring the plaintiff, within two years, to designate the general route of the road as near as might be, and file a map of the same in the department of the interior, did not affect the grant of the right of way; it only furnished the means by which the secretary could withdraw the lands within a specified distance of such designated route from pre-emption, private entry and sale.

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 6 Am. Law Rev. 385, contains only a partial report.]

This was a bill to quiet the title of the plaintiff to a portion of the land granted to it by congress in the territory, now state of Nevada, as a right of way for the construction of its railroad. The plaintiff was incorporated by the state of California in June, 1861. On the first day of July, 1862, congress passed an act incorporating the Union Pacific Railroad Company (12 Stat. 489), entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes."

The following are the second, third and seventh sections of the act:

"Sec. 2. And it is further enacted, that the right of way through the public lands be, and the same is hereby granted to said company for the construction of the said railroad and telegraph line; and the right, power and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depôts, machine-shops, switches, side-tracks, turn-tables, and water stations. The United States shall extinguish as rapidly as may be, the Indian titles to all lands falling under the operation of this act, and required for the said right of way and grants hereinafter made.

"Sec. 3. And be it further enacted, that there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed; provided, that all mineral lands shall be excepted from operations of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

"Sec. 7. And be it further enacted, that said company shall file their assent to this act, under the seal of said company, in the department of the interior, within one year after the passage of this act, and shall complete said railroad and telegraph from the point of beginning, as herein provided, to the western boundary of Nevada territory, before the first day of July, one thousand eight hundred and seventy-four; provided, that within two years after the passage of this act, said company shall designate the general route of said road, as near as may be, and shall file a map of the same in the department of the interior, whereupon the secretary of the interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from pre-emption, private entry, and sale; and when any portion of said route shall be finally located, the secretary of the interior shall cause the said lands hereinbefore granted, to be surveyed and set off as fast as may be necessary for the purposes herein named; provided, that in fixing the point of connection of the main trunk with the eastern connections it shall be fixed at the most practicable point for the construction of the Iowa and Missouri branches, as hereinafter provided."

The ninth section authorized the plaintiff "to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco or the navigable waters of the Sacramento river, to the eastern boundary of California, upon the same terms and conditions in all respects" as were contained in the act for the construction of the Union Pacific railroad and telegraph line, and to meet and connect with said railroad and telegraph line on the eastern boundary. The tenth section authorized the plaintiff, after completing its road across the state of California, "to continue the construction of said railroad and telegraph through the territories of the United States to the Missouri river, including the branch roads specified" in the act, upon the routes therein indicated, on the terms and conditions provided in the act in relation to the Union Pacific Railroad Company, until said roads should meet and connect, and the whole line of said railroad and branches and telegraph was completed.

On the second of July, 1864, congress passed an act [13 Stat. 364] to amend the act of July 1, 1862, by increasing the grant of alternate sections made in the act of 1862, from five to ten, and extending the limits within which the sections were to be selected to twenty miles on each side of the road, and by extending the distance from the designated route of the road within which lands were to be withdrawn from pre-emption, private entry and sale by the seventh section of the act of 1862, from fifteen to twenty-five miles. 13 Stat. 358.

The defendants demurred to the bill of complaint for the want of equity, and for misjoinder of defendants. The latter point was argued on the ground that the bill averred that the defendants claimed sepa-

rate and distinct parcels of land under separate purchases made by them.

Thomas H. Williams, for defendants.
Sunderland & Wood, for plaintiff.

Before FIELD, Circuit Justice, and HILLYER, District Judge.

FIELD, Circuit Justice. The plaintiff, the Central Pacific Railroad Company, a corporation created under the laws of California, brings the present suit against a large number of persons, who are citizens of the state of Nevada, to determine the estate and interest claimed by them in the land over which the line of the railroad constructed by the company runs, between the boundary of Nevada and the Big Bend of Truckee river in that state.

The plaintiff was incorporated in June, 1861, for the purpose of constructing and maintaining a railroad from the city of Sacramento, in California, to the eastern line of the state, where that line crosses the Truckee river, and to form a continuous railroad connection between the navigable waters of the Sacramento river and the Missouri river, and for that purpose to construct and maintain a railroad through the then territory, now state of Nevada, and other territories lying between California and the Missouri river.

On the first of July, 1862, congress passed an act [12 Stat. 491] to aid in the construction of a railroad from the Missouri river to the Pacific ocean, and by its provisions the plaintiff was authorized, after completing its road across the state of California, to extend its construction through the territories of the United States eastwardly until it should connect with the road which the Union Pacific Railroad Company, a corporation created by the same act, was authorized to construct westwardly from a designated point in the territory of Nebraska.

By this act, the right of way was also granted the plaintiff through the public lands of the United States for the construction of the road, to the extent of two hundred feet on each side of the track, with the right to take from the public lands adjacent all needed earth, stone, timber, and other materials. The right of way included all necessary ground for stations, buildings, work-shops, depots, machine-shops, switches, side-tracks, turn-tables and water-stations which the plaintiff might require for the use and maintenance of the road.

Under the right and authority thus conferred by the legislation of the state and of the United States, the plaintiff has not only laid out and constructed a railroad from the city of Sacramento to the eastern line of the state of California, but has extended the road through the state of Nevada and the territory of Utah to its connection with the road of the Union Pacific Railroad Company —thus forming a completed road between the navigable waters of the Sacramento river and the Missouri river. This we know as matter of history. The bill of complaint, however, only alleges, in addition to the construction of the road across the state of California, that the plaintiff has laid out and constructed the road from the eastern line of that state where it crosses the Truckee river, eastwardly, in the state of Nevada, along that river to what is known as the "Big Bend" thereof, a distance of forty-seven miles. With respect to this position of the road in the state of Nevada, the bill avers, in substance, that the plaintiff has expended in its construction more than two millions of dollars; that all the lands through which it passes were, at the time of the passage of the act of congress, and the location of the road, public lands of the United States, and subject to the grant of the government for the use of the railroad; that the plaintiff is in its possession, maintaining and using it in the transportation of passengers, freight and the mails of the United States; that the plaintiff has erected near the line of the road and within two hundred feet of the track on either side, at convenient places and points, divers work-shops, machine-shops, side-tracks, and turn-tables, water stations and depots; and has made various excavations and taken wood, stone, earth and other material, and has used the same in the construction of the road; that the defendants claim, and each of them claims, to own some estate or interest in the land over which the road passes and upon which the track is laid, and in the public lands adjacent thereto, and the portions upon which the work-shops, side-tracks, turn-tables and switches have been constructed and the stations and depots have been established, adverse to the interest and title of the plaintiff, which estate and interest they claim, and each of the defendants claims, to have acquired by purchase from the government of the United States, subsequent to the grant to the plaintiff.

The bill further avers, upon information and belief, that the defendants claim the land over which the road passes, and their estate and interest in the same, in distinct parcels or quantities, but that the particular quantities claimed by each are unknown to the plaintiff; that they threaten and intend to bring distinct actions at law, based solely upon such pretended purchases, to recover damages from the plaintiff, for alleged trespasses upon and injuries to the property, and thus to involve the plaintiff in a multitude of suits.

The bill further avers that the estate and interest claimed by the defendants and each of them are invalid and subordinate to the grant to the plaintiff, and the rights the grant conferred; and concludes with a prayer that the defendants may be required to set out the estate and interest claimed; that the same may be decreed invalid and subordi-

nate to the right and title of the plaintiff; and that the defendants may be enjoined from setting up or asserting any right, estate or interest in the said lands, and from bringing any action for damages by reason of the construction of the road and the excavations within two hundred feet of the track, and the construction of the buildings and other works of the company; and for such further and other relief as the nature of the case may require.

The suit is evidently founded upon a statute of the state of Nevada, which declares that "an action may be brought by any person in possession, by himself or tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate or interest." Act March 8, 1869 (regulating proceedings in civil cases), § 256. The term "action" in that state includes not merely proceedings at law, but suits for equitable relief. It is for relief of that character that the present bill is filed.

The bill is in substance a bill of peace—its object being to quiet the title of the plaintiff, and to prevent harassing and expensive litigation from a multiplicity of suits. The jurisdiction of equity to afford relief in such cases is undoubted. The statute, it is true, enlarges the classes of cases in which the jurisdiction was formerly exercised in quieting the title and possession of real property. It dispenses with the necessity of the previous establishment of the right of the plaintiff by repeated judgments in his favor in actions at law. Curtis v. Sutter, 15 Cal. 259; Stark v. Starrs, 6 Wall. [73 U. S.] 409. To that extent it confers upon the possessor of real property a new right, one which enables him, without the delay of previous proceedings at law, to draw to himself all outstanding inferior claims. That right the national courts will enforce in the same manner in which they will enforce other equitable rights of parties. This was held in Clark v. Smith, 13 Pet. [38 U. S.] 203, where the bill was filed to enforce an act of Kentucky, which authorized a person having both the title and possession of land to institute a suit against any other person setting up a claim to the property, and provided that if the plaintiff established his title, the defendant should be decreed to release his claim, and pay the costs of the complainant, unless by his answer he disclaimed all title to the premises, and offered to release to the complainant. "The state legislature," said the court, "have no authority to prescribe the forms and modes of proceeding in the courts of the United States, but having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceedings on the chancery side of the federal courts, no reason exists why it should not be pursued in the same form as it is in the state courts; on the contrary, propriety and convenience suggest that the practice should not materially differ when titles to lands are the subjects of investigation."

The jurisdiction would therefore exist in the present case if there were only one defendant asserting an interest or estate adverse to the plaintiff, but the fact that there are numerous defendants claiming distinct and separate parcels by a similar title, and threatening distinct actions for injuries to their respective parcels, furnishes a further ground for entertaining the bill. A court of equity will always interfere to prevent a multiplicity of suits, when the rights of the parties can be fairly determined by a single proceeding. Crews v. Burcham, 1 Black [66 U. S.] 352.

The objection taken by demurrer, that the defendants are improperly joined, or more correctly speaking, that the bill is multifarious, because it is averred therein that the defendants claim separate and distinct parcels, is not well taken. The bill alleges that the rights of the plaintiff come from the act of congress, and that the interests claimed by defendants come from pretended subsequent purchases from the government. The plaintiff asserts that upon the passage of the act, the lands through which the road passes were public lands, subject to the disposal of the United States for the purposes of the railroad. The principal question therefore, involved, upon the allegations of the bill, is when did the grant to the plaintiff take effect? and its determination equally concerns all the defendants. If the grant took effect immediately, the subsequent purchasers from the government must necessarily have taken the lands held by them in subordination to the rights which it conferred. They are all in consequence alike interested in defeating any pretentions of this kind.

In Mayor of York v. Pilkington, 1 Atk. 282, the plaintiff claimed the sole right of fishery in the river Ouse, and brought a bill to quiet the right against several riparian proprietors on the river claiming distinct rights. It was objected that the defendants ought to be considered as distinct trespassers; that there was no general right to be established against them; and that there was no privity between them and the plaintiff. But Lord Hardwicke sustained the bill, observing that the question was whether the plaintiff had a general right to the sole fishery which extended to all the defendants, and that the defendants were not precluded from taking advantage of their several exceptions or distinct rights.

In Gaines v. Chew, 2 How. [43 U. S.] 640, the bill was filed to set aside a will, and made the executors and all persons who had come into possession of the property of the alleged testator by purchase or otherwise, parties. The purchases were made at different times and for different parcels of

the property. To the objection that there was misjoinder or multifariousness in the bill in making the defendants parties, the court said that the main ground of defense, the validity of the will attacked and the proceedings under it was common to all; that their interests might be of greater or less extent, but that constituted a difference in degree only, and not in principle; that in every fact which went to impair or establish the authority of the executors, the defendants were alike interested, and that the bill avoided multiplicity of suits without subjecting the defendants to inconvenience or unreasonable expense. The objection was therefore overruled. In considering the subject of multifariousness, the court cited the language of Lord Cotttenham in Campbell v. Mackay, 1 Mylne & C. 603, that "to lay down a rule applicable universally, or to say what constituted multifariousness as an abstract proposition, is upon the authorities utterly impossible," and observed that "every case must be governed by its own circumstances; and as these are as diversified as the names of the parties, the court must exercise a sound discretion on the subject. Whilst parties should not be subjected to expense and inconvenience in litigating matters in which they have no interest, multiplicity of suits should be avoided by uniting in one bill all who have an interest in the principal matter in controversy, though the interests may have arisen under distinct contracts."

As already intimated, the real question presented by the case is, when did the right of way to the extent of two hundred feet on each side of the road, vest, under the act of congress, in the plaintiff? The defendants contend that the grant of the right of way was subject to the same limitation which is prescribed by the act to grants of the alternate sections, namely, that the land designated was not reserved or otherwise disposed of by the United States, or that a pre-emption or homestead claim had not attached to it at the time the line of the road was definitely fixed; and hence it is argued that the bill, in averring that the defendants' claim, by purchases made from the government subsequent to the passage of the act of congress, does not negative all possible right in them, as they may still have acquired their interests before the definite location of the road.

The construction for which the defendants thus contend is clearly incorrect. The grant of the right of way is a present grant, operating immediately upon the passage of the act, without reservation or exception, and is subject to no conditions except those which are subsequent, or necessarily implied, such as that the road shall be constructed within the period specified, and be afterward maintained and used for the purposes designated. All acquisitions of land over which this right of way was thus granted, made subsequent to the passage of the act, were necessarily subject to the exercise of this right. The reservations and exceptions found in the third section, apply only to the grants of land therein mentioned, and do not apply to the grant of the right of way made in the second section.

The provision of the seventh section requiring the plaintiff, within two years, to designate the general route of the road as near as might be, and file a map of the same in the department of the interior, in no respect affected the grant of the right of way; it only furnished the means by which the secretary could withdraw the lands within a specified distance of such designated route from pre-emption, private entry and sale.

It follows that the objection to the bill founded upon this construction of the act falls to the ground. The demurrer must, therefore, be overruled, and the defendants be required to answer the bill by the rule-day in November next. Ordered accordingly.

CENTRAL PAC. R. CO. (HUNTINGTON v.). See Case No. 6,911.

CENTRAL PAC. R. CO. (QUIGLEY v.). See Case No. 11,510.

CENTRAL PAC. R. CO. (RYAN v.). See Case No. 12,185.

CENTRAL PAC. R. CO. (UNITED STATES v.). See Case No. 14,763.

CENTRAL PAC. R. CO. (VAUGHAN v.). See Case No. 16,897.

CENTRAL R. CO. (CLYMER v.). See Case No. 2,912.

CENTRAL R. CO. (LEHIGH COAL, ETC., CO. v.). See Case No. 8,213.

CENTRAL R. CO. OF NEW JERSEY (GOODYEAR v.). See Case No. 5,563.

CENTRAL R. CO. OF NEW JERSEY (MACKAY v.). See Case No. 8,842.

CENTRAL RAILROAD OF IOWA (ALEXANDER v.). See Case No. 166.

CENTRAL RAILROAD OF IOWA (FARMERS' LOAN & TRUST CO. v.). See Cases Nos. 4,663 and 4,664.

CENTRAL RAILWAY (CURTIS v.). See Case No. 3,501.

CENTRAL VERMONT R. CO. (WELLS v.). See Case No. 17,390.

Case No. 2,553.

CENTRE v. KEENE.

[2 Cranch, C. C. 198.] [1]

Circuit Court, District of Columbia. April Term, 1820.

DEPOSITION—CAPTION—CERTIFICATE OF MAGISTRATE.

The magistrate who takes a deposition under the act of congress, need not certify that the deponent subscribed it in his presence, but the title of the cause in which it is to be used must

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

be truly stated in the certificate of the caption.

[Cited in Re Thomas, 35 Fed. 823.]

Mr. Taylor, for defendant, objected to a deposition taken under the act of congress (1 Stat. 73), that the magistrate did not certify that the deponent subscribed it in his presence, but that he subscribed it after it was reduced to writing by the magistrate.

But THE COURT (THRUSTON, Circuit Judge, absent) overruled the objection.

Mr. Taylor then objected, that it is stated in the caption that the deposition was taken to be used in an action in which Robert Centre & Co. were plaintiffs.

Mr. Swann, contra. This is evidently the same suit.

THE COURT supported the objection, and rejected the deposition; and said they could not judicially know it to be the same cause.

Case No. 2,554.

The CENTURION.

[1 Ware (477) 490.][1]

District Court, D. Maine. Feb. 21, 1839.

ADMIRALTY JURISDICTION — SALVAGE SERVICE — AUTHORITY OF MASTER TO EMPLOY VESSEL AND CREW — WHO ARE SALVORS — FORFEITURE OF COMPENSATION.

1. A court of admiralty has jurisdiction in cases of salvage to proceed in personam as well as in rem.

[Cited in The Williams, Case No. 17,710; Fox v. Patton, 22 Fed. 747.]

2. It has jurisdiction to carry into execution the decree of another admiralty court.

3. In a case in which the master and crew of a vessel had saved a wreck stranded on the shore, salvage was awarded by arbitrators. No distribution of it was made by the award, but the whole sum was paid to the master. It was held that one of the crew could maintain a libel in the admiralty for a share of the salvage.

[Cited in McConnochie v. Kerr, 9 Fed. 51.]

4. In all cases where services are rendered in saving property in danger of being lost on the high seas, or when wrecked or stranded on the shore, it is in the sense of the maritime law, a salvage service.

[Cited in The A. D. Patchin, Case No. 87; The Pontiac, Id. 8,801; The Independent, Id. 7,014; Harley v. Four Hundred and Sixty-Seven Bars Railroad Iron, Id. 6,068.]

5. When a vessel in the course of a voyage falls in with a wreck, the master is authorized by the general customs and usages of the sea, to employ his own vessel and crew in saving it.

[6. Cited in McConnochie v. Kerr, 9 Fed. 54, to the point that by the maritime law the master has an implied discretionary authority to make such deviations in the interest of commerce and humanity, in order to save endangered life or property.]

7. In such a case, all the crew who are ready and willing to engage in the service, are entitled to a share of the reward, although they may not have gone on board the wreck.

[Cited in Roff v. Wass, Case No. 11,990; Gates v. Johnson, Id. 5,268. Distinguished in McConnochie v. Kerr, 9 Fed. 59.]

8. When the master of a vessel, in the course of a voyage, engages in a salvage service, he cannot oppose to the claim of any of his crew, for a share of the salvage, their misconduct during the voyage, if they are guilty of no misconduct during the time they are engaged in the salvage.

[9. Cited in Coffin v. The John Shaw, Case No. 2,949; Adams v. The Island City, Id. 55; Camanche v. Coast Wrecking Co., 8 Wall. (75 U. S.) 478,—to the point that nothing short of a contract to pay a given sum for the services to be rendered, or a binding engagement to pay at all events, whether successful or unsuccessful in the enterprise, will operate as a bar to a meritorious salvage claim.]

[10. Cited in U. S. v. The Mollie, Case No. 15,795, to the point that where a rule existed that the judge should proceed and hear a cause ex parte, according to the regular course of the court, the case should be heard upon evidence produced upon the part of the libellant only.]

In admiralty. This was a libel in personam against the master of the brig Frances Ellen for salvage. The libellant shipped on board the brig at Portland, September 3, 1837, for a voyage to the West Indies and back to the United States, in the capacity of cook and steward. In the prosecution of the voyage the brig arrived at Cardenas in the island of Cuba, and while lying in that port the master was informed that the brig Centurion, of Providence, was ashore in distress, on the coast, at a place about twenty miles distant; and was applied to by persons interested in the Centurion to go with his vessel to her relief, to which he agreed. The Frances Ellen was not then fully discharged, and as is alleged in the libel, and not denied in the answer, he urged the crew to make all the despatch they could in discharging her, in order to proceed immediately to the relief of the Centurion, encouraging them with the promise of a liberal reward as salvage, in case they should succeed. They accordingly proceeded to the Centurion and found her stranded upon a sand-bank. With the aid of some of her crew they took out part of her cargo, and having lightened her, got her off, and proceeded with her in tow to Matanzas. The claim for salvage was there submitted to arbitration, and the arbiters awarded one third of the net proceeds of the sale of the cargo, and one half of the net proceeds of the sale of the vessel; amounting in the whole to about 850 dollars. It does not appear that any distribution of the salvage was made by the arbiters, but the whole was paid to the master, and the distribution left to him, excepting that he was required to pay sixty-two dollars to such of the crew of the Centurion as aided in the salvage; and he paid also eighty-six to the pilot, leaving in his hands about seven hundred dollars. To each of his own crew, except the libellant, he paid seventeen dollars, this being at the same rate as was paid to the crew of the Centurion. Some difficulty arising between him and his owners on his return, he paid over to them the whole of the residue of the salvage money remaining in his hands,

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

and refused any allowance to the libellant, who having frequently demanded his compensation in vain, brought this libel against the master for his share of the salvage.

Codman & Fox, for libellant.
Mr. Preble, for respondent.

WARE, District Judge. The most familiar form, in which the jurisdiction of this court is exercised over the matter of salvage, is by process in rem; but there is no doubt that the court has authority to adjudicate upon it as well in a proceeding in personam as in rem. The only doubt which can arise in the present case is this; the general question of salvage having been already decided, and the money received by the master acting for all who are interested in it, whether the claim of the libellant is not now converted into a simple debt, for which a remedy lies only at common law. Although the admiralty has a general jurisdiction over maritime contracts and quasi contracts, and things done on the sea, it does not follow that the payment of a debt in every form which it may assume can be enforced in the admiralty, simply because it originated in a contract, or in the performance of a service which was within the jurisdiction of the court. While the original cause or consideration subsists and is in force, the party may have his remedy in this court, but when that is extinguished and the debt passes into a new form, by what in the civil law is called a novation, as when the creditor receives a bond for the sum due, or a negotiable note, or bill of exchange is taken as payment, and as an extinguishment of the debt, it will not be contended that the admiralty has jurisdiction to enforce the payment of the debt in its new form. Ramsay v. Allegre, 12 Wheat. [25 U. S.] 611. In the cases of The Hope, 3 C. Rob. Adm. 215, and The Trelawney, 4 C. Rob. Adm. 223, after the property was saved from the peril, it was redelivered by the salvor to the owners, and a libel was brought against them personally for the reward. The whole question of salvage was therefore open and put in issue. But in this case that question has been already settled. If it had been decided by a regular decree of a court of admiralty by which a specific sum were awarded to the libellant, this court could have taken cognizance of the case, because a court of admiralty has jurisdiction to carry into execution the decree of another court of admiralty. 2 Brown, Civ. & Adm. Law, 120; Penhallow v. Doane's Adm'r, 3 Dall. [3 U. S.] 54; Jennings v. Carson, 4 Cranch [8 U. S.] 2. Whether this court has authority to carry into execution an award of arbitrators, in a matter peculiarly of admiralty and maritime jurisdiction, it is not necessary to decide in this case, because it presents another ground upon which I think the jurisdiction of the court is free from doubt. The libellant in this case does not demand a specific sum which the master is alleged to have received to his use; he claims generally an unliquidated sum as a reward for his services as a salvor, the amount to be ascertained by a decree of the court. The libel is founded, therefore, strictly upon the maritime service, a consideration over which the court has an undisputed jurisdiction. The question at issue is, whether he performed such services as entitle him to a reward as a salvor or not. The sum in controversy in this case is inconsiderable, and it is understood to be contested by the master of the salvor ship, or rather by the owners, although the suit is nominally against the master, more on account of the principles which it is supposed to involve than the amount in controversy.

In the first place it is questioned, whether this be properly a case of salvage, within the proper import of the term, as it is understood in maritime jurisprudence. At the time when the master of the Frances Ellen was called upon to perform the service, the Centurion was lying aground upon a sand-bank, on the shore, in a state of utter helplessness. He proceeded with his vessel and crew to the place, and found her in this situation, and after some time spent, for the precise time does not appear, in taking out part of her cargo and transferring it to the Frances Ellen, they succeeded in lightening her so much that she was got off the sand and floated. They then took her in tow, and carried her to Matanzas. It does not appear that this business of saving the wreck was attended with any peculiar danger, but this was solely owing to the favorable state of the weather. Had the weather changed and become tempestuous, the peril might have been very great, not only to the salvor vessel, but to all who were engaged in the enterprise. This was a risk which the salvors took upon themselves. After the arrival at Matanzas, the claim for compensation or reward was submitted to arbiters. They manifestly treated it as a case of salvage in the strictest sense of the word, for they awarded not a specific sum as a quantum meruit for the service, but a certain proportion of the property saved. It is true that if a specific sum had been awarded, this would not at all have affected the character of the case, for it is not uncommon for courts to decree a compensation in that form. But the form of the award is referred to, as showing that the arbiters considered the case as one clearly of salvage, and not of affreightment, as is now pretended.

After all this has been done, a direct decision having been made upon this question by a tribunal of the parties' own choosing, and the master and owners having received the sum awarded, it is, to say the least, extremely doubtful whether the question can be brought into controversy in this collateral way, in a case in which the libellant is claiming his share of the reward. But if the question were open to be contested by the master, I have no doubt that the case is, both upon

principle and authority, clearly a case of salvage in the strictest sense of the word. The cases, in which doubts have arisen of this kind, are those in which the service has been performed by pilots, or by the crew of the vessel lost; persons who were in the employment and pay of the owners, and bound by their relation to the vessel to contribute their aid in saving her. Such persons are ordinarily excluded from claiming as salvors; and they are allowed a reward in that character only in peculiar cases, as those of extraordinary peril or gallantry, or when their exertions pass beyond the limits of duty properly required by law. The Joseph Harvey, 1 C. Rob. Adm. 306; Le Tigre [Case No. 8,281]; Hobart v. Drogan, 10 Pet. [35 U. S.] 121; Mason v. The Blaireau, 2 Cranch [6 U. S.] 268; The Two Catharines [Case No. 14,288]. But the salvors in this case were volunteers and were bound by no obligations to the Centurion. In all such cases, where services are rendered in saving property which is in danger of being lost on the high seas, or when wrecked, or stranded on the shore, it is, in the sense of the maritime law, a salvage service, The Emulous [Id. 4,480], and it is quite immaterial whether the salvors accidentally fall in with the wreck, and volunteer their services, or are called upon by the owners, or persons interested in the wreck, to aid in saving it. It is the place where the property is situated, and the circumstances of exposure and peril in which it is found, that determine the question whether it is a case of salvage or not.

But whether this case is considered as one of salvage or otherwise, the right of the libellant to maintain this libel would not be materially affected. He contracted to perform a particular voyage. The master had no right under this contract to change the voyage for another, nor to add to it an intermediate voyage, unless it was authorized by some usage of trade. He certainly had no authority under the contract, to require the libellant to proceed upon a wrecking enterprise. To such an order he might say "non in haec foedera veni." If he consented to go, he would be justly entitled to an extra compensation, as well upon the ground that it was a service of peculiar hazard, as upon the general principles which govern maritime courts in the distribution of salvage. And in fact such a reward was expressly promised by the master in this case. I do not mean to say when a vessel in the course of her voyage falls in with a wreck, and the master thinks proper to make an attempt to save it, that the seamen are not bound to obey him; on the contrary, I hold that they are. The customs and usages of the sea, silently assented to by the whole maritime world, appear to authorize the master in such cases to employ his vessel and crew in rescuing from destruction property thus exposed. The Boston [Case No. 1,673]. It is an authority that is allowed in the general interest of commerce; and the invariable custom of courts of maritime jurisdiction is to remunerate and encourage such services by a liberal and generous reward. But though the authority for engaging in such enterprises rests solely in the discretion of the master, yet he is considered as acting not for himself alone, but for the common benefit of all who participate in the risk. In the distribution of the salvage, the owners are compensated for the use of their vessel, and the crew for their share of the peril and labor. It is a service which is not contemplated in the contract with the crew, and which they are not by the terms of the contract bound to perform, but it is a duty imposed by the policy of the law, and the law compensates them for it by a liberal reward. In the present case, as the service in which their vessel was employed was not embraced within the contract with the crew, and was one which might have been attended with great peril, I am clear that the crew was entitled to a specific compensation beyond the rate of their wages for the time. The master himself so understood it at the time, for he promised the crew a share of the salvage as an inducement for them to engage in it.

Another ground of defence, particularly relied upon in the answer, is that the libellant actually performed no part of the service in saving this property; that he was never on board the Centurion; that he performed no part of the labor in removing her cargo to the Frances Ellen; but was employed during the whole time in his ordinary duty of cook and steward. This is the precise objection that was made to the claim of part of the crew of the salvor ship in the case of The Baltimore, 2 Dod. 132. Sir William Scott, in that case, said: "With respect to the contest which exists between those who went on board the Baltimore and became the immediate instruments of preserving her, and those who remained on board their own ship, I confess I can see no ground for making a distinction between them, and consider it but fair to hold that they are all equally entitled to be rewarded. All of them, it is true, did not go on board the Baltimore, but they were all, with one exception, ready to do so; and a selection of a part of them became necessary, which was accordingly made, and I have no doubt properly, by their commander. As all concurred in their readiness to go, they are all equally deserving of reward." The man who refused to go on board the Baltimore was of course excluded from all share in the salvage, but all who are willing to share in the labor were held equally entitled, and it appears to me for reasons perfectly satisfactory. It was necessary for some to remain on board the salvor ship, and the master selected such as he thought proper to go out of her to save the wreck. The same observations ap-

ply to the present case. The master proposed to the crew to go on this enterprise, to which they agreed, and when they arrived at the wreck he selected such as he thought proper to engage in the immediate agency of transferring the cargo of the Centurion to the Frances Ellen. The libellant was as ready as the rest of the crew to embark in the enterprise; nor does it appear that he refused to perform any duty that was required of him. It was the choice of the master that he should remain on board the Frances Ellen, and if he had not, prudence, I presume, would have required that another man should.

It is alleged as a third objection to the libellant's maintaining this suit, that he "conducted himself on board the said Frances Ellen in a disorderly and disobedient manner, refusing to perform his duty, threatening to poison the crew, breaking and destroying property, and finally wholly refusing to return in said Frances Ellen, so that this respondent was compelled to discharge him on account of his misconduct as aforesaid These are, without doubt, grave charges, and if they could apply to affect the claim set up in this case, would deserve to be carefully considered. But none of this disorderly conduct is charged as having occurred while they were engaged in the business of the salvage. Now without adverting to the insufficiency of the proof with respect to most of the charges, my opinion is, that the misconduct of the libellant in the course of the voyage, if proved, cannot be resorted to as a reason for forfeiting his claim for salvage, when no misconduct is proved during the time they were employed in this service. This was an enterprise apart from the voyage for which he shipped, and his previous offences, although they might affect his claim for wages, cannot be imported into this new and distinct enterprise, though springing up in the course of the voyage, to impair his claim for a share in the reward.

Upon the whole I can see no legal ground upon which the libellant can be excluded from the claim set up in this libel; no evidence has been introduced which goes to distinguish the merits of one man from another. The service does not appear to have been attended with any peculiar danger, nor to have afforded occasion for the display of extraordinary gallantry. The libellant remained on board the Frances Ellen. This was of course by order of the master. No evidence is offered to show that, during the period employed in saving the wreck and bringing her into port, he declined any duty which was required of him. As I see no reason for making a distinction between this man and the rest of the crew, I shall allow him the same sum which the master allowed to the others with costs.

Decree of seventeen dollars and costs.

C. E. PAGE, The. See Case No. 13,540.

Case No. 2,555.

The CERES.

[The case reported under above title in 7 Wkly. Notes Cas. 576, and 10 Cent. Law J. 113, is the same as Case No. 12,881.]

CERES, The. See Case No. 12,881.

CERES, The (SIMPSON v.). See Case No. 12,881.

Case No. 2,556.

In re CERF.

[11 N. B. R. 143;[1] 7 Chi. Leg. News (1874) 79.]

District Court, E. D. Texas.

DISCHARGE IN BANKRUPTCY.

A voluntary bankrupt whose assets are not equal to thirty per cent. of the claims proved against his estate, upon which he was liable as principal debtor, and who has not obtained the consent of one-fourth of his creditors in number and one-third in value, is not entitled to his discharge under the bankrupt act, as amended June 22, 1874 [18 Stat. 180].

[In bankruptcy. In the matter of Louis Cerf.]

MORRILL, District Judge. I have been requested to reconsider the decision heretofore made in this case, and accordingly have given it as much consideration as is consistent with other duties. The attorneys for the appellant admit that both the proceedings in bankruptcy and the debts of the bankrupt were subsequent to the 1st day of January, 1869, and previous to the 1st day of December, 1873, but insist that the clause in section 33 of the bankrupt act providing "that no discharge shall be granted to a debtor whose assets shall not be equal to fifty per cent. of the claims proved against his estate, unless the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as a principal debtor, and who shall have proven their claims, be filed in the case, at or before the time of the hearing of the application for discharge," is repealed by the act of June 22, 1874, and that consequently the bankrupt is entitled to a discharge, without any regard to the amount of the assets.

The repealing clause relied upon is contained in the two last lines of the section 9 of the act, which is, "The provision in section 33 of said act of March 2, 1867 [14 Stat. 533], requiring fifty per cent. of such assets, is hereby repealed." We will take from the section what was expressly "hereby repealed," and the section would then read, "no discharge shall be granted to a debtor, * * * unless the consent in writing of a majority in number and value of his creditors, to whom he shall have become liable as principal debtor, and who shall have

[1] [Reprinted from 11 N. B. R. 143, by permission.]

proved their claims, be filed in the case, at or before the time of the hearing of the application for discharge." This would virtually limit and confine the bankrupt to the performance of one thing for a discharge instead of allowing the option of one of two things, as before. And, of course, the bankrupt could not be discharged unless he should obtain the required number of creditors, even if he had paid the fifty per cent. of his debts, or a larger amount. But this construction of the section 9 would be so obviously erroneous that it does not require a moment's consideration. It is evident that the repealing clause did not receive any more attention than is usually given to those passed at the close of the session in great haste.

The congress, in the passage of the section 9, intended to draw a distinction between a voluntary and an involuntary bankrupt. They further intended to make the conditions of obtaining a discharge of a voluntary bankrupt less onerous than they had previously been, and attach no conditions whatever, except as provided in the general act, and particularly section 29, to the discharge of an involuntary bankrupt. As it was in the power of congress to repeal any part or the whole of this bankrupt act, or so to change it as to make the conditions of obtaining a discharge of indebtedness more or less onerous, both as to future cases as well as to cases pending in the courts, and as section 9 of the act of June 22 was inconsistent with the section 33, and pro tanto a repeal thereof, the cause of the repealing clause in the last lines is not obvious. It is possible that it was thought by some that the judiciary might construe the amended act as applying only to causes thereafter to be instituted, and from abundant caution added the repealing clause.

I see no cause to change the opinion heretofore rendered, that inasmuch as the applicant is a voluntary bankrupt, and has not assets equal to thirty per cent. of the claims proved against his estate, upon which he was liable as principal debtor, and has not obtained the consent of one-fourth of his creditors in number and one-third in value—his application for a discharge is refused.

Case No. 2,557.

The CERRO GORDO.

FRANKLIN v. The CERRO GORDO.

[6 Adm. Rec. 537.]

District Court, S. D. Florida. Dec. 24, 1862.

SALVAGE—COMPENSATION.

[Cited in Pent v. The Ocean Belle, Case No. 10,961.]

[In admiralty. Libel for salvage, by Thomas Franklin and others against the cargo and materials of the ship Cerro Gordo.]

Winer Bethel, for libellants.

S. J. Douglas, for respondent.

MARVIN, District Judge. This cause having been fully heard, and mature deliberation had, it is now ordered, adjudged and decreed, that the libellants composing the first general consortship have and recover in full compensation for their services rendered in saving said cargo, the one-quarter of the number of bales of dry and partly wet cotton, saved by them,—or one hundred and seventy-nine bales in all, that is one hundred and sixty-three bales of dry cotton and sixteen bales of cotton partially wet,—and that they also recover two hundred and two bales and two-fifths of a bale of the damaged or wet cotton saved by them, being two-fifths thereof,—to be set off to them by the clerk and marshal according to quality and weight.—That they also receive three hundred and seventy-two dollars and thirty-one cents, being the one-third of the proceeds of the materials and stores saved by them.—That the petitioners, the sloop Ratler, L. Burrows, Usquepang, Fairy and Hawkins receive two-fifths of the number of bales of cotton saved by them, weight and quality duly considered, and one-third of the proceeds of the materials saved by them.—And that the schooners Libie Sheppard, Relampago and E. Catherine, the Young America, and Jane Eliza receive one-half of the cotton saved by them, in full compensation for their services.—That the costs, expenses and charges, be charged to the residue of said cargo and materials and also the sum of $175 to be paid to the petitioners Michael McNamara and others for their services as by them alleged, and that the marshal advertize and sell so much of the residue of said cotton as may be sufficient to pay said sum, costs and charges, if said sale should become necessary.—That the marshal advertize and sell the cotton set off to the salvors, and that the proceeds be divided among them according to their consortships and the rule of this court, and that the marshal restore the residue of said cargo to the master of said ship for and on account of whom it may concern.

CERTAIN CASKS OF GLASSWARE (UNITED STATES v.). See Case No. 14,764.

CERTAIN CIGARS (UNITED STATES v.). See Case No. 14,765.

Case No. 2,558.

CERTAIN DISTILLED SPIRITS.

[Case cited as above in 2 Brightly, Fed. Dig. 379, is the same as Case No. 3,923.]

CERTAIN GOODS (JOHNSON v.). See Case No. 7,377.

CERTAIN HOGSHEADS OF MOLASSES (UNITED STATES v.). See Case No. 14,766.

Case No. 2,559.

CERTAIN LOGS OF MAHOGANY.

[2 Sumn. 589.] [1]

Circuit Court, D. Massachusetts. May Term, 1837.

CHARTER PARTY—RIGHTS OF THE PARTIES—ADMIRALTY—JURISDICTION—PLEADING—LIS PENDENS — PROCEEDINGS IN STATE COURT — LIEN FOR FREIGHT—WAIVER—RIGHTS OF SHIPPER — PERSONAL LIABILITY FOR FREIGHT.

1. The admiralty has jurisdiction over charter-parties for foreign voyages, and will enforce the lien thereof.

[Cited in Thatcher v. McCulloh, Case No. 13,862; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 420; U. S. v. The Reindeer, Case No. 16,144.]

2. An objection, grounded on the pendency of another suit, for the same cause of action, is preliminary in its character, and should be taken in admiralty by a special plea, in the nature of a plea in abatement, known, in the practice of the admiralty, as a dilatory or declinatory exception.

[Cited in Benary v. The Prince Albert, Case No. 11,426; The Grace Darling, Id. 5,651.]

3. The objection of lis pendens can be sustained only, where the two suits are of the same character, and where the plaintiff in both suits is the same.

[Cited in Atlantic Mut. Ins. Co. v. Alexandre, 16 Fed. 281.]

4. A suit in a state court by replevin, or by an attachment of the property in question, cannot supersede the right of a court of admiralty to proceed by a suit in rem, to enforce a right, or lien against that property.

[Cited in A Raft of Spars, Case No. 11,528; Ashbrook v. The Golden Gate, Id. 574; The Isabella, Id. 7,100. Dissenting opinion in Taylor v. Carryl, 20 How. (61 U. S.) 605. Distinguished in Taylor v. The Royal Saxon, Case No. 13,803.]

5. The general owner of a ship will be deemed owner for the voyage, notwithstanding a charter-party, if he retains the possession and control of the navigation of the ship during the voyage, and if the master is his agent, acting under his instructions. So also, if the intention of the parties, with regard to this point, seems doubtful on the face of the charter-party.

[Cited in The Aberfoyle, Case No. 16; Raymond v. Tyson, 17 How. (58 U. S.) 60; Hill v. The Golden Gate, Case No. 6,491; Donahoe v. Kettell, Id. 3,980.]

6. The lien on the cargo for freight is recognised by the common law and maritime law; but it may be displaced by particular circumstances, which denote a clear and determinate abandonment.

[Cited in Maxwell v. The Powell, Case No. 9,324; The Hyperion's Cargo, Id. 6,987; Duncan v. Kimball, 3 Wall. (70 U. S.) 43.]

7. A clause in a charter-party, providing, that the freight shall be paid "in five days after her (the brig's) return to and discharge in Boston" is not a waiver or displacement of the lien for freight; the word "discharge" merely referring to the unlading, and not to the delivery of the cargo.

[Cited in Sears v. Bags of Linseed, Case No. 12,589; The Bird of Paradise, 5 Wall. (72 U. S.) 557. Approved in Kimball v. The Anna Kimball, Case No. 7,772. Distinguished in The Santee, Id. 12,328.]

8. Semble. A shipper has a right, by the maritime law, to examine the goods after they are unlivered in order to ascertain whether they are damaged or not, before he makes himself liable at all events for the freight.

[Cited in Fox v. Holt, Case No. 5,012.]

9. Where by the charter-party the freight was a gross sum payable on the successful close of the whole voyage, and the bill of lading declared, that the return cargo should be delivered to the shipper or his assigns, they paying freight, as per charter-party; *held*, that a lien attached to the homeward cargo for the freight due from the whole voyage; also, that the consignee by his receipt of the goods, became personally liable, upon his implied assumpsit, for the whole freight.

[Cited in The Panama, Case No. 10,703; Raymond v. Tyson, 17 How. (58 U. S.) 63; The Hyperion's Cargo, Case No. 6,987.]

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

In admiralty. This was the case of a libel in rem brought against a certain cargo, consisting principally of mahogany, claimed by the respondent and laden on board of the brig Sterling, owned by the libellants, to recover the amount of the freight due and earned on a foreign voyage under a charter-party, which, as the libellants contended, gave them, under all the circumstances, a lien on the same cargo for the amount of such freight, which they were entitled to enforce in the present proceeding. The charter-party was entered into on the 18th of October, 1836, at Boston, between G. P. Richardson, as agent and owner of the brig, and Thomas N. French, for a voyage from Boston to port or ports in the West Indies, from thence to the city of St. Domingo and back to Boston (not exceeding three ports used in all), where she was to be discharged, the dangers of the seas excepted. After the outward cargo was taken on board and before the brig sailed on the voyage French failed in business, and the cargo (which was shipped on his account), was attached by French's creditors. It was then agreed between French and the respondent, that he should relieve the cargo from the attachments, and that for his indemnification he should have the control and management of the cargo, during the voyage, and that the homeward cargo should be shipped and consigned to the respondent by the firm of Joseph Mansfield & Co. (which firm the supercargo, who had been previously appointed such by French, was a member), who were the consignees of the outward cargo. The written instructions for the voyage were given by G. P. Richardson for the owner, and were approved by the respondent. By the bill of lading of the outward cargo it was deliverable to Mansfield & Co. or to assigns, "he or they paying freight for the goods as per charter-party." The voyage was duly performed and the homeward cargo was shipped by Mansfield & Co., and by the terms of the bill of lading was made deliverable "to the order of the shippers or assigns, he or they paying freight as per charter-party;" and the bill of lading was afterwards sent endorsed by the shippers to the

[1] [Reported by Hon. Charles Sumner.]

respondent. It was, under this consignment, made in pursuance of the original agreement with French, that the respondent claimed the homeward cargo for his indemnification for debts and liabilities exceeding its full value. Upon the arrival of the brig at Boston the libellants gave notice to the respondent, that they were ready to deliver the cargo to him upon his payment, or upon security for payment, of the freight due by the charter-party; otherwise they should proceed to discharge the cargo and detain the same until the expiration of five days from the discharge, and then take such steps as they should be advised in the law to obtain the charter money. The respondent, upon receiving the notice, declined to accede to the terms. The cargo was accordingly landed and put into the possession of Mr. Mackay, a wharfinger, as bailee for the libellants. The respondent immediately afterwards brought a writ of replevin, which was sued out of the state court by the respondent, against the wharfinger under which the cargo was replevied; and, the five days having expired, the present libel was filed against the cargo and the same was taken into the possession of the marshal, and afterwards delivered to the respondents, upon giving bail according to the course in the admiralty. Upon the answer and proofs a decree was rendered by the district judge in favor of the libellants [case not reported], and an appeal was taken from that decree by the claimant and respondent.

C. P. and B. R. Curtis, for libellants.

Henry H. Fuller, for claimant and respondent.

STORY, Circuit Justice. The answer of the respondent insists upon various grounds. In the first place, that the court, sitting in admiralty, has no jurisdiction over the case. But since the decision of this court in the case of The Volunteer [Case No. 16,991], the objection would be deemed unmaintainable; and it has now been waived at the argument. In the next place, the respondent relies on the pendency of the replevin suit, as a good defence against the libel, as it is substantially, as he contends, for the same cause of action; and the parties are not to be harassed with successive suits upon the same cause of action at the same time. To this objection several answers may be given, each of which is equally conclusive against it. (1) The objection is in its own nature a mere declinatory or dilatory objection in the nature of a plea in abatement; and not peremptory, as a bar on the merits. It being preliminary in its character it should have been taken, if at all, by a special plea in the nature of a plea in abatement, known in the practice of the ecclesiastical and admiralty courts by the appellation of a dilatory or declinatory exception, which is always brought forward before the contestatio litis, or general defence in bar, or general answer upon the merits. See 1 Brown, Civ. & Adm. Law, 464–470; 2 Brown, Civ. & Adm. Law, 361–369, 414, 415; Law, Forms Ecc. Law, pp. 167–170, tits. 78–81. (2) But, if this could be overcome, there is another objection to it, founded upon the different character of the two suits. The parties to the replevin are not the same, as in the present suit. The wharfinger is the sole defendant in that suit, and he is no party to the present suit. Then, again, the suits are not of the same nature; the replevin is founded upon a supposed tort; the libel upon a supposed contract. It is possible, nay it is probable, that many questions of the same nature may arise in each suit. But it never can be judicially affirmed, that all the questions in a suit founded in tort, and in the one founded in contract are, or must necessarily be the same; and that no others can arise. Then, again, the replevin, though in form in rem, acts in personam as to the judgment. But the libel is solely and exclusively in rem. The replevin is founded on the right of property in the thing. The libel insists upon no property, but upon a mere lien. (3) Then, again, a suit in a state court by replevin, or by an attachment under process, of the property, can never be admitted to supersede the right of a court of admiralty to proceed by a suit in rem to enforce a right against that property to whomsoever it may belong. The admiralty suit does not attempt to enter into any conflict with the state court, as to the just operation of its own process; but it merely asserts a paramount right against all persons whatever, whether claiming above or under that process. No doubt can exist, that a ship may be seized under admiralty process for a forfeiture, notwithstanding a prior replevin or attachment of the ship then pending. The same thing is true as to the lien on a ship for seamen's wages or a bottomry bond. 3. But if this objection also could be overcome, there is another entirely fatal; and that is, that the plea of a prior lis pendens applies exclusively to the case, where the plaintiff in both suits is the same, and both are commenced by himself; and not to cases, where there are cross suits by a plaintiff in one suit, who is defendant in the other. The slightest examination of the doctrines of the common law on this subject will satisfactorily establish the conclusiveness of this objection to the exception. See Bac. Abr. "Abatement," M; Sparry's Case, 5 Coke, 61; Com. Dig. "Abatement," H 24. I might add, that if the respondent had originally commenced a suit in the admiralty for the supposed tort, and afterwards for the same cause of action had sued out a replevin in the state court, upon the principles decided in the case of Dudfield v. Warden, Fitzg. 313, if applicable to our courts, the lis pendens in the admiralty could not in the state court have been urged as an objection to the replevin. In every view of the matter then, this exception is untenable.

We come, then, to the main or substantial ground of controversy upon the merits; and that is, whether there is a lien upon these goods for the freight earned. If there be, I have no doubt, that it is within the competency of the district court, as a court of admiralty, to enforce it upon the principles stated in the case of The Volunteer [supra], and what I cannot but deem the ancient and legitimate jurisdiction of the admiralty. Let us proceed at once, then, to the question of the lien. That there is generally a lien on the cargo for the freight, is not disputed; and indeed, it is equally acknowledged in the common law, and in the maritime law, as is abundantly shown in the authors cited in The Volunteer [supra]. If, then, the circumstances of the present case do not displace that lien, it must be treated as a subsisting lien. And I accede to the argument urged at the bar, that the onus probandi is on the respondent to establish a waiver, or extinguishment of the lien. Three grounds have been relied on for this purpose. 1. That by the charter-party, French, the charterer, became owner for the voyage. 2. That if not, the terms of the charter-party are repugnant to the notion of any existing lien, as the freight is not to be paid until after a contemplated delivery of the cargo to the respondent. 3. That at all events the homeward cargo is not liable for the freight due for the whole voyage; and, at most, only for the freight due on that cargo in the return voyage.

In the first place, then, was French, the charterer, upon the true interpretation of the charter-party, owner for the voyage? I shall not attempt to go over the authorities on this subject, since they are fully collected and their result stated in the case of The Volunteer [supra]; to which, therefore, I take leave generally to refer. There are two decisions, however, to which I wish especially to refer, the one English, the other American. In the case of Colvin v. Newberry, 6 Bligh, (N. S.) 189, Lord Tenterden, in moving for an affirmance of a judgment in the exchequer chamber upon the question, who is to be deemed owner for the voyage (and which judgment reversed his own in the king's bench), used the following language: "Two propositions of law are clear, as applicable to a case like the present. The first is the common case of goods shipped on board of a vessel, of which the shipment is acknowledged by a bill of lading, signed by the master, that, if the goods are not delivered the shipper has a right to maintain an action against the owner of the ship. The other proposition, which is equally clear, is this; that if the person, in whom the absolute property of the ship is vested, charters that ship to another for a particular voyage, although the absolute owner appoints the master and crew, and finds provisions, and every thing else, and is to receive from the charterer of the ship a certain sum of money for the use and hire of the ship, an action can be brought only against the person, to whom the absolute owner has chartered the ship, and who is considered the owner pro tempore, that is, during the voyage, for which the ship is chartered. In such a case the action cannot be maintained against the person, who has let out the ship on charter, namely the absolute owner." So that, according to this decision, the fact, that the absolute owner appoints the master and crew, and finds provisions for the voyage, will not alone control the other words, if there is by them a clear letting to charter of the whole ship; but the charterer will be deemed the owner for the voyage. On the other hand, the supreme court of the United States, in the case of Marcardier v. Chesapeake Ins. Co., 8 Cranch [12 U. S.] 49, where the same question arose, used the following language: "A person may be the owner for the voyage, who, by a contract with the general owner, hires the ship for the voyage, and has the exclusive possession, command, and navigation of the ship. But where the general owner retains the possession, command, and navigation of the ship, and contracts to carry a cargo on freight, the charter-party is considered as a mere affreightment, sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership." Perhaps, there is no real discrepancy between the doctrines held in each of these cases; and, with reference to the facts, each may be perfectly correct. In the former case the master was the charterer, and not the absolute owner. In the latter the master was the absolute owner, and entered into the charter-party, he being to continue master during the voyage. The charter-parties too contained very different and special provisions. In the former case, although there were no express words of demise, yet the court thought, that, upon the whole terms of the instrument, taken together, there was in effect a letting of the whole ship to the master for the voyage, notwithstanding she was to be victualled and manned at the expense of the absolute owner. But, if there be any real discrepancy between these cases, I have no difficulty, independently of my official duty, to obey the decisions of the supreme court, in saying, that I deem the American decision built upon the more solid and satisfactory distinction. I agree, that it is not indispensable, to constitute the charterer the owner for the voyage, that express terms of demise and letting of the whole ship should appear on the face of the charter-party; but that it may be gathered, as a result, from the whole stipulations in the instrument. I also agree, that the clause, that the absolute owner shall appoint the master and crew, and victual, and provision, and equip the ship during the voyage, is not of itself necessarily conclusive, that he retains the ownership during the voyage; and that the provision is controllable by other stipulations, showing a

clear intention, that the charterer shall be owner for the voyage. But I do consider such a stipulation, as very strong primâ facie evidence in favor of the absolute owner, that he is deemed to be the owner for the voyage, and that it will require very cogent circumstances to overcome it. In short, it appears to me, that, if the absolute owner does retain the possession, command, and control of the navigation of the ship during the voyage, and the master is deemed his agent, acting under his instructions for the voyage, though authorized and required to fulfil the terms of the charter-party, the absolute owner must, under such circumstances, be still deemed owner for the voyage, and be liable as such to all persons, who do not contract personally and exclusively with the charterer by a sub-contract with the latter, knowing his rights and character under the charter-party. This seems to me the natural, and, indeed, the necessary result of the doctrine stated in Marcardier v. Chesapeake Ins. Co., 8 Cranch [12 U. S.] 49, and McIntyre v. Bowne, 1 Johns. 229, and Gracie v. Palmer, 8 Wheat. [21 U. S.] 632, 633; Id. [Case No. 10,692]. The same view of this subject is taken by Mr. Chancellor Kent in his very learned Commentaries. See 3 Kent Comm. (3d Ed. 1836) pp. 137, 138, lect. 45. See, also, Abb. Shipp. (Story's Ed. 1829) p. 22, and note; Id. pp. 172–176; Christie v. Lewis, 2 Brod. & B. 410. And it stands confirmed by the decision in Taggard v. Loring, 16 Mass. 336, and in Clarkson v. Edes, 4 Cow. 478. My brother, the late Mr. Justice Washington, in his excellent opinion in the case of Gracie v. Palmer, has collected the main authorities, and commented on the true results to be deduced from them with his usual clearness and accuracy; and the supreme court on the appeal supported and approved his opinion. So that, whatever of minute differences or distinctions or discrepancies are to be found in the English cases on this subject, in America there is a general uniformity of decision upon the principles and distinctions already stated.

Let us now proceed to the consideration of the terms of the present charter-party, in order to ascertain, what is their true meaning and interpretation. If, upon comparing the various clauses, we are led to the conclusion, that it is doubtful, whether the charterer was intended to have the sole possession and control of the brig during the voyage, or to be constituted owner for the voyage, then the general owner must be deemed such; for his rights and authorities over the voyage must continue, unless displaced by some clear and determinate transfer of them. The charter-party purports to be between George P. Richardson, as agent and owner of the brig Sterling, of which one Treat was the master, and Thomas A. French; and witnesseth, that Richardson, for the consideration thereinafter mentioned, "hath letten to freight all the aforesaid brig, with the appurtenances to her belonging, for a voyage to be made from Boston to port or ports in the West Indies; from thence to the city of St. Domingo, and back to Boston, not exceeding three ports used in all, when she is to be discharged, the dangers of the seas excepted." It then proceeds to state, that Richardson covenants, that the brig shall be tight, staunch, and strong, and apparalled during the voyage; that it shall be lawful for French, his agents and factors, as well at one place as at another, to load on board of the brig a full loading of goods and merchandise, as they shall think proper, contraband goods excepted. In consideration thereof, French agrees to pay in full for freight or hire of the brig, "the sum of six hundred and fifty dollars per calendar month, payable in five days after her return to and discharge in Boston." Richardson further agrees "to pay the charge of victualling and manning the brig," and French "to pay all lighterage, port charges, and pilotage during the voyage, and to deliver said brig, on her return to Boston, to the owner aforesaid or his order." Then follows this clause: "It is understood, that one passenger in cabin the charterer has the liberty of putting in, he finding his own small stores. The charterer to load the vessel at Boston, and the owner to discharge the cargo on her return. Should any funds be required for disbursements in a foreign port, to be advanced the captain on account of the charter." The parties then bind themselves for the true and faithful performance of their covenants and agreements in the penal sum of two thousand dollars.

Such are all the material clauses in the charter-party. And it must be admitted, that they are somewhat indeterminate in their nature and character, so far as they affect the ownership for the voyage. The language in the beginning imports a present demise of the ship for the voyage. It is, that the owner lets to freight the brig for the voyage. But this does not necessarily import, that the possession is given up to, and taken by the charterer. Whether so intended, or so by operation of law, will essentially depend upon all the terms of the instrument taken together. This is very clearly established by the decisions cited by Lord Tenterden in his excellent treatise on Shipping (Abb. Shipp. pt. 3, pp. 173–178, c. 1, § 6). On the other hand, the clause of covenant by the owner (who had appointed the master,) that the ship should be tight, &c., and that he should pay for the victualling and manning during the voyage, is not necessarily decisive (as has been already intimated) the other way. The clause, that the charterer should have the liberty of putting a passenger on board in the cabin, does, indeed, favor the construction, that the owner was to retain the possession of the brig by his master during the voyage. So also the clause, that the owner should discharge the

cargo on the brig's return to Boston. On the other hand, the clause, that the charterer should deliver the brig on her return to Boston, to the owner or his order, does strongly imply, that the charterer was to have possession during the voyage up to that time. So that, from the obscurity of the phrases, and the apparent contradictory presumptions arising from these various clauses, it is really somewhat difficult to say, what was the absolute intention of the parties. And, then, upon the doctrine already stated, on the footing of the doubt what the parties did intend, the owner must be deemed to continue owner for the voyage. It is not an unimportant circumstance, also, in the actual posture of the case, that the acts of the parties under the charter-party conform to this view of the matter, and put this construction upon it. It distinctly appears, that the sole instructions for the voyage were given by the owner, and not by the charterer; and that the respondent acquiesced in what the owner assumed to be his right and duty, the giving of the orders for the whole voyage to the master, as his agent, without any interference by the charterer. But it appears to me the less necessary to decide the case on this point, because it is manifest, that the owner, and not the charterer, was to have the possession of the brig immediately on her return to Boston, and was, as owner, to discharge the cargo; and the freight was not payable until five days after such discharge. So that, in the most unfavorable aspect of the case for the owner, the possession of the brig and cargo were to be in him upon the brig's arrival at Boston, and he was to discharge the cargo. And thus his possession became coupled with his lien for the freight, if it existed, in the same way and to the same extent, as if he had had possession of both during the whole voyage.

We are, therefore, led to the consideration of the second point already stated; and that is, whether there was, under the circumstances, a lien on the homeward cargo for the freight. That there was such a lien, unless waived or displaced by the agreement of the parties, has been already affirmed; and, indeed, is upon principle, as well as upon authority, incontrovertible. The clause, in the charter-party, relied upon by the respondent as a waiver or displacement of the lien, is that, which provides, that the freight shall be paid "in five days after her (the brig's) return to and discharge in Boston." The argument of the respondent is, that, by the word "discharge," as here used, is meant, not an unlivery or unlading merely of the cargo, but a delivery of the same to the charterer, or owner of the cargo. The argument on the other side is, that by the word "discharge" is meant a mere unlading or unlivery from the brig, without any reference to a delivery to the owner. And, certainly, in a general sense, as well as in a nautical sense, the proper meaning of the word "discharge," with reference to a cargo, is to unlade it from the ship. So it will be found stated in Johnson's Dictionary, and Falconer's Marine Dictionary. The word, therefore, in its appropriate sense, being perfectly significant in the place, where it occurs, that meaning is not to be departed from, unless a different use of it is manifestly intended in the clause in question. I see no reason for any such construction. On the contrary, it seems to me, that the appropriate sense is here, as matter of intention, to be presumed from the circumstances, rather than any wider or different sense. It is well known, that the goods of the shipper may not only be detained for freight, properly so called, but also for the hire agreed to be paid by the shipper under a charter-party for the use of the ship, if the owner of the ship retains possession of the cargo; and that the shipper cannot ordinarily insist on a delivery of the goods to him, until the freight or hire is paid or secured, according to the terms of the agreement. See Abb. Shipp. pt. 3, p. 168, c. 1, § 7; Id. pp. 246, 247, c. 3. But, then, the owner is not at liberty to insist, that the goods shall not be landed before such payment or security is made. On the contrary, the shipper has a right, as it should seem, by the maritime law, to insist upon examining the goods, after they are unlivered, in order to ascertain, whether they are damaged or not, before he makes himself liable at all events for the freight. Under such circumstances, an unlivery of the cargo becomes perfectly proper; and after it is made, the owner of the ship has a right to detain it in his custody, until the payment of or security for the freight. So the law is laid down in Lord Tenterden's Treatise on Shipping (Abb. Shipp. pt. 3, pp. 247, 248, c. 3, § 11); and it appears to be the general rule adopted by foreign maritime nations. In the marine ordinance of Louis XIV. (1 Valin, lib. 3, p. 665, tit. 3, art. 21), it is expressly prescribed, that the master shall not retain the merchandise on board his vessel for default of payment of the freight. But he may, at the time of the discharge, refuse to deliver it, or cause it to be held for the freight. Valin gives, as the reason, that it would be absurd to allow the master to insist upon the payment of his freight before the goods were examined, and the damage, if any, ascertained. The modern Code of Commerce of France (lib. 2, tit. 8, art. 306) contains a provision very similar in its purport and objects. It declares, that the master shall not retain the merchandise on board of his ship for default of the payment of freight. But he may, at the time of discharging, insist upon having them deposited in the hands of a third person, until the freight is paid. The commentators give the same reason for this provision, which is assigned by Valin. See Boucher, Instit. de Droit Marit. (1803); Santayra, Code de Comm. art. 306, note; Locré, Esprit du Code

de Comm. art. 306, note (2 Lucré, p. 211); Pardessus, Droit Comm. pt. 3, tit. 4, c. 2, art. 719.

Now, I cannot but think, that the very object of the clause, that the brig should be delivered to the owner on her return to Boston, and that he should discharge her, was intended to fasten his lien for the freight or hire under the charter-party, by enabling him to discharge the cargo, and retain it, until the freight was paid. At least, this is a natural explanation of the object of the clause, which, in any other view, would seem either superfluous or of little legal importance. It is not at all improbable, that the commercial embarrassments of French were suspected at the time, when the charter-party was entered into. But, at all events, his known failure at the time, when the cargo shipped was put under the control of the respondent, and the owner's agreeing to allow the brig to go the voyage, without any farther security than that derived under the original charter-party, favor this construction, especially as it appears, from Capt. Treat's testimony, that there had been some objections made by the owner to proceeding on the voyage; and in reply to a suggestion made by the respondent, the owner said, "that there was no need of any misunderstanding; that he was willing, that the brig should go the voyage, provided they would pay him for it." This was said in the presence of the respondent, of French, and of Mansfield, the supercargo. So that the demur about proceeding on the voyage seems to have been occasioned by French's failure, and the consequent arrangements made with the respondent. It seems to me in a high degree improbable, that the difficulty about the freight could have been overcome without some collateral security, if it had not been already well understood by all the parties, that the cargo then on board was, and by the arrangements made, the homeward cargo also, would be, subject to the lien for the freight. It would be so subject, if the discharge of the cargo, referred to in the charter-party, was construed to be a mere unlading thereof, and not an unconditional delivery to the consignee or respondent. The bill of lading for the homeward voyage does, in my judgment, greatly fortify this interpretation of the understanding of the parties. By the terms of it, the homeward cargo was to be delivered at Boston, the dangers of the seas only excepted, "unto the order of the shippers or assigns, he or they paying freight for the said goods as per charter-party." By the very terms of the instrument, then, the delivery was not to be, until the freight was paid according to the provisions in the charter-party, that is to say, "in five days after (the brig's) return to and discharge in Boston." The natural interpretation of this language, taken together, is, that the shipper or his assigns will pay the freight or hire in five days after the cargo is unladen by the owner, if the latter will, at the time of the payment deliver the cargo to the shipper or his assigns. In this way, all the words in the charter-party and the bill of lading have their usual and appropriate meaning. But if "discharge" means delivery, there will be, at least, a seeming repugnancy between the two instruments. By the bill of lading, the payment of freight is to be a contemporaneous act with the delivery; but by the charter-party, it is to be five days after the delivery. I am aware, that this repugnancy may be avoided, or at least mitigated, by construing the words, that when the cargo is delivered, the payment of freight shall be in five days after such delivery. But this construction is less consonant to the just import of the words, and would defeat the right of the owner to any lien for freight; a lien, which is favored in law, and ought not to be displaced without a clear and determinate abandonment of it.

Then, as to the remaining point, to what extent the homeward cargo is liable for the freight or hire. The argument is, that the homeward cargo (if at all) is not liable for any freight beyond what accrued and is properly due from itself for the return voyage; and, therefore, the freight must be apportioned. I am of a different opinion. By this charter-party, the freight or hire was a gross sum, payable on the successful close of the whole voyage. The bill of lading declares, that the return cargo shall be delivered to the shipper or his assigns, they paying freight as per charter-party. The shipper and his assigns, therefore, agree to pay the whole freight, for the whole voyage, upon the delivery of the cargo to them, according to the terms of the bill of lading; and I am unable to see, upon what grounds they can escape the obligations of their own contract. It is common learning, that where goods are consigned to a party, he paying the freight stipulated in the bill of lading, the consignee, by receiving the goods, is bound to pay the freight; and the law charges him upon his implied promise to pay it. In this view of the matter, if there were no lien at all, still the respondent would, upon clear principles of law, be personally liable for the payment of the whole freight or hire due by the charter-party, upon his receipt of the goods, upon his implied undertaking, even if he were now to be treated as the absolute owner of them. But, so far as the transactions between him and French are disclosed, he seems to stand as a mere substitute of French, and as holding the title of the goods under him, as security for debts and liabilities incurred by him for French, and not as absolute owner; and a fortiori in such a case he is bound to pay, what French would be bound to pay, since he must accept the goods cum onere. On this account I have not been able to perceive upon what substantial grounds the respondent can rest his present defence: for if he should succeed here, he would still remain bound to pay the full freight of the voyage

upon his implied assumpsit as consignee. It would, therefore (as was said by a great judge, on another occasion), only be changing postures on an uneasy bed. It seems to me, that on this part of the case the decisions in Faith v. East India Co., 4 Barn. & Ald. 630, and Small v. Moates, 9 Bing. 574, have a very strong bearing.

Upon the whole, my opinion is, that there is a lien for the whole freight or hire, due under the charter-party, on the return cargo; and, therefore, the decree of the district court is affirmed, with costs.

CERTAIN PIECE OF LAND (UNITED STATES v.). See Case No. 14,767.

CERTAIN QUANTITY OF WHEAT (STRONG v.). See Case No. 13,541.

CERTAIN SLAVES (ALMEIDA v.). See Case No. 255.

Case No. 2,560.

CERVANTES v. UNITED STATES.

[3 Am. Law Reg. (1855) 745.]

District Court, N. D. California.[1]

MEXICAN GRANTS—VALIDITY — CONDITIONS—LIMITS OF MISSION—WITHIN LITTORAL LEAGUES.

1. A grant by the political chief for the time being of Alta California, was not invalid, though it did not receive the previous approbation of the territorial deputation. The grant conveyed a present and immediate interest, and the neglect to obtain such approbation, if it were the duty of the grantee at all, would have been only the breach of a condition subsequent, by which the title was not forfeited.

2. In the same manner, conditions in such a grant, that the grantee should build and inhabit a house within a certain time, and also obtain judicial possession of the land, are conditions subsequent; and where, in a particular case, after the time limited, the grantee actually took possession of the premises, and had lived on them and cultivated them for three years, when he obtained judicial possession, which he maintained till the time of suit, a period of twelve years, it was *held* that the title had not been forfeited.

3. It is also no objection to such a grant (made in 1836) that the lands comprehended by it were within the limits of a mission.

[See not at end of case.]

4. It is, finally, no objection to such a grant, that the land was within ten leagues of the sea-coast, and that the approbation of the supreme executive did not appear to have been obtained.

[See note at end of case.]

McALLISTER, Circuit Judge. "The board of commissioners to ascertain and settle the private land claims in the state of California," decided in favor of the validity of the claim of the appellant, from which decision the United States appealed to this court, by whom the decree of the said board of commissioners was reversed, and a decree entered declaring the claim of the present appellant to be invalid. [Case No. 14,768.] From this last decision an appeal was taken to the supreme court of the United States, by whom it has been remanded to this tribunal with instructions to permit certain amendments to be made in the pleadings. See Cervantes v. U. S., 16 How. [57 U. S.] 619. It now comes before us for decision on its merits, with the lights which have been shed upon some of the principles embodied in it by the decisions made by the supreme court in the recent cases of Freemont v. U. S. [17 How. (58 U. S.) 542], and U. S. v. Ritchie [Id. 525].

From the evidence in this cause it appears, that the appellant having complied with all the provisions of the Mexican government relating to colonization, obtained a grant from Don Nicolas Gutierrez, dated April 1st, 1836, in these words: "Nicolas Gutierrez, lieutenant colonel of the permanent cavalry, commandant general, inspector and superior political chief ad interim of the territory of Alta California. Whereas, Citizen Cruz Cervantes, a Mexican by birth, has applied, for his own benefit and that of his family, for the parcel of land known by the name of San Joaquin, bounded on the north by San Felipe, on the south by Santa Anna, on the west by the plain of San Juan, and on the east by the hills of the same name; and whereas, all the requirements of the laws and regulations in the matter have been complied with; now, by virtue of the authority in me vested, I have thought proper, by a decree of this day's date, and in the name of the Mexican nation, to grant to him the aforementioned parcel of land, declaring the same to be his property by these letters patent, subject to the approval of the excellent deputation and the following conditions: 1st. He will submit to such conditions as shall be made by the regulations hereafter to be made for the distribution of vacant lands, and that meanwhile neither the grantee nor his heirs shall divide or alienate that which is adjudicated them, nor shall they subject it to rent, entail, bond, mortgage, nor to any incumbrance whatever, even if it should be for charitable purposes, nor convey it into mortmain. 2d. He may fence it without obstructing crossings, roads, and servitudes, putting it to such use and culture as he may deem best, but within one year at farthest he shall build thereon a house and shall inhabit it. 3d. He shall solicit of the respective judge to give him judicial possession by virtue of this patent, by whom the boundaries shall be marked, at the limits of which, besides the landmarks, there shall be set some fruit trees or else wild ones of some usefulness. 4th. The land of which donation is made is of two sitios de ganado mayor (two square leagues) according to the plat annexed to the proceedings. The judge who may give possession will cause it to be measured agreeably to ordinance, leaving the excess, (sobrante) which may result to the nation for its purposes as

[1] [Affirmed in U. S. v. Cervantes, 18 How. (59 U. S.) 553.]

may be deemed convenient. 5th. If he shall contravene these conditions he shall lose his right to the land, and it may be denounced by any other person. Wherefore I command, that holding this as a firm and valid title, the same be entered in the corresponding book, and be returned to the interested party for his own security and further ends. Given in Monterey on the 1st of April, 1836. Nicolas Gutierrez. F'co del Castillo Negrete, S'rio."

The parol evidence in the cause shows that Cervantes was living on and cultivating the premises "about two years after the revolution between Governor Chico and Gutierrez." This, then, must have been some time in 1838. Another witness deposes to the appellant's living on the premises in 1846, and "that the house looked to be several years old," and the continued occupation by him and cultivation of the premises down to the present time, is established. The genuineness of the grant and all preceding documents on which it is predicated is not disputed. The objections to the claim are: 1st. That the grant had not received the approval of the territorial deputation. 2d. That a house was not built within the time prescribed by the grant, nor judicial possession applied for. 3d. That the land belonged to a mission, and could not be granted. 4th. That the lands being within ten leagues of the sea coast, were not subject to colonization.

A reference to the first and immediately succeeding articles of the general regulations of 21st November, 1828, for the colonization of Mexican territories, of which Upper California was one, will show the power of granting lands was confined to the political chiefs of those territories. True it is, that by the fifth article, it is declared that the grants made "shall not be definitely valid without the previous approbation of the departmental assembly, to which the respective expedientes shall be referred." If this article treats the grant as void until such consent shall have been obtained, then is the granting power transferred from the political chief to the territorial deputation, for it would be their approval and not his grant, which conveyed an interest in the land. But the article itself does not consider the grant void without such approval, for in case such approval is not obtained by the political chief, it is made his duty by the sixth article, "to report to the supreme government with the record of the case for its resolution." Intermediate the issuing of the grant, and the approval of the departmental assembly, and that if that could not be obtained, the promulgation of the resolution of the supreme government, the grant is declared to be not definitively valid. It is then at least inceptibly valid—but to what extent, as the regulations are silent, we must look to the grant itself, the construction placed upon it by the supreme court of the United States, and the well established usage of the country for an answer. In the case of Fremont v. U. S., 17 How. [58 U. S.] 542, and in that of U. S. v. Ritchie, Id. 525, grants similar to that under consideration were reviewed by the supreme court. That tribunal declared in the former case, that the words of such grant "were positive and plain;" they purport to "convey a present and immediate interest." Now the consent of the territorial delegation could not vary the character of the grant. Passing by its terms, a "present and immediate interest," it presents the ordinary case of an estate or interest conveyed to the grantee determinable on the happening of a future event. The usage of the country also established this interpretation of the grant. One of the witnesses in the case, E. P. Hartnell, deposes, he has resided thirty years in California, has filled the offices of inspector general to the missions, collector of the port of Monterey, translator to the military government of California, and is now state translator; is well acquainted with the usages and customs which prevailed for eleven or twelve years prior to the acquisition of the country by the Americans, in relation to the granting of lands. He states the usage was for the grantee upon receiving the governor's grant, to consider himself entitled to enter into the granted premises, and so far from having to wait for judicial possession or the approval of the deputation, "I have known, (he says,) numerous instances in which neither the one nor the other was asked for many years." He further deposes, "it was always considered the duty of the governor to do that, (to obtain the approval of the assembly,) and I know, from my own knowledge, that whilst the deputation was held at Monterey, the governor always did so. I never knew of any grantee interesting himself about getting the approval of his title, until it was rumored that the Americans were coming to take possession of the country." On his cross-examination he is equally explicit as to the usage and the general opinion of the inhabitants as to its existence. Viewed then, as the grant has been construed by the supreme court, or as it has been interpreted by the well established usage in California, during the Mexican rule, the court considers that the failure of appellant to procure the approval of the departmental assembly, if it is to be deemed his duty so to have done, was the breach of a condition subsequent, for which the title of appellant cannot be forfeited.

The omission of appellant to build a house within the time prescribed by the grant, and to obtain judicial possession of the land, are clearly conditions subsequent. It has been urged, that the eleventh article of the general regulations declares the grant to be "null and void," in case of a failure to occupy and cultivate. But this section applies exclusively to pobladores, (settlers or colonists,) who shall have failed to cultivate the lands on the

terms and with the number of persons or families agreed on. In such cases only, is the grant declared "null and void," and even in such cases the political chief is authorized to confirm the same in proportion to the part of the agreement fulfilled. The conditions then, to build a house within the time prescribed by the grant, and to obtain judicial possession of the premises being conditions subsequent, the breach of both or either of them cannot operate, under the facts of the case, a forfeiture of appellant's title. Arredondo's Case, 6 Pet. [31 U. S.] 729; Fremont v. U. S., 17 How. [58 U. S.] 542.

The third objection to the validity of this claim is, that the lands granted were what are generally termed "Mission lands," and therefore not subject to colonization. This objection we deem to have been disposed of by the supreme court, U. S., in the case of U. S. v. Ritchie, 17 How. [58 U. S.] 525, in which it was decided not to be available.

The last ground taken against the appellant is, that the lands granted to him are situated within ten leagues of the sea shore, and therefore not the subject of grant without the previous approbation of the supreme executive power. "The principle, (say the supreme court,) which prevails as to all public grants of land, or acts of public officers in issuing warrants, &c., is, that the public acts of public officers, purporting to be exercised in an official capacity and by public authority, shall not be presumed to be a usurped, but a legitimate authority previously given, or subsequently ratified, which is equivalent." It is a universal principle, where power or jurisdiction "is delegated to any public officer or tribunal, over a subject matter, and the exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject matter." Arredondo's Case, 6 Pet. [31 U. S.] 729. In U. S. v. Clarke, 8 Pet. [33 U. S.] 453, the court say, "He who would contravene a grant executed by the lawful authority, with all the solemnities required by law, takes upon himself the burthen of showing that the officer has transcended the powers conferred upon him, or that the transaction is tainted with fraud." The principle under consideration, was extended to a case where a grant was issued by a governor of East Florida, reciting a royal ordinance which authorized the issuing of grants to foreigners, for the consideration therein mentioned; but the grant proceeded to concede lands to a citizen, for a consideration totally different from that mentioned in the ordinance. The court in such case, say, "although the order is recited, it (the grant,) does not profess to be founded upon it." This is apparent, (the court say,) from the fact that the land is granted to a citizen, and for a consideration entirely different from that mentioned in the ordinance, and although the ordinance is recited in the grant. the court proceed to predicate the power to make it upon the decree made by the governor on 3d April preceding. To sustain his power to make such decree and grant, they enter into a general consideration of the Spanish laws, and after enunciating the general principle, "that a grant made by a governor, if authorized to grant lands in his province, is prima facie evidence that his power is not exceeded," they state that the connection between the crown and the governor justifies the presumption that he acts according to his orders. His orders are "known to himself and to those from whom they proceed, but may not be known to the world. Such a grant, under a general power, would be considered as valid, even if the power to disavow it existed, until actually disavowed. It can scarcely be doubted, that in a Spanish tribunal, a grant having all the forms and sanctions required by law, not actually annulled by superior authority, would be received as evidence of title." 8 Pet. [33 U. S.] 451. We do not consider the relative position between the king and a governor, under the Spanish rule, unlike that which existed between the executive and the territorial chief, under the Mexican régime, as to absolutism on the one hand, and dependence on the other. It is upon such presumed relation, the supreme court rests its argument to some extent in the case cited, and sustains the grant. Now the argument against the validity of appellant's grant is, that the lands covered by it are within ten leagues of the sea coast, and without the previous approbation of the supreme executive power of Mexico, could not be granted. The general power to grant is not denied; but it is asserted that these specific lands were excepted from the granting power; and the 4th article of the colonization law of the 18th August, 1824, is relied on. For the present it may be admitted, that such is the clear import of that article, and the first reply to it is, that four years subsequently, in the year 1828, the supreme executive power did give its approbation as required. The act of 1824 did not express the form in which such consent was to be given. That was left to the discretion of the executive.

In 1828 the general regulations for the colonization of the territories of the republic were announced by the supreme executive power. By the first article the power to "grant vacant lands generally within their respective territories," was delegated to the political chief. There is no limitation in terms as to vacant lands, within ten leagues of the sea coast; but there is a reference to a class of lands, a portion of which is well known to lie within the ten littoral leagues, and that reference is to be found in the 17th article, where it is provided that mission lands are not to be colonized, not because of their vicinity to the coast, but because it was yet to be determined by the government whether they

were to be considered the property of neophytes, catechumens, and of Mexican settlers. It is natural to suppose, that in the settlement of a new country, with a savage foe in the interior, with the ecclesiastical and military establishments on the coast, and a sparse population struggling into existence, that the lands first petitioned for, should be those immediately on the coast, affording safety from hostile attacks in the rear, and in front the means of escape in the hour of necessity. In truth the very object of the law, (the settlement of families and cultivation of the soil,) could only be effected by primarily reclaiming the frontier lands on the coast. Accordingly, the political chiefs—not one, but all—proceeded, to grant vacant lands without distinction. It has been well argued by the board of commissioners in this case, "that one political chief or governor, might have erred in the matter through ignorance, or from some improper motive, and so of one body of the deputation or junta; but that all should have done so through a series of years, and successions of terms, it is difficult to believe; and the evidence of this construction is heightened to the highest degree of moral and legal certainty by the acquiescence of the executive, after we must presume he had knowledge of this construction of his regulations, and never intimating, as far as we can learn, that there was any error in this uniform course of proceeding. His knowledge of all this is a presumption of law, from the requirement of quarterly returns to be made to him of all the grants that were made and the facts relating to them" (9th article, general regulation, 1828). In this case there was no fraud on part of appellant; no mistake on the part of the political chief. The former, in his first petition for a grant, gives the boundaries of the land, and in his second reiterates them, accompanying such petition with a map; and the proper functionary to whom the petition was referred, reported the land to be within the ten littoral leagues mentioned in the law of August 18th, 1824, and the report concludes "that the land may be granted to petitioner if the mission of San Juan Bautista, to whom it belongs has no objection." In face of the fact that the lands proposed to be granted were reported by the appropriate functionary to be within the ten littoral leagues, the governor proceeded to grant them. All other political chiefs before and since his time have exercised like power. All the Mexican functionaries recognized it—the most valuable portions of land were granted under its exercise, and the people of the territories acted upon it. Property conveyed under it passed from one to another by operation of law, and by act of the parties for years—all acted upon the belief of the right of the governors to grant, and of the correctness of the interpretation placed by them on the regulations. The usage and custom was well established, and the community to a considerable extent was built up under its operation. The supreme court have said "there is another source of law in all governments:—usage, custom, which is always to be presumed to have been adopted with the consent of those who may be affected by it. The court not only may, but are bound to respect general customs and usages as the law of the land equally with the written law, and when clearly proved they will control the general law." "We cannot impute to congress the intention to not only authorize this court, but to require it, to take jurisdiction of such a case, and to hear and determine such a claim according to the principles of justice, by such a solemn mockery of it as would be evinced by excluding from our consideration, usages and customs, which are the law of every government, for no other reason than in referring to the laws and ordinances in the second section, congress had not enumerated all the kinds of laws and ordinances by which we should decide whether the claim would be valid if the province had remained under the dominion of Spain." Arredondo's Case [supra]. This court consider that the exception sought to be established in this case to the general power of granting by the political chiefs, is not clearly made out against the legal presumption which exists in favor of a grant on a fair interpretation of the phraseology of the general regulations of 1828, and the well established usage of the Mexican local authorities, acquiesced in for a series of years by the supreme executive power. Opposed to all these, is a verbal criticism upon two articles of the regulations of 1828, in connection with the 4th article of the colonization act of Mexico, 18th August, 1824. The first act of the regulations, it is argued, authorizes the political chiefs to grant only in conformity to the act of the 18th August, 1824, and the third article directs the political chiefs to ascertain whether the requirements of that act are embraced in the petition, and whether the petitioner, as well as the land, possess the requisite conditions. Now, the act of colonization contained general provisions, which were designed to control the new system Mexico had recently adopted, and doubtless the general regulations of 1828 were intended to carry out the policy of that act. Among other provisions, it extended to all colonists certain guaranties—restricted the quantity of lands to be held by one person, directed certain distinctions to be made in the selection of grantees, and reserved to the government the right to take precautions, in certain cases against foreigners. The reference to that act by the regulations of 1828, may be regarded as simply adopting its general policy. The direction in the third act of the general regulations to the political chiefs to ascertain if the requirements of the law were embraced in the petition, and the persons as well as the land, possessed

the requisite conditions, are but a repetition of the words in the first article, with the additional direction that he should ascertain if the persons who petitioned, if foreigners, applied with a view to settle in the country —if citizens, to live on and cultivate the soil, and that the land petitioned for was "vacant," such being requisite conditions of persons and land coming within the purview of the regulations themselves. But if this interpretation be deemed equivocal, and not a clear exposition of the intention to be gathered from the colonization act of 1824, and the general regulations of 1828, we consider there is such doubt on this point, that it cannot be successfully urged to defeat the claim of the appellant acquired under the interpretation of the granting power by all the political chiefs and lesser functionaries of the Mexican government, acquiesced in for years by the supreme executive power sanctioned by well established usage, and had thus become a rule of property under which large amounts of property have been acquired, held, and transferred during the existence of Mexican rule in California.

It has been strongly argued by counsel for the appellant that the colonization act of 1824 applies exclusively to foreign colonists, and is applicable to the states only, and does not extend to the territories of the republic. In the view taken of this case, it is deemed unnecessary to discuss these questions.

In this case the evidence clearly establishes the fact that at no time did the appellant abandon his claim. Within two years after receiving his grant he took actual possession of the premises, and lived on and cultivated them until 1841, when the Mexican authorities placed him in judical possession, which he maintained until the acquisition of Mexico by that country. It is true he did not attain judicial possession until some five years after the date of his grant, but subsequently in 1841 he did obtain from the authorities such possession and has continued to hold under it to the present time. Under these circumstances, we consider that his claim is to be held valid by the rules prescribed for our guidance in the adjudication of this and similar cases.

It is therefore hereby ordered, adjudged and decreed that the decision and decree of the board of commissioners for the ascertainment and settlement of private land claims in California made in this case be confirmed, and that the claim of the appellant, Cruz Cervantes, be, and the same is hereby confirmed to the extent of two square leagues or sitios de ganado mayor, and for no more; being the same land described in the grant and expediente referred to therein, and of which judicial possession was given to him as appears by the evidence, provided that the said quantity to him granted, and now to him confirmed, be contained within the boundaries called for in said grant, and map to which the grant refers; and, if there be less than two square leagues, or sitios de ganado mayor, within the said bounds then there is confirmed to him the said less quantity.

[NOTE. The United States appealed from the decree of the circuit court to the supreme court, where the decree below was affirmed on the grounds, as appears from the opinion delivered by Mr. Justice Grier, that under the decision in U. S. v. Reading, 18 How. (59 U. S.) 1, the objection that the grant had not been approved by the departmental assembly was untenable, as was likewise the objection that the land was within the 10 littoral leagues,—that restriction applying to foreign colonists, and not to Mexican citizens,—following U. S. v. Arquello, 18 How. (59 U. S.) 539; also, that the tracts appurtenant to missions never vested in the church or any one else by legal title, and that the lands, though formerly occupied by a mission, were not so occupied when the grant was made, the grant having been made with the assent of the mission, which set up no further claim to occupancy; therefore, that the 17th section of the regulations of 1828, forbidding the grant of lands "occupied" by missions for colonization, could have no application to unoccupied lands not made the subject of colonization. U. S. v. Cervantes, 18 How. (59 U. S.) 553.]

CERVANTES (UNITED STATES v.). See Case No. 14,768.

Case No. 2,561.

The C. F. ACKERMAN.

Circuit Court, E. D. New York. 1877.[1]

[Nowhere reported; opinion not now accessible. For an opinion in this case subsequent to the affirmance of the decree of the district court, see Case No. 2,564.]

Case No. 2,562.

The C. F. ACKERMAN.

[8 Ben. 496.][2]

District Court, E. D. New York. July, 1876.[3]

DAMAGES—TUG AND TOW—SALVAGE AWARD.

Where a tug towed a vessel aground and she was compelled to pay salvage to another tug to haul her off: *Held*, that the facts proved showing carelessness on the part of the tug, as the cause of the grounding, the vessel was entitled to recover from her as damages the salvage ordered by the court to be paid to the tug that drew the vessel off.

[Cited in Greenwood v. The Fletcher, 42 Fed. 504.]

In admiralty. This was an action brought by the owners of the brig Homely to recover as damages a sum the Homely was ordered to pay as salvage. See the case of The Homely [Case No. 6661].

Scudder & Carter, for libellant.

Butler, Stillman & Hubbard, for claimant.

[1] [Affirming Case No. 2,562.]

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

[3] [Affirmed in Case No. 2,561.]

BENEDICT, District Judge. This action is brought by the owners of the brig Homely, to recover of the tug C. F. Ackerman the damages arising from failure to perform a contract to tow the brig from sea into the port of New York. The evidence shows an employment of the tug and that she took the brig in tow upon a hawser; that shortly after passing the Hook, the brig, while in the tow of the Ackerman and following her, brought up upon the tail of the Romer shoal, whence the Ackerman was unable to pull her off that evening. On the next morning the tug Weed and the Ackerman, together, made fast to the brig and towed her off the shoal. For the Weed's share of that service the brig has been condemned by this court to pay the sum of $625.

The question in this action is whether the Ackerman is liable for this sum to the brig. I am of the opinion that she is liable, and for these reasons: It is quite plain, from the evidence, that the pilot, the master of the brig, and the master of the tug understood that, subject to the general instruction given by the pilot to keep her in deep water, as she drew 14 feet, the knowledge and skill of the tug was relied upon to keep the brig in the proper channel. The averment of the answer is, that a course by compass was given by the pilot; but the testimony, when fairly considered, does not support the averment. The amount of water the brig drew was given, with a direction to keep her in deep water. As to the general direction of the course, there was no choice and it was as well known to the tug as to the pilot. Knowledge on the part of the tug of where the water was deep enough to float a vessel drawing 14 feet, and ability to keep in such a channel, was taken for granted by all. So the tug proceeded, as she herself says, without any instructions as to the course, after the tug's hawser was taken at such a distance that it was not possible for the pilot of the brig to direct her course, and in water selected as a proper channel for a vessel drawing 14 feet. The brig followed behind the tug, and while so following in the course selected by the tug, she grounded. No one was on the stern of the tug to receive orders from the pilot on board the brig. No orders from the brig were given, and it is plain that no orders from the pilot were expected to be given or received. The tug was, therefore, bound to exercise care and skill in selecting a course which the brig could follow in safety, performing the duty she had undertaken and was bound to take. There is no doubt that care and skill on the part of the tug would have carried the brig into the harbor in safety, for the weather was still, the position of the vessels and shoals was known, the depth of water the brig was drawing was also known, and no reason, except carelessness on the part of the tug, can be assigned for the brig going upon the shoal. This carelessness renders her liable for damage resulting, and such damage is the sum necessary to get her off the shoal, namely $625, for which sum the libellants are entitled to a decree.

[NOTE. The claimant of the C. F. Ackerman subsequently appealed to the circuit court, where the decree herein was affirmed. Case unreported.

[For decision granting a motion for summary judgment against Erick P. Lindahl, who, with Thomas Kenny, deceased, was a stipulator for the release of the C. F. Ackerman, see Case No. 2,564.]

Case No. 2,563.

The C. F. ACKERMAN.

The PALESTINE.

[9 Ben. 179.][1]

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

COLLISION IN LONG ISLAND SOUND—SAILING VESSEL AND STEAMER.

Where a schooner, the P., closehauled on a N. N. W. breeze, met a tug, the C. F. A., with three barges in tow, nearly head on, and keeping her course came in collision with the tow: *Held*, that the facts proved showed the tug to have been unable to change her course as required by rule 20 of the navigation rules (Rev. St. § 4233), but that she was in fault for not making known such inability to the schooner by the hoisting two vertical lights as required by rule 24.

[Cited in The Rose Culkin, 52 Fed. 330.]

In admiralty.

Owen & Gray, for the schooner.

John J. Allen, for the steam tug.

BENEDICT, District Judge. These are cross-actions brought to recover the damages caused by a collision that occurred in Long Island Sound on the 31st of November, 1876, between the schooner Palestine and a tow.

The schooner was bound to the westward closehauled upon a north northwest wind. The tow was bound to the eastward, and consisted of the tug C. F. Ackerman with three heavily-loaded barges in tow astern. The allegation on the part of the schooner is that she held her course, and the tug failed to keep out of her way, as she was bound to do. The allegation on the part of the tug is that the schooner did not keep her course, but, when near the tug, luffed up, and by this change of course caused the collision. The evidence does not sustain the charge that the collision was caused by the schooner's luffing. On the contrary, the proof is that the schooner held her course until just before the collision. On the proof without regard to the pleadings it might be found that these vessels were approaching nearly head on, so that a collision could only be avoided by one or the other giving way; and perhaps also found that the capacity of the tug to give way, hampered as she

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

was by three heavy barges in tow astern, and moving at a very low rate of speed, was far inferior to that of the schooner close-hauled, so that it was impossible for her to move herself and tow out of the way of an approaching vessel within any reasonable time. If such were the courses and situations of the two vessels, according to the principle of the maritime law lying at the foundation of the rules of navigation, the duty of avoiding the collision attached to the one able to do it, which in the case supposed would be the sailing vessel, as she could fall off, and not to the tug that could change neither way. But it must be noticed that the courts are now called on to apply a statute to cases of collision in this locality, and that by rule 20 of the navigation rules (Rev. St. § 4233), when proceeding in opposite directions so as to involve risks of collision, the duty of avoiding a sailing vessel is cast upon the steam vessel, in all cases, subject only to rule 24. Whether rule 24 could be resorted to in a proper case, to cast upon a sailing vessel in the open sound the obligation to avoid a steam vessel seen approaching, need not be decided here, because it is certain that, if the condition of the tug was such by reason of her tow as to render it impossible for her to discharge what, under ordinary circumstances, is the duty of the steam vessel, and entitled her by virtue of rule 24 to call upon approaching sailing vessels to perform the extraordinary duty of altering their courses to avoid her, it was manifestly great neglect on the part of the tug not to disclose her condition to approaching vessels, by displaying the two masthead vertical lights required by rule 4 to be displayed by steam vessels when towing other vessels. That the tug did not display such lights is proved, and the absence of such lights would cast upon her the responsibility of the collision, even were the case to be that I have supposed, instead of that stated in the pleadings.

The libel against the tug is therefore maintained, and the libel against the schooner is dismissed, with costs.

Case No. 2,564.

The C. F. ACKERMAN.

[14 Blatchf. 360.] [1]

Circuit Court, E. D. New York. Dec. 21, 1877.

ADMIRALTY PRACTICE—SUMMARY JUDGMENT AGAINST SURVIVING STIPULATOR.

In a suit in rem against a vessel, brought in the district court, the vessel was discharged from custody, in that court, on a stipulation for value. On appeal, a decree was rendered by the circuit court for the libellant, with a direction that the two stipulators for value pay into that court the amount of such stipulation. One of the stipulators having died, the libellant applied for the entry of a summary judgment against the other stipulator, for the amount of the decree, and for execution against him. It was objected, that the libellant had not exhausted his remedy against the claimant of the vessel, and that the death of the one stipulator defeated the right of the libellant to execution against the survivor: *Held*, that the application must be granted.

[In admiralty. Libel by the owners of the brig Homely to recover of the C. F. Ackerman damages arising from a breach of contract of towage. There was a decree for libellants in the district court (Case No. 2,562), and the claimants appealed, to the circuit court, where its decree was affirmed (case unreported). The libellants now seek a summary judgment against the stipulators in the district court.]

Scudder & Carter, for libellants.

Butler, Stillman & Hubbard, for claimants.

BENEDICT, District Judge. This is a proceeding in rem, which has been carried by appeal from the district to the circuit court, and there decided in favor of the libellants. While the case was in the district court, the vessel was discharged from custody, upon a stipulation for value, which stipulation, accordingly, took the place of the vessel. Upon the determination of the case in the circuit court, it was there ordered, adjudged and decreed, that, in pursuance of the terms of the stipulation for value herein, given on the discharge of said steam tug from custody herein, Thomas Kenny and Erick P. Lindahl, the stipulators named therein, pay into this court the amount of their stipulation, and that the libellants have execution to enforce this decree. The libellants, now, upon proof of failure to pay the decree and of non-performance of the stipulation, upon due notice, ask for a summary judgment against Erick P. Lindahl, one of the stipulators for value, for the amount of the decree, and for execution against him to collect the amount. In opposition to the motion Lindahl appears and objects, upon the ground, that it does not appear that the libellants have exhausted their remedy against the claimants. The answer to the objection is, that the proceeding is in rem, and the libellants' right to proceed against the stipulators, upon the stipulation for value, became perfect upon the rendition of the decree. The stipulation for value represents the vessel, and the stipulators, by reason of their stipulation, are liable to a summary judgment against them, without other proceedings had, and without regard to the solvency of the claimants, or to any liability of the claimants, by reason of their intervention, if any such liability exists.

The only other question presented is, whether the death of one of the stipulators for value defeats the right of the libellants to execution against the survivor. It is to be observed, that, although the order of the circuit court does not, in terms, direct the entry of a summary judgment against the

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

stipulators, it adjudges the stipulators liable to pay the amount awarded to the libellants, and authorizes execution to issue against them, in case of default. This order supposes authority to enter a summary judgment upon proof of non-compliance with the stipulation, and, such proof being made, requires the entry of judgment and the issuing of execution thereon. The right to give summary judgment upon a stipulation in admiralty has been long recognized, not only by the district courts, but also by the circuit courts, where such judgments have often been entered. It has also been recognized by the supreme court of the United States. This right appears to be expressly conferred, in actions in personam, by admiralty rules 3 and 4, of the supreme court, and the right to such a judgment, in actions in rem, is given by rule 66 of the district court of this district, under which rule the stipulation in question was taken. To the same effect is rule 144 of the district court for the southern district of New York, where that rule has been in existence and acted upon for many years. I do not doubt, therefore, the power of this court to direct the entry of a summary judgment upon the stipulation for value given in this case, against the surviving stipulator, who, by the terms of the stipulation, has made himself liable to pay the full amount of the decree. It is no answer to the engagement of such a stipulation, for him to say that another person, at one time bound with him, is now dead. What might be the libellants' rights against the estate of the deceased stipulator need not be considered, as the present application is only for a judgment and decree against the surviving stipulator.

The motion is granted.

Case No. 2,565.

The C. F. STARIN.

[10 Ben. 494.] [1]

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

COLLISION IN EAST RIVER—DAMAGE WHILE IN SINKING CONDITION.

Where a ferry-boat, already in sinking condition from collision with another boat, in attempting to go into her dock, came in collision with a canal boat in tow of a tug, and afterwards sank: *Held*, that as the sinking condition of the ferry-boat was an inevitable result of the first collision, and the loss which resulted was not increased by the second collision, the question whether the tug or the ferry-boat was in fault was immaterial.

In admiralty.

W. W. Goodrich, for libellant.
Peter Cantine, for claimant.

BENEDICT, District Judge. The evidence shows that the steamboat Stevens having been damaged in a collision with the John Cooker and her tow, left the Annex dock at Brooklyn, leaking badly, for the purpose of getting to a place of safety, if possible, and if not, to the beach of the Jersey shore or Governor's Island. After she was in the stream it was found that her pumps could not keep her free, and that she would necessarily sink, and accordingly she turned to get to a dock. In the effort to reach the dock she came in collision with a canal boat in tow of the propeller Charles F. Starin; she was in a sinking condition at the time. The injury she had already received in the collision with the John Cooker was of so serious a character as to render it impossible to keep her afloat. While it may doubtless be true that some wood was broken, and perhaps the leak increased by the collision with the canal boat in tow of the Starin, that collision did not prevent her from reaching the docks, nor materially increase the libellant's loss. His loss would have been precisely the same, if there had been no second collision, for his boat would have been sunk just as she did sink. Under such circumstances the libellant can recover nothing of the Starin, and the question whether the second collision was caused by the fault of the Starin or of the Stevens becomes an immaterial one. The libel is accordingly dismissed, with costs.

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

CHABOLLA (LE ROY v.). See Case No. 8,267.

Case No. 2,566.

CHABOLLA v. UNITED STATES.

[Hoff. Land Cas. 130.] [1]

District Court, N. D. California. Dec. Term, 1855.

MEXICAN LAND GRANTS—VALIDITY.

This claim must be confirmed under the ruling of the supreme court in Fremont's Case [Fremont v. U. S., 17 How. (58 U. S.) 542.]

Claim [of the heirs of Anastasio Chabolla] for eight leagues of land [called the Rancho Saujon de los Moquelemes], in San Joaquin county, rejected by the board, and appealed by claimants.

A. P. Crittenden, for appellants.
S. W. Inge, U. S. Atty.

HOFFMAN, District Judge. The grantee in this case, on the seventeenth of May, 1843, addressed a petition to the governor, representing that he had, some sixteen months previously, applied for a grant of land designated on a map, which he inclosed. This application, he stated, had been referred to General Sutter and the juzgado of the pueblo, but had been wholly neglected by them; and that in the meantime grants had been

[1] [Reported by Hon. Ogden Hoffman, District Judge, and here reprinted by permission.]

made to Gulnac and other foreigners, less entitled than himself to favorable consideration. He therefore prayed the governor to make him the concession as originally solicited. The governor made the usual marginal decree or order of reference for information, and the juzgado of the pueblo of San José and the secretary, Jimeno, reported favorably to Chabolla's application. On the twenty-fourth of January, 1844, the governor made his decree of concession, granting to Chabolla "eight sitios of gañado mayor on the borders of the river Cosumnes southward, and on that of the San Joaquin," the possession to be measured two leagues on the bank of the river San Joaquin and the rest in the plain running to the east. The documento or title delivered to the grantee corresponds with the decree of concession, and the fourth condition states that the land is eight leagues in extent, to be measured as above mentioned, and according to the diseño. The foregoing facts appear in the expediente on file in the archives, and in the title produced by the party, the signatures to which are duly proved. No approval by the departmental assembly appears to have been obtained, nor was juridical possession of the land given to the grantee. The usual condition of cultivation and habitation was annexed to the grant, and the question arises in this as in the Case of Fremont, "whether there has been such unreasonable delay or want of effort on the part of the grantee to fulfill the conditions as will justify the presumption that he had abandoned his claim, and is now seeking to resume it from the enhanced value of the land." [Fremont v. U. S.] 17 How. [58 U. S.] 561.

The grant was issued in January, 1844. By the deposition of Antonio M. Pico it appears that in 1846 or 1847, there were upon the rancho three hundred head of cattle and forty or fifty horses belonging to Chabolla; there was also at that time a house on the place, in which an overseer lived, with Indian servants, and corrals had been built and land put under cultivation. The witness states that he believes the cattle had been taken to the rancho from San José in 1844. Henry J. Bee, a witness whose testimony was taken in this court, states that he saw Chabolla on his place in 1846; that he was then building a house; and that in 1845 he saw him driving cattle up there. The witness visited the rancho in 1848. A house had then been built. Sulinas, the steward of Chabolla was living there, and there were cattle and horses upon the rancho bearing Chabolla's brand. The witness adds that in 1845 he did not go to the place where in 1846 he saw the house. George F. Wyman, whose testimony has also been taken since the case was appealed, states that in 1844 he saw a man named Sulinas building a house on the rancho for Chabolla, as he said. The house was situated on the south side of the Cosumnes river. The witness also states that he was again on the rancho in 1845, and from time to time for three or four years, and that in 1848 he lived several months in Chabolla's house. In 1845 he saw cattle and horses there marked with Chabolla's brand; and in 1846–7 there were some twenty acres of land inclosed by a ditch, dug by Sulinas, who cultivated wheat, barley, etc., within the inclosure. No opposing testimony has been taken on the part of the United States. Under the facts as disclosed by these witnesses it is evident that the claimant has not only not been guilty of such a breach of the conditions as would justify the presumption that he had abandoned his claim, but on the contrary he seems to have proceeded to settle upon and cultivate his land with a diligence by no means usual with the grantees under the Mexican government. I think, therefore, that under the rules laid down by the supreme court in the case of Fremont, the objection that the conditions were not fulfilled cannot be maintained. This claim was rejected by the board for the nonfulfillment of the conditions; but one of the commissioners appears to have concurred in the decision on the ground that no proof was offered to show that the present claimants are the heirs and representatives of Chabolla, who is deceased. That objection, whatever force it may have had, is obviated by the testimony of Antonio Chabolla, a brother of the grantee, taken in this court.

The cause has been submitted without argument on the part of the United States, or the statement of any objection to the claim, except a reference to the opinion of the board as containing the grounds on which the United States rely for the rejection of the claim. It is not mentioned in the opinion of the board, or suggested on the part of the United States, that there is any difficulty as to locating the land. The grant mentions that the land is situated on the borders of the Cosumnes southward, and on those of the San Joaquin, measuring two leagues on the latter river, and the remainder of the tract on the plain to the east. The description of the land in the grant delivered to the party, in one respect differs from that contained in the decree of concession. In the former, the land is described as lying in the plain to the west of the San Joaquin. But this is evidently a clerical error, for the map of the country shows that the plain out of which the land could alone be taken lies to the east of the San Joaquin, the land to the west being a broad belt of marshy land covered with tule, and if located to the west, the grant would not touch the Cosumnes, on the borders of which to the south it is described as situated.

A decree of confirmation of the claim, to the extent of eight leagues, to be located and measured as set forth in the expediente, must therefore be entered.

Case No. 2,567.

CHABOT v. AMERICAN BUTTON-HOLE & OVERSEAMING CO.

[6 Fish. Pat. Cas. 71;[1] 9 Phila. 378; 5 Chi. Leg. News, 75; 29 Leg. Int. 348; 16 Int. Rev. Rec. 164; 7 Am. Law Rev. 382; 4 Leg. Gaz. 345.]

Circuit Court, E. D. Pennsylvania. Oct., 1872.

PATENTS—LICENSE—CONSTRUCTION OF CONTRACT.

1. Complainant, while in the employ of defendant, conducted experiments in defendant's factory, and at its expense, which resulted in the production of the devices on which complainant afterward obtained a patent; but previous to his application he contracted with defendant to make for it, at a fixed price, five thousand machines equal to a specimen, selected as a standard, which contained the devices afterward patented—complainant to use defendant's factory, power, machinery, and materials, and any machinery or tools made or bought by complainant, at his own cost, for the purpose of facilitating the fulfillment of the contract, at the close thereof, to be the property of defendant at a price to be adjusted according to the terms of the contract. The contract having been executed, and complainant having meanwhile obtained his patent, upon a suit brought by complainant to restrain defendant as an infringer: *Held*—That under the rule laid down in McClurg v. Kingsland, 1 How. [42 U. S.] 202, the facts are sufficient to justify the presumption of a license to the defendant to make and use complainant's invention, and that this presumption is strengthened by the terms of the written contract.

[Cited in Wade v. Metcalf, 16 Fed. 132; Keller v. Stolzenbach, 20 Fed. 49; Herman v. Herman, 29 Fed. 94; American Paper-Bag Co. v. Van Nortwick, 3 C. C. A. 274, 52 Fed. 757.]

2. The chief, if not the only value of a portion of the tools, which by stipulation defendant was to purchase at the termination of the contract, consisting in their special adaptation to the production of complainant's patented devices: Quaere, whether this stipulation did not import an understanding on both sides, that the defendant might employ their tools for the uses for which they were peculiarly adapted.

In equity. Final hearing on pleadings and proofs. Suit brought [by Cyprien Chabot] on letters patent [No. 77,715] for an "improvement in sewing-machines" granted to Cyprien Chabot, March 12, 1868.

Hector T. Fenton and Furman Sheppard, for complainant.

Chas. B. Collier and Theodore Cuyler, for defendant.

McKENNAN, Circuit Judge. The decision of this cause turns upon the applicability of a rule at law, settled by the highest authority, to the facts presented in the proofs. The defendant is a corporation, and has been for a number of years engaged in the manufacture and sale of sewing-machines. In 1866, the complainant went into the service of the defendant, as foreman. During that period of his employment, he was engaged in experiments with the tools and materials of his employer, which resulted in the production of the devices for which he obtained a patent on May 12, 1868, in pursuance of an application dated January 27, 1868. After he had invented these devices, and while he was in the service of the defendant, between October, 1866, and August, 1867, he made a number of sewing-machines for it, which embodied his subsequently-patented improvements. For his services during this period, he was fully compensated. On September 30, 1867, he entered into a written contract with the defendant, by which he stipulated to make for it, at a fixed price, not less than five thousand of its machines, known as the combination button-hole and sewing machines, to be in all respects equal to a specimen selected as a standard. This specimen machine had in it the devices for which the complainant afterward obtained a patent. The contract also provided for the free use, by the complainant, of the defendant's factory, machinery, and tools, and for the supply, by the defendant, of power, light, and all the materials necessary to be used in making these machines. It also provided that any machinery or tools bought or made by the complainant, partly or wholly at his own cost, for the purpose of facilitating the fulfillment of the contract, should, at the close thereof, be the property of the defendant, and be paid for at a price to be adjusted according to the terms of the contract. This contract seems to have been fully executed on both sides, and the relations established by it to have been terminated by the mutual consent of the parties.

Now the question is, do these facts amount to a "consent and allowance" by the complainant of the use of his invention by the defendant? In McClurg v. Kingsland, 1 How. [42 U. S.] 202, where the patentee was in the employment of the defendants, at a weekly compensation, and while so employed made experiments at their expense, which resulted in the discovery of an improved method of casting iron rollers, where he continued to use his new method in making rollers for them for four months, at increased wages, before he applied for a patent, proposed to the defendants to purchase his right and take out a patent, which they declined, and made no demand on them for thus using his improvement, nor gave them any notice not to use it, until a misunderstanding occurred between them, it was held that these facts "would fully justify the presumption of a license, a special privilege or grant to the defendants, to use the invention; that the facts amounted to a 'consent and allowance of such use,' and show such consideration as would support an express license or grant, or call for the presumption of one to meet the justice of the case, by exempting them from liability."

Now, it seems to me that the facts in this case call more imperatively for the presumption of a license than in McClurg v. Kingsland [supra]. The complainant's experi-

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

ments were carried on in the defendant's factory, and at its expense, and while he was in its employment, in an advanced position. After he had brought them to a successful issue, he incorporated his new devices in machines which were constructed under his superintendence in the defendant's factory, and so he continued to do, for more than four months, until he made them their contract before referred to. If the rule stated in McClurg v. Kingsland is to be followed, these facts are sufficient to justify the presumption of a license to the defendant, to make and use complainant's invention. But that presumption is strengthened by the terms of the written contract. It provided for the manufacture of a large number of machines by the use of the defendant's factory, machinery, tools, and materials—the labor expended upon them and the complainant's services alone being supplied by him; and for these his compensation was fixed by the contract. These machines were intended to be, and were actually sold and distributed throughout the country as the defendant's machines. Whatever degree of popular favor might be secured for them as the result of their peculiar features of construction and operation, it is obvious that this was the expected source of profit to the defendant, and the inducing motive on its part to enter into the contract. When they had been introduced into general use by the defendant's efforts, were known distinctly as its machinery, and a growing market for them had been established, it is not a fair inference that the parties intended that the advantage thus gained by the defendant should be lost, when the number of machines contemplated by the written contract should be supplied. On the contrary, it was stipulated that the machinery and tools, bought or made by the complainant, should, at the termination of the contract, become the property of the defendant, upon payment to him of their value ascertained in the method provided for. The chief, if not the only value of a portion of these tools, consisted in their special adaptation to the production of the complainant's patented devices. Without the right to use them, there is no apparent reason why provision should be made for their transfer to the defendant, for a price measured by their real value. Does not this stipulation then, import an understanding on both sides, that the defendant might employ these tools, for the uses for which they were peculiarly adapted? Considering all these circumstances, in their just significance, I think the case is brought within the dominion of the rule stated in McClurg v. Kingsland, and that the complainant must be presumed to have consented to and allowed the use of his inventions by the defendant. The bill must therefore be dismissed, with costs.

CHABOYA (UNITED STATES v.). See Cases Nos. 14,769 and 14,770.

Case No. 2,568.

CHACON v. EIGHTY-NINE BALES OF COCHINEAL.

[1 Brock. 478.][1]

Circuit Court, D. Virginia. May Term, 1821.[2]

JURISDICTION—PRIZE—VIOLATION OF NEUTRALITY—CITIZENSHIP—EXPATRIATION—EFFECT OF ENTERING FOREIGN NAVAL SERVICE—PIRACY—LAW OF NATIONS—AUGMENTATION OF FORCE—EVIDENCE—RESTITUTION OF PRIZE CAPTURED IN VIOLATION OF NEUTRALITY.

1. The question, of prize or no prize? belongs exclusively to the courts of the captor; and in no case does a neutral assume the right of deciding it. But offences may be committed by a belligerent against a neutral, in his military operations, which it would be inconsistent with the neutral character to permit; and which give to the other belligerent, the party injured by those operations, claims upon the neutral which he is not at liberty to disregard. In such a situation, the neutral has a double duty to perform; he must vindicate his own rights, and afford redress to the party injured by their violation.

[See note at end of case.]

2. If the wrong-doer comes completely within the power of the neutral, the practice of this government is, to restore the thing wrongfully taken.

3. Quaere: If a native born American citizen can expatriate himself? If he can, he divests himself, by the very act of expatriation, as well of the obligations, as of the rights of a citizen. He becomes, ipso facto, an alien; his lands are escheatable, and the rights appertaining to citizenship, once lost, cannot be recovered by residence, but he must go through the formula prescribed by law, for the naturalization of an alien born.

4. But whether the right of expatriation exists or not, an American citizen may, under the modern usage of nations, enter either the land or naval service of a foreign government without compromising the neutrality of his own, or divesting himself thereby of his rights of citizenship. The application of this general principle to the United States, is not affected by our treaty with Spain. Admitting the capturing vessel to have been a privateer, commissioned by the enemy of Spain, and the captured vessels to have been Spanish property: that a person (a native citizen of the United States,) holding a commission to cruize under the enemy of that power, might be deemed a pirate in the courts of the United States or Spain; still, he would not be so deemed by the rest of the world. Those two powers may bind themselves by treaty, but cannot bind foreign nations; and, though that treaty may affect the individual, (in the case supposed,) personally, it cannot affect the prize. The enemy of Spain had the right, like all other sovereigns, to grant the commission, and captures made under it, are as valid, and vest as completely in the belligerent sovereign, under whose flag they were made, as if the treaty between the United States and Spain had never been made.

5. Neutral rights are not violated by the grant of a commission to a neutral, while within the territory of a belligerent. A commission to cruize, granted in a time of profound peace, but in contemplation of war, may be used after war breaks out. It is sufficient to give validity to captures made under it, that war existed at the time of the capture.

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[1] [Reported by John W. Brockenbrough.]

[2] [Affirmed in The Santissima Trinidad and The St. Ander, 7 Wheat. (20 U. S.) 283.]

6. Quaere: If a colony in a state of rebellion, and struggling to establish its independence of the parent state, is embraced by the act of congress of 1794, prohibiting the enlistment of soldiers, marines, and seamen, within the limits of the United States, to enter the service of any foreign prince or state?

7. However this may be, such a revolted colony, or section of a state, comes within the more ample provisions of the law of nations: and while neutrals concede to a people in such a situation, the character and rights of a belligerent, if they are in a condition to make war, they are as much bound to refrain from a violation of the rights of neutrals, as if they were an acknowledged state.

8. It seems, that the public, current declarations of a crew, that a large portion of them were enlisted for the cruize, in the United States, in a case where no motives existed for previous combination; and the testimony of the master of the captured vessel, that a portion of the crew spoke English, and that the mate told him, that the vessel was equipped and fitted out in Baltimore, cannot be entirely disregarded.

9. The principle has been well settled by the supreme court, that belligerent captures by privateers, fitted out, armed, and manned within the United States, in violation of the neutrality of our government, and the act of congress, in such case provided, if they are brought within the powers of our courts, may be restored by them to the injured belligerent.

10. And the same principle is applicable to the national ships of a foreign sovereign, whether the capture was made within the waters of the United States, or upon the high seas, and brought within the jurisdiction of the federal courts. The general principle is undeniable, that the national ship of a foreign sovereign, coming within the United States, is exempted from the jurisdiction of the United States, but this exemption is granted only on the condition that the sovereignty of our government shall be respected: and the gross violation of its neutrality by such foreign national ship, forfeits the condition, and subjects her prizes, made in fact through neutral means, to restitution to the original owner.

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

In admiralty. This was a libel, originally filed in the district court of Norfolk, by the consul of Spain, in April 1817, against eighty-nine bales of cochineal, two bales of jalap, and one box of vanilla, formerly constituting part of the cargoes of the Spanish ships, Santissima Trinidad and St. Ander, and alleged to be unlawfully and piratically taken out of those vessels on the high seas, by a squadron, consisting of two armed vessels, called the Independencia del Sud, and the Altravida, and owned and commanded by persons, assuming themselves to be citizens of the United Provinces of the Rio de la Plata. The libel was filed, in behalf of the original Spanish owners, by Don Pablo Chacon, consul of his catholic majesty, for the port of Norfolk; and, as amended, it insisted upon restitution, principally for three reasons: 1st. That the commanders of the capturing vessels, the Independencia del Sud and the Altravida, were native citizens of the United States, and were prohibited by our treaty with Spain of 1795, from taking commissions to cruize against that power. 2d. That the said capturing vessels were owned in the United States, and were originally equipped, fitted out, armed and manned in the United States, contrary to law. 3d. That their force and armament had been illegally augmented within the United States. A claim and answer was given in by James Chaytor, styling himself Don Diego Chaytor, in which he asserted that he was the commander of the Independencia, that she was a public armed vessel, belonging to the government of the United Provinces of Rio de la Plata, and that he was duly commissioned as her commander: that open war existed between those provinces and Spain: that the property in question was captured by him, as prize of war, on the high seas, and taken out of the Spanish ships, the Santissima Trinidad and the St. Ander, and put on board of the Independencia: and that he afterwards, in March 1817, came into the port of Norfolk with his capturing ship, where he was received and acknowledged as a public ship of war, and the captured property, with the approbation and consent of the government of the United States, was there landed for safe keeping in the custom-house store. The claimant admitted that he was a native citizen of the United States, and that his wife and family had constantly resided in Baltimore; but alleged, that in May 1816, at the city of Buenos Ayres, he accepted a commission under the government of the United Provinces, and then and there expatriated himself by the only means in his power, viz: a formal notification of the fact to the United States consul at that place. He denied that the capturing vessel, the Independencia, was owned in the United States, or that she was fitted out, equipped, or armed, or her force augmented in the ports of the United States, contrary to law. He denied, also, that the Altravida was owned in the United States, or that she was armed, equipped, or fitted out, in the United States, contrary to law; or that she aided in the capture of the vessel in question. He further asserted that the captured property had been libelled, and duly condemned as prize in the tribunal of prizes of the United Provinces, at Buenos Ayres, on the 6th of February, 1818. He denied the illegal enlistment of his crew in the United States; but admitted that several persons there entered themselves on board as seamen, in December 1816, representing themselves to be, and being, as he supposed, citizens of the United Provinces, or in their service, and then transiently in the United States: and that he refused to receive citizens of this country, and actually sent on shore, some who had clandestinely introduced themselves on board.

It appeared, by the evidence in the cause, that the capturing vessel, the Independencia, was originally built and equipped in the port of Baltimore, as a privateer, during the late war between the United States and Great Britain, and was then rigged as a schooner, and called the Mammoth, and was fitted out

to cruize against the enemy. After the peace, she was converted into a brig, and sold by her original owners. In January 1816, she was loaded with a cargo of munitions of war, by her new owners, who were inhabitants of Baltimore, and being armed with twelve guns, part of her original armament, she was sent from that port, under the command of the claimant, Chaytor, ostensibly, on a voyage to the north west coast of America, but in reality to Buenos Ayres. By the written instructions given to the supercargo, on this voyage, he was authorized by the owners, to sell the vessel to the government of Buenos Ayres, if he could obtain a suitable price. She arrived at Buenos Ayres, having committed no act of hostility, but sailing under the protection of the United States flag, during the outward voyage. At Buenos Ayres, the vessel was sold to the claimant, and two other persons, and soon afterwards, in May 1816, assumed the flag and character of a public ship, and was understood by the crew, to have been sold to the government of Buenos Ayres; and the claimant made known these facts to the crew, asserting, that he had become a citizen of Buenos Ayres, and had received a commission to command the vessel as a national ship, and invited the crew to enlist in the same service, and the greater part of them accordingly enlisted. From this period, the public agents of the government of the United States, and other foreign governments, at that port, considered the vessel as a public ship of war, and this was her avowed character and reputation. No bill of sale to the government of Buenos Ayres was produced, but the claimant's commission from that government was given in evidence.

Upon the point of the illegal equipment and augmentation of force of the capturing vessels in the ports of the United States, different witnesses were examined on the part of the libellant, whose testimony was extremely contradictory; but it appeared from the evidence, and was admitted by the claimant, that after the sale in Buenos Ayres, in May 1816, the Independencia departed from that port, under his command, on a cruize against Spain; and after visiting the coast of Spain, put into Baltimore, early in the month of October, in the same year, having then on board, the greater part of her original crew, among which were many citizens of the United States. On her arrival at Baltimore, she was received as a public ship, and underwent considerable repairs in that port. Her bottom was new coppered, some parts of her hull was recaulked, part of her water ways replaced, a new head was put on, some new sails and rigging, to a small amount, and a new mainyard, were obtained; some bolts were driven into the hull, and the mainmast, (which had been shivered by lightning,) was taken out, reduced in length, and replaced in its former station. For the purpose of making these repairs, her guns, ammunition, and cargo, were discharged, under the inspection of an officer of the customs; and when the repairs were made, the armament was replaced, and a report made by the proper officer to the collector, that there was no addition to her armament. The Independencia again left Baltimore, in the latter part of December 1816, having at that time on board, a crew of 112 men; and on or about the 8th of February following, sailed from the capes of the Chesapeake, on the cruize, in which the property in question was captured. During the stay of the Independencia at Baltimore, several persons were enlisted on board her, and the claimant's own witnesses proved, that the number was about thirty. On her departure from Baltimore, the Independencia was accompanied by the Altravida, as a tender or despatch vessel. This last was formerly a privateer, called the Romp, and had been condemned by the district court of Virginia, for illegal conduct, and was sold under the decree of the court, together with the armament and munitions of war, then on board. She was purchased, ostensibly, for one Thomas Taylor, but immediately transferred to the claimant, Chaytor. She soon afterwards went to Baltimore, and was attached to the Independencia, as a tender, having no separate commission, but acting under the authority of the claimant. Some of her guns were mounted, and a crew of about twenty-five men put on board at Baltimore. She dropped down the Patuxent, a few days before the sailing of the Independencia, and was there joined by the latter, and accompanied her on her cruize.

The district court, upon the hearing of the cause, decreed restitution to the original Spanish owners [case not reported], and from that sentence, the claimant, Chaytor, appealed to this court.[3]

The following opinion was delivered by

MARSHALL, Circuit Justice. It is universally admitted, that the question of prize, or no prize, belongs solely to the courts of the captor. In no case, does a neutral assume the right of deciding it. But offences may be committed by a belligerent, against a neutral, in his military operations, which the neutral ought not to permit; and which give claims upon him, to the party injured by those operations, which he is not at liberty to disregard. In such a situation, the course to be pursued by the neutral, to assert his own rights, and perform his duties, by affording redress to the party injured by a violation of those rights, will vary with varying circumstances. If the wrong doer comes completely within his power, and brings that which will afford complete redress for the wrong done, the usage of nations, generally, as is believed, certainly the usage of this nation, is to restore the thing wrongfully tak-

[3] The editor has adopted the accurate statement of Mr. Wheaton, in his report of this same case. See 7 Wheat. [20 U. S.] 283.

en. This act vindicates the offended dignity of the neutral, and gives to the injured party, the most ample redress, perhaps, which is attainable, or can reasonably be demanded. This ought to satisfy the sovereign, who claims reparation from the neutral, for his involuntary instrumentality in the war; and ought to be submitted to, by the sovereign of the offending party, whose duty it was, to restrain his officer from violating the rights of a friendly government, or to punish him for their violation. This usage, then, is recommended by the strong consideration of convenience and effectiveness. This principle having been adopted by the American government, two questions arise in the case under consideration. 1st. Has the capturing vessel so violated the neutrality of the United States, as to give this government the right, and impose upon it the duty, of restoring to the original owners, when brought within its power, the property which has been taken? 2d. By what department is this right to be exercised? this duty to be performed? Many points have been raised on both sides, and supported with great strength of argument, which on views, which might have been taken of the subject, by the court, it would have been necessary to consider and decide, but which, in the more narrow view that has been taken, need not be considered fully, because they are not necessary to the decision which will be made. These points, therefore, will be noticed very cursorily.

The right of Commodore Chaytor to make prizes, has been denied; because, 1st. he is an American citizen; and, 2dly. his commission does not authorize him to wage war.

1. The commodore, though a native American, insists, that he has expatriated himself, and has become a citizen of Buenos Ayres. I deem it unnecessary, in this case, to discuss the abstract question of this alleged natural right to dissolve the connexion between an individual and his country, and will only observe, that the principle is often of more serious consequence to those who would shield particular acts by its assertion, than they suppose. The individual who divests himself of the obligations of a citizen, if this be within the power of an individual, loses the rights which are connected with those obligations. He becomes an alien. His lands, if he has any, are escheatable. He cannot recover these rights by residence, but must go through that process which the laws prescribe for the naturalization of an alien born. Would Commodore Chaytor wish to place himself in this situation? I decline inquiring whether he has done so, because I think, that an American citizen may, according to the modern usage of nations, engage in foreign service, without compromising the neutrality of his government. I do not perceive any solid distinction between the land and naval service, in this particular. It is probable, that foreigners have less frequently obtained commissions in the marine than in the army; and for this it would not be difficult to account; but in cases where the subjects of the nation are supposed to be defective in maritime skill, as in the Russian service, foreigners are not unfrequently engaged. It has been supposed, that the application of this general principle to Commodore Chaytor, is prevented by our treaty with Spain. I do not think so; even admitting the Independencia del Sud to have been a privateer, and admitting the construction of the treaty, by the counsel for the libellant, to be right, (and I am very far from assenting to it,) the treaty may affect the individual, personally, but cannot affect the prize. Were it true, that a person holding a commission to cruize under the enemy of one of the contracting parties, might be prosecuted as a pirate, in their courts, he would not be deemed a pirate by the rest of the world. America and Spain may bind themselves, but they cannot bind foreign nations. They cannot bind the republic, if it be one, of Rio de la Plata. Pueyrredon had a right to grant this commission at his city of Buenos Ayres; and the world will respect it just as much as if the treaty between the United States and Spain had never been made. As between the government granting the commission, and the person to whom it is granted, it is valid. Captures made under it, will be deemed valid by that government, and by all foreign nations. Such captures vest the prize in the belligerent sovereign, under whose commission it was made; and, however his prize acts, or his edicts, may dispose of it afterwards, the world considers it as his property, taken by himself. We may punish the instrument, personally, if our law directs it; but this does not authorize us to seize the property of a belligerent sovereign, taken jure belli. The only principle on which this can be done, is, that our neutral rights have been violated. Now, the grant of a commission to a neutral, while within the territory of a belligerent, has never been considered as a violation of neutral rights.

2. Neither do I think, the objections to the commission have been sustained. Admitting that Rio de la Plata was not at war with Spain when it was granted, it is not doubted, that if a commission be given in contemplation of war, or in time of profound peace, that commission may be used when war shall break out. War existed at the time of the capture, and that is sufficient for the captor. The commission, in its terms, gives him the command of the Independencia, and so far as respects that vessel, is equivalent to a general commission in the navy; and the instructions authorize him to "cruize," which term strongly indicates hostile operations. But I think that a commission to command a ship of war, authorizes the officer holding it, if not interdicted by other circumstances, to attack and capture

an enemy. It has also been contended that this vessel, which was originally the Mammoth of Baltimore, has not been transferred, with good faith, to the government of Rio de la Plata, but is, in truth, the property of an American citizen. The circumstances in support of this proposition, are certainly entitled to consideration, although they do not outweigh the positive testimony of the transfer. I shall therefore consider the transfer as unimpeached.

The court is now brought to the inquiry, whether the neutrality of the United States has been violated by any equipment, or augmentation of armament, or enlistment of seamen, within their territory? These acts are forbidden to a belligerent, by the law of nations; and are also forbidden by an act of congress. I will put out of the case the equipment in Baltimore, in 1815, for the voyage to Buenos Ayres, in January 1816, because I think the subsequent sale of the vessel authorised the purchaser, if unconnected with the original equipment, to make war upon the enemies of her flag.

I will consider the transactions of Commodore Chaytor, after his arrival in Baltimore, in October, 1816, and will first inquire whether he has enlisted any part of his crew, in violation of the neutral character, and of the laws of the United States.

The act of 1794 enacts, "that if any person shall, within the territory or jurisdiction of the United States, enlist or enter himself, or hire, or retain, another person to enlist or enter himself, or to go beyond the limits, or jurisdiction of the United States, with intent to be enlisted or entered, in the service of any foreign prince or state as a soldier, as a marine, or seaman, on board of any vessel of war, letter of marque or privateer," &c. 1 Story's Laws U. S. p. 352, c. 50, § 2 [1 Stat. 383]. To this clause is added a proviso, which is understood to authorize the enlistment of a transient foreigner to serve on board a ship of war of his own sovereign, not equipped or armed within the United States. The history of the day informs us, that this act was considered as declaratory of the pre-existing law of nations, and was intended to aid the executive in the enforcement of that law. However serious may be the doubt, whether a section of a nation struggling for its independence, may come within the prohibitions of the act, there can be no doubt that such a people come within the more ample provisions of the law of nations. Whether Buenos Ayres be a state or not, if she is in a condition to make war, and to claim the character and rights of a belligerent, she is bound to respect the laws of war; and the government which concedes her those rights, is bound to maintain its own neutrality, unless it means to become a party to the war, as entirely as if she were an acknowledged state. She has no more right to recruit her navy within the United States, than Spain would have, and this government is as much bound to restrain her from using our strength in the war, as to restrain her enemy. Therefore, if Commodore Chaytor has recruited any men within the United States, not being the subjects or citizens of Rio de la Plata, he has violated their neutrality.

The depositions of Henry, Irvine, and Pecker, are supposed by the counsel for the claimant, to have no bearing on the case, because they detail only what they have heard from others; and I readily admit, that their testimony, standing alone, would not be sufficient to establish the fact of an enlistment within the United States, prior to the capture of the cochineal, mentioned in the libel. But they prove, unequivocally, that Commodore Chaytor did enlist American citizens, within the United States, for his subsequent cruize; and certainly, positive evidence of this fact, gives, in such a case as this, strong probability to other evidence, which asserts, that the same fact took place, previous to the preceding cruize. They prove also, the current declaration of the crew, that a great number of them were concerned in the preceding cruize, and were enlisted for that cruize, in the United States. I feel some difficulty in totally disregarding these declarations. The private communications of an individual, would certainly be entitled to no consideration; but the public conversation of a ship's crew, relative to the transactions of a ship, in a case where no motives exist for previous combination, will give some belief. Of the same nature, is the testimony of the master of the captured vessel. He says, that the crew of the Independencia spoke English, and that the second officer told him, they had been equipped and fitted out in Baltimore. The testimony of John Davis, is positive; and, if true, establishes every thing for which the libellants contend. This witness is supposed to be discredited by others, who, in some respects, are said to contradict him. Let us examine this subject. Davis swears that he was born in New York, and that he was enlisted in Norfolk, by Hooper, for the Independencia. Currie swears that he is an Englishman, who deserted from an English merchantman, lying in the port of Baltimore, and secreted himself on board the Independencia, until she sailed. It also appears, that Hooper recruited in Baltimore, not in Norfolk. But who is Currie? and what gives him superior credit to Davis? But I waive this inquiry, and will consider how far the repugnancy between their depositions, discredits either. Davis says he was born in New York; and if this be untrue, nothing he says ought to be believed, because, he knowingly asserts a falsehood. Currie says that Davis is an Englishman; and states facts, which may be presumed to be the foundation of his assertion. They are, that he deserted from an English merchantman, and that he had been employed during our war, under the British flag. But seamen, born in England, are

found in American merchantman, and seamen born in New York, may be found on board an English merchantman. The fact of his receiving prize-money, is much stronger, but not conclusive. We have the highest authority for saying, that many of our seamen were impressed, and Davis may be among them. The fact is susceptible of explanation, and might, perhaps, have been explained, had the deposition of Davis been taken, after the statements of Currie were known. But he states, himself, to have enlisted in Norfolk, when it is proved, that he came on board in Baltimore; and Hooper, by whom he says he was engaged, was employed in Baltimore. But how often is it, that the memory errs with respect to unimportant circumstances, but is correct with respect to the principal subject. That Davis was enlisted, and by Hooper, were facts which would make a much stronger impression on his memory, than the place at which he enlisted. Baltimore and Norfolk were equal to him; he was, probably, at both, and might very well have the impression that he enlisted at the one place, when, in truth, he enlisted at the other. A mistake in such a circumstance, when the mind is not called particularly to it, would not, perhaps, invalidate the testimony of a witness whose moral character is not impeached. But let it be, that Davis is to be rejected. The testimony which discredits him, must be believed. That testimony, as well as the admission implied in the questions put by Commodore Chaytor, shows, that Davis was enlisted within the United States; and shows, further, that he was not a subject of Buenos Ayres, but an Englishman. Joseph Smith is proved to be unworthy of credit, but the testimony which discredits him, shows, that he was enlisted with the United States, and is a European Spaniard. Isaac Berry, also proves the whole case; but he is said to have destroyed his whole testimony, by the contradictions beween his first and second depositions. What are those contradictions? In the first, he says that he was shipped by M'Donnel; in his second, by James. Both these men may have kept sailors' houses; both have recruited for Buenos Ayres; both have communicated with Berry; and, certainly, his not recollecting distinctly with which he shipped, the act not always of a sober man, does not prove that he was not shipped at all. The commodore might shake his testimony, on this point, by his muster-roll, or by taking the deposition of those who are alleged to have shipped him, or of some of the crew who would prove, that no such man was on board. But no such testimony is adduced. One Wood, is said, in one deposition, to have been second mate, in another, a midshipman. He might, in the course of the voyage, have been both. But this does not prove that Wood was not on board. He varies in his estimate of the number of the crew. He does not profess to be exact. I do not think these small variances affect the body of his testimony, especially, as he states a great number of facts which expose him to detection, if he spoke what was untrue. John Harris, also, proves the whole case; but he, too, is said to be unworthy of belief, because he speaks of a forty-two pounder, which had no existence; and because he speaks of eighteen pounders, instead of twelves. There may have been some large piece on board, which was not brought in, though it is not probable; but this man, who has probably sailed in many cruizers, may have confounded what was on board one vessel, with the guns on board another. This mistake, if it be one, might affect very seriously his testimony respecting the armament, but does not destroy his testimony respecting his having been on board, when we recollect that he gives, completely, the means of contradicting him, if he could be contradicted. He names the officers and many of the crew, and says by whom he was enlisted. The muster-roll, or James, or any seaman on board the Independencia, could disprove any untruth he may assert. I cannot, therefore, reject his testimony. John Lewis is discredited, because he says that he is a native American, and is proved to be a Frenchman. I admit that his testimony is to be disregarded, but, still, he was enlisted in the United States, and is not a subject of Buenos Ayres. Matthew Murray proves the case, but is said, in his second deposition, to speak only from hearsay. I disregard entirely the testimony of Edward M'Donnel. His reputation is such as to discredit him completely.

I proceed, now, to the examination of the claimant's testimony. Edward Currie was in the Independencia, while she lay in the port of Baltimore, in 1816, and could have contradicted the enlistments alleged to have been made there, had they been untrue. He speaks only of John Davis. Daniel James discredits M'Donnel. Why was he not examined as to the enlistment of the crew? It is said that he enlisted Berry; why was he not interrogated as to that fact? James Barnes, commander of the Mangoree, says, that the Independencia was fitted, equipped, and manned, as he has understood, in Buenos Ayres, in May 1816; that the ships cruizing under the flag of that republic, of which the Mangoree was one, are manned chiefly by foreign seamen. The Regent, another of these cruizers, he understood to be fitted out, and manned in the port of Baltimore. How the vessels of Buenos Ayres were manned, is, in some measure, stated by other witnesses. Alexander Hunter, a native citizen of the United States, was a sailor on board the Mangoree. Where did he enlist? He does not say, and it is of not much consequence in this case. But he enlisted in the Independencia, in Baltimore. How is this to be justified? He had served the republic in the Mangoree. But did this convert him into a subject of Buenos Ayres, who was not an

inhabitant of the United States? Will it be contended that by enlisting on board one privateer, an American citizen acquires a right to enlist, within his own country, on board any other? The crew, he says, belonged to all nations. They did not belong exclusively to Buenos Ayres. Hugh Cagne says, that he is a native of Ireland, and has been many years in the service of South America. How in her service? He is a seaman, and the fair presumption is, that he served in her marine. What is her marine? We have no reason to presume that it consists of much more than such vessels as the Independencia, the Mangoree, the Altravida, and the Regent, fitted out in other countries, and manned by foreigners. At any rate, he does not state himself to have become a subject of Buenos Ayres, and he does not state himself to have enlisted in Baltimore. He says, that among her crew, were many North Americans, and most of the crew, who came in her from Buenos Ayres. Where did those of her crew, who were North Americans, and who did not come in her from Buenos Ayres, enlist? We are left to conjecture. But what was the condition of that part of the crew, which came into port with her? The greater number of them sailed in her from Baltimore, and were, we must suppose, engaged for the voyage. On their return to port, their engagements terminated, unless others more extensive were made at Buenos Ayres. William Amos has been examined, and gives us some information on this subject. After the sale of the vessel, he says, Captain Chaytor came on board, and told them, they were at liberty to continue in the new service, or to be discharged. They chose to continue. Not one syllable is said of changing their political character, and throwing off their allegiance to the United States. Not one syllable is said of their engaging for a longer time, than till the vessel should return to the United States. We must, then, suppose that they continued citizens, and we have the more reason to believe, that their engagements expired on their return to the United States, because, Amos says he then left the vessel, and because Roe, who shipped at Buenos Ayres, also says that he left her at the same place. The crew, then, which came in her from Buenos Ayres, were American citizens, who, most probably, re-enlisted in Baltimore. Such a re-enlistment, is equivalent to an original enlistment. If they engaged for a longer time in Buenos Ayres, I think it would have been stated. Cagne goes, not to prove the enlistment of strangers, indiscriminately, but that they said they were in the service of the patriots. How in that service? He does not tell us. He does not say, admitting they spoke the truth, that every seaman, who had made a cruize in a privateer, said to be commissioned by any of the patriot governments, did not think himself in the service of the patriots. About fifteen of the crew of the Mangoree, shipped on board of her. All we know of this crew, would lead to the opinion, that they were American, and such other sailors as are found in our ports. They had been in the patriot service, and Captain Chaytor supposed himself authorized by that circumstance, to re-enlist them. But in this he was mistaken. Cagne says, too, that when she left the capes, her crew consisted of about one hundred and twelve, among whom were twenty-eight or thirty new men. Who were they? Are they proved to be citizens of Buenos Ayres, transiently within the United States? He does not pretend that they were. The fair presumption from the whole testimony is, that they consisted of that class of sailors, who are usually employed in privateering. Whether those who had sailed in the Mangoree, were among the number of new men, is not certainly stated; it is probable they were. Cagne states a fact, which is certainly material, in the inquiry, respecting the character of the Independencia. It is, that her crew was enlisted, not for the cruize, but for the year, and were on wages. But he entered the vessel in Baltimore, and does not say, that these were the terms on which the original crew were engaged. It gives some complexion to this transaction, that Cagne says, there were two brigs fitting out in Baltimore, which sailed about the same time with the Independencia, which were said to be intended as cruizers. It illustrates the practice of the place, and aids in informing us, what is understood by being in the patriot service. John H. Speck appears also, to have entered the Independencia in Baltimore, and he agrees in everything with Cagne. About thirty men were enlisted in Baltimore, not one of whom is said to have been a subject of Buenos Ayres; though they all said they had been in the patriot service.

I think, then, the evidence is more complete, than could have been expected, in a case of violation of law, that nearly the whole crew of the Independencia was enlisted within the United States, in violation of the act of congress, and of the neutrality of this government. The prize goods in question, have been taken by a neutral force. I must consider the men who came in the Independencia from Buenos Ayres, and the thirty men engaged in the Chesapeake, as enlisted within the United States, and as being men who could not be lawfully enlisted. It is unnecessary to extend the inquiry to the equipment, or the augmentation of the armament. The enlistment being established, the law is the same, whether those charges be supported or not. It is equally unnecessary to extend the inquiry to the Altravida. The prize having been made, in truth, by neutral means, is it the duty of the government to restore it to the original owner, when it is brought within the power of the United States?

The reasoning in favour of an affirmative answer to this question, appears conclusive. The government is bound to maintain its neutrality; and to prevent a foreign belligerent, from preparing a military force within its territory, to operate against a nation with whom it is at peace. If its means of prevention have been eluded, and its force against its will, been employed by a belligerent, in a manner not authorized by public law, if it has been thus made an instrument of war, the injured belligerent has claims on the neutral government, which has corresponding claims on the aggressing belligerent. If, under such circumstances, the means of obtaining reparation from the one, and of making it to the other, are placed within the power of the neutral, the strongest reasons of convenience, and of justice, seem to require that he should use those means. When a ship of war, which has acquired her military capacities in a neutral country, brings her prize into that country, these plain principles require, that the prize should be restored. In conformity with them, the Grange, captured by the Ambuscade frigate, within the waters of the United States, was restored by the government.

A question of much more difficulty remains to be considered. By what department of the government is this restitution to be made. Without recapitulating much of what has been said at the bar, by stating the reasons on which my opinion is founded, I will acknowledge, that in my private judgment, this right, and this duty devolve on the executive, or legislative, and not on the judicial department. The exercise must be regulated by a discretion, which courts do not possess, and may be controlled by reasons of state, which do not govern tribunals acting on principles of positive law. If, therefore, this was a case in which my own judgment was alone to be consulted, I should, I believe, confine myself to the inquiry, whether any act of congress authorized the restitution sought by the libellants. But this court is not at liberty to decide for itself. It is bound, and ought to be bound, by the decisions of the supreme court, and its judgment must conform to those decisions. They are admitted to have settled the principle, that property captured by privateers, fitted out, armed, or manned, within the ports of the United States, and brought within the power of our courts, may be restored by them to the original owner. It is, however, contended that the same principle does not extend to captures made by national ships. That national ships are in many respects distinguishable from privateers, is not to be denied; is this a case in which a sound distinction can be taken between them? Ships of war and privateers, both cruise under a commission from their sovereign, and both make prizes under the authority of that commission. In both cases, the sovereign is the captor, and the prize vests absolutely in him. The cruizer, in both cases, is a mere instrument of war employed by his sovereign, and the particular interest which the agent may have in the thing acquired, depends on municipal regulations, of which this court can take no notice. The courts of the captor, will in both cases distribute the proceeds according to those municipal regulations, but foreign courts consider the property as the property of the sovereign, and the possession of the captor as the possession of the sovereign. In both cases, then, the foreign court which acts upon the prize, acts on property in the possession of a foreign sovereign, acquired by his authorized agent. In what then does the difference between the right of courts, to interfere with their prizes consist?

We are told that the national ship of war, carries upon its deck a portion of the sovereignty of his prince, and is, of course, inviolable. I am not prepared to say that a privateer, commissioned for the purposes of war, is not equally inviolable, at least so far as respects its military operations. But I will not enter into this inquiry. I will ask, how is this inviolability acquired, and how far does it extend? In the case of The Exchange, 7 Cranch [11 U. S.] 116, the supreme court laid down the principle expressly, that this exemption from the jurisdiction of the nation, in which the national ship of a foreign sovereign is found, is derived, where there is no express compact, from the assent implied in the admission of such vessel into port. But the same case establishes this further principle: that this immunity is granted, on condition that the sovereignty of the place be respected. A breach of the condition, forfeits the immunity depending on it.

A national ship, openly and grossly violating the laws of a neutral government, enlisting a full crew, in opposition to those laws, forfeits the condition on which an exemption from those laws was granted. On this principle, the Grange was restored.[4] The government acts without being charged with a violation of faith. If the government acts, it acts by that department, which is entrusted with the power of inquiring, whether the belligerent has violated those neutral rights which forfeit his prize, and if the courts exercise this power rightfully, in the case of prizes made by privateers, they may, I think, exercise it in the case of prizes made by a national ship, and brought within our territory. If there is fallacy in this reasoning, I do not perceive it. But, supposing it to be applicable to a capture made within our waters, and immediately arrested, it is contended, that it is inapplicable to a capture made on the high seas, and brought within

[4] The Grange was a British ship, which had been cleared out from Philadelphia, in 1793, and was captured by the French frigate L'Ambuscade, within the capes of the Delaware, while on her way to the ocean. 2 Marshall's Life of Washington (Rev. Ed.) 262.

our waters. The violation of neutrality gives, it is said, a claim on the sovereign, whose power is an unit, and cannot give rights to seize prizes made by one vessel, more than by another. When the offending vessel comes again into port, she comes in with all the immunities originally attached to her. In theory, this argument is strong; but, practically, it would destroy the efficacy of the principle. It would deprive the neutral government of its power to give specific relief; and seems to me to be as applicable to prizes made by privateers, as by national ships.

Another idea was suggested by the counsel for the claimants, of which I feel the full force. It is, that this application to the neutral sovereign, to vindicate his neutral rights, and repair the wrongs done to a foreign sovereign, must be made by that foreign sovereign himself, through his authorized agent, and not by a private individual. Were I to admit this, the question immediately occurs—Does not this objection go as strongly to the restoration of prizes made by privateers, as to the restoration of prizes made by national ships? I am not sure, that I am master of that train of reasoning, which has conducted the supreme court, to the assertion of that jurisdiction over prizes made by privateers, which has been exercised. If I were, I should not attempt to give it, because it will be stated more ably by those who are themselves convinced of its propriety. I content myself with saying, that I think the principles on which prizes made by privateers, have been restored, apply to prizes made by national ships, who have violated the neutrality of the United States, and I, therefore, hold myself bound to restore in this case. The sentence of the district court is affirmed.

NOTE [from original report]. This cause was carried by appeal to the supreme court of the United States. It was argued with distinguished ability, both in the circuit and supreme court, and the sentence of the circuit court was unanimously affirmed by the supreme court. See [The Santissima Trinidad] 7 Wheat. [20 U. S.] 283.

[NOTE. Mr. Justice Story delivered the opinion of the supreme court, and after stating that the commission of the Independencia was complete proof that she was a public ship; that the production of the bill of sale was unnecessary; that Buenos Ayres was to be deemed a belligerent nation; that captures made by her public vessels were to be regarded as having the same validity and possessing the same immunities claimed by public ships under the law of nations; and that the arming and supplying the Independencia with munitions of war, and forwarding her for sale to Buenos Ayres, was a commercial adventure, contraband, but in no sense a violation of the laws or neutrality of the United States,—assigned the following grounds for affirmance: That although the testimony as to illegal equipment and augmentation of force adduced by libellant was unsatisfactory and contradictory, and evidently false in some particulars, yet there were other proofs, from independent sources, which clearly established the violation of neutrality beyond all reasonable doubt. That the enlistment of men for the Independencia at Baltimore was a clear augmentation of force within the United States, and consequently a violation of the neutrality laws. That the evidence clearly showed, as to the Altravida, an illegal outfit and enlistment of crew within our waters, constituting a like augmentation, was a violation of the law of nations as well as of municipal laws, a violation of the neutrality of the United States, and infected captures subsequently made with the character of torts, which justified and required a restitution to the parties injured by the misconduct. That while neither a public ship nor her officers are liable to arrest in a neutral court for illegal captures on the high seas, yet this exemption did not extend to prizes in our ports, as to which our courts had the right to exercise their jurisdiction; citing The Cassius (U. S. v. Peters) 3 Dall. (3 U. S.) 121; The Invincible, 1 Wheat. (14 U. S.) 238. That, in cases of violation of neutral territorial jurisdiction, there was no distinction between the capture of public and private armed ships; following The Invincible, supra. That the fact that the goods illegally captured were landed at Norfolk from the capturing public ship, by the express permission of our government, did not vary the case, since it involved no pledge that, if illegally captured, the goods should be exempted from the ordinary operation of our laws. And that the condemnation of the property at Buenos Ayres, during the pendency of this suit, even assuming it to have been regularly made and duly authenticated, could not oust the jurisdiction of the federal courts after it had once regularly attached itself to the cause.]

CHACON (ELDREDGE v.). See Case No. 4,329.

Case No. 2,569.

In re CHADWICK et al.

[5 Law Rep. 457.]

District Court, W. D. Pennsylvania. Sept., 1842.

BANKRUPTCY—ACT OF 1841—TIME OF TAKING EFFECT—WHO ENTITLED TO BENEFITS OF.

1. The meaning of the word "future," in the second section of the bankrupt act [5 Stat. 442], is future with reference to the day when the act was to take effect. See Hutchins v. Taylor [Case No. 6,953].

2. An assignment made by debtors subsequent to the passage of the bankrupt act [5 Stat. 440, c. 19], but before it was to go into operation, of all their property, in trust for certain preferred creditors, will not prevent their discharge and certificate under the act, on their voluntary petition.

In bankruptcy.

Hampton & Black, for bankrupt Chadwick.

Findly & Lowrie, for opposing creditors.

M'Candless & Black, for the bankrupt Leavitt.

Lowrie & Baird, for opposing creditors.

IRWIN, District Judge. On the 23d of October, 1841, the bankrupts, Hanson S. Chadwick and Hart A. Leavitt, merchants of the city of Pittsburgh, made an assignment of all their estate, rights and credits, to assignees, in trust for certain preferred creditors; and on the 19th and 25th of March, following, they severally presented their petitions for the benefit of the bankrupt act, and

were subsequently declared to be bankrupts. Their petitions for discharge are opposed on the ground that the assignment was voluntarily given of all their property, rights and credits, in contemplation of bankruptcy, and is therefore fraudulent and void. On the part of the bankrupts it is contended that the assignment is not embraced in the bankrupt act; that the words, "all future payments, securities," &c., found after the enacting clause of the second section, which it is supposed to infringe, mean all payments, &c., subsequent to the time the act took effect; and that if the act does include the assignment, they are protected by the first and second provisions of the said second section. The act was passed on the 19th of August, 1841 [5 Stat. 449], and the seventeenth section declares "that this act shall take affect from and after the first day of February next." Until the time last mentioned, the act had no legal existence or power, except as to such parts of it as, in express words, are retrospective, or which declare that certain provisions shall take effect from "and after the passage of the act." The rights which it creates, its disabilities, and obligations began on the 2d day of February, 1841, except where it otherwise provides in words, the import of which cannot be mistaken, as in the retrospective clause of the second section, which prevents the discharge of a bankrupt, who has made an assignment with preferences, subsequent to the first of January, 1841, or at any other time, in contemplation of the passage of a bankrupt law, unless assented to by a majority in interest of the unpreferred creditors, and in that part of the 4th section which declares that the bankrupt shall not be entitled to a discharge and certificate "who shall not have kept proper books of account, after the passage of this act, nor any person who, after the passage of this act, shall apply trust funds to his own use." These words are not found in any other part of the act, from which it may be inferred that, where congress, in any other case, intended to give the act effect from its passage, the same language would have been used; yet, if equivalent words are used, and the context and the scope of the act indicate the same purpose, they must receive the like construction. One leading and important object of the act is to place the creditors of a bankrupt upon an equality in the distribution of his assets; and to effect this, in the first section, "any fraudulent conveyance, assignment," etc., is made an act of bankruptcy, and in the second section, all "payments, securities," etc., with preferences, in contemplation of bankruptcy, are declared to be a fraud upon the act. The words "any fraudulent conveyance," &c., in the first section, embrace the fraudulent acts mentioned in the second section, and they are alike void, and a fraud upon the act, and subject to the same action in case of both voluntary and involuntary bankruptcy. They are, with the other enumerated cases in the first section, acts of bankruptcy It has become material to inquire, from what time they are so? No argument need be used to show that the "persons liable to become bankrupts within the true intent and meaning of the act," are only such as committed acts of bankruptcy from the time it took effect. This is too obvious to be denied. The great aim and object of the law is to declare what shall be acts of bankruptcy, and who are to be bankrupts; all the rest is but details of proceedings in bankruptcy, and these proceedings must necessarily begin to operate at the time when the subject matter of them can be reached. Unless, therefore, an exception is made of a particular class of bankrupts, whose acts are void, from the passage of the law, there can be no decree of bankruptcy made which will have relation back to that time. It is contended that this exception is made by a fair construction of the second section of the act; that though it may be admitted that the first four classes of persons mentioned in the first section as liable to become bankrupts could only become so after the law took effect, yet that the fifth class, such as make "any fraudulent conveyances, assignments," &c., from the natural meaning of the words "future payments," &c., in the second section, which only define the frauds referred to in the first section, must be deemed bankrupts from the passage of the act. It must be admitted, that where a statute requires something to be done in future, or forbids that which was lawful before to be done in future, and there should not be found in any other part of it language to restrict, qualify, enlarge, or show another meaning than the words naturally import, it takes effect from its passage, however inconvenient or injurious the consequences. The second section, unconnected with any other part of the act, would involve those who made "payments, conveyances, &c." in bankruptcy from the passage of the act, so that all such "payments, conveyances, &c." from that time would be fraudulent and void, and the person making them could not receive a discharge, while from the operation of the first and seventeenth sections all other acts of bankruptcy are created such at a future day, the act as to them not going into effect until more than six months from its passage. In the first section those liable to become bankrupts are ranged in classes, the fifth being such as "make any fraudulent conveyance, assignment, &c.," and but for the words "future payments, &c.," in the second section, this class as well as the first four could not be known as bankrupt before the day on which the act was to take effect. Can it be that the legislature intended to discriminate between them, so that one class should be the immediate subject of notice and punishment while the other classes are protected for more than six months longer? In the nature and in the degree of frauds

they are all placed by the statute upon the same equal ground, but they were not so before the statute was passed, for the first four always bore a character of fraud, while the fifth, as defined by the second section, makes that fraudulent which was before sanctioned by general usage among merchants and by the laws of the state. It might be supposed therefore, that if it was designed to apply the law to one act of bankruptcy at one period, and to another at a later period, the longest notice was due to the persons whose assignments and transfers, by long usage and the statutes of several of the states—Pennsylvania among the number—were valid and sometimes meritorious, and who, if the bankrupt law took effect from its passage, could not in distant parts of the union, and after they had made bona fide transferances of property, know that they had subjected themselves to its provisions. It is a mistake to suppose that such assignments had any character of fraud.

In the case of Brashear v. West, 7 Pet. [32 U. S.] 614, Chief Justice Marshall says, "that a general assignment of all a man's property is, per se, fraudulent, has never been alleged in this country; the right to make it, results from the absolute ownership which every man claims over that which is his own, and where no bankrupt law exists for setting aside a deed honestly made for transferring the whole of a debtor's estate for the payment of his debts the preference given to favored creditors, is the exercise of a power resulting from the ownership of property which the law has not yet restrained. It cannot be treated as a fraud." This doctrine had before repeatedly received the assent of the supreme court of this state. While such assignments were thus protected and were often considered as meritorious, a law that would suddenly change their character, and convert them into frauds, without promulgation, or, which is the same thing, without reasonable notice, would be harsh and unjust, and it would be going too far to attribute such an intention to the legislature, unless expressed in language free from doubt, and which could not be rationally misconstrued. Probably no statute can be found, affecting rights so pervading and important, and subjecting them to changes so material, which is made to take effect from its passage. The bankrupt act of 1800 [2 Stat. 26], contained a provision against fraudulent conveyances of property similar to that found in the existing law; but the legislature guarded against any injustice in its operation. It passed on the 4th of April, but was not to take effect until from and after the first day of June following. A statute ought to receive such a construction, if the words and subject matter will admit of it, as that the existing rights of individuals shall not be infringed; and it is a general rule in construing them, that they are to be considered as prospective, and not to prejudice or affect transactions, unless such intention be manifestly expressed, especially if it tend to produce injustice or inconvenience. "Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects." U. S. v. Fisher, 2 Cranch. [6 U. S.] 390.

With regard to the first four acts of bankruptcy mentioned in the first section, no rights would be infringed, or no injustice done, if the law went into operation from its passage, for they are not protected by the usage or statute of any state; but the fifth act, so far as it relates to assignments which were not frauds per se was not repugnant to the law and usage of the state, and if the law intended to discriminate between them, as to the time of its operation upon each, the fifth would have been the last to go into effect. But it is manifest that these several acts of bankruptcy were intended to go into effect at the same time, and that that time was from and after the first day of February 1842. The fifth class includes, if not in precise words, every kind of transfer, security, gift, &c., mentioned in the first clause of the second section, and the latter part of the clause declares that "the assignee under the bankruptcy shall be entitled to claim, sue for, recover and receive the same as a part of the assets of the bankruptcy." The third section vests all the property and rights of property of the bankrupt, from the time of the decree, in his assignee, for the benefit of his creditors. Now, it is clear, that the right of the assignee to the bankrupt's property, created by the decree, in involuntary cases, cannot go farther back than the act of bankruptcy, and that that act could not be committed before the law went into operation. There is nothing in the law which designs to reach the property of the bankrupt before an act of bankruptcy; in that respect it pursues the policy of all bankrupt laws as well as the plain dictates of justice; the assignments spoken of in the second clause of the second section, made subsequent to the first of January, 1841, or at any other time, create no exception, as they are not void, but merely prevent a discharge, unless assented to by a majority in interest of the creditors not preferred.

In giving a construction, then, to the words "future payments," &c., in the second section, every part of the act is to be considered, and the intention of the legislature to be extracted from the whole; and where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature is plain, in which case it must be obeyed. Now, it is acts of bankruptcy which the law only intends to reach; there can be no frauds upon the law but the acts themselves eo nomine, and as such acts can only happen by force of the statute, which, as has been shown, took

effect, except such parts thereof as have been before noticed, from the second day of February, the "future payments, securities, &c.," mentioned in the second section must be such as were made and given future to that day; otherwise we should involve ourselves in the anomaly of decreeing, in involuntary cases, certain matters to be frauds upon the law, which were not by any of its provisions acts of bankruptcy. If the words "future payments, &c.," should be construed to mean future to the passage of the act, in most cases the enactment would defeat itself; the debtor being then in failing circumstances, and intending to apply for the benefit of the act, would be deterred from giving preference by assignment, and his property might all be exposed to the creditor or creditors who should be most vigilant in obtaining judgments and executions. The other creditors, meanwhile, between the passage and operation of the act, could make no movement under it; and after its operation, if the judgments and executions were not by the procurement of the debtor, they would be without remedy. Where the law was intended to have effect from its passage, it employs language not to be mistaken, as in the parts quoted "from and after the passage of the act, &c." If it has been shown that there could be no act of involuntary bankruptcy until after the law took effect, the reasoning which leads to that conclusion, applies with as much force to cases of voluntary bankruptcy. The right of the creditors to the property of either bankrupt is secured by the law from the same time, and with the single exception in the last clause of the second section, which is retrospective in its effects, they are both equally subject to its provisions. There can be no reason given why the matter in dispute should apply to the one and not to the other, and none has been attempted.

Looking into every part of the act, its object and its consequences, the intention of the legislature in using the words "all future payments," &c., cannot be doubted: they must be construed to mean all payments, securities, &c., which were made and given after the act took effect. The assignment of the petitioners is therefore not embraced by the bankrupt law, and they are entitled to their discharge. Decree accordingly.

Case No. 2,570.

In re CHADWICK.

[1 Lowell, 439; 11 Int. Rev. Rec. 126, 133.][1]

District Court, D. Massachusetts. April, 1870.

INTERNAL REVENUE—ASSESSMENT OF INCOME TAX—EXAMINATION OF TAX-PAYER—PRACTICE—PRODUCTION OF BOOKS—EXTENT OF INQUIRY.

1. Upon an application by an assessor of internal revenue for an attachment for contempt against a tax-payer, in not producing books and giving evidence concerning his liability to assessment for income, the court has power to issue an order to show cause instead of proceeding ex parte, and the defendant has no ground of complaint if such an order is granted.

2. The court has power to authorize the assessor to amend his application.

3. The books which the assessor has the right to examine are those of the person whose assessment is in question, and not those of third persons who have had dealings with him.

4. A corporation is not bound to produce its books to the assessor on an inquiry into the income of its shareholders.

[Cited in U. S. v. Anon, 21 Fed. 768.]

Petition for an attachment by the assessor of internal revenue for the third collection district of Massachusetts, within which the respondent resides; alleging that the respondent [J. H. Chadwick] was a shareholder in an incorporated company, called the Boston Lead Company, of which he was likewise treasurer and agent, having charge and custody of the books of said company; that the respondent rendered his income return for 1869, and was duly assessed thereon: that the petitioner afterwards issued a summons, of which a copy was annexed to the petition, requiring the respondent to appear before the petitioner at his office and produce the books of the company, and give evidence respecting his own "liability to an income," for the years 1865, 1866, 1867, and 1868. Upon this petition being filed in court, a rule to show cause was issued, and the respondent appeared and moved to dismiss the petition for sundry supposed defects, apparent upon its face. Afterwards the petitioner moved to amend, and the respondent filed an answer insisting on his former objections and on others which affected the merits of the case.

J. C. Ropes, Assist. Dist. Atty., for petitioner.

H. W. Paine and J. Ritchie (B. F. Butler with them), for respondent.

LOWELL, District Judge. The statute of 1866, amending section 14 of that of 1864, is found in 14 Stat. 101, and enacts that if any person shall deliver or disclose to any assessor any list, statement, or return, which in the opinion of the assessor is false or fraudulent, or contains any understatement or undervaluation, it shall be lawful for the assessor to summon such person, his agent, or other person having possession, custody, or care of books of account containing entries relating to the trade or business of such person, or any other person he may deem proper, to appear and produce such books, and answer interrogatories, &c. It then provides for the service of the summons, and that if any person so summoned shall neglect or refuse to obey such summons, or to give testimony or answer interrogatories, the assessor may apply to a judge or commissioner for an attachment against such person as for a contempt, and the judge or commis-

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

sioner shall hear the application, and if satisfactory proof be made, shall issue an attachment, &c.

Under this section it is objected that the judge should in all cases proceed to hear the application ex parte, and issue or refuse the attachment, as may appear to be just on such a hearing. But I am of opinion that I have power to pursue the course taken in this case, and issue a rule to show cause. The power to issue the attachment includes a power to notify the respondent to appear and show cause against it, whenever such a course seems most reasonable. It is and always has been the practice in chancery to make such a rule in cases which required it. It is done every day in the circuit court in patent causes, and is a practice most beneficial to the supposed contemners. The respondent has no valid ground of objection that he is permitted to be heard on the application. If he does not care to be heard, he need not appear. Again it is said that no amendment is within the power of the court. The argument, if I understand it, is that this is a quasi criminal proceeding, or at least is of such an anomalous character as not to be within the law and practice of amendments as applied in the federal courts. The act is remedial, not penal. It provides for cases like those which are of constant occurrence in chancery and in bankruptcy. A bankrupt is required to submit to examination before the register, or a witness to testify before an examiner; and if in the course of the examination a question is asked which he is advised he need not answer, and he refuses to reply to it, I know of no effectual remedy for the examining party excepting to move for an attachment. I decide a great many such motions every year; but I never supposed that in doing so I was engaged in trying criminals. This is the only mode by which the assessor can perform a duty which the law casts upon him. The tax-payer has a simple remedy, if he considers his rights are invaded, by refusing to appear, or to answer, as the case may be, and the assessor has no alternative but to omit to do his duty, as he understands it, or to apply for an attachment. No doubt the court has power to punish a wilful neglect or refusal to testify in this as in all other cases, but no judge would ever fine or imprison a person for vindicating his supposed rights, in good faith; and it would be as appropriate to call a motion to attach any witness an indictment, as to give that name to this application. Power seems to me to be given by the statute of jeofails, namely, the thirty-second section of the judiciary act of 1789, as well as by the general authority vested in the courts.

We come now to the merits of the case. It seems that the respondent obeyed the summons of the assessor, so far as to appear at the time and place appointed therein, but that he refused to produce the books of the Boston Lead Company; and the most serious point of contention has been whether the statute requires such production. It seems to me entirely clear that it does not. The subject-matter of inquiry by the assessor, according to the summons, and according to the fact, is the income of the respondent, for one or more years, and the books of a manufacturing corporation of which he happens to be a shareholder are not books relating to his trade or business, and are not alleged to be so in the summons. The application is not based upon his being treasurer of the company, and the question does not concern the amount of his salary; but the broad ground is taken that these books are the defendant's books. The statute appears to be very simple. It authorizes the assessor to examine the tax-payer's books. This is its whole scope and purpose so far as the present case is concerned. To effectuate this object, it adds agents and all other persons having care or custody or even bare possession of the books. This is the whole of the enactment. It is impossible to misunderstand it. No doubt the books of every person with whom the tax-payer deals contain some entries which relate to his business, and if every such person were summoned, it might be within the bounds of possibility to make up his income more or less accurately from a detail of all the bargains which he had made with others. But the law does not contemplate any such absurd mode of proceeding. The trade of each person is to be shown by his own books, and he or his agent, or other person having custody of them, must produce them; but it is not the intention of the law to require A. to produce his own books in order to discover, incidentally, the trade or business of B., C., and D., who may have dealt with him.

It was strongly urged that by the statute of 1867 (14 Stat. 478), the income of every person shall include his share of the gains and profits of all companies, whether incorporated or partnership, and whether the gains are divided or otherwise, excepting of certain institutions and corporations, "whose officers, as required by law, withhold a per centum of the dividends made by such institutions, and pay the same to the officer authorized to receive the same;" and that it may be very difficult for assessors to ascertain the undivided profits of an incorporated company (not being one of those whose officers make returns) unless he can examine their books by virtue of this section, and that this section therefore may be so construed as to effect this object, and enable the assessor to examine the books of such companies, precisely as if they were partnerships. It is not consistent with any sound canon of construction with which I am acquainted, to interpret a law passed in 1866 by reference to one passed in 1867. In 1866, the income of any person included the dividends of all companies of every kind, without exception (13 Stat. 480); so that the

argument must reach to the production of the books of all corporations when the income of any one shareholder is the subject of inquiry, or it is insufficient. Now I agree that in some cases this might be very convenient; but I doubt whether this convenience would make up for the very great inconvenience which the companies and their officers must suffer by having their books liable to be called for and taken and detained whenever the income account of any shareholder is to be made up. The argument from convenience may fairly enough be said to be balanced, but not so the argument from the construction of the statute itself. There is nothing in the statute which makes corporations partnerships or the books of a corporation the books of the individual shareholders. The law at section 14 assumes that a person's income will appear in his books, and although it may be found that by another part of the law some undivided profits not shown by his own books, are made a part of his income, yet this does not alter the law concerning his books, which are to be produced when called for, but only proves that the law may to some extent, and in some cases, fail to furnish full evidence. A person may keep no books, or may fail to make certain entries in them, or may omit, by design or accident, to collect all his dues. In such instances, the books will not fully disclose his taxable income. In the majority of cases, and in the long run, it is probable, the books will show the real state of the tax-payer's affairs; and it is to give the assessor the aid and advantage which the tax-payer himself has, and to verify his lists and statements by the record, that the statute is made.

This being so, it is unnecessary to pass upon the objections taken to the form of the assessor's summons. My impression is that the summons should state, with reasonable certainty, the cause of its being issued; as, that the assessor is dissatisfied with the returns, or the like, and the subject-matter of the injury. It is not like a mere subpoena to an ordinary witness to appear and give evidence in court, because that writ refers to the case pending in court, which enables the witness to ascertain what is required of him. The summons in such a case as this should be sufficiently explicit to enable the person summoned to decide whether he is bound to appear or not. In the present instance it may perhaps be that all defects of form were waived by the respondent's appearing and taking the oath, but the most important defect is one that goes to the essence of the case, and could not be cured, because it involves the very point that I have been considering. It is that the summons does not and cannot state that the books called for are the books of the respondent or of his agent, &c., containing entries concerning his trade or business within the statute. Petition dismissed without costs.

Case No. 2,571.

CHADWICK et al. v. The ADELAIDE.

[Hoff. Op. 459.]

District Court, N. D. California. Oct. 20, 1859.

ACTION FOR BREACH OF CHARTER PARTY—PROOF OF DAMAGE—PENALTY—ESTIMATED PROFITS.

[1. In an action on a charter party, for a breach thereof, by reason of the refusal of the master to commence the voyage, nominal damages only are recoverable, where the libellant fails to prove some actual damage suffered, notwithstanding the agreement binds the parties to a penalty for its breach.]

[2. The sum mentioned in the penal clause of the instrument will be regarded as a penalty, and not as liquidated damages.]

[3. The due performance of the voyage being subject to many future contingencies, estimated profits cannot be computed as an element of damage. The Tribune, Case No. 14,171, followed.]

In admiralty.

J. B. Manchester, for libellants.

Gregory Yale, for claimant.

HOFFMAN, District Judge. The libel in this case is for the breach of a charter party. The execution of the instrument, and the refusal of the master to sail on the voyage, are admitted. By the terms of the charter party, the libellants agreed to furnish at Johnson's islands, in the Pacific, a full cargo of guano, in bulk or in bags, and also bags enough to line the ship. They were also to place on board three lighters, and all their men, on their arrival at the islands, were to be employed in loading the vessel, and, in case the crew were required to assist, they were to be paid $1 per day each. Ninety lay days were allowed for taking in the cargo, and, for every day's detention beyond that time, $150 was to be paid the ship. There were other stipulations in the charter party not material to be noticed. No proof whatever was offered on the part of the libellants that they were ready and willing to furnish the cargo proposed, or to provide the bags to line the ship as agreed upon. Neither did they show that they were ready to furnish three lighters, nor that they had any men on the islands to assist in loading the vessel.

No testimony as to the damages sustained by the ship's refusal to sail on the voyage was offered, except the statement of Mr. Landswert, a chemist in this city, that guano of the quality of that found on these islands would be worth in New York $30 or $35 per ton. He did not, however, assert this on knowledge or information of any sales; but it was an estimate of the value of the guano founded on an analysis by himself. The libellants, on this testimony, seek to recover the sum of $35,000, being the amount mentioned in the penal clause of the charter party. This sum is claimed in the libel as "the stipulated sum agreed upon between the parties to the said charter party, as dam-

ages for a breach or violation of the same." This claim is evidently based on the idea that the amount is mentioned in the charter party as liquidated damages, and not as a penalty. But such a construction of that instrument is inadmissible. The sum mentioned is called in the charter party "the penal sum of $35,000," in the usual form in which the penalty is stated in that clause of the instrument by which the parties bind to each other, respectively, the vessel, freight, etc., and the merchandise to be taken on board, for the true performance of their covenants. I am not aware that it has ever been doubted that the sums so stated in charter parties were to be considered penalties, and not liquidated damages. In all such cases, the recovery of the party suing on such penal clauses is restricted to the damage actually sustained. Abb. Shipp. p. 364. It does not appear that any damage was actually sustained by the libellants. The expected profits which might have been realized on the voyage cannot be computed as proper items of damages.

In a somewhat similar case, Judge Story says: "The due performance of the voyage was subject to many future contingencies, and the item of profits is too uncertain in its nature to form any basis of damages, even if, in a case like the present, there was no other objection to it." The case in which these observations were made was much stronger than the case at bar, for the goods which the libellant was under contract to deliver to the government of Cuba, were actually put on board of the vessel, and relanded by the master in breach of the charter party. But in the case at bar the vessel never reached the place where her cargo was to be laden. It is not shown that the libellants could have furnished a cargo, nor that they would have had men or lighters to place it on board; nor does it appear what time would have been required for the purpose, nor whether the ship might not have been entitled to damage at the rate agreed,—$150 for a greater or less period,—nor whether in loading the ship the services of the crew might not have been required.

To allow as damages estimated net profits of the sale of a cargo of guano at New York, deducting only the freight, is to presume without any proof that the vessel would have safely arrived at the islands; would have obtained a full cargo of guano; that it would have been put on board within the time limited in the charter party; that the services of the crew would not have been required; and therefore that the one dollar per day agreed to be given would not have been due; that the libellants would have furnished three lighters for loading the cargo, and would have had men to assist in the operation; and, finally, that the vessel would have safely made the voyage to New York, delivered and been paid for her cargo, at rates such as a chemist of this city thinks would represent the value of the guano, samples of which he analysed. If in the case of The Tribune [Case No. 14,171] the estimated profits were too uncertain to be admitted as an item of damages, a fortiori the rule must be applied to the case at bar.

The libellants have not shown that they incurred any losses or expenses in and about the voyage, or in procuring lighters, or making preparations for it—contemplated—nor in endeavoring to procure another vessel. That another vessel could readily have been obtained, provided security for the charter money were furnished, is clear. But the masters and agents of ships at this port seem to have been distrustful of the security which would have been afforded by the proposed cargo, and perhaps were doubtful whether a cargo would be furnished them—doubts which the refusal of the Adelaide to sail on the voyage tended to confirm. I cannot, therefore, perceive how I can award any damages, except nominal, for the breach of contract complained of. A decree to that effect must therefore be entered.

Case No. 2,571a.

CHAFEE v. COGGSHALL.

[6 Leg. Gaz. 342.]

Circuit Court, D. Rhode Island. June 2, 1874.

CORPORATIONS — LEVY ON INDIVIDUAL PROPERTY OF MEMBER—PRELIMINARY INJUNCTIONS.

1. Under the act of the legislature of Rhode Island concerning manufacturing corporations, a levy upon the individual property of a member of the corporation involved in this suit is allowed.

2. The granting of a preliminary injunction being a matter entirely in the discretion of the court, and it appearing to the court that no legal injury will result to the complainant by the sale of his property, the injunction asked for is refused.

In equity. Sur motions for injunction against a sale by Coggshall, United States marshal, of certain bank and manufacturing stocks levied on as the property of William Sprague, Amasa Sprague, and Edwin Hoyt, respectively, in virtue of an execution issued from the circuit court in favor of James v. Atlantic Delaine Co. [Cases No. 7,177 and 7,178].

Tillinghast & Thurston (with whom were Gardner & Hart), for Chafee and Mrs. Sprague.

Mr. Markland, for Franklyn.

Parsons & Jenckes, for Coggshall.

KNOWLES, District Judge. Three motions for a preliminary injunction are to be disposed of in consonance with the views of this court, touching its powers and duties as heretofore expressed. In Earth Closet Co. v. Fenner [Case No. 4,249], said the court: "A motion for a preliminary injunction is one of the class addressed in technical parlance to the discretion of the court. For

precedents, in any recognized sense of that word, it is therefore idle to search. By one judge an injunction may be granted to-day under a given state of facts and by another be refused to-morrow, upon identically the same state of facts, and yet neither functionary be chargeable with even error in judgment. The law makes the judge's discretion the rule, not unheedful that, in the qualities of mind which give character to an exercise of discretion, individuals differ scarcely less than in form and features. The judge is bound to decide a question of this kind as in his judgment, upon the particular case before him, the principles of equity and the practice of its courts warrant or dictate, and this whether his decision be in accord or at variance with that of his brother officer, of whatever grade or whatever locality. The largest liberty imaginable is his, practically, 'with no rules to restrain, no after reckonings to dread.' Neither upon appeal, nor by writ of error, nor even by petition for revisory action, can a judge's rulings or orders upon a motion for a preliminary injunction be subjected to correction or even criticism on the part of his superiors in official position or in judicial acumen." And more recently, in James v. Atlantic Delaine Co. [supra], said the court, adopting the language of Chancellor Kent: "The power of injunction is too peremptory and powerful in its effects to be used in such a case as this without the clearest convictions. I shall better consult the stability and utility of the powers of this court by not stretching them beyond the limits prescribed by the precedents."

The first of these motions is that of Zachariah Chafee, trustee. To the argument in its support, and the argument against it, I have given all needful consideration, arriving at the conclusion that the motion must be denied. Granting for argument's sake that the jurisdiction of the court as to parties is not to be questioned, that the bill is ancillary to the Delaine suit, and not an original bill, and also, that the parties respondent have been duly cited, and have appeared (all points upon which I express no opinion), still my conclusion is that the motion must be denied. The complainant's case, as stated in his bill, is not, in my judgment, one which warrants an exercise by the court of its power to restrain a sale under the respondent's levy upon her execution. She is shown to have done nothing as yet that affords just cause of complaint to the complainant,—nothing that is not justifiable in view of the court's decree, and of the execution it awarded,—and what is more important, nothing that is not sanctioned and contemplated by the act concerning manufacturing corporations cited in the bill, and exhaustively discussed at the hearing. Under that act, a levy upon the property of a member of the company is allowed, not to say prescribed; and if the marshal charged with the service of an execution, under directions from the creditor or his attorney, or without directions, makes a levy upon the property of a person not a member, he does so at his peril. There may be ground for an action of trover, trespass, replevin or debt, against the officer and his sureties, and his aiders and advisers, but no ground, it is believed and held, in view of recognized principles and sound precedents, for an injunction against the officer or his employer. Again, that the officer's proceedings are throwing a cloud over the complainant's title, a leading allegation in the bill, is a proposition to which the court can give little heed, until it can be shown that clouds upon title to personal property are clouds upon title "in equity parlance;" a task not even attempted by the learned counsel of the complainant. And, finally, the court fails to see in the allegations of the bill any reason whatever for apprehending that any injury, in the legal sense of the term, much less any "irreparable injury," would be inflicted upon the complainant by a sale of the attached property. This is not property, it is to be remembered, of which the purchaser can take possession at the moment of sale, and thus compel the aggrieved owner to commence proceedings to recover it, but property of which the owner practically retains possession, compelling the purchaser to show his title to possession by some proceeding at law or in equity. For any supposable damage to the owner, the law is presumed to have prescribed all needed means and modes of redress. The statute referred to may be impolitic or defective, but it does not follow that the courts of equity, state or federal, are bound to supply its defects by an exercise of their power of injunction. The federal court of equity has, by decree, awarded to the respondent administratrix an execution, to be levied in accordance with the laws of Rhode Island, upon the property of Rhode Island citizens; and it may well leave it to be determined by suits in Rhode Island courts, whether or not her laws are outraged or infringed in the service of that execution. Says the supreme court of New Hampshire (N. H. Reports, page 272), treating of an application for an injunction to stay a sale of real estate: "In many cases equity would decline to interfere, but leave the parties to their remedy at law. This would ordinarily be the case where a creditor had levied his execution upon land of his debtor which had been previously conveyed by him, but which the creditor proposed to impeach as fraudulent." The motion for an injunction in the case of Chafee, complainant, must be denied.

Of the motion in the case of Fannie Sprague, complainant, it needs only be said that as this bill is in all essentials similar to that of Chafee, that also must be dismissed.

The third and last of these motions, is that of Charles G. Franklyn et al., embodied in

their petition in equity. In this case it is contended in the interest of the respondent, by counsel who appear (as they set forth in writing), simply to protest against any action upon the motion by the court, and to move to take the petition off the files, that the court has no jurisdiction over the matter to which the petition relates, and in support and in denial of this proposition, learned and elaborate arguments were submitted by the counsel respectively. My conclusions upon this point, it seems, it is not necessary here to state, inasmuch as, upon other grounds, I arrive at the determination that the petition must be dismissed, in so far as relates to the issue of an injunction of the sale of the attached property therein specified and referred to. Granting for the argument's sake, that the petitioners' standing in court is unexceptionable as relates to their residence and interest in the matter,—nay, granting that Mr. Hoyt himself were the petitioner,—I should still be constrained to adjudge that no sufficient ground is shown for the issuing of an injunction as prayed. From the organization of the company, in 1851, it is conceded he had been a leading member, at one time president, and for a long period a director, enjoying all the advantages, whatever these were, incident to the transaction of business under the manufacturing act of Rhode Island. It is conceded, too, that he was active in the management of the prolonged suit which resulted in the decree in favor of the respondent administratrix; that he was apprised of the issue of the execution and of its levy upon his property, on the 20th of April, and lastly, until about the 12th of May, he was in full life, and actively engaged in managing his business, daily in conference with gentlemen of the legal profession. The gentlemen now petitioning are the persons named as the executors in his will, not at the date of the filing of the petition approved by the probate court of the city of his residence; their rights and equities, surely, can be nowise superior to his. Besides, the grounds upon which a stay of the sale under the levy is asked, are not of the character recognized by a court of equity, as demanding or warranting a stay of an execution as to personal property issuing from a court of law, even much less to warrant a stay of an execution, based on a decree of its own, after a litigation of fifteen years' continuance. That injury of any kind or grade is likely to result from a sale of the property, as advertised, is not even alleged in the petition, nor indeed in the argument. The allegations of fact and of law embodied in the petition, however truthful, and however pertinent they might be in certain imaginable connections, must be regarded as of inconsiderable weight, in this application for a preliminary injunction, by persons merely the representatives of Mr. Hoyt. For his failure or neglect to move in this matter between the 20th of April and his decease on the 15th of May, no sufficient reason is shown or suggested, a circumstance not without weight and significance in this connection. As already indicated, the prayer for a preliminary injunction must be denied; but the petition itself, having been regularly filed, on the 29th of May, must stand upon the docket, as a petition filed, but of the filing of which the principal respondent, Mrs. James, has, as yet, no notice, other than by service of citation upon her attorneys of record in the suit in equity, James v. Atlantic Delaine Co. [supra], in which a final decree was rendered as long since as February 19th, 1874. The three motions are severally disallowed.

CHAFFEE (GOODYEAR v.). See Case No. 5,564.

CHAFFEE (MAY v.). See Case No. 9,332.

CHAFFEE v. N. E. CAR-SPRING CO. See Cases Nos. 3,685–3,687.

CHAFFEE (UNITED STATES v.). See Cases Nos. 14,771–14,774.

Case No. 2,572.

CHAFFIN v. ST. LOUIS et al.

[4 Dill. 19.] [1]

Circuit Court, E. D. Missouri. Dec. 18, 1876.

INJUNCTION TO STAY PROCEEDINGS IN A COURT OF A STATE—CORPORATIONS—SUIT BY STOCKHOLDER.

The federal courts are prohibited, except in certain cases in bankruptcy, from granting "the writ of injunction to stay proceedings in any court of a state" (Rev. St. § 720); and in this case such injunction was refused at the instance of a stockholder in a corporation where the state court had determined the questions sought to be litigated in a suit against the stockholder's corporation, without objection from the stockholders.

[Cited in Hutchinson v. Green, 6 Fed. 838. Explained in Dillon v. Kansas City S. B. Ry. Co., 43 Fed. 113.]

On motion for a temporary injunction Edwin Chaffin, a citizen of the state of Massachusetts, and the owner of one hundred and twenty-five shares of the capital stock of the St. Louis Gas Light Company, files his bill of complaint on behalf of himself and all other stockholders of said company against the city of St. Louis, the St. Louis Gas Light Company, and each of the directors thereof, as also the Laclede Gas Light Company. The bill purports to be brought for the purpose of removing a cloud upon the title of defendant to his stock in the St. Louis Gas Light Company, which has been created and caused, as is alleged, by the unlawful and unauthorized acts of the directors of the company in making and entering into certain contracts, dated, respectively, 1846 and 1873, as also for an injunction to prevent further threatened injury by the recognition of those contracts by the directors of said company—the first with the city of St.

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

Louis, and the other a tripartite contract between the St. Louis Gas Light Company, the city of St. Louis, and the Laclede Gas Light Company. The relief sought is the cancellation by decree of court of the alleged illegal and unauthorized contracts, as also the restraining of defendants, during the pendency of this suit, from doing any further acts prejudicial to complainant's interest, or making further claim to any rights under said illegal contracts, and particularly to restrain the directors from in any manner recognizing or ratifying the illegal contracts heretofore made, or from making settlements based thereon, and that the Laclede Gas Light Company be restrained from exercising any of the rights or privileges claimed by it under said "tripartite agreement" of 1873; as also that the city of St. Louis be restrained and enjoined from further claiming rights or title under said pretended contracts until this suit is heard and determined.

Frank J. Bowman and James O. Broadhead, for the motion.

Leverett Bell, contra.

DILLON, Circuit Judge. This cause is before me on a motion by the complainant, a single stockholder in the St. Louis Gas Light Company, for a temporary injunction. On a preliminary application of this character, it is not advisable to express any opinion upon the rights of the city or of either of the gas companies, except so far as may be necessary to decide the application. It appears from the bill and exhibits, that in 1870 the city of St. Louis, as plaintiff, commenced a suit in the St. Louis county circuit court against the St. Louis Gas Light Company, to enforce, inter alia, an alleged right to purchase the works and property of that company, under the charter thereof, and the fifth clause of the contract between the city and the gas company, dated January 9th, 1846, which clause undertook to give to the city the right to make such purchase beyond the end of twenty-five years from January 1st, 1840, viz.: at the end of every five years thereafter.

On the 28th of February, 1873, the so-called tripartite agreement was made between the city and the two gas companies, which undertook to settle and compromise their respective disputes—dividing the territory to be lighted between the two gas companies, and containing stipulations as to furnishing the city with gas, and the price thereof, until January 1st, 1890, if the said gas companies shall so long exist. This contract also contained an agreement between the city and the St. Louis Gas Light Company that the litigation between them shall cease, and all suits pending between them are to be dismissed, and all causes of action between them be considered settled. Afterwards an amended and supplemental bill was filed by the city against each of the companies, still seeking to enforce its right to purchase the property of the St. Louis Gas Light Company, and insisting upon the validity of the contract in that respect made in 1846, and upon the invalidity of the tripartite agreement of 1873.

The Laclede Gas Light Company answered, insisting upon the validity of the contract of 1873, under which it had acted and expended large sums of money. The answer of the St. Louis Gas Light Company denied the validity of the above mentioned fifth clause of the contract of 1846, giving the city the right to purchase beyond the year 1865, and insisted upon the validity and binding force of the compromise contract of 1873. On the 1st day of June, 1876, an interlocutory decree was entered in the suit by the state court, holding that the contract of 1846 was valid and the contract of 1873 was not binding or effectual to defeat the right of the city to purchase the property and works of the gas company.

That court accordingly decreed a specific performance of the contract of 1846; that is, decreed that the city had the right to purchase the property and works of the company, appointed commissioners to ascertain the value, placed the property in the hands of a receiver, and perpetually enjoined the St. Louis Gas Light Company from manufacturing or selling gas in St. Louis. Now, after all this had been done, the complainant herein, Mr. Edward Chaffin, in the right of a stockholder in the St. Louis Gas Light Company, filed the present bill in the circuit court of the United States against the city, and the Laclede Company and his own company and the directors thereof, the prayer of which appears in the statement of the case.

Without pronouncing upon the validity of the contracts of 1846 and 1873, there are several reasons why the injunction asked cannot be allowed:

1. The plaintiff does not inform us when he became the owner of his stock, nor show that he has not, all along, been aware of the proceedings in the state court, and just what was being done and omitted to be done therein. By the answer his company denied the right of the city to enforce the purchase, and there is no evidence before me that the directors did not resist to the best of their ability the claim of the city to enforce a purchase of the property. On the plainest principles, a stockholder who stands by, awaiting the result of a litigation, cannot, on that result proving unfavorable to his company, draw the litigation into another court in a suit between himself and the litigants in the state court. If such a rule had its foundation in the law, there would be no end to a suit against a private corporation, so long as any one or more stockholders should see fit to re-litigate the same controversy in their own names. So far as an injunction is sought on

the ground that the directors of the St. Louis Gas Light Company did not resist the right of the city to make a compulsory purchase of its works and property, it is not sustained by the record of the cause, so far as it has been called to my attention.

It is also urged as a ground for the injunction, that the directors ought to have insisted in the state court that the contract of 1873 was invalid, whereas, in the answer filed, they maintained its validity. However this may be as to the duty of the directors, it is plain that no injury has been wrought thereby to the complainant, for the state court decreed in this regard in accordance with the view for which the complainant contends.

2. The complainant has amended his prayer for an injunction by striking out the words which ask that the city be enjoined "from further prosecuting its said suit" in the state court, but notwithstanding this, it is evident that to grant the injunction sought, would, if it were effectual for any purpose, be so only because it would in some way interfere with the progress of the litigation in that court. This a federal court is prohibited from doing directly, for the Revised Statutes of the United States (section 720) enact that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state." And on the case made by the bill, it is not justified in doing this indirectly, at the instance of a stockholder. Memphis v. Dean, 8 Wall. [75 U. S.] 64; Peck v. Jenness, 7 How. [48 U. S.] 612. The motion for the allowance of a provisional injunction is denied.

[NOTE. For decision disallowing exceptions taken by complainant to the answer to the amended bill of complaint, see Case No. 2,573, next following.]

Case No. 2,573.

CHAFFIN v. ST. LOUIS.

[4 Dill. 24;[1] 23 Int. Rev. Rec. 330; 5 Cent. Law J. 284; 25 Pittsb. Leg. J. 34; 2 Cin. Law Bul. 237.]

Circuit Court, E. D. Missouri. 1876.

JURISDICTION OF UNITED STATES CIRCUIT COURT —STOCKHOLDER'S BILL.

The United States circuit court will not entertain a bill in equity by a non-resident stockholder of a domestic corporation, where it appears that the issues raised by the bill have been already adjudicated in a suit brought in the state court between the corporation and the proper adversary parties, and litigated there without fraud or collusion.

This is a bill in equity by complainant, a citizen of Massachusetts, and the owner of one hundred and twenty-five shares of capital stock in the St. Louis Gas Light Company, on his own behalf and that of other stockholders who may join him, against the St. Louis Gas Light Company and the directors thereof, and the Laclede Gas Light Company, and the city of St. Louis, to procure the cancellation of certain contracts, to which said corporations are parties. 4 Dill. 19 [Case No. 2,572].

The amended bill of complaint states that, under the charter of the St. Louis Gas Light Company, the city was entitled to purchase the works, etc., of the said company, at a price to be determined by arbitrators, in 1860 and 1865, if it elected at either of said times so to do; and that by a contract between the city and the company, of January 9th, 1846, the city relinquished its right to purchase in 1860; and said contract thereupon further provided that if the city should not exercise its right to purchase in 1865, it might purchase in 1870, in the same manner and to the same effect as is provided in the charter; and it is charged that said contract is and was invalid, illegal, void, and of no binding force, etc.

It is further alleged that in 1870 the city instituted an action in the circuit court of St. Louis county, to enforce said contract and acquire said works, etc., thereunder, and that the directors of the St. Louis Gas Light Company did not properly and in good faith defend said action, and that during its pendency, in 1873, another contract was entered into between the city and the gas light companies, which was also illegal and void, and that said suit resulted adversely to the St. Louis Gas Light Company, and thereby, and by said illegal contracts, said complainant's shares of stock therein have suffered great depreciation in value, and, as against the city, it is prayed that said contracts of 1846 and 1873 be declared void and be cancelled, and that the city be enjoined from claiming or exercising any rights thereunder.

The separate answer of the city of St. Louis, to which exceptions have been taken and are now urged, is as follows:

"And further answering, said defendant says that on the 21st day of May, 1870, the city of St. Louis instituted an action in the circuit court of St. Louis county (being the suit mentioned in the amended bill herein), against the St. Louis Gas Light Company, for a specific performance of said contract of January 9th, 1846, which said action was entitled: The City of St. Louis, plaintiff, against the St. Louis Gas Light Company, defendant; and said St. Louis Gas Light Company duly appeared in said action, and defended the same, and alleged in its answer to plaintiff's petition therein, that said contract of January 9th, 1846, was invalid, for the same reasons now herein urged by complainant in his amended bill of complaint; that said suit was proceeded with in said county; and thereafter, upon August 4th, 1875, the Laclede Gas Light Company was joined as a party defendant therein, and thereupon it also appeared by counsel and

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

defended; that said suit was thereafter duly tried and heard by said court upon evidence and witnesses adduced and heard on the part of plaintiff herein, the city of St. Louis; also, on the part of said St. Louis Gas Light Company and said Laclede Gas Light Company; and such further proceedings were had therein, that, on June 1st, 1876, an interlocutory decree was rendered in said cause by said court, in which it was, amongst other things, adjudged and decreed by said court that said contract of January 9th, 1846, was and is a valid and lawful contract, and binding upon the St. Louis Gas Light Company; and said gas light company was forever enjoined and restrained from manufacturing or selling gas in the city of St. Louis, or its suburbs, or prosecuting the business of a gas light company; and a receiver was appointed of all the property and effects of said gas light company; and said receiver thereafter duly entered into the possession of the same, and now holds the same, and is manufacturing and selling gas in St. Louis, under the order and direction of said court; that further proceedings being had, a final decree in said cause was entered on the 12th day of February, 1877; that thereupon the said St. Louis Gas Light Company filed a motion for a new trial and for a rehearing in said cause; which motion is now pending and undetermined in said court.

"And herewith is presented and filed a certified copy of the original petition in said cause, the answer of the St. Louis Gas Light Company thereto—to amended and supplemental petition of plaintiff therein; the demurrer of the St. Louis Gas Light Company thereto; also the demurrer of the Laclede Gas Light Company, and a judgment of said court overruling said demurrers; the answer of the St. Louis Gas Light Company; and the replications of the city of St. Louis thereto; the interlocutory decree of June 1st, 1876, therein; and the final decree of February 12th, 1877 [therein, which said certified copy is marked 'Exhibit A,' and this answer, and is herewith filed].[2]

"And said defendant alleges that said cause—so instituted as aforesaid in the circuit court of St. Louis county—is still pending in said court; and that the same identical matters, questions, and issues were presented for trial, adjudication, and determination in said case, in said circuit court of St. Louis county, as are here presented for trial, adjudication, and determination, to this honorable court, by the amended bill of complainant herein; that said circuit court of St. Louis county had full, ample, and complete jurisdiction to hear and determine said matters, questions, and issues, and each and all of them, in said case; and that it did hear and determine the same, and all of them, and perpetually enjoin the St. Louis Gas Light Company from manufacturing and selling gas in St. Louis; that the said St. Louis Gas Light Company is now bound by said injunction, and subject to the further order of said circuit court of St. Louis county in said cause; that the St. Louis Gas Light Company and the directors thereof, in good faith, defended said action in the circuit court of St. Louis county, by counsel learned in the law, duly employed by them for that purpose, and they are now defending the same; that the proceedings, orders, and judgments of said circuit court of St. Louis county in said cause are now in full force, and unreversed, and binding upon the St. Louis Gas Light Company, its directors and stockholders, including the complainant herein, if he be a stockholder, as alleged in his amended bill of complaint."

A certified copy of the record, including the proceedings, pleadings, and decrees in said cause in the state court, is filed with the answer as an exhibit.

The complainant excepts to the above parts of said answer, on the ground that they fail to state facts sufficient to constitute a legal defense to his amended bill of complaint; and the questions presented by said exceptions are now here to be determined.

F. J. Bowman, for plaintiff.

L. Bell and E. T. Farish, for St. Louis.

DILLON, Circuit Judge. The answer sets up the suit of the city of St. Louis, commenced in May, 1870, in the state court, against the St. Louis Gas Light Company (in which the present plaintiff is a stockholder), to enforce the right of the city to purchase the works and property of the gas company, conferred by the legislature of the state in that behalf, and by the contract of January 9th, 1846. This alleged right of the city to make such purchase was denied by the gas company, and the record of that suit shows that such right was vigorously resisted at every step of the progress of that suit. After a hearing on the merits, that court, June 1st, 1876, entered an interlocutory decree declaring that the contract of January 9th, 1846, was valid, and that the city had the right to purchase the works and property of the gas light company; and afterwards, on the 12th day of February, a final decree was rendered effectuating such right, and declaring that all the estate, interest, and claim of the gas light company to its works and property be vested in the city of St. Louis; which decree is alleged in the answer to be in full force and unreversed. The present suit by a stockholder in the said gas light company was brought in this court November 23d, 1876, which was after the interlocutory decree above mentioned was rendered in the state court.

One of the main objects of the present bill is to have the contract of January 9th, 1846, declared null and void as respects the gas light company. But the state court having jurisdiction of the suit of the city against

[2] [From 25 Pittsb. Leg. J. 34.]

the gas light company, upon pleadings presenting that precise issue, has judicially determined that said contract, in the respect here involved, was a valid contract, and the answer which pleads this decree avers that the gas light company and the directors in good faith defended said action in the state court, and are now defending the same, and further avers that the decree in the said suit, which is in full force, is binding upon the gas light company, its directors and stockholders, including the complainant. A decree thus rendered upon adverse proceedings, and without fraud and collusion, is binding upon the gas light company, and upon its stockholders; and the latter cannot as we said when the injunction asked for was denied, afterwards draw the litigation into a federal court in a suit between themselves and the litigants in the state court. If this could be done, there would be no end to a suit against a private corporation so long as any stockholder should see fit to re-litigate the same controversy in his own name.

The exceptions to the answer are disallowed. Ordered accordingly.

CHAFLIN (UNITED STATES v.). See Case No. 14,775.

CHAIN AND ANCHOR (CROWELL v.). See Case No. 3,443.

CHAIN CABLE (UNITED STATES v.). See Case No. 14,776.

CHALMERS v. HOWELL. See Cases Nos. 9,302 and 9,303.

Case No. 2,573a.

CHALMERS SPENCE PAT. NON-CONDUCTOR CO. v. CRAMP et al.

[5 Ban. & A. 66.][1]

Circuit Court, E. D. Pennsylvania. Jan., 1880.

PATENTS—"STEAM BOILER COVERING"—VALIDITY.

The letters patent, No. 55,598, granted June 19th, 1866, to John Ashcroft, the claim of which is for "covering a steam boiler, pipe or other heater with felt or other non-conducting material, when the latter is supported on a framework removed from and surrounding the former, not being in direct contact, but having an air-space intervening between said felt and boiler, pipe or other heater, constructed and operated substantially in the manner described and for the purpose set forth:" *Held*, to be valid.

[Cited in Chalmers Spence Patent Non-Conductor Co. v. Pierce, 9 Fed. 152.]

[In equity. Bill for injunction by Chalmers Spence Patent Non-Conductor Company against William H. Cramp and others for the alleged infringement of letters patent No. 55,598, granted to John Ashcroft June 19, 1866.]

E. B. Barnum, for complainants.

Charles B. Collier and W. W. Ledyard, for defendants.

McKENNAN, Circuit Judge. There is no substantial contest here touching the infringement of the complainants' patent by the defendants. Indeed, there is no denial of infringement in the answer as charged in the bill. The defence is rested upon the alleged invalidity of the patent, for the reason that the patentee was not the first and original inventor of the thing claimed; and various patents are referred to and allegations of prior use are made, which are charged as anticipatory of the patentee's invention. A careful consideration and comparison of the patents referred to and of the devices proved, although indefinitely and unsatisfactorily, to have been used experimentally before the date of the patent in controversy, have led me to the conclusion that they are substantially distinguishable, and that the assault upon the patent must be regarded as having failed. I do not propose to assume the burden of stating in detail the reason for this conclusion, but to express it generally, and to direct that a decree for an injunction and an account be entered in favor of the complainants.

[NOTE. For another case involving this patent, see Chalmers Spence Pat. Non-Conductor Co. v. Pierce, 9 Fed. 152.]

CHALMETTE, The (The BOLIVAR v.). See Cases Nos. 1,609–1,611.

CHALONER (UNITED STATES v.). See Case No. 14,777.

Case No. 2,574.

In re CHAMBERLAIN et al.

[3 N. B. R. 710 (Quarto, 173).][1]

District Court, E. D. Michigan. March 28, 1870.

BANKRUPTCY—FRAUDULENT PREFERENCE—EXCLUSION OF PREFERRED CREDITOR FROM CHOICE OF ASSIGNEE.

1. Whether a creditor who had received a conveyance of property made with intent to defeat or delay the operation of the bankrupt act [14 Stat. 534], having reasonable cause to believe a fraud on the bankrupt act was intended, may prove his claim and vote for assignee? At the time of the delivery of the bond and mortgages, an act of bankruptcy was close at hand, the mortgagee, of the firm Allan Shelden & Co., being well apprised of the facts. The assignment was not general, for the benefit of all the creditors, but conditional; the mortgagee having no power whatever over the real property for six months, and the personal property encumbered by a specific reservation. The motion was to exclude the firm of Allan Shelden & Co., and other creditors who had expressed themselves satisfied with the transaction, from participation in the choice of assignee, and to postpone the proof of their claims. *Held*, it is the character of the instrument which is the subject of discussion; and if the exercise of the powers granted by it would defeat or delay the

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operation of the bankrupt act, then such would be presumed to have been its intention.

[Cited in Re Union Pac. R. Co., Case No. 14,376.]

2. The disposition of property under it was complete on the day of the execution and delivery of the bond and mortgages; and the intent existing at that time determines the character of the transaction.

3. The proof of the claim of Allan Shelden & Co. should be postponed until after the choice of an assignee.

4. The motion to exclude the other creditors mentioned from participation in the choice of assignee, ought to be denied.

On certificate of register in bankruptcy. [In the matter of Eli B. and Owen P. Chamberlain.]

Before Mr. Hovey K. Clarke, register in bankruptcy:

I, the said register, do hereby certify that in the course of proceedings before me at the meeting of creditors for the choice of an assignee of said bankrupt's estate, the attorney for the petitioning creditors moved that the proof of the claim tendered by Allan Shelden & Co., and the proofs of the claims filed by Beatty, Fitzsimons & Co., A. C. McGraw & Co., W. D. Robinson, Burtenshaw & Co., E. Lieberman, and Geo. B. Kelley & Co., be postponed until the assignee is chosen, on the ground that said claimants had received a conveyance of the property of said bankrupts, made with intent to defeat or delay the operation of the bankrupt act, having reasonable cause to believe that a fraud upon the bankrupt act was intended, and that said bankrupts were insolvent. The said claimants being present and insisting upon their right to vote for assignee, questions of fact and law were presented and stated by the parties, Mr. Dickinson appearing for petitioning creditors and Mr. Driggs for the claimants whose rights to vote were objected to, and thereupon witnesses were examined relative to the facts in controversy between the parties.

In April, 1869, the bankrupts, then doing business as partners in Brockway, St. Clair county, finding themselves in embarrassed circumstances, sought an interview with Mr. Allan Shelden, of the firm of Allan Shelden & Co., and stated to him that their stock had been attached; that one of their creditors would probably take a judgment against them the next day, and, as Mr. Shelden thinks, the other creditors would take judgments against them at the same term of court. That this statement truly represented the then existing condition of the affairs of the Chamberlains is not controverted. This interview resulted, after consultation with counsel, in the execution by the bankrupts and the delivery to Mr. Shelden of a bond, bearing date April 22d, 1869, in the penal sum of eighteen thousand dollars, reciting the indebtedness of the Chamberlains to various persons and firms, in divers sums of money—neither names of persons nor sums of indebtedness being specified—amounting in the aggregate to about nine thousand dollars, as near as they could estimate the same, and which they further recite "they are desirous of securing." The condition of the bond is declared to be the payment within six months or sooner, if they should be able to do so, of all just debts which they were then owing and liable to pay, with interest; and also to pay any future indebtedness which they may incur to the firm of Allan Shelden & Co., for goods or merchandise which said firm may advance to them. The performance of the condition of this bond was secured by two mortgages, one upon a considerable quantity of real estate in the counties of St. Clair and Sanilac, and a chattel mortgage of all the personal property of the Chamberlains in their store at Brockway, of a quantity of lumber and saw logs, and some other specified articles. The chattel mortgage contained the further condition that the mortgagors "may sell any or all of the property above described in the usual course of business, the avails of such sales to be applied in accordance with the condition of the bond above referred to. The party of the second part may at any time take possession of the property hereby mortgaged." The trust created by these instruments was accepted by Mr. Shelden; the greater part of the personal property has been sold, and a considerable portion of it converted into money. No subsequent advances have been made by the firm of A. Shelden & Co., as provided for in the bond. It does not appear that any of the creditors whose right to vote for assignee is objected to, had any knowledge of the transaction between the Chamberlains and Mr. Shelden previous to the execution and delivery of the papers. They all, however, in terms more or less explicit, have since the transaction expressed themselves satisfied with it.

By Hovey K. Clarke, Register:

It is clear that at the time of the interview with Mr. Shelden the Chamberlains were insolvent. They were unable to pay their debts in the ordinary course of business, and this inability was of a character, as the proof shows, which would result in the eventual breaking up of their business. Their goods were attached, several suits were pending against them, on one of which it was expected judgment would be entered the next day, and on the others during the same term of the court. In these circumstances, it is evident, an act of bankruptcy was close at hand. If they remained inactive, they had reason to expect that an execution would be levied on their property within forty-eight hours. To remain thus inactive would be to "suffer their property to be taken on legal process," which would justify a proceeding by their creditors against them to have them adjudicated bankrupts. In re

Black [Case No. 1,457]; In re Dibble [Id. 3,884]. They could prevent this by filing a voluntary petition to be adjudged bankrupts. By one or the other of these methods an act of bankruptcy seemed inevitable. By resorting to the voluntary method they could have effectually precluded the involuntary, and they would have submitted all their property to be distributed as provided by the law of the land, and under the control and guaranties that the rights of all creditors will be protected, which those laws afford. For some reason which is not stated, and which therefore can only be inferred from their acts, they do not resort to the method prescribed by the bankrupt act to prevent the preference which the judgment creditors were likely to obtain. They state their condition to Mr. Shelden, so that he becomes well informed as to all the essential facts affecting their liabilities and their duties, and, after consultation with counsel, the method of the bond and mortgages which have been proved in this case, was adopted to prevent the levy of the impending execution. It is insisted that this was done to protect the property for the benefit of all the creditors, the proceeds of which were to be distributed among them equally without preference.

It is to be observed, however, that the conveyance to Shelden was not a general assignment for the benefit of the creditors, such as would authorize him to proceed at once to convert the property and distribute the proceeds. The conveyances are conditional—one mortgage on the real estate, and the other upon personal property—conditioned to pay all the mortgagors' creditors, and also what they may in addition become indebted to A. Shelden & Co. within six months; during which period Shelden could exercise no rights whatever over the real property, and his right to take possession of the personal property was encumbered by a reservation of the mortgagors' right to continue to sell the property mortgaged in the usual course of business. If this were a general assignment for the benefit of creditors, it is difficult to see how it could be sustained under the well settled principles which require such an assignment to fix definitely the rights of the parties and of those to be benefited by it, and especially to be free from all control whatever by the assignor of the property assigned. The reservation of the right to continue to sell the mortgaged property, and the agreement that the security should embrace any subsequent indebtedness of the Chamberlains to the firm of A. Shelden & Co., are clearly inconsistent with the principles above referred to, and which are supposed to be well settled as applicable to the construction of assignments for the benefit of creditors. Instead of making an unconditional surrender of their property for the benefit of their creditors, they seek to convert it into a special trust, by which, at the option of the parties, it may be employed indefinitely as a basis on which to continue their business; and if they were doing an unprofitable business, the property which ought to be distributed to creditors, existing at the time of the transaction, may be used to protect the interests of the firm in which the trustee was a partner, against loss from the business thus continued. It is no answer to this to say that this power was not actually exercised—that no further advances were made. It is the character of the instrument which is the subject of discussion; and if the exercise of the powers granted by it would defeat or delay the operation of the bankrupt act, then such will be presumed to have been its intention. The disposition of property under it was complete on the day of the execution and delivery of the bond and mortgages; and the intent existing at that time determines the character of the transaction.

As mortgages, however, the same objections recur with increased force, and establish the inconsistency of such conveyances with the general policy of the bankrupt act not only, but the provisions of section 39 of that act in particular. [14 Stat. 536.] The general policy of the bankrupt act demands that the property of an insolvent shall be taken charge of by the officers of the bankrupt court, where all creditors have an opportunity to assert their rights, where the utmost publicity as to all proceedings is secured, and where the bankrupt's estate is to be converted and distributed by public officers, directed and controlled by a statute which provides speedy and summary methods to enforce it and protect the rights of all parties. In this case, the Chamberlains were in circumstances that inactivity merely would expose them within forty-eight hours, probably, to the compulsory process of the bankrupt court. They might avoid it by becoming voluntary petitioners to be adjudicated bankrupts. They decline to do this, and execute instead certain mortgages, which if valid, not only set their creditors at defiance for six months, but secure for them the right, with the consent of a party selected by themselves, to continue their business, including the purchase of more goods, until a breach of the condition of the mortgages. If they can do this legally for six months, it is difficult to see how in principle they can be restrained from securing like immunity for six years by the same method. Its effect, unquestionably, is not only to delay the operation of the bankrupt act, but if sustainable at all, may be employed to defeat it altogether. The involuntary clauses of the bankrupt act may as well be repealed—for a time mortgage will be always effectual to set them all at defiance. Such is the practical and necessary effect of such a disposition of property as is proved in this case; and the law conclusively presumes that such effect was intended by the parties to it.

Who were the parties to it? The two

Chamberlains, the bankrupts, and Mr. Allan Shelden. All the facts which give character to the transaction are shown to be known to Mr. Shelden before he took the bond and mortgages. The intent of the mortgagors is thus brought home to the mortgagee, and the consequences, as declared by the last sentences of section 39, that a creditor having "reasonable cause to believe that a fraud on the act was intended, and that the debtor was insolvent, shall not be allowed to prove his debt in bankruptcy," the petitioning creditors contend exclude the proof of the debt due to Allan Shelden & Co., and at any rate are sufficient to justify the postponement of the proof of the claim until after the choice of an assignee. I do not understand that any point has been made that the objections which might exist to the proof of a claim by Allan Shelden, on account of his participation with the bankrupts in the purpose to defeat or delay the operation of the act, do not apply to Allan Shelden & Co. If proved at all, it must be proved in favor of all the partners—as creditors they cannot sever. The penalty therefore which the act imposes cannot be visited upon Mr. Shelden unless his partners are also involved in its effect. It is unnecessary, however, to discuss this question, for whatever there may be in it, enough I think appears to require the postponement of the proof of the claim of Allan Shelden & Co., until after the choice of an assignee.

The motion to exclude the other creditors named, to wit: Messrs. Beatty & Fitzsimons, A. C. McGraw & Co., W. D. Robinson, Burtenshaw & Co., E. Lieberman, and George B. Kelley & Co., rests upon the proof that they have expressed themselves as satisfied with the arrangement entered into between the bankrupts and Mr. Shelden. It does not appear that they had any knowledge whatever of the facts that make up the intent to defeat the operation of the bankrupt act, until after the bond and mortgages were given, nor that they were consulted concerning it, or in any way accepted it, except to declare that they were satisfied with it. In no sense can it be said that they have received the conveyances which it is alleged were given, with the intent to defeat the operation of the bankrupt act. The conveyances were not to them directly or indirectly; they were complete before these creditors had any knowledge of them. There is, therefore, not only no proof of the alleged intent, but there is no fact proved from which any such intent on their part can be inferred.

I am of opinion, therefore, that the motion to exclude them from participation in the choice of an assignee ought to be denied.

LONGYEAR, District Judge. I fully concur in and approve of the foregoing views and conclusions of the register.

Case No. 2,575.

CHAMBERLAIN et al. v. CHANDLER.

[3 Mason, 242.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1823.

ADMIRALTY JURISDICTION OF TORTS.

1. The admiralty has jurisdiction of personal torts and wrongs committed on a passenger, on the high seas, by the master of the ship.

[Cited in Thomas v. Gray, Case No. 13,898; Waring v. Clarke, 5 How. (46 U. S.) 488; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 434; The Aberfoyle, Case No. 16; Crapo v. Allen, Id. 3,360; Smith v. Wilson, Id. 13,128; Pendleton v. Kinsley, Id. 10,922; The City of Brussels, Id. 2,745; White v. McDonough, Id. 17,552; Simpson v. The Ceres, Id. 12,881. Distinguished in McGuire v. The Golden Gate, Id. 8,815.]

2. It is immaterial whether such torts be by direct force, as trespasses, or consequential injuries.

[Cited in Waring v. Clarke, 5 How. (46 U. S.) 468; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 432; The Highland Light, Case No. 6,477. Distinguished in The David Reeves, Id. 6,625.]

This was a libel in the admiralty, brought by the libellants, (being husband, wife, and children,) who were passengers on board of the ship Pearl, on a voyage from the island of Woakoo to Boston, against the defendant, who was master of the ship, for the voyage, for damage, for asserted ill-treatment and injuries to them during the voyage. The defendant put in, by way of answer, an allegation denying the ill-treatment and injuries. The cause came to be heard upon the evidence.

Hubbard and Webster, for libellants.

T. Fuller, for defendant.

STORY, Circuit Justice. No exception has been interposed against the jurisdiction of the court in this case. I wish however that it should be understood, that the point has not passed sub silentio; but that it has attracted the consideration of the court. The contract itself is a maritime contract, for the conveyance of passengers on the high seas, and the wrongs complained of, are gross ill-treatment and misconduct in the course of the voyage, while on the high seas, by the master, in breach of the stipulations necessarily implied in his contract, of the duties of his office, and of the rights of the libellants, under the maritime law. The jurisdiction of courts of admiralty over torts, committed in personam on the high seas, has never, to my knowledge, been doubted or denied by the courts of common law, and has been often recognised by adjudications in the admiralty. 2 Brown, Civ. & Adm. Law, 108; 3 Bl. Comm. 106. In 4 Inst. 134, the common law judges admitted, in the fullest manner, that "of contracts, pleas, and quereles made upon the

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

seas, &c. the admiral hath and ought to have jurisdiction; and no precedent can be shown that any prohibition hath been granted for any contract, plea, or querele concerning any marine cause, made or done upon the sea." As to the competency of the admiralty to award damages for personal wrongs in cases of captures, as prize, Le Caux v. Eden, 2 Doug. 594, is directly in point; and farther, that in such cases (i. e. of prize), it is exclusive. 2 Jenk. p. 774. See, also, Caton v. Burton, Cowp. 330; 2 Brown, Civ. & Adm. Law, 108, 110; 3 Bl. Comm. 106; Zouch. Adm. 104. No distinction has been recognized between torts to property and torts to persons, on the high seas; and in Le Caux v. Eden, the court seemed to think that none existed. In the case of Lindo v. Rodney, 2 Doug. 613, note, the court held, that the operation of the statutes of Richard was only "to confine the admiralty by the locality of the thing done, which is the cause of action; it must be done on the high seas." Indeed, a tort on the high seas is strictly, within the words of those statutes, a plea or querele, arising on the high seas. And it cannot make any difference in point of principle, whether it be a direct or consequential wrong, whether it be an assault and imprisonment, or a denial of all comforts and necessaries, and a course of brutal insult and mal-treatment, whereby the health of the party is materially injured, or he is subjected to gross ignominy and mental suffering.

The admiralty has been accustomed to deal with subjects of this nature from early times. In the case of The Ruckers, 4 C. Rob. Adm. 73, a civil suit for damages was brought in the admiralty, for an assault by the master of the ship on a passenger on the high seas, and on full consideration the jurisdiction was sustained. On that occasion the court directed the records to be searched, and the registrar reported, "that many instances were to be found of proceedings on damage on behalf of persons described as part of the ship's company, against officers or others belonging to the same ship; and several against persons belonging to other ships; and that there were other instances of proceedings on the part of A. B. against C. D. without any specification of the capacity, in which the persons stood." Sir William Scott said: "Looking to the locality of the injury, that it was done on the high seas, it seems to be fit matter for redress in this court." Doctor Godolphin (a very learned admiralty judge) in enumerating the various subjects of admiralty jurisdiction includes "all affairs relating to mariners, whether ship officers, or common mariners, their rights and privileges respectively; their office and duty; their wages; their offences whether by wilfulness, casualty, ignorance, negligence, or insufficiency, with their punishments." See, also, Exton, Adm. Jur. 70. My judgment accordingly is, that the libel is well founded in point of jurisdiction; and that if the injuries complained of are established in evidence, the plaintiffs are entitled to redress, constituting in the technical phrase of the admiralty "a cause of damage."

In respect to a case like that before the court, a suit by passengers (a husband, wife, and family) against the master of the ship, for continued, wanton cruelty, and ill treatment, it is certainly entitled to be listened to with attention. The authority of a master at sea is necessarily summary, and often absolute. For the time he exercises the rights of sovereign control; and obedience to his will and even to his caprices, becomes almost indispensable. If he chooses to perform his duties, or to exert his office in a harsh, intemperate, or oppressive manner, he can seldom be resisted by physical or moral force; and therefore in a limited sense, he may be said to hold the lives and personal welfare of all on board in a great measure under his arbitrary discretion. He is nevertheless responsible to the law; and if he is guilty of gross abuse and oppression, I hope it will never be found, that courts of justice are slow in visiting him, in the shape of damages, with an appropriate punishment. In respect to passengers, the case of the master is one of peculiar responsibility and delicacy. Their contract with him is not for mere ship room, and personal existence, on board; but for reasonable food, comforts, necessaries, and kindness. It is a stipulation, not for toleration merely, but for respectful treatment, for that decency of demeanor, which constitutes the charm of social life, for that attention, which mitigates evils without reluctance, and that promptitude, which administers aid to distress. In respect to females, it proceeds yet farther, it includes an implied stipulation against general obscenity, that immodesty of approach, which borders on lasciviousness, and against that wanton disregard of the feelings, which aggravates every evil, and endeavors by the excitement of terror, and cool malignancy of conduct, to inflict torture upon susceptible minds: What can be more disreputable, and at the same time more distressing, than habitual obscenity, harsh threats, and immodest conduct, to delicate and inoffensive females? What can be more oppressive than to confine them to their cabins by threats of personal insult or injury? What more aggravating than a malicious tyranny, which denies them every reasonable request, and seeks revenge by withholding suitable food and the common means of relief, in cases of sea-sickness and ill health? It is intimated that all these acts, though wrong in morals, are yet acts which the law does not punish; that if the person is untouched, if the acts do not amount to an assault and battery, they are not to be redressed. The law looks on them as unworthy of its cognizance. The master is at liberty to inflict the most severe mental sufferings, in the most tyrannical manner, and yet if he withholds a blow, the victim may be crushed by his unkindness. He commits nothing within the reach of civil

jurisprudence. My opinion is, that the law involves no such absurdity. It is rational and just. It gives compensation for mental sufferings occasioned by acts of wanton injustice, equally whether they operate by way of direct, or of consequential, injuries. In each case the contract of the passengers for the voyage is in substance violated; and the wrong is to be redressed as a cause of damage. I do not say that every slight aberration from propriety or duty, or that every act of unkindness or passionate folly, is to be visited with punishment; but if the whole course of conduct be oppressive and malicious, if habitual immodesty is accompanied by habitual cruelty, it would be a reproach to the law, if it could not award some recompense.

Let us now proceed to the consideration of the evidence in this case so far as it applies to the libel, which is not confined to mere acts of wanton cruelty and misconduct, but embraces in its gravamen what the law in its strictest sense deems assaults and batteries.

(The judge here went into a full examination of the evidence; and came to the conclusion, that the libel was sufficiently proved to entitle the libellants to damages, and he accordingly decreed, that the defendant should pay $400 damages—being the amount of his share of the passage money received for the passage of the libellants—and costs of suit.)

Decree accordingly.

Case No. 2,576.

CHAMBERLAIN v. ECKERT.

[2 Biss. 124.][1]

Circuit Court, N. D. Illinois. April, 1869.

PLEA IN ABATEMENT—SUIT PENDING IN STATE COURT.

To a suit on a promissory note, defendant pleaded in abatement the pendency of a suit in the state court; plaintiff replied that since the filing of the plea, the suit had been dismissed. *Held*—a good replication.

This was a suit upon a promissory note. Defendant pleaded in abatement that at the time of commencement of this suit an action was pending in the circuit court of La Salle county upon the same note, and between the same parties, which action was still pending. Plaintiff replied that on the 6th of March, after the filing of the plea in abatement, but before the replication, the suit in the state court had been dismissed. Defendant demurred to replication.

J. Milton Peters, for plaintiff.

Elliott Anthony, for defendant.

DRUMMOND, District Judge. I am inclined to think that this replication ought to be held good; and, in the absence of any express authority to the contrary, I shall so hold. There is an opinion given by Chief Justice Parsons, proceeding on the ground that a suit pending at the time of the commencement of the second suit is a good plea; but this, I think, is not the present doctrine. At any rate, it is not the doctrine in this state; and I think it ought not to be because, when a suit has once been commenced, and is dismissed, the fact that it was pending at the time the second suit was brought is no reason why the court in which the second suit was commenced should not go on and adjudicate on the rights of the parties, because, although there was a difficulty once, it is removed. When the suit was commenced there was an obstacle in the way. When the plea was pleaded there was the same obstacle. But now, when the replication is filed, that obstacle is removed.

Demurrer to replication overruled.

Plea of lis pendens in another state not good. Smith v. Lathrop, 44 Pa. St. 326, and cases there referred to.

[NOTE. Subsequently, and without leave of the court, defendant filed a demurrer to the declarations, and on motion of plaintiff the demurrer was stricken from the files. See Case No. 2,577, next following.]

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

Case No. 2,577.

CHAMBERLAIN v. ECKERT.

[2 Biss. 126.][1]

Circuit Court, N. D. Illinois. April, 1869.

CIRCUIT COURTS—JURISDICTION—CITIZENSHIP—ACTION BY ASSIGNEE OF PROMISSORY NOTE.

1. The assignee of a promissory note (being otherwise competent) may maintain an action upon it if the assignor might have done so at the time of the commencement of the suit.

[Cited in Jones v. Shapera, 6 C. C. A. 423, 57 Fed. 461.]

2. The payee, a resident of the same state with the maker at the time the note was given, but having removed therefrom, may maintain an action in this court.

3. The words in the eleventh section of the judiciary act of 1789 [1 Stat. 78], "unless a suit might have been prosecuted * * * if no assignment had been made," refer to the time when the suit was commenced, not the time of the assignment.

4. It is not necessary that it should appear that the assignor could have brought suit upon it before assignment. Thaxter v. Hatch [Case No. 13,866], approved.

5. It seems that if the payee after the maturity of the note and before suit brought had become a citizen of the same state, the federal courts could not sustain jurisdiction.

Suit upon a promissory note by an assignee, the declaration alleging that the plaintiff is a citizen of Vermont, the assignor a citizen of Missouri, and the defendant a citizen of Illinois. Defendant pleaded pend-

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

ency of a former suit—replication that said suit had been dismissed. Demurrer to replication filed and overruled. See preceding case [No. 2,576]. Defendant then, without leave of court, filed a demurrer to the declaration, and this was a motion to strike it from the files.

J. Milton Peters, for plaintiff.
Elliott Anthony, for defendant.

DRUMMOND, District Judge. The plaintiff, when the demurrer to the replication was overruled, was entitled to judgment upon the demurrer. Before the defendant could rejoin to the replication or take any action in relation to the case, leave must have been granted by the court. The proper judgment of the court would follow upon the demurrer, as a necessary consequence. It is known, however, that as a general thing the court is very liberal in the exercise of its discretion and allows a demurrer to be withdrawn and issues of fact to be taken. But in this case no rejoinder was put in, but the defendant demurred to the declaration. I have however, as it is a question of jurisdiction and might come up hereafter, examined the declaration. It is upon an assigned promissory note, and avers that the plaintiff is a citizen of Vermont, and that the assignor of the note is a citizen of Missouri, and that the defendant is a citizen of Illinois. I am satisfied that the court has jurisdiction of the case.

The ground taken by the defendant is, that it must appear upon the face of the declaration, where an action is brought upon a promissory note by an assignee, that the assignor could have brought suit upon the note before he assigned it. The question is, whether that is correct? The clause in the eleventh section of the judiciary act is: "Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." 1 Stat. 78.

The question is, to what time does the language "might have been prosecuted" apply. Does it apply to the time when the assignor held and owned the promissory note, or to the time when the suit is brought? If a promissory note is made by a citizen of Wisconsin to a citizen of the same state, and as such assigned by him to a citizen of New York, at the time that the assignor held the note he could not bring a suit in a federal court of Wisconsin, against the maker, because he was a citizen of the same state with the maker; neither could the assignee, a citizen of New York, bring a suit in the federal court of Wisconsin, while the assignor remained a citizen of Wisconsin, but if the assignor ceased to be a citizen of Wisconsin, then, as I take it, a suit could be brought in the federal court of Wisconsin, by the assignee and holder of the note, because, then, being in the position as "if no assignment had been made," he, a citizen of New York, could bring a suit. The assignor, who had ceased to be a citizen of Wisconsin, could, while he was holder of the note, bring suit in the federal court of Wisconsin, because he had changed his residence and his citizenship, and become a citizen of another state.

But if the rule contended for by the defendant is the true rule, then no change in the status of the payee, after the assignment, could ever enable a party to bring a suit, and it might happen, where the note was executed by the maker to the payee of another state, and at the time of the commencement of the suit in the federal court, he was of the same state with the maker, the suit could be maintained by the assignee, a citizen of another state, because you have to look according to the view of the defense, to the status of the parties at the time that the assignor held the note. And if he ever could have prosecuted the suit, the assignee could prosecute it, although at the time when the suit is brought the payee and maker are citizens of the same state. That would be the necessary consequence, and the question recurs; what does the language of the statute mean, "unless the suit might have been prosecuted in said court, if no assignment had been made?" I think it means at the time the suit was prosecuted, so that if it appears then that the assignor could have maintained the suit if no assignment had been made, the assignee being a citizen of another state, can maintain the suit.

The only authority mentioned contrary to this view is to be found in the cases of Rogers v. Linn [Case No. 12,015], and Fry v. Rosseau [Id. 5,141]. I admit that those two cases seem to imply that the question is, what is the status of the assignor at the time he held the chose in action, the promissory note. But these cases are not very fully reported, and apparently proceed upon an erroneous view of this clause of the eleventh section of the judiciary act. It should be observed, however, that the attention of the court was not drawn to the distinction between the status of the assignor at the time he was the owner of the note and at the time the suit was brought. It does not seem that point was at all considered by the court, in order that the proper discrimination might have been made, and therefore I cannot say but that if the attention of the court had been directed to the point which is now presented, it might have used different language from that we find in the reported cases.

In this case, admit that the maker and payee were citizens of Illinois. The plaintiff, a citizen of Vermont, sues in this court. Now what is his status? Suppose there had been

no assignment of this promissory note. It appears upon the face of the declaration that the assignor at the time the suit was brought could have maintained an action in this court, in the contingency named. He is averred to be a citizen of the state of Missouri, so that the language of the act, (unless the suit might have been prosecuted in such court if no assignment had been made,) applies to him. It cannot be pretended that when a note is made by a citizen of one state to a citizen of the same state that the payee cannot remove to another state, and after he has so removed and become a citizen thereof, bring a suit in a federal court against the maker in the district where he resides. That can scarcely be claimed. So that the maker and the payee both being citizens of Illinois at the time this note was made, by the removal of the payee, Le Roy D. Dewey, to Missouri, he certainly could have maintained a suit on this note against the maker in the federal court of the district in which the maker resides, if no assignment had been made, and that being so, this plaintiff can maintain the action. The opinion now given accords with one reported some years since. Thaxter v. Hatch [supra].

A further illustration may be suggested by considering the time of the maturity of the note. If the maker and payee of the note sued on, in this case, were both citizens of Illinois when it was made, then the right of the assignee to sue in this court would depend, if I understand the argument of the defendant, upon the fact whether the payee was a citizen of Missouri when the note matured and was the owner, and so himself had the right to sue; in other words, that the payee must have first become a citizen of Missouri and allowed the note to mature before assignment, for both must concur to enable the assignor to sue in this court. And this, I think, demonstrates the error of the argument, because the claim is, if the payee, after the maturity of the note and after the assignment, became a citizen of Illinois at the commencement of the suit by the assignee, the court would still have jurisdiction, whereas, according to my reading of the statute, the fact that the assignor of the note is a citizen of Illinois at the commencement of the suit, would be fatal to the jurisdiction of the court.

The motion must be sustained and demurrer stricken from the files.

NOTE [from original report]. Where a judgment has been rendered in a state court between citizens of different states, and the judgment has been since assigned to a citizen of the same state as the original plaintiff, the circuit court has jurisdiction to sustain a bill in equity in favor of the assignee, although the original ground of the suit, on which judgment was rendered, was a negotiable chose in action, on which the circuit court could not have held jurisdiction under the restrictive clause of the eleventh section of the judiciary act of 1789. Dexter v. Smith [Case No. 3,866]. If the payee change his domicile to another state bona fide, before maturity of note, he or his indorsee in such state may sue in the federal court. Kirkman v. Hamilton, 6 Pet. [31 U. S.] 20; Catlett v. Pacific Ins. Co. [Case No. 2,517]. Jurisdiction having once attached is not divested by change of domicil of one of the parties pendente lite. Morgan's Heirs v. Morgan, 2 Wheat. [15 U. S.] 290; Mollan v. Torrance, 9 Wheat. [22 U. S.] 537; Dunn v. Clarke, 8 Pet. [33 U. S.] 1; Clarke v. Mathewson, 12 Pet. [37 U. S.] 164; U. S. v. Myers [Case No. 15,844].

CHAMBERLAIN (EMIGH v.). See Case No. 4,447.

CHAMBERLAIN (GLADSTONE v.). See Cases Nos. 5,469–5,471.

CHAMBERLAIN (LYMAN VENTILATING & REFRIGERATOR CO. v.). See Case No. 8,631.

CHAMBERLAIN v. The McDONALD. See Case No. 11,238.

Case No. 2,578.

CHAMBERLAIN v. ST. PAUL & S. C. R. CO. et al.

[1 Cent. Law J. 53.][1]

Circuit Court, D. Minnesota. Dec. Term, 1873.[2]

LAND GRANT TO RAILROADS — MINNESOTA STATE RAILROAD BONDS—CONSTITUTIONAL AMENDMENT —REMEDIES.

1. The present railroad companies, to which the land grant of congress was re-granted on the failure of the old companies (upon which the benefit of the grant was first conferred) to build the roads, do not hold any of the said lands, not even the first 120 sections, subject to any trust in favor of the creditors of the state, or of the former companies.

[See note at end of case.]

2. Power of the state over the disposition of the railroad aid land grant considered.

3. Minnesota state railroad aid bonds, issued under the amendment to the state constitution of April 15, 1858, held valid.

4. Construction of said constitutional amendment and the nature of the remedies by foreclosure and forfeiture considered.

On the 3d day of March, 1857, congress granted to the territory of Minnesota, lands to aid in the construction of certain lines of railroads therein. 11 Stat. 195. By the act it is provided, inter alia, that "the lands hereby granted for and on account of said road and branches severally, shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses; and the same shall be applied to no other purpose whatever." Section 4 enacts: "That the land hereby granted * * * shall be disposed of by said state only in the manner following: that is to say, that a quantity of land not exceeding one hundred and twenty sections for each of said roads and branches, * * * may be sold; and when the governor shall

[1] [Reprinted by permission.]

[2] [Affirmed in Chamberlain v. St. Paul & S. C. R. Co., 92 U. S. 299.]

certify * * * that any twenty continuous miles of any of said roads, etc., is completed, then another quantity of land not to exceed one hundred and twenty sections, * * * for each of said roads * * * may be sold," and so on. The territorial legislature of Minnesota, passed an act, approved May 22, 1857, entitled "An act to execute the trust created by an act of congress, entitled 'An act,' etc.;" and by chapter 3 of said act, the Root River Valley & Southern Minnesota R. R. Co., a corporation created and then existing under the laws of said territory (the name of which corporation was soon after changed to the "Southern Minnesota R. R. Co."), was authorized to construct two of the lines of said road mentioned in the said act of congress, being the lines since severally constructed by the two companies, defendants in this action. That, by sections 3, 7 and 12, of said chapter 3, of said territorial act, it was provided that said railroad company, upon the construction of said lines of road, as in said act and the act of congress provided, should have the lands to aid in the construction thereof, in and by said act of congress designated.

On the 15th day of April, 1868, an amendment to the constitution of the state was adopted by the people, authorizing the issue of state bonds, not to exceed $5,000,000, to the land grant railroads, "for the purpose of expediting the construction thereof." By this amendment the provision was, that state bonds to the amount of $100,000 should be issued to each company for every ten miles of road made "ready for placing the superstructure thereon," and $100,000 for each ten miles completed with cars running thereon. "Said bonds thus issued shall be denominated 'Minnesota state railroad bonds,' and the faith and credit of the state are hereby pledged for the payment of the interest and the redemption of the principal thereof." By this amendment, also, the state bonds were to be made payable to the order of the company to which they were issued, and transferable by the endorsement of the president thereof. Then follows this provision: "Each company shall make provision for the punctual payment and redemption of all bonds issued and delivered to it, and for the punctual payment of the interest which shall accrue thereon, in such manner as to exonerate the treasury of this state from any advances of money for that purpose; and as security therefor, the governor shall demand and receive from each of said companies, before any of such bonds are issued, an instrument pledging the net profits of the road for the payment of said interest, and a conveyance to the state of the first 240 sections of land, free from prior incumbrances, which said company is or may be authorized to sell in trust for the better security of the treasury of the state from loss on said bonds," etc. And by the said constitutional amendment it was also provided that as a further security, each company should transfer to the state its own first mortgage bonds, corresponding in amount to the said state bonds so issued to such company; and in case of default of such company to pay the interest on the state bonds so issued to it, the governor was authorized, in such manner as should be provided by law, to sell the said first mortgage bonds of such company so transferred to the state, or require a foreclosure of the mortgage executed by said company to secure the same. And it was further provided, that in consideration of the loan of the state credit to such companies, and as a condition thereof, each company should complete not less than fifty miles of its road on or before the 31st of December, 1861, and not less than 100 miles before the year 1864, and four-fifths of the entire line before the year 1866;. and any failure so to complete within the said several times, should forfeit to the state all the right, title and interest of any kind whatsoever, in and to any lands together with the franchises connected with the same pertaining to the portion of the road so uncompleted. Said proposed amendment was submitted to the people, for approval, at a special election, held April 15, 1858, and was approved by a vote of about five to one. But said proposed amendment was not submitted to congress, or referred to in the act admitting Minnesota as a state. The said Root River Valley & Southern Minnesota R. R. Co. accepted the provisions of said amendment.

In October, 1858, the Southern Minnesota R. R. Co. (being the new name for the Root River Valley & Southern Minnesota R. R. Co.) executed to the state an instrument, pledging the net profits of the road for the payment of the interest on the state bonds that should be issued to it, and also a conveyance of the first 240 sections of land which it was or might be authorized to sell, for the better security of the state against the payment of interest on the state bonds so to be issued to the said company. And, on October 1, 1868, the company made a trust deed to Pringle & Chatfield, trustees, on the road, lands, franchises, and property of every description, to secure $2,000,000 of the bonds of the company. In July, 1857, the route of the Southern Minnesota R. R. Co. was located. In 1858, and early in 1859, the plaintiff constructed roadbed and received therefor from the companies, state bonds endorsed by the companies, to the amount of $575,000. In 1859, the railroad company became insolvent and never completed a mile of road, nor did anything beyond the grading, and made default in the payment of interest on its bonds and on the bonds of the state.

In 1860, the constitution was amended by "expunging" the amendment of April 15, 1858, under which the state bonds were issued, "saving to the state all rights, reme-

dies and forfeitures accruing under said amendment;" and by providing that "no law levying a tax or making other provision for the payment of interest or principal of the bonds denominated 'Minnesota state railroad bonds' shall take effect, or be in force, until such law shall have been submitted to a vote of the people of the state, and adopted by a majority of the electors of the state voting upon the same." By an act of the legislature of the state, of August 12, 1858, and March 6, 1860, provision was made for the foreclosure of the mortgages, by order of the governor, of such companies as should be in default in payment of the interest on the state bonds that should be issued to it, and also in default in the payment of the interest of its own bonds, which should be held by the state as indemnity, as provided in said loan amendment, and upon such foreclosure to bid the property in, in the name and for the use of the state.

The original Southern Minnesota R. R. Co. having made default in payment of interest both on its own bonds and the bonds of the state, the governor duly caused the deed of trust to the state to be foreclosed and all lands, etc., were sold to and purchased for and in the name of the state, and a conveyance made to the state therefor, and the state continued to hold all the lands, property and franchises, thus acquired, until the 4th day of March, 1864. On March 4, 1864, the legislature of the state passed an act, whereby the present railroad companies, defendants in this action, were created, and all rights acquired by the state by virtue of said foreclosure proceedings, or by any forfeiture to the state, done or suffered by said old or original Southern Minnesota R. R. Co., were granted to the new companies thereby created, free and clear of all liens whatsoever, with further provisions that said new companies should have and receive severally, the lands pertaining to the line of the road which each was empowered to construct, upon the construction and completion of the same as provided in said act, and in said act of congress. The said railroad companies, defendants, severally went on under said act and completed their several lines of road, and received therefor, as the same were constructed, the lands from the state appertaining thereto under said congressional grant; said congressional grant having been amended so as to allow the lands to be disposed of by the state, as the lines were constructed in sections of ten instead of twenty miles, as originally provided. The said defendants, the railroad companies, to raise the means to construct said lines of road, issued their bonds severally, and mortgaged their roads, franchises and lands, to secure said bonds, as set forth in the answers of the trustees in this action. That said defendants acquired no title, right or license, in regard to the right of way from, through or under the old company, but procured the right of way from the individual land owners, over and upon which the old grading was done, so far as they used the same.

The present bill is by the plaintiff [Selah Chamberlain], as the holder of $500,000 state bonds, and is brought, not against the railroad companies to which they were issued, and which endorsed them, but against the new companies created in 1864, and to which the state re-granted the lands and property, and against the trustees in mortgages executed by the present companies to secure bonds issued to borrow money to build the roads, and as to the lands (particularly the first 240 sections granted to the said roads) and franchises conferred upon the present companies by the legislature of 1864, seeks to charge them with a trust for the payment of the plaintiff's bonds. The bill, in substance, prays for discovery and answer to special interrogatories; for a receiver; for an account of value of franchises and road beds at time of conveyance to defendants; for the value of all lands sold for cash; that defendants pay over all moneys by them received, and deliver all bonds, mortgages, contracts or evidences of indebtedness, for sale of lands to the receiver; convey to him all the lands remaining unsold; all to be by him converted into cash and applied to the liquidation of said state bonds and interest; and for general relief.

Gordon E. Cole and F. R. E. Cornell, for complainant.

Gilman, Clough & Wilder, E. C. Palmer, Gilfillan & Williams, and H. F. Horn, for defendants.

DILLON, Circuit Judge. The plaintiff, who was a contractor on certain railroads, to which the state originally gave the benefit of the land grant of congress, holds bonds of the state of Minnesota, issued pursuant to the constitutional amendment of April 15, 1858, to the amount of half a million of dollars, upon which no interest has been paid since 1859, and which, by the expunging amendment to the constitution of 1860, if valid, the state legislature is disabled from paying or making provision to pay, until a law for that purpose shall be approved by a popular vote. These bonds were endorsed by the original companies to which they were issued, and which, as between them and the state, are the principal and primary debtors. The present defendants, the St. Paul & Sioux City R. R. Co., and the Southern Minnesota R. R. Co., are not the companies with which the plaintiff contracted and for which he did work, but are companies created by the state in 1864, and to which the state then re-granted the lands and property, which it had obtained by foreclosure or forfeiture, or both, from the old

or original companies. The bill proceeds upon the theory that the plaintiff's bonds are legal and subsisting obligations of the state; that the companies to which they were issued are the principal debtors, and the state their surety; that the lands, particularly the first 120 sections to each road, became by the act of the legislature of May 22, 1857, the property of the companies; that the only interest the state afterwards acquired in these lands, was the right to hold them to secure itself against loss by reason of its issue of state bonds; that the plaintiff, a creditor of the main debtor, has a right in equity to be subrogated to the rights of his surety (the state) in respect to all securities belonging to the principal debtor, and that the present companies not being bona fide purchasers of the lands for value and without notice, are open to the same trusts which might have been fastened upon them had they still remained in the hands of the state. That the bonds held by the plaintiff are the legal obligations of the state, and binding upon it in law, honor and justice, I have no doubt. Indeed, counsel have not seriously contended that these bonds were not valid. They were issued pursuant to an amendment of the constitution of the state, adopted by a popular vote of about 35,000 for, to 8,000 against the project; and have been repeatedly recognized as valid by subsequent legislation of the state, and by the foreclosure proceedings. Under these circumstances, the fact that it does not appear that the acting governor signed the bill, providing for the submission to the people of the loan amendment to the constitution, is a matter of no consequence. In the amendment to the constitution "the faith and credit of the state are pledged for the payment of the interest and the redemption of the principal" of the bonds; they are signed by the governor and bear upon their face the seal of the state; they were issued to the plaintiff and others for grading and work actually done upon the roads at the rate specified in the constitutional amendment, and the state obtained the benefit of the securities it took for its indemnification, and re-granted the property it acquired, free from all liens, to the present companies; under these circumstances, if the state were suable in the courts, there can be no doubt that the bonds would be legally enforceable against it. Justice and honor alike, require the state to recognize these bonds as binding upon it, and in the end the court cannot doubt that the people of the state will so ordain. A state with such a future before it as the state of Minnesota, cannot afford to bear the odium of repudiation, and if there are no other difficulties in the plaintiff's way, except the suggested one that his bonds are invalid, he will be entitled to the relief demanded.

The main purpose of the bill is to charge the first 120 sections of land granted by the state to the original companies, and by the act of 1864 re-granted to the present companies, with an equitable trust in favor of the plaintiff, for the payment of his state bonds endorsed by the old companies. It is admitted that the old companies, after doing a large amount of grading, became insolvent, and that they never completed any part of their line of road, and hence under the act of congress never became entitled to any lands, unless it may be the first 120 sections to each of the roads. These, the plaintiff contends, the state, under the act of congress of March 3, 1857, making the grant, had a right to sell in advance of construction; that the act of the territorial legislature of May 22, 1857, was a sale of the 120 sections to the companies, by force, whereof, they became absolutely their property by a title not subject to be divested by their subsequent failure to build the roads; that being the property of the companies they had a right to pledge them to the state to indemnify it against liabilities it assumed for them; and that the plaintiff has the right to follow these lands into the hands of the state or its grantees, with notice, and subject them to payment of his bonds. The lands granted to the state by congress were held by it in trust to be "exclusively applied to the construction of the road for and on account of which such lands were granted, and the same should be applied to no other purposes whatsoever." Said lands "shall be disposed of," says the act of congress, "by the state only, in the manner following, that is to say, that a quantity of land not exceeding 120 sections for each of said roads and branches * * * may be sold; and when the governor shall certify that any twenty continuous miles of any said roads, etc., is completed, then a quantity not exceeding 120 sections * * * for each of said roads, may be sold," and so on. This comprised the extent of the power of the state over these lands. The state was a trustee whose powers were strictly limited by the congressional enactment. The state might, I am inclined to think, have sold the 120 sections in advance of construction, and conveyed a good title; but I doubt whether the act of the legislature of May 22, 1857, was a sale to the original companies so as to confer a title not subject to be defeated, if they failed to construct the roads as required by the act of congress; and I am clear, that under the act of congress it was not competent for the state, acting as a trustee, to acquire any lien on or right in these lands, inconsistent with the unfettered execution of its trust duties under the act of congress. The state sustained to the old companies a double relation, one as trustee under the land grant act of congress; the other as the sovereign which had created these companies, and was undertaking to aid them in their enterprise by a loan of its own credit. Now it is clear

that if the state became a creditor of these companies, it could not lawfully stipulate for security out of lands which it held in trust, if this would be inconsistent with its duties under the act of congress.

In this view, I have serious doubts as to the validity of the security for its bonds which the state sought to obtain by the constitutional amendment upon the lands or any of them, which had been granted by congress, and which had never been earned by the completion of the required section of 20 (subsequently reduced to 10) miles of road. But I need not decide the point; for assuming that the 120 sections became the absolute property of the company, it was then competent for the state to take security, upon it for its indemnity, and to provide for the forfeiture thereof to the state in case the roads were not completed as required by the constitutional amendment. The companies made default in the payment of interest, and their rights were foreclosed, and the property purchased by the state. The companies failed to build and complete the roads, as required by the constitutional amendment; and the legislation of 1864 shows that the state elected to take advantage of the forfeiture. Foreclosure and forfeiture were cumulative and concurrent remedies. The main object of the mortgage was pecuniary indemnity to the state. The principal purpose of the provisions for forfeiture was to secure the completion of the roads by the stipulated time. By foreclosure or forfeiture, or both, the rights of the old companies in those lands became vested in the state. It need not be denied in this case, that if these bonds were still in the hands of the state, or a voluntary grantee or a purchaser with notice, that the plaintiff, as the holder of unpaid state bonds (to indemnify the state against which the companies had conveyed to it the lands) might fasten an equitable trust upon them. Undoubtedly, he could do this, if these lands were in the hands of the state, discharged of any trusts under the act of congress. But upon the failure of the old companies, the state, in 1864, in order to secure the completion of the roads, created the present companies, and granted to them all the lands and franchises which had been granted to the old companies, "free of all claims or liens," and on the faith of this legislation, the new companies have built, completed the lines of road, the one at a cost of $5,000,000 and the other at a cost of $3,000,000. The money to accomplish this was raised upon deeds of trust and mortgages yet outstanding, made by the present companies to secure issues of bonds, preferred stock and land certificates. After all this is done, the present bill is filed, and it would, in my judgment, be inequitable as against the present companies and their creditors, to hold that the plaintiff could subject to the payment of his bonds the land or other property which the defendant companies acquired from the state by the legislation of 1864.

A decree will, therefore, be entered, dismissing the bill with costs. Decree accordingly.

NOTE [from original report]. Construction of acts of congress granting public lands to states to aid in building railroads: Schulenburg v. Harriman [Case No. 12,486]; Rice v. Minnesota & N. W. R. Co., 1 Black [66 U. S.] 358; State v. Southern Minn. R. Co., 18 Minn. 50 [Gil. 21]. To Union Pacific Railroad Co.: Union Pac. R. Co. v. Watts [Case No. 14,385]. Taxation of such lands by the states: Kansas Pac. R. Co. v. Prescott, 16 Wall. [83 U. S.] 603. Lien of state to secure state bonds issued to the companies: Murdock v. Woodson [Case No. 9,942]; Wilson v. Boyce [Id. 17,793].

[NOTE. The plaintiff appealed to the supreme court, which affirmed the decree herein. Chamberlain v. St. Paul & S. C. R. Co., 92 U. S. 299. Mr. Justice Field, in delivering the opinion, held that the act of congress of March 3, 1857, only authorized for each road, in advance of its construction, a sale of 120 sections, and that no further disposition of land along the road was allowable, except as the road was completed in divisions of 20 miles, and, furthermore, that, as to the land conveyed to indemnify the state against losses on the bonds, the bondholders had no equity to have the land applied to the payment of the bonds which could be enforced against the state, and that the grantees from the state took the property discharged of all claims of the bondholders.]

Case No. 2,579.

CHAMBERLAIN et al. v. STANTON et al.

[2 Woods, 164.][1]

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

WAR — CAPTURED AND ABANDONED PROPERTY — PAYMENT TO FRAUDULENT CLAIMANT — REMEDY OF REAL PARTY—LIMITATIONS.

1. During the late war between the United States and the insurgent states, a quantity of cotton was seized in one of the insurgent states by an officer of the government, under authority of the captured and abandoned property act, was sold, and its proceeds paid into the treasury. *Held*, that the question whether or not the cotton was in fact captured or abandoned property was not open to litigation in the courts.

2. When parties not entitled to said proceeds, within two years after the suppression of the Rebellion, brought a fraudulent suit in the court of claims to recover the same from the United States, and, by means of false allegations, false testimony and fraud, recovered judgment and received said proceeds from the treasury, a bill filed by the real owners against such persons, more than two years after the suppression of the Rebellion, praying for a decree against them for the amount of said proceeds, was dismissed on demurrer for want of equity.

[In equity. Bill by Julia L. Chamberlain and others against Huldah L. Stanton and others to recover moneys received by the latter from the United States, as the proceeds of the sale of alleged captured and abandoned property, which property in fact had belonged to plaintiffs. Defendants demurred for want of equity.]

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

T. J. Semmes and George S. Sawyer, for complainants.

D. C. Labatt and J. Aroni, for defendants.

WOODS, Circuit Judge. The case made by the bill is as follows: The complainants say that during the late war between the United States and the states in rebellion, they were the owners of one hundred and ninety-six bales, and one-half a bale of cotton; that during the war the cotton was seized by a subordinate officer of the United States, without orders from any competent authority; the cotton was sold as captured or abandoned property, and its proceeds, amounting to $51,969, paid into the treasury of the United States; that the cotton was never in fact captured or abandoned property; the United States never acquired any interest in it or its proceeds, but acted in the matter simply as an ordinary depositary or bailee of this specific fund for the benefit of the true owner. The bill further alleges that the defendants, having no title to said cotton, nevertheless prosecuted a suit for the proceeds thereof against the United States in the court of claims, and by means of false allegations, false testimony and fraud, on the 7th day of March, 1870, recovered a judgment for said proceeds, and the amount thereof was paid to them by the officers of the treasury of the United States.

The prayer of the bill is for a decree against the defendants for the said sum of $51,969, the proceeds of said cotton received by the defendants, and five thousand dollars for special damages sustained by complainants by reason of the premises. To this bill, defendants have filed a demurrer for want of equity. On this demurrer the cause has been argued and submitted.

The complainants have made no case for the intervention of this court. According to the averments of the bill, the proceeds of this cotton found their way into the treasury of the United States as the proceeds of captured or abandoned property. Whether the cotton was really captured or abandoned is not now an open question. There was but one way of recovering the money after it had been paid into the treasury as such, and that was by bringing suit in the court of claims. See act of March 12, 1863 (12 Stat. 820). The statute declares, that "any person claiming to have been the owner of any such abandoned or captured property may at any time, within two years after the suppression of the Rebellion, prefer his claim to the proceeds thereof in the court of claims, and on proof to the satisfaction of said court of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present Rebellion, may receive the residue of such proceeds after the deduction of any lawful expenses attending the disposition thereof," etc. The law never contemplated, that a party claiming to be the owner of captured or abandoned property might recover the proceeds thereof after his claim was barred by the limitation of the statute, or without proving his ownership and loyalty to the satisfaction of the court of claims, by bringing suit therefor against a party who had, by fraudulent practices, received said proceeds from the United States treasury.

If the averments of the bill are true, the United States is entitled to the proceeds of the cotton claimed by complainants. The title of the United States became absolute upon the expiration of two years from and after the close of the Rebellion, unless suit therefor was brought within that time by the real owner. According to the bill no such suit was brought, and the right of the real owner was forever cut off. The fact that some person, not the real owner, has by fraud and perjury cheated the United States out of the proceeds of the cotton, does not confer any new rights upon the former owner of the cotton. If the defendants have fraudulently got from the treasury of the United States, money which did not belong to them, the United States has a right of action to recover the same, but the complainants have no such right, and they cannot acquire any such right by adopting the frauds and perjuries of the defendants. Demurrer sustained.

CHAMBERLAIN v. The THOMAS SPARKS. See Case No. 10,115.

CHAMBERLAIN (UNITED STATES v.). See Case No. 14,778.

CHAMBERLAIN (WALDEN v.). See Case No. 17,055.

CHAMBERLAIN (WARD v.). See Cases Nos. 17,151 and 17,152.

CHAMBERLAIN, The OLIVE. See Case No. 10,491.

CHAMBERLAINES, In re. See Case No. 4,855.

Case No. 2,580.

In re CHAMBERLIN.

[9 Ben. 149;[1] 17 N. B. R. 49.]

District Court, S. D. New York. May, 1877.

BANKRUPTCY—PRIORITY OF DEBT TO STATE—COMPOSITION—ADJUDICATION.

1. A judgment recovered by the people of the state of New York against a surety in a bail bond given for the appearance of a person indicted for a crime, is a debt to the state, entitled to a priority in payment in full out of the assets of a debtor who files a petition in voluntary bankruptcy, and, without being adjudged a bankrupt, institutes proceedings for a composition.

2. But payment in full of the judgment by the debtor otherwise than out of his assets will not be made a condition precedent to the paying anything to a general creditor, under the composition.

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

3. The state is entitled to have the debtor adjudged a bankrupt, and to proceed to realize his assets for application on the judgment.

[In bankruptcy. In the matter of John F. Chamberlin.]

P. B. Olney, for the state.
L. H. Arnold, Jr., for debtor.

BLATCHFORD, District Judge. On the 29th of January, 1877, John F. Chamberlin filed a voluntary petition in bankruptcy in this court. In his schedules to such petition, he set forth as a debt to be paid in full, or entitled to priority, under the statute, the following: "Name of creditor—the people of the state of New York; residence and occupation—Charles S. Fairchild, attorney general of the state of New York, Albany, New York; amount—$10,000; contracted in the year 1874, at the city of New York; debt as surety on two bail bonds for William Hennessy Cook—judgment recovered on the said two bonds, on the 18th May, 1874, for $5,000 on each bond—said bonds were made by the said Cook as principal and the petitioner as surety." He did not set forth any creditor as holding securities. By his schedules his creditors were 87 in number and his debts amounted to $243,330.28, while his assets consisted of clothing of the value of $185 and 131 shares of the capital stock of three corporations, of the nominal value of $13,100. On such petition, the petitioner has never been adjudicated a bankrupt. On the same 29th of January, he presented to this court a petition, proposing a composition to his creditors of one per cent. of his indebtedness, to be paid in money within ten days after the final order on composition. The proper proceedings were had, and the composition was confirmed by 60 of the creditors, representing debts amounting to $170,944.01. The said debt to the people of the state of New York was not proved at the first meeting of creditors on the composition. In the statement of assets presented to that meeting, the only assets set forth are the said shares of stock, and it is stated therein that none of them are of any real value. All of the 60 creditors except one (whose debt was $260) appeared and signed by the same person as their attorney in fact. At the second meeting of creditors on the composition, the attorney-general of the state of New York filed, in behalf of the people of the state of New York, a proof of the said debt for $10,000 on the said two judgments, as a debt due to the people of the state of New York. The proof was not objected to. On the application to the court for the confirmation of the composition, the attorney-general applies to the court for an order that the people of the state of New York be paid the amounts due on the said two judgments in full, before the proposed compromise is carried out, or that the compromise be subject to the said debts.

The composition statute provides, that every composition shall, "subject to priorities declared in said act, provide for a pro rata payment or satisfaction, in money, to the creditors of such debtor, in proportion to the amount of their unsecured debts in respect to which any such security shall have been duly surrendered and given up." The priorities referred to are those provided for in section 5101 of the Revised Statutes, which enacts, that, "in the order for a dividend, the following claims shall be entitled to priority, and to be first paid in full, in the following order:" The third in the list is this: "All debts due to the state in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws thereof."

It is contended for the state, that the proper construction of the composition statute is, that a debt due to the state must be paid in full before anything can be paid to any general creditor under the composition. The priority secured by section 5101 is priority in payment out of the assets of the bankrupt, priority in the division of the proceeds of such assets. Such proceeds are to be devoted towards paying the preferred claims, and in full, if sufficient, in the order designated, before the general creditors can receive anything out of such proceeds. This priority is preserved by the composition statute. But there is nothing more given to the preferred creditor. He can only have, under the composition statute, a priority in payment out of what assets the debtor has which would go to his assignee in bankruptcy. The statute does not give him more than such priority. It does not impose on the debtor, as a condition precedent to a composition, that he shall pay in full all the claims which, under section 5101, are entitled to priority.

If the debtor in this case has any assets, those assets must be devoted by him to the payment of the debts which are declared by section 5101 to be entitled to priority, before any part of such assets can be devoted to paying any part of the composition to the general creditors. So far as now appears, the assets set forth by the debtor have no value, and the money wherewith the composition will be paid, if paid, is to come from some source other than any assets which would go to an assignee in bankruptcy in this proceeding. Yet, if the debt to the state is a preferred debt, the state is entitled to have those assets so administered that they will be applied towards paying its debt, and is entitled to have the debtor adjudicated a bankrupt, and to have an assignee appointed. So, also, if there be other assets of the debtor, not yet disclosed. To this end the state is entitled to examine the debtor in the composition proceedings, and also to examine witnesses, to show that the debtor has other assets. This is necessary, to enable the court to determine whether the composition "is for the best interest of all concerned," including the state, and the examination may now be had.

If it should turn out that the debtor has no assets of any value, the fact that the state would be entitled to priority, in payment out of the assets, if there were any, will be no impediment to the confirming of the composition; and the composition, if confirmed, will bind the state equally with other creditors whom it will bind. If it should turn out that there are assets of value, the state will be enabled to take measures to secure its priority in respect to such assets, while the question of confirming the composition will remain to be determined.

It is contended, for the debtor, that the debts in this case are not due to the state, although the judgments are in favor of the people of the state, because, under some provisions of the state statutes, the money, when collected, may go into the treasury of the county of New York. But, neither the county of New York, nor its county treasurer, nor its treasury, is the creditor. The state is the creditor. The state may direct what shall be done with the money, when collected. It may do so, in advance of the collection, or it may make such disposition of the money, as it pleases, after the collection. Until the money is collected, the debt is the property of the state and the money is due to the state. Any and all laws now in force in regard to the disposition of the money when collected may be repealed before the money is collected, and a new law be before that time enacted, directing that the money be paid into the state treasury. The state is the real creditor, having supreme control over the debt, and the right to say what shall be done with its own property. The bonds on which the payments were recovered were given in the course of the administration of the criminal laws of the state, as security for the appearance of an indicted person to answer to the indictments. A decision that judgments in the name of the state on such bonds are debts due to the state, does not necessarily require a decision that other bonds to the people of the state, in respect to matters not exclusively of public concern, but really to secure private rights, where the state is not the real creditor, but only the nominal creditor for the use of the real creditor, create debts due to the state, within section 5,101.

The proof of debt filed by the district attorney of the city and county of New York on these judgments, being shown to have been filed under a misapprehension and in ignorance of the fact that one had been previously filed by the attorney general, may be withdrawn.

The question as to the constitutionality of the provisions for composition is disposed of by the decisions of this court and of the circuit court for this district in Re Reiman [Cases Nos. 11,673 and 11,675].

CHAMBERLIN (DOW v.). See Case No. 4,037.

Case No. 2,581.

In re CHAMBERS.

[1 MacA. Pat. Cas. 641.]

Circuit Court, District of Columbia. June, 1859.

PATENTS—"FRAMEWORK FOR SKIRTS"—ANTICIPATION—REVIEW OF COMMISSIONER'S DECISION.

[1. On appeal from a decision of the commissioner of patents, the court will not review his action in intimating that a certain patent is an apposite reference, without stating grounds to support his position, in deciding an application finally by simply reaffirming former action, and without reconsidering the application, and in deciding that if, upon appeal to a commissioner, the case is rejected upon an entirely new reference, the applicant is not entitled to have his case re-examined on his former claim, or a claim substantially similar, as such questions properly address themselves to the consideration of the commissioner in connection with the internal discipline and routine or practice of the office.]

[2. The invention of Mathew Chambers for a framework for a skirt or bustle is not anticipated by the patent of Alexander Douglass, No. 17,082, nor by the English patent of Osman, No. 2,513, of 1856.]

[Appeal from the commissioner of patents.

[Application by Mathew Chambers for letters patent for an improved framework for skirts or bustles. From a decision of the commissioner of patents rejecting the application, the applicant appeals. Reversed.

[The patent was subsequently granted to Chambers, July 12, 1859, and is numbered 24,720.

[The appellant assigned the following reasons of appeal:] First. Because on an examination of the alleged new invention or discovery it did not appear that the same improvement in bustles had been discovered or invented by any other person in this country prior to the alleged invention or discovery thereof by the applicant, the said Mathew Chambers, or that it had been patented or described in any printed publication in this or any foreign country, or had been in public use or on sale with the applicant's consent and allowance prior to the application, or that the improvement such as this is not sufficiently useful and important to be worthy of a patent. Second. Because in deciding against the said Chambers' application for a patent for improvement in bustles, by simply intimating that a certain English patent (Osman's) is considered to be an apposite reference, without giving any grounds to support such a position—which amounts to an ipse dixit—he departed from the correct practice of the patent office and acted contrary to the spirit of the law. Third. Because he decided finally upon the appellant's case, by simply reaffirming the former action, without reconsidering the application. Fourth. Because he decided that if upon appeal to the commissioner a case be rejected, not upon the same references that had been given by the ex-

aminer, (said references having been declared by the commissioner to be not in point, and therefore void and invalid,) but upon an entirely new reference, the applicant is not entitled to have his case re-examined on his former claim or on a claim substantially similar; thus deciding in effect that, because the examiner had erred (according to the commissioner's own opinion) in deciding adversely to the applicant's claim, the applicant should be deprived of the privilege of a second examination or reconsideration of his claim, as provided by law. Fifth. Because he decided that the appellant's claim of invention is covered by Osman's patent, contrary to the express language of the two specifications and claims. Sixth. Because he decided that the objects and purposes intended to be accomplished by and derived from the appellant's invention might or could be accomplished by Osman's; whereas his arrangement, on the contrary, is not at all available or serviceable for distributing the weight of the skirts in order to relieve the waist from over-pressure, which is the main object of the appellant's invention.

A. Pollok, for appellants.

MERRICK, Circuit Judge. In considering the reasons of appeal filed in this case, the second, third, and fourth appear to me to present questions more properly addressing themselves to the consideration of the commissioner in connection with the internal discipline and routine of practice of the office, not involving matters cognizable before a judge of the circuit court upon appeal. The law undoubtedly requires of the commissioner to aid the inventor by information and suitable references in remedying a defective specification or claim, and to assist his judgment in determining whether he should withdraw or persist in a rejected application; but the manner of so doing is of necessity left to the sound discretion of the commissioner; and whether the duty be well or insufficiently performed in a particular instance, is not the subject of review, and from the nature of such cases cannot be passed upon by a judge on appeal. I therefore dismiss those three objections from further inquiry.

The first, fifth, and sixth reasons of appeal amount to but one, viz., that his invention has not been anticipated by any other, and particularly that the English patent of Osman (described in the thirty-first volume of English specifications for 1856, No. 2,513) does not embrace his claim. The examiner originally in charge of the case rejected the claim upon reference to the patent of Alexander Douglass of April 21st, 1857 (No. 17,082); but upon review of his decision upon two successive modifications of the claim, the commissioner, confirming reports of the board of review, declared that reference inapplicable, upon the ground that Chambers relied upon a combination of a corset band with the frame-work of a hooped skirt, and that this was not to be found in Douglass' invention, but that the essential features of his invention were embraced by Osman's patent. Upon comparing Osman's patent with Douglass', I have not been able to discover the combination of a corset band furnished with distributing stays upon the back, sides, and front thereof, any more than in Douglass'; but in the element of usefulness and novelty most relied upon in the present claim, to wit, the distribution of weight and compression upon the parts of the body best adapted to sustain weight and compression, the advantage appears to me to be with the Douglass patent, in this: that Osman's transfers the weight from the circle of the waist by three perpendicular strips of metal, forming the heads or fulcrums of the three springs which make the bustle, while the cords or adjustable metallic bands marked in Douglass' drawings CC distribute that same weight much more perfectly and on a much larger surface of the lower back and hips of the wearer. If, therefore, Douglass' invention is not in the way of the combination claimed by Chambers, neither is the patent of Osman. If the application of Chambers extended no further than to a partial relief of the waist of the wearer, by distributing a portion of the weight of the dress upon the strong parts of the back, I should feel obliged to reject the claim upon that reference; but the claim goes not only to the relief of weight upon the waist, but to the relief of the waist from the ill effects of the necessary confinement and compression along the front of the circle of the waist; and this is accomplished by the continuation of the corset and its arrangement in such a way as to operate as an abdominal supporter, and making the weight and stricture, which might prove injurious if limited to the waist, beneficial, by distributing them, by means of the stays and lacings of the corset, over the whole abdomen. In this way, it appears to me that he has introduced a new feature of general distribution of weight and compression over the abdomen, loins, and back not found in the other patents, and sufficiently distinctive to entitle him to a patent for his combination of a bustle with a corset, in the manner described in his specifications. The vital element of Douglass' invention, although, as I have just said, it embraces some parts of Chambers' claim, consists in the admirable adaptation of the adjusting cords CC, which give lightness and form to the article and enable the wearer from time to time to change the arc of its curvature in obedience to the demands of good taste. And looking to this as the controlling idea in Douglass' patent, I cannot think that the invention of Chambers

materially conflicts with it, and hence conclude that each should receive from a discriminating public the appropriate rewards for his ingenuity.

CHAMBERS (EVANS v.). See Case No. 4,555.

Case No. 2,581a.

CHAMBERS et al. v. The HENRY KNEELAND.

[4 Betts, D. C. MS. 17.]

District Court, S. D. New York. Nov. 20, 1844.

PRACTICE IN ADMIRALTY—DISMISSAL FOR WANT OF PROSECUTION—SECURITY FOR COSTS.

[1. Where a party has placed his case upon the calendar and noticed it immediately after issue joined, but, by reason of the accidental absence of his witnesses from the court when the case was called, the same could not be brought to trial, and the opposing party has failed to comply with the rule requiring notice of the cause, it will not be dismissed in accordance with a rule requiring dismissal for neglect to prosecute.]

[2. Security for costs will not be required on a libel for wages, when the answer is "forfeiture for desertion," and an attachment issued after hearing upon summons, but such defense was not then interposed.]

[In admiralty. Libel by Thaddeus Chambers and others against the sloop Henry Kneeland.] Motion [by the claimants] for security for costs and to dismiss libel for want of prosecution.

Before BETTS, District Judge.

It appearing to the court, upon the proofs, that this cause was noticed by the libellants, and put upon the calendar, immediately after issue joined, and with intent to try the same, and that the failure to bring the same to trial was accidental absence of the libellants' witnesses from court when the case was called, and it appearing that the claimants did not notice the cause on their part, as authorized to do by rule 123, it is therefore considered that the libellants have been guilty of no such neglect in the matter as to entitle the claimants to have the libel dismissed under the authority of rule 136. And it further appearing that the defence to the libellants' suit for wages is "forfeiture by desertion," and that the attachment was issued after hearing upon summons, when such defence, if available, might have been made, therefore, it is considered that the motion on the part of the claimants that the libellants file security for costs in the cause be denied; but, upon the facts and equities of the case, it is ordered that no costs be allowed to either party against the other on these motions.

CHAMBERS (MARVIN v.). See Case No. 9,179.

Case No. 2,582.

CHAMBERS v. SMITH et al.

[5 Fish. Pat. Cas. 12;[1] 7 Phila. 575; 27 Leg. Int. 196; 2 Leg. Gaz. 185.]

Circuit Court, E. D. Pennsylvania. June, 1870.

PATENTS — "BRICK MACHINE" — INFRINGEMENT — RIGHTS OF ASSIGNEE—RECORDING LICENSE—NOTICE TO PURCHASER FROM LICENSEE — DUTY OF PURCHASER.

1. A., the patentee, assigned to plaintiff all his right to and interest in a patented brick machine, except the right to manufacture said machines in the counties of Philadelphia, Pa., and Camden, N. J. The plaintiff licensed B. to use one of said machines within a portion of the city of Philadelphia. B. sold the machine to C., who removed it to another part of the city, beyond the district described in the license, and commenced the manufacture of bricks. *Held*, that this was an infringement of the patent.

[Cited in Wilder v. Kent, 15 Fed. 219.]

2. The assignee of an exclusive right to use but not to make the thing patented within specified territory, may maintain an action against an infringer in his own name.

3. The act of congress makes no provision for the recording of a mere license, and therefore it is not required. If recorded, it would not affect the rights of any one.

4. In the absence of any statutory provision, there is no principle of equity which requires the owner of a patented invention to give notice to a voluntary purchaser of a licensee's right, in order to enable him to hold such purchaser to the restricted use and enjoyment of the invention stipulated in the license.

5. It is the duty of the purchaser to inform himself of the nature of the licensee's ownership, and the extent of his right; if he fails to do this, he can not complain that the patentee has misled him, or set up his own remissness to secure to himself a larger interest than was granted to his predecessor in the ownership.

In equity. Final hearing on pleadings and proofs. Suit brought [by Maris Chambers against Frederick V. Smith and Stephen G. Smith] upon letters patent [No. 40,221] for an "improvement in brick machines," granted to Cyrus Chambers, Jr., October 6, 1863.

H. R. Warriner and W. F. McElroy, for complainant.

Andrew Zane and Theodore Cuyler, for defendants.

McKENNAN, Circuit Judge. The plaintiff seeks by this bill to enjoin the use of a patented brick machine beyond certain defined limits, within which its use was licensed to William M. Clark. The bill alleges that Cyrus Chambers, Jr., was the original inventor of a new and useful brick machine, for which letters patent were duly granted to him by the United States. That the patentee, by writing dated March 28, 1862, duly recorded in the patent office, assigned to the plaintiff all his right to and interest in said invention, except the right to manufacture said machines in the coun-

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

ties of Philadelphia, Pennsylvania, and Camden, New Jersey. That the plaintiff, by writing dated December 27, 1862, granted to William M. Clark, his personal representatives and assigns, a license to use one of said machines, and to sell all bricks or tiles made thereby within a part of the city of Philadelphia, specifically defined in said license. And that the defendants, claiming to be the owners of the machine licensed to Clark, had removed it beyond the district described in his license, and were manufacturing large quantities of brick upon said machine without any authority from the plaintiff. All these allegations are fully sustained by the proofs; and the plaintiff would, therefore, seem to have made out a complete title to the relief prayed for.

The defendants, however, oppose a decree in favor of the plaintiff, on two grounds:

1. That this suit ought to have been brought in the name of the patentee, and can not be maintained by the plaintiff. The alleged infringement was carried on within the city of Philadelphia, and it is only the use of the machine therein which is complained of. This is covered by the patentee's assignment to the plaintiff, whereby an exclusive right to use the invention was secured to the plaintiff, which might be enforced against the patentee himself. By the settled construction of the act of congress of July 4, 1836 [5 Stat. 123], an assignee can maintain a suit in his own name for an invasion of such exclusive right. Wilson v. Rousseau, 4 How. [45 U. S.] 646; Gayler v. Wilder, 10 How. [51 U. S.] 477.

2. That the license to Clark not being recorded, and no notice being given of any restriction of his right to use the machine, a purchaser at a marshal's sale of his interest in it would have the right to use it anywhere. The act of congress makes no provision for the recording of a mere license, and therefore it is not required. Brooks v. Byam [Case No. 1,948]. And although the license here was recorded in the patent office, May 1, 1863, that would not affect the rights of any one, because it was unauthorized. In the absence of any statutory provision, there is no principle of equity which requires the owner of a patented invention to give notice to a voluntary purchaser of a licensee's right, to enable him to hold such purchaser to the restricted use and enjoyment of the invention stipulated in the license. It is the duty of the purchaser to inform himself of the nature of the licensee's ownership and the extent of his right. If he fails to do this, he can not complain that the patentee has misled him, or set up his own remissness to secure to himself a larger interest than was granted to his predecessor in the ownership. It is a familiar rule that a purchaser at a judicial sale acquires only the title of the defendant in the execution to the property sold. Here Clark's ownership of the machine was qualified by an express restriction as to the place in which it should be used. He could not convey any greater interest. And to hold that a judicial sale could pass to the purchaser a larger interest, would make it operate to divest the patentee of a right and property which he had not voluntarily parted with, and which he is not, by any principle of equity, estopped from claiming.

Let a decree be entered for a perpetual injunction, and for an account as prayed for, with costs.

Case No. 2,582a.

The CHAMPION.

[N. Y. Even. Post, March 5, 1857.]

District Court, S. D. New York.

SALVAGE—BY PILOTS—TOWING ABANDONED VESSEL.

[Pilots who take charge of and tow into port an abandoned ship, at the request of the vessel which has been towing her, render pilotage, towage, and salvage service, and are entitled to a greater compensation than the usual pilotage fees.]

[Cited in The Philah, Case No. 11,091a.]

[In admiralty. Libel for salvage by Lane and others against the schooner Champion.]

W. Q. Morton, for libellants.

W. & B. Cutting, for claimants.

Before INGERSOLL, District Judge.

The schooner Champion, coming in collision with the brig Arcadian, was immediately abandoned by her crew, who went off to another vessel because the Arcadian had yellow fever on board. The Arcadian took the Champion in tow, and towed her towards New York for about twenty-three hours, when she was fallen in with by the libellants, who are pilots, and came to the Arcadian in answer to a signal for a pilot. They refused, however, to take charge of the two vessels for pilotage compensation, but put a pilot on board the Arcadian, and were willing to take charge of the Champion by herself. The master of the Arcadian accordingly cast her off, and the libellants took charge of her. The weather was favorable, and they towed her for twenty hours, and then employed a steamtug for $70 to tow her to the city, which was about fifty-four miles.

HELD BY THE COURT, that the services rendered by the libellants were not of a salvage character, nor strictly towage, nor pilotage, but partake of the three qualities, and the authority of the court to recompense maritime services is not limited to any special denomination or classification within which they may be arranged. That, when the schooner was cast off by the Arcadian, she stood in respect to the libellants as if then first fallen in with by them requiring towage and nothing more. That the libellants were not bound in their character as pilots to take charge of the Champion. They could render

her no aid simply as pilots. That a proper compensation for the labor, exposure and cost incurred by them, is the foundation upon which their reward must be computed, and that $20 per hour is such compensation. That they are also entitled to their regular pilotage. When a pilot is called to and undertakes the business of towage, he is not bound to become pilot also of the vessel relieved.

Decree for libellants for $550, with legal outside pilotage and costs.

Case No. 2,583.

The CHAMPION.

[1 Brown, Adm. 520;[1] 1 Am. Law T. Rep. (N. S.) 493: 7 Chi. Leg. News, 1.]

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

MARITIME LIEN — SUPPLIES FURNISHED IN CANADA—RIGHT OF ASSIGNEE TO SUE.

1. By the law of England previous to the statute of 3 & 4 Vict., no lien existed for supplies furnished domestic vessels.

[Cited in The Union Express, Case No. 14,364; Whittaker v. The J. A. Travis, Id. 17,599.]

2. Whether such lien existed with respect to foreign vessels, or whether the court of admiralty had jurisdiction to enforce it, seems never to have been settled prior to the passage of the act of 3 & 4 Vict. This statute was, however, simply declaratory of the maritime law with respect to the existence of the lien as it was prior to its passage, and vested jurisdiction to enforce it in the admiralty courts.

[Cited in The Champion, Case No. 2,584.]

3. Want of jurisdiction to enforce a lien in any particular locality is not fatal to the existence of the lien The lien exists by virtue of the general maritime law—it follows the ship wherever she goes, and may be enforced wherever there is jurisdiction to enforce it.

[Cited in The Union Express, Case No. 14,364.]

4. There is a lien in Canada for supplies furnished an American vessel, and a court of admiralty has power to enforce this lien.

5. A lien for supplies is divested by an assignment of the claim.

[Cited in The Napoleon, Case No. 10,011; The Emma L. Coyne, Id. 4,466; The Sarah J. Weed, Id. 12,350; The Rapid Transit, 11 Fed. 335.]

[See note at end of case.]

In admiralty. This was a libel in rem by James O'Leary for wood supplied the tug Champion by the libellant at Lampton, on St. Clair river, in the province of Ontario, in October and November, 1871. The tug was a vessel of the United States, and owned and registered at Detroit, in this district. The libellant was a citizen of Ontario and a subject of Great Britain. Before the suit was brought, O'Leary had assigned his claim to Johnson & Co., brokers and bankers, of Port Huron, in this district, and the suit was brought at their instance and for their benefit. The claim was evidenced by drafts drawn by the master of the tug upon the owner. After the suit had been commenced, and before the hearing, Johnson & Co. withdrew the drafts from the hands of their proctors, and, without further consultation or co-operation with them, made a settlement with and received payment from the owner of the tug, but not including costs, and without any reservation as to costs, and delivered up the drafts. The proctor's costs have not been paid. Libellant's proctors now ask for a decree for the same.

This is opposed on behalf of the owner of the tug, on three grounds: First. That by the laws of the province of Ontario, where the supplies were furnished, there was no maritime lien for the same; and that therefore libellant had no right of action in rem, and the court was without jurisdiction in the premises. Second. That any lien which may have existed in favor of libellant ceased on the assignment of his claim to Johnson & Co. Third. That in any event, the proctors having voluntarily delivered up to Johnson & Co. the evidences of claim, and thus enabled them to make a full and complete settlement with the owner, the proctors cannot now, without proof of collusion, look to the tug or her owner for their costs, but must look to Johnson & Co. alone. Upon the question of lien, it is conceded that if a maritime lien for supplies had an existence in Ontario in any case, it had in this. There are several other suits against the tug in behalf of Canadian parties, for supplies, depending substantially upon the same questions as the present case; and the decision in this case was to determine the others.

L. S. Trowbridge, for libellant.

(1) The question of jurisdiction in cases of supplies furnished in Canada is conclusively settled in the case of The Maggie Hammond, 9 Wall. [76 U. S.] 451. It is not a question of jurisdiction, but of comity. This case was followed by the circuit judge of this circuit in that of The Avon [Case No. 680].

(2) The question of assignment is not free from doubt. The authorities are conflicting, but upon principle the lien should be preserved. In other cases an assignment of the debt carries with it the security, as in case of indorsement of note secured by mortgage. Conceding the lien to be a personal right, why should it be lost by assignment? The want of power to assign by so much lessens the value of the lien. The Boston [Case No. 1,669]; The General Jackson [Id. 5,314]; The Wasp, L. R. 1 Adm. & Ecc. 367; Sorley v. Brewer, 1 Daly, 79. In the following cases a mechanic's lien was held assignable: Iaege v. Bossieux, 15 Grat. 98; Tuttle v. Howe, 14 Minn. 145 [Gil. 113]; Goff v. Papin, 34 Mo. 180. It is a general rule well settled that whatever rights of action survive to an executor are assignable. People v. Tioga Common Pleas, 19 Wend. 73; Sears v. Cono-

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

ver, 34 Barb. 330; Hoyt v. Thompson, 1 Selden [5 N. Y.] 320.

F. H. Canfield, for claimant.

(1) This being a proceeding in rem, the jurisdiction depends upon the existence of a lien in favor of the libellant against the tug. The Rock Island Bridge, 6 Wall. [73 U. S.] 213; Gardner v. The New Jersey [Case No. 5,233]; Harmer v. Bell, 7 Moore, P. C. 267; 2 Pars. Shipp. 172 (note 2), 322. A maritime lien is defined in The Young Mechanic [Case No. 18,180]. If the debt in these cases created a lien, that lien existed and was in full force at the moment the supplies were placed on board the vessels while they lay in the Canadian port. If the liens did not exist then and there, they never existed. The Two Ellens, 1 Asp. 208–211. This action being founded in contract, the existence of the lien depends upon the law of Canada—the lex loci contractus. Story, Confl. Law, §§ 321, 322b; Whiston v. Stodder, 8 Mart. (La.) 95, 134; The Avon [supra]; The Peerless, Lush. 30. Whether there was a lien created depends upon the intention of the parties; they contracted with reference to the law of the place, and that law became part of the contract. By the law of Canada no such thing as a maritime lien for supplies exists. It is not merely the want of a court capable of enforcing it. The only expert sworn so testifies. The fact that no such lien exists is fully shown by the authorities. By the law of England no such lien existed till 1840. The Neptune, 3 Knapp, 94; Abb. Shipp. 142–144, and cases cited; The Two Ellens, 1 Asp. 40, 208, 210. By virtue of the conquest, and subsequent acts of the British government, the law of England, as it then existed, became the law of Canada. 1 Cooley, Bl. 108; Baldwin v. Gibbon, Stu. K. B. p. 72; Hamilton v. Fraser, Id. 21; 1 Chit. Commer. Law, 638; Blankard v. Galdy, 4 Mod. 222; 16 Am. St. P. 36; Campbell v. Hall, Cowp. 204; Mitchell v. U. S., 9 Pet. [34 U. S.] 748. The recent English statutes do not apply to Canada. The act of parliament under which the government of Canada was organized, expressly provides that the English statutes shall not apply to the Canadas unless they are named or referred to by necessary intendment. These colonies have full power of local legislation upon this subject. 1 Cooley, Bl. 109; 7 & 8 Wm. III. In 1791 Canada was divided, and in October, 1792, the legislative council of Upper Canada, by express enactment, declared the laws of England should be the rules of decision in all civil cases. See Consol. St. Up. Can. p. 30. The recent English statutes on this subject do not apply to the upper province. It would seem, also, they do not apply to the lower province. See The Australia, Swab. 480–488, where it is held the jurisdiction of the vice-admiralty courts remains as it was previous to 1840. By the law of Canada, full power of legislation is given to its parliament in respect to navigation and shipping. Debates on Confederation of Provinces, p. 1029; Laws Up. Can. 448, 456, 535. The English courts of admiralty, in cases arising in the colonies, are bound by the local law. The Peerless, Lush. 30.

(2) If any lien ever existed it was divested by the assignment of the claim to Johnson. Cross, Liens, 48; The Yankee Blade, 19 How. [60 U. S.] 82; Logan v. The Aeolian [Case No. 8,465]; Rusk v. The Freestone [Id. 12,143]; Patchin v. The A. D. Patchin [Id. 10,794]; The Geo. Nicholaus [Id. 13,578]; Reppert v. Robinson [Id. 11,703]; Pearsons v. Tincker, 36 Mo. 384; Hays v. The Columbus, 23 Mo. 232; The White v. Levy, 5 Eng. (Ark.) 411. Same rule applies to mechanics' liens. Lovett v. Brown, 40 N. H. 511; 2 Kent, Comm. 635, note. The right of stoppage in transitu can only be enforced as between the buyer and seller. Pars. Mer. Law, 60; Siffken v. Wray, 6 East, 371.

L. S. Trowbridge, in reply.

Claimant's counsel assumes the position that by the conquest of Canada the French or civil law was superseded by the law of England. If this position be untenable his whole argument falls to the ground. While under the dominion of France, there is no question that the general maritime law prevailed there, and that by it a lien existed in favor of material-men. The conquest did not alter this, and the same general maritime law prevails there, unless changed by positive enactment. Blackstone, in speaking of the colonies of the mother country, makes a nice distinction between colonies that are established by discovery and those which are gained by conquest. As regards the former, all the laws of the mother country in being at the time of the establishment, are immediately in force in the colonies. "But in conquered or ceded countries, that have already laws of their own, the king may, indeed, alter and change those laws, but till he does actually change them the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country. Our American plantations are principally of this latter sort, being obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not inquire), or by treaties. And therefore the common law of England, as such, has no allowance or authority there, they being no part of the mother country, but distinct though dependent dominions." 1 Cooley, Bl. pp. 107, 108. While the opinion of the learned author might be questioned, as to the statement that American colonies (i. e., those not included in the United States) were obtained by conquest, instead of discovery, no question can arise as to the Canadian colonies. The case cited by counsel from Stuart's Lower Canada Reports (page 72), does not conflict with the above. It was there held that the French

law was suspended by the conquest, and the establishment of an admiralty court, the very thing which Blackstone says the king can do, but until he does it the ancient law remains. There has been no such act regarding Upper Canada, and the conquest alone would not have the effect to supersede the French law.

J. W. Finney and H. H. Swan, on same side.

(1) The lien exists by the general maritime law, even in the absence of a remedy in rem for its enforcement. Farmer v. Davies, 1 Term R. 109; Rich v. Coe, Cowp. 639; Abb. Shipp. p. 157; The Rebecca [Case No. 11,619]; 3 Kent, Comm. (8th Ed.) 281; The Phoebe [Case No. 11,064]; The China, 7 Wall. [74 U. S.] 68; Dupont de Nemours v. Vance, 19 How. [60 U. S.] 171. The jurisdiction to enforce this lien was formerly denied in England, but in this country has always been admitted. La Constancia, 2 W. Rob. Adm. 487; Briggs v. The Light Boat, 11 Allen, 158; The Siren, 7 Wall. [74 U. S.] 152; The Davis, 10 Wall. [77 U. S.] 19; The Maggie Hammond, 9 Wall. [76 U. S.] 451; The Jerusalem [Case No. 7,294]; The Chusan [Id. 2,717].

(2) The contract of the master here is governed by the general maritime law, and not by the lex loci. Pope v. Nickerson [Case No. 11,274]; Story, Confl. Laws, § 286b; The Nelson, 1 Hagg. Adm. 169, 175, 176.

(3) The act of 3 & 4 Vict. c. 65, enlarging admiralty jurisdiction, extends to the colonies, though not named, and impliedly repeals the statute of 1792. The Wataga, Swab. 165.

LONGYEAR, District Judge. The argument of respondent's advocate in support of the first ground of defense—that there was no lien by the lex loci contractus, and therefore no right of action in rem in this court—is based upon the following propositions: First. That the laws of France which prevailed in Canada at the time of its conquest by England, and by which there was a lien for necessaries supplied to a ship, had been superseded by the laws of England. Second. That a lien for necessaries supplied to a ship, whether domestic or foreign, never had an existence in England until it was created by act of parliament. Third. That the act of 3 & 4 Vict. c. 65, § 6 (in 1840), creating a lien in such cases, had no operation in Upper Canada, now province of Ontario, because not so expressly named and provided. Fourth. That such was the state of the law in the province of Ontario in October and November, 1871, when the cause of action in this case arose. The arguments were confined to these propositions, and were conducted on both sides with commendable zeal and ability, and elaborate research. I have also received much aid from an instructive brief of Messrs. H. H. Swan and J. W. Finney, proctors and advocates for libellants in another suit now under advisement, and in which this same question is involved.

It will be seen that the second proposition lies at the foundation of the entire argument; because it is only by maintaining it that the others are of any consequence. The second proposition will therefore be first considered. In considering this proposition, it must be borne in mind that the Champion was a vessel of the United States, and therefore foreign to the place where the necessaries were supplied.

It is too well settled and understood to need citation of authorities or admit of discussion, that, as to domestic vessels, jurisdiction to enforce the lien accorded by the maritime law to material-men, by action in rem in the admiralty or elsewhere, was long since overthrown and denied in England, and the lien itself held never to have had any existence there. Such has hitherto always been the rule in the United States also, where the maritime law was at first adopted as it was administered in England, together with all its inconsistencies and incongruities as applied to the condition of things here. The incongruity of limiting the jurisdiction to tide water has already been abandoned, and has ceased to mar the harmony of the system; and, judging from the recent amendment of admiralty rule 12 by the supreme court, and certain foreshadowings by recent enunciations from the bench of that court, and to which may be added a recent decision by the district court for the eastern district of Missouri, it is evident that this other is about to meet the same fate. Wilson v. Bell, 6 Chi. Leg. N. 261; Taylor v. Com. [Case No. 13,788]. But it is by no means so well settled, although seemingly so understood, that the denial of jurisdiction in the admiralty to enforce liens of material-men extended to necessaries supplied in England to foreign vessels, and much less so in regard to the existence of the lien in such cases. It is true it seems to be assumed by Mr. Abbott, in his excellent work on Shipping (pages 142 to 150), and it was no doubt held by the court of king's bench, that the denial went to that extent, both as to the jurisdiction and the existence of the lien. To my mind, however, it is apparent from the notes to those pages of Abbott, and the cases there cited and commented on, in both text and notes, that the controversy in this respect between the admiralty and common law courts of England, never was entirely settled and determined, the one way or the other; that, in fact, that controversy continued as to foreign vessels, until it was finally disposed of and determined in favor of the admiralty, by the statute of 3 & 4 Vict., supra. The high court of admiralty did not understand the denial to have gone to the extent claimed, certainly as late as 1834. In that year, in the case

of The Neptune, 3 Hagg. Adm. 129–140, 8 Eng. Adm., Sir John Nicholl, delivering the opinion of the court, says: "In England, then, the law of nations, of which the lex mercatoria is a branch, forms part of the common law, unless it be altered or controlled by parliament or the municipal courts. It is clear that, by the civil law, and by the general law of other nations, when uncontrolled, persons who have furnished materials for the fitting out of a ship, have a lien upon the ship itself, and, if so, upon the proceeds of the ship. If an English ship were repaired in France or in Holland, material-men might there arrest and enforce payment against the ship itself. How far a foreign ship repaired here might not be subject to the same right is a question into which it is not necessary now to inquire, for the Neptune is a British ship, and in such case the municipal courts of this country have so far departed from the rule of the civil law that they have held that the lien does not extend to the ship itself; and so far, therefore, this court is restrained; but they have not gone further." It is true the Neptune, being a domestic ship, and the repairs having been done in England, and the application in that case being to participate in surplus proceeds, and not a proceeding against the ship itself, the point thus discussed was not directly involved; but what was said none the less shows that, in the opinion of Sir John Nicholl at least, the question of lien for necessaries supplied to a foreign vessel in England had not then passed beyond controversy in her courts. The judgment in that case was afterwards reversed by the privy council (2 Knapp, 84), on the ground that it allowed a party to participate in proceeds who had no lien upon the vessel itself. It became a leading case, and was deemed a final determination of the question of lien for necessaries supplied in England, so far as it related to domestic ships.

The statute of 3 & 4 Vict., supra, must be regarded, I think, as declaratory, or at least as a recognition merely, of what the maritime law then was, so far as concerned the question of lien for necessaries supplied to a foreign ship, whether within the body of a county or upon the high seas, and not as introducing a new principle into English jurisprudence. This, I think, is abundantly evident from the language of the enactment itself, which is as follows: "The high court of admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to or damage received by any ship or sea-going vessel, or in the nature of towage, or for necessaries supplied to any foreign ship or sea-going vessel, and to enforce payment thereof, whether such ship or vessel may have been within the body of the county, or upon the high seas, at the time when the services were rendered or damage received or necessaries furnished in respect of which such claim is made." Abb. Shipp. 150. It will be noticed that the act does not purport to create a lien. It leaves that question just where it stood before, and, of course, to be determined by the maritime law. It seems to assume the existence of the lien, and then simply restores to the admiralty a jurisdiction in relation to it, of which it had been deprived by the municipal courts. That this is the light in which that act was regarded by the high court of admiralty is evident by the subsequent decision of that court in at least two cases—one, The Alexander, 1 W. Rob. 288, soon after the act went into operation [holding that the jurisdiction conferred by the act was not confined to cases of necessaries supplied after it went into operation][2] and the other, The Wataga, Swab. 165, at a later period (1856), holding that the jurisdiction conferred by the act extended to claims for necessaries supplied to a foreign vessel in colonial as well as in British ports. In the case of The Alexander the libel was in rem against a Norwegian ship, for necessaries supplied to her in England in 1835, five years before the act went into operation. The jurisdiction of the court was contested on the ground that the act did not affect past claims; but the court held the contrary, and maintained the jurisdiction. In the course of the opinion (page 294), Dr. Lushington said: "Now the action in the case is brought in virtue of the particular statute recently enacted, and without that statute the court would not have been justified in entertaining the suit at all; for, although the subject-matter clearly falls within the original scope of the maritime law, before the passing of the statute, the court might have been prohibited from proceeding in the cause, on the ground that the common law had narrowed the general jurisdiction originally belonging to this court. Such prohibition is now taken off by the statute; but looking to the words of the act, I do not find any expressions limiting the jurisdiction of the court to cases accruing subsequent to the period when the act came into operation." The learned doctor treated the statute simply as an act of delivery of the admiralty from the thraldom in which it had been held by the common law courts; and he maintained the jurisdiction, not because the statute created a lien, or that the claim or cause of action had any foundation in it, but because the lien, claim, and cause of action clearly fell "within the original scope of the maritime law," and had their foundation in it. I consider the learned doctor's position entirely sound, and am not aware that its soundness has ever been questioned. In the case of The Wataga, the application was for payment out of the proceeds of an American ship for necessaries supplied to her in 1856, at the Cape of Good Hope, a British possession—the case being, in its incidents, almost identical with the one now under consideration. The

[2] [From 1 Am. Law T. Rep. 493.]

application was opposed on the ground that the statute of 3 & 4 Vict. c. 65, § 6, was not intended to apply to the case of necessaries supplied to a foreign ship in a port at a distance from England, though a British possession. But Dr. Lushington, by whom this case was also decided, held otherwise, and maintained the jurisdiction. The decision in that case would maintain the jurisdiction in this in that same court. At the close of the opinion (page 167), and after quite fully discussing the object and purposes of this act, he throws out the following significant intimation: "This claim must be maintained; but I am by no means clear, even if I am mistaken on the point of colonial ports, that it could not be supported under the narrower interpretation."

The high court of admiralty seems in fact never to have relinquished its claim, that under the general maritime law there was a lien for supplies, whether to domestic or foreign vessels, or whether within the body of a country or upon the high seas, only so that they were necessary and were furnished upon the credit of the ship. It simply surrendered to the superior jurisdiction and powers of the common law courts, and ceased to exercise the jurisdiction to enforce the lien. When parliament in part took off the prohibition imposed by the common law courts, by the statute of 3 & 4 Vict., the high court of admiralty to that extent simply resumed that which it had all along claimed as its right, and proceeded at once to enforce a lien which it assumed, and no doubt rightfully, had simply been in abeyance. That the lien for necessaries supplied to a ship, recognized by the general maritime law, always existed in England as to foreign ships, before as well as after the act of 3 & 4 Vict., was assumed by our courts from the earliest period of the exercise of admiralty jurisdiction here, for while adopting in the main, the admiralty jurisprudence of England as there exercised, the supreme court of the United States from the beginning assumed and fully recognized the existence of the maritime lien for necessaries supplied to a foreign ship in all cases, and the jurisdiction of the federal admiralty courts to enforce it. See General Admiralty Rule 12. This rule, from the beginning, and all through its various modifications by amendments or otherwise, has always assumed the existence of the lien, and provided for its enforcement. This has always been true of it as to foreign ships, and recently it has been so amended as to drop all distinction in that regard. Maritime liens for necessaries supplied in England to a foreign ship, I am satisfied, have always had an existence there. Jurisdiction to enforce them was alone prohibited. It is well settled, however, that want of jurisdiction to enforce a lien in any particular locality is not fatal to the existence of the lien itself. The lien exists by virtue of the maritime law, and it follows the ship wherever she goes, and may be enforced wherever there is a jurisdiction to enforce it. The Maggie Hammond, 9 Wall. [76 U. S.] 435, 451; The Avon [Case No. 680]. And this applies as well to the objection that there is no jurisdiction to enforce a maritime lien in the province of Ontario, where the cause of action arose. The question of lien in this case, therefore, in the absence of any positive enactment to the contrary, must be determined by the general maritime law, and by that law there was a lien, and also jurisdiction in this court to enforce it. No object on was made that the necessaries in question were not supplied upon the high seas, or upon tide water, as those terms are understood in English admiralty jurisprudence, and that therefore there could be no lien; it is therefore unnecessary to consider it. The omission of learned counsel to make that objection was undoubtedly for the very good reason that since the decision of the United States supreme court in the case of The Eagle, 8 Wall. [75 U. S.] 15, and of the United States circuit court for the northern district of Ohio, by Emmons, circuit judge, in the case of The Avon [supra], that objection has no longer any force in our court. This may be said to be especially so under the authority of the supreme court in the case of The Eagle, supra, in a case like the present, arising upon the great boundary waters between this country and British North America, constituting as they do great national thoroughfares, international in their character, and common to the vessels of both countries. There are many decisions of the admiralty courts of the United States which have a bearing upon the questions presented by the defense here under consideration; but it would serve no useful purpose to enter into an analysis of them here. A few of the leading ones, as far as I have taken the time to examine them, are, however, here cited: The Eagle, 8 Wall. [75 U. S.] 15; The Maggie Hammond, 9 Wall. [76 U. S.] 435, 451; The Avon [supra]; The Rebecca [Case No. 11,619]; The Phebe [Id. 11,064]; Dupont de Nemours v. Vance, 19 How. [60 U. S.] 171; The Boston [Case No. 1,669]; The Siren, 7 Wall. [74 U. S.] 156, 158; The Jerusalem [Case No. 7,394]; The Chusan [Id. 2,717]; Pope v. Nickerson [Id. 11,274]. See, also, Abb. Shipp. 142–150; 2 Kent, Comm. (8th Ed.) 281; 2 Pars. Shipp. & Adm. 322; Story, Confl. Law, § 286c.

The second proposition of the argument in support of the first ground of defense, viz., that there was no lien, and therefore no right of action in rem in this case, is not sustained; and with that the whole superstructure of the argument in support of that defense falls.

2d. The lien and jurisdiction to enforce it being maintained in favor of the original creditor, was the lien divested by the assignment of the claim? Upon authority, I am clear that this question must be answered

in the affirmative. It has been so held in every case in the federal admiralty courts to which my attention has been called, in which the discussion was not evidently influenced by special circumstances. In the case of The Patchin [Case No. 10,794], Judge Conklin, in a well-reasoned opinion, so held in regard to mariners' wages. He notices a distinction between liens for wages and upon bottomry bonds and bills of lading, which are assignable, on the grounds that the bond is an express hypothecation, and binds the ship to the lender and his assigns; and that the bill of lading is negotiable, made so by law for the benefit of trade, and its transfer carries with it the title to the goods shipped, and of course the right to maintain a suit upon it in case of their loss; while, on the contrary, the right of the mariner to proceed against the ship in specie, is conferred upon him for his own exclusive benefit, and arises by implication merely. He held that liens of the latter character are strictly personal. He recognizes that the claim or debt may be lawfully transferred, but holds that the lien does not follow. In the case of Reppert v. Robinson [Id. 11,703], the libel was in personam for repairs and supplies. In delivering his opinion, Chief Justice Taney said: "But if it appeared upon the proceedings that when the suit was brought Hamilton held this due bill as assignee, and the proceedings were instituted for his benefit, I do not think the admiralty jurisdiction could have been maintained; the right to sue in admiralty upon claims of this description is personal, and is maintained upon principles and for reasons which do not apply to the assignee." Certainly if no jurisdiction in personam, there can be none in rem. In the case of Sturtevant v. The George Nicholaus [Id. 13,578], the libel was in rem for salvage, and Judge McCaleb held that the same rule applies to liens for salvage as to those for wages, and that they are not assignable, citing, with approbation, Judge Conkling's opinion in The Patchin, supra. In the cases of Logan v. The Aeolian [Id. 8,465], and Rusk v. The Freestone [Id. 12,143], the libels were in rem for wages, and Judge Leavitt held the same as Judge Conkling in The Patchin and Judge McCaleb in The Freestone. These are all the cases in the federal admiralty courts in which this doctrine has been maintained, to which my attention has been called, or that have fallen under my notice. There are, however, several cases in state courts, arising mostly under state statutes, conferring liens where none existed by the maritime law, and in favor of mechanics and others, in which the same doctrine has been held. Pearsons v. Tincker, 36 Me. 384, 386; Hays v. The Columbus, 23 Mo. 233; Lovett v. Brown, 40 N. H. 511; The White v. Levy, 5 Eng. (Ark.) 411.

The cases in the federal admiralty courts which seem to hold the opposite doctrine will now be considered. In the case of The Boston [Case No. 1,669], the libel was in rem for repairs, and Judge Betts held that an assignee of the debt for a full consideration, who became such at the express instance of the master, was entitled to all the legal remedies possessed by the original creditors, including the right to proceed against the vessel. There can be no doubt that the fact that the transfer was made at the express instance of the master, had its influence, although it is not so stated in the opinion. At all events, it affords a reasonable explanation for the difference of opinion between the learned judge and the others whose opinions have been cited. In the case of The General Jackson [Id. 5,314], the libel was in rem for supplies, and Judge Sprague held that "the assignment of the claim, as security for a debt which has since been paid, would not of itself be a waiver of the lien." What his opinion would have been [if the debt had not been paid, or][3] if the assignment had been absolute instead of for security merely, the case does not inform us. These are all the cases in the federal admiralty courts to which my attention has been called, or which have fallen under my notice, which even seem to hold that the lien is not divested by the assignment of the debt; and as to each of these cases it is to be observed that the decision was evidently influenced by special considerations.

As on the other side of the question, so here there are also several state decisions, based in like manner on state statutes, holding the same way as the judgments last cited. Hoyt v. Thompson, 5 N. Y. 320, 327; Sears v. Conover, 34 Barb. 330; Sorley v. Brewer, 1 Daly, 79; Iaege v. Bossieux, 15 Grat. 83, 88; Goff v. Papin, 32 Mo. 180; Tuttle v. Howe, 14 Minn. 145 [Gil. 113]. It is seen, therefore, that the decisions of our own admiralty courts upon this question are substantially all one way; and they fully sustain the position that the lien which a material-man has is strictly personal to himself, and does not pass to his assignee; that it is, in fact, extinguished by the assignment of his claim, so that neither he nor his assignee can come into a court of admiralty for its enforcement. I have not the time to devote to a discussion of the soundness of those decisions. It has, however, been so fully done by the learned judges in the opinions I have cited that there really does not appear to be much left to be said upon the subject. Even if I doubted the soundness of those decisions, I should hesitate long before venturing an opinion in opposition to so formidable an array of experience, learning and ability. At all events, I should not do so except for cogent and conclusive reasons. Until overruled by higher authority, the rule of those cases will be the rule of decision in this court. In England the ques-

[3] [From 7 Chi. Leg. News, 1.]

tion does not seem to have been much discussed as applied to maritime liens; at all events not sufficiently to have established a rule upon the subject. See Cross, Liens, 48 (18 Law Lib.), as to assignments of liens in general, and The Wasp, L. R. 1 Adm. & Ecc. 367, as to assignments of maritime liens.

The proofs in this case showed that before this suit was brought, libellant had sold and transferred his claim to Johnson & Co., and that the suit was instituted by them, in libellant's name, but for their benefit. The lien was thereby lost, and the suit cannot be maintained. In this view of the case a consideration and decision of respondents' third ground of defense has become unnecessary. Libel dismissed.

[NOTE. The question of the assignability of maritime liens is examined at length by Judge Lowell in the case of The Sarah J. Weed, Case No. 12,350, and upon principle and authority he dissents from the doctrine of the principal case, and those upon which it is based, and maintains that such liens are assignable. In that case, too, the lien was one for supplies. Prior to that time an assignment of a lien for advances had been sustained by Judge Betts, in The Panama, Id. 10,703. The Sarah J. Weed was followed in the case of The American Eagle, 19 Fed. 879, which involved a lien for supplies, and in The M. Vandercook, 24 Fed. 472, which was a case of lien for salvage. See, also, to the same effect, The Norfolk, Case No. 10,297; Murdock v. The Emma Graham, Id. 9,940; and The Liberty No. 4, 7 Fed. 226, in which, however, in addition to the assignment, there was held to be a right of subrogation. In the case of The Woodland, 104 U. S. 180, the supreme court seems to assume that parties who discount a draft given by the master or owners in payment for repairs, etc., furnished to his vessel in distress, would be entitled to enforce the same against the vessel; but the court decided as a matter of fact that the drawee had been reimbursed by sales of cargo, that the drafts were fraudulent, and that consequently no lien had ever existed. Upon this subject the court says: "It is incumbent on the libellants to prove a debt from the vessel to Niles [the drawee], and its amount. Until this proof is made they cannot recover. If the settlement between the master and Niles had not been impeached, that would have been enough, for the master is the agent of the owner for all purposes. But it has been impeached," etc. In The Pride of America, 19 Fed. 607, it was held that where a maritime lien attaches to a vessel, and her owner gives a draft for the debt, the draft in terms recognizing, confirming, and continuing the lien, an assignee of the draft and claim can enforce the lien against the vessel; citing, as authority, The Woodland, supra.]

Case No. 2,584.

The CHAMPION.

[10 Chi. Leg. News, 10; 23 Int. Rev. Rec. 355, 359; 2 Cin. Law Bul. 226, 271.]

District Court, E. D. Michigan. April 30, 1877.

SEAMAN'S WAGES—FOREIGN VESSEL—SHIPKEEPER'S LIEN.

1. Where a Canadian vessel is in custody of the marshal, upon a claim made by an American citizen, the court will take jurisdiction of an intervening libel filed by one of her seamen, notwithstanding his contract is made and performed in Canada, and all the parties are British subjects.

2. As the lien of the seaman exists by the general maritime law, the courts of this country will enforce such a lien arising in Canada, notwithstanding the absence of admiralty courts there.

3. There is no lien for services as shipkeeper while the vessel is laid up during the winter.

[See The A. R. Dunlap, Case No. 513; The Amstel, Id. 339. But, contra, see The Windermere, 2 Fed. 722; The Erinagh, 7 Fed. 231; The Hattie M. Bain, 20 Fed. 389; The Velox, 21 Fed. 479; The Scotia, 35 Fed. 916; The Gilbert Knapp, 37 Fed. 209; The Main, 2 C. C. A. 569, 51 Fed. 954; Norwegian S. S. Co. v. Washington, 6 C. C. A. 313, 57 Fed. 224; The Hattie Thomas, 59 Fed. 297.]

4. Where a party shipped as seaman in the spring, served as such during the season of navigation, and then remained on board during the winter, keeping the ship: *Held*, that he could recover as seaman, only for his services during the season of navigation though no new contract was made.

In admiralty. The libel claimed for services as seaman and cook for one year, at the rate of sixteen dollars per month, but it appeared that, after the close of navigation and until libellant was discharged, his services were those of a shipkeeper. The answer set forth that the Champion was a Canadian vessel; that libellant and the owners of the vessel were residents of Ontario; that the contract was made in Canada, and insisted that the same was to be construed and governed by the laws of that dominion, and that no lien exists under these laws for services as seaman; that these services were rendered upon the sole credit of the owner of the vessel; that there is no admiralty court in the province of Ontario, and that the laws of said province do not recognize a lien for any of the services set forth in the libel. The facts were, that libellant was employed from March 26th, 1874, to March 26th, 1875; that he served as deck hand three weeks, and during the remainder of the season of navigation as cook, and occasionally as deck hand; and after the vessel, laid up, without discharge or change of wages, he continued on the vessel as shipkeeper to the end of the year. All the services were rendered under a single contract of hiring. The services were continuous, and small sums were paid from time to time, amounting altogether to twenty-five dollars. The contract of hiring was made in Canada, and the vessel plied between Canadian ports, touching occasionally at American ports.

Moore & Moore, for libellant.
F. H. Canfield, for claimants.

BROWN, District Judge. At the time this libel was filed, the vessel was in custody of the marshal upon another libel, filed by an American citizen for repairs put upon her in this state. Although libellant would not have been entitled to this remedy in Canada, and although as a general rule, I should decline to take jurisdiction of controversies be-

tween Canadian subjects, especially where the contract was made and performed in Canada, I think there is no objection to doing so, (at least in the absence of a consular protest), where the vessel is already in custody, and the libel is filed to enable the seamen to obtain pay from the proceeds of sale; in such case, it would be manifestly unjust to send the seaman back to a foreign country, when the court which has taken possession of the vessel is able to afford him relief here.

The principal defense to this claim was made upon the theory that inasmuch as there are no admiralty courts in the province of Ontario, it follows that the seaman has no lien upon his vessel; that liens are creatures of local law, and that he can obtain no lien by proceeding in the admiralty courts of this country. I think this objection, however, is completely disposed of by the reasoning in the case of The Maggie Hammond, 9 Wall. [76 U. S.] 435, and in The Avon [Case No. 680]. A distinction is taken in both these cases between liens existing by the law maritime, and those which are mere creatures of local legislation. The former are held to exist everywhere, unless expressly excluded by statute, and the absence of local admiralty courts will not prevent the courts of another country from exercising admiralty jurisdiction, and enforcing them, but, as observed by the supreme court in the former case (page 451), "Where the lien exists only by some local statute, and is not given by the maritime law, admiralty courts in another jurisdiction can no more take jurisdiction of a case, not within the local statute, than the courts of the country could do where the cause of action arose; but where the lien is given by the maritime law, the question in such a case, in the admiralty courts of the United States, is not one of jurisdiction, but of comity," etc. Again, "maritime liens are of little or no value, in a country where there are no appropriate tribunals for their enforcement, as they must remain dormant and unavailable, but the denial of such jurisdiction to her admiralty courts, by one country, whether it be by legislation or by the prohibitions of her common law courts, cannot have the effect to impair or diminish the jurisdiction in such cases of the admiralty courts of any other country, if they are legally clothed with the power and authority to enforce such remedies for the breach of a maritime contract." In this case, the court enforced the lien of the owner of a cargo upon the vessel, under the maritime law, notwithstanding the libellant and claimant were both foreigners; the place of shipping and of consignment foreign ports, and the whole ground of libel a matter which occurred abroad. In the case of The Avon [supra] a libel in rem was sustained for a collision in the Welland canal, notwithstanding the fact that a lien for such a cause of action could not be enforced in any of the Canadian courts, and it was denied that any such lien existed. The case was reasoned with great elaborateness, and contained all the authorities up to that time, bearing upon the question. See, also, The Champion [Case No. 2,583]. In the subsequent case of The Moxhan, L. R. 1 Prob. Div. 107, also 3 Asp. Marit. Law Cas. 191, it was held by the court of appeals, reversing in that respect the decree of the high court of admiralty that the question of liability of a ship owner proceeded against in an English admiralty court, for an injury done by his ship to a pier projecting into the sea, but standing upon the soil of a foreign country, is governed by the lex loci, and not by the English law; and where an English ship, by negligence of her master and crew, ran into and damaged a pier on the coast of Spain, and the owners of the pier proceeded against the ship for the damage in an admiralty court, and the defendant pleaded that by the law of Spain a ship owner is not responsible for damage occasioned by the negligence of the ship master and crew, the plea was held good. This case was not only in tort, but it appeared affirmatively that there was not a mere absence of a court to enforce a lien, but that the courts of the country had expressly excluded the existence of a lien for this cause of action, although a lien was given in such cases by the local law of England, the same rule would undoubtedly obtain here. Indeed, it was decided by this court, in the case of The Ottawa [Case No. 10,616], that no lien existed for damage done to a pier. But inasmuch as the lien of the seaman exists, by the general law maritime, and the defense is set up, not that the laws of Canada exclude such lien, but simply that they have provided no court for its enforcement, I deem it a clear inference, from the cases above cited, that the libellant may enforce his lien upon the vessel in this court.

Notwithstanding some conflict of authority, I think the better rule is, that a shipkeeper, particularly of a domestic vessel, has no lien upon her for wages, by the general maritime law. It was so decided by Judge Lowell in the case of The Island City [Case No. 7,109], following in this respect Phillips v. The Thomas Scattergood [Id. 11,106], Gilpin, J.; Weaver v. The S. G. Owens [Id. 17,310]. See, also, The John T. Moore [Id. 7,430]. In the case of The Trimountain [Id. 14,175], the court allowed a watchman for his fees before she was taken into custody by the marshal, giving as a reason that that constituted one of the privileged demands of the maritime law, as administered under the ordinance of Louis XVI., and was so ranked in the Code de Commerce. In the case of The Dolphin [Id. 3,973], I held that the underwriter had a claim on that vessel for his premiums, following in this respect French law. But the supreme court had already determined the contract of insurance to be a maritime contract, and it seemed to me the lien followed naturally upon this decision, and inasmuch as the civil law conferred the

lien, I considered myself at liberty to adopt it. I did not intend, however, to decide that the courts of this country, would give a lien in every case where it was given by the Commercial Code of France; indeed, many of these liens, particularly those for the wages of the master, for supplies furnished for domestic vessels, and for the expense of building and equipping, have been held by the supreme court not to exist in this country. Where the contract is maritime, I should be very reluctant to deny the lien, but where, as in this case, the services are rendered, not in aid of the navigation of the vessel, but while she is laid up for the winter, it seems to me the service is not maritime, and consequently that the party is not entitled to his lien.

Nor do I think the lien is saved in this case, because no new contract was made, but the party remained on board during the winter, without having been paid in the fall for his services, as cook. Had his services as watchman been performed merely as an incident to the navigation of the vessel, and while she was lying up in some port, it would have been saved, by the rulings in such cases as The Gazelle [Case No. 5289]; Pittman v. Hooper [Id. 11,185]; Brown v. Lull [Id. 2,018]; The Jane and Matilda, 1 Hagg. Adm. 187; The Sloop Canton [Case No. 2,388]. But the contract as a cook and seaman terminated with the season of navigation and with the discharges of the crew, and if libellant remained on board while the vessel was laid up in winter quarters, he must be held to have remained, by implication, under a different contract, although no new contract was actually made, circumstances had intervened, which put an end to the first contract, and he must be held to know that if he remained on board during the winter, it was not in the capacity of a seaman or cook.

Inasmuch as the time when the vessel was laid up, does not clearly appear, the libellant is entitled to recover for his wages as seaman and cook, at sixteen dollars per month, from the 26th of March to the 1st of December, which, in absence of evidence to the contrary, I would hold to be the close of navigation.

CHAMPION, The (HURLEY v.). See Case No. 6,919a.

Case No. 2,585.

CHAMPION v. ROSS.

[4 Wash. C. C. 325.][1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1822.

PRACTICE—RULE TO SHOW CAUSE OF ACTION.

On a rule on plaintiff to show his cause of action, who thereupon files a positive affidavit of the debt, the court will not order the party making the affidavit to be examined on oath in court; no ground appearing to the court to justify a suspicion that the debt was not due.

Rule on the plaintiff to show cause of action, and why the defendant should not appear on common bail.

Mahany, for plaintiff, showed cause, by reading the positive affidavit of the plaintiff, that the action is founded on certain promissory notes due by the defendant to the plaintiff, as assignee.

Scott, for defendant, moved to examine the plaintiff in court, as he doubted the fairness of the assignment.

BY THE COURT. The affidavit of the plaintiff, being positive, and no ground appearing to the court to justify the suspicion entertained by the counsel, the rule must be discharged.

CHAMPION (UNITED STATES v.). See Case No. 14,779.

CHAMPLIN (SANDS v.). See Case No. 12,303.

Case No. 2,586.

CHAMPLIN v. TILLEY et al.

[1 Brunner, Col. Cas. 71;[1] 3 Day (Conn.) 303.]

Circuit Court, D. Connecticut. 1809.

FOREIGN EXECUTORS AND ADMINISTRATORS — RIGHTS AND POWERS OF—EVIDENCE — ADMISSIBILITY OF LETTERS TO DENY PARTNERSHIP — PARTNERSHIP—BOOK ACCOUNT AS EVIDENCE OF —JOINT CONTRACT—EFFECT OF JUDGMENT ON.

1. Letters testamentary issued under the authority of one state are not available in another. But if to an action brought by an executor, on a cause of action arising in the lifetime of the testator, the defendant plead the general issue, the plaintiff cannot be required on the trial to produce any letters testamentary.

2. In an action against A. and B. as partners on a contract executed in the partnership name, A. suffered a default, and B. pleaded the general issue; held, that letters written by A. in the partnership name could not be read in evidence by B. to show that he was not a partner with A.

3. In such case an account book containing entries made by A. and B. may go to the jury as evidence of a partnership.

4. In an action on a joint contract against two, where one has suffered a default and the other has obtained a verdict, judgment must be entered up for both.

The plaintiff [Christopher Gibbs Champlin, as executor of Christopher Champlin] in his declaration stated "that at New Port the defendants [James Tilley and William Tilley], by said William Tilley, purchased of said deceased a quantity of hemp, to be manufactured at their rope factory in New London, on a credit of four months, and to secure payment thereof the defendants, at said New Port, by said William

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

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

Tilley, one of said firm and company, and then joint mechanic and trader with said James Tilley as aforesaid, made, executed, and to said deceased, then in full life, delivered a certain writing or promissory note, in the words and figures following, viz:—"We, William Tilley & Company, of New London, promise to pay Christopher Champlin of New Port, or his order, within four months from the date hereof, five hundred and eighty dollars, value received. Witness our hands, New Port, January 31st, 1804. William Tilley & Co. Witness, George G. Whitehorne." When the cause came on for trial, William Tilley, who had failed and absconded, was defaulted; James Tilley, the father of William, and a man of property, appeared and pleaded non assumpsit.

Daggett, for defendants, called upon the plaintiff's counsel for evidence that the plaintiff was executor to the deceased. He said that unless this were shown there was no propriety in proceeding any farther in the cause. He stated, at the same time, that no letters testamentary issued by any authority out of the state of Connecticut could be admitted as evidence before the courts of this state, according to the decision of the supreme court of errors, at their last session in Hartford. Vide Riley v. Riley, 3 Day, 74.

Goddard, for plaintiff, replied that he was somewhat surprised by the motion, though he apprehended that the defendant was too late with it, and that advantage ought to have been taken by plea in abatement, as the want of lawful appointment to be executor is a disqualification to sue in this case.

Before LIVINGSTON, Circuit Justice, and EDWARDS, District Judge.

LIVINGSTON, Circuit Justice, having inquired whether there was a profert of letters testamentary, was answered in the negative and that it was not common in our practice to make such a profert, the mere naming the plaintiff as executor being considered as sufficient to enable the defendant to plead ne unques executor.

His honor then observed that it must undoubtedly be good law that letters testamentary should be used only within the jurisdiction under which they were issued, and that he should have no doubt, in a proper stage of the proceeding, as to requiring the production of such letters issued under the authority of the state of Connecticut; and he did not see but the plaintiff in this case must produce his claim to the character of executor, if the defendant required it.

At the request of the plaintiff's counsel, the question was permitted to rest till afternoon, as he wished to look at authorities, that he might be able to show that the defendant was too late in his motion. This was assented to by the court.

At the opening of the court in the afternoon, Goddard proceeded to show that on a plea of non assumpsit, when the case is entered upon before the jury, it is too late to call for letters testamentary. He cited, as in point, Peake, Ev. (Last Ed.) 342, and Marsfield v. Marsh, 2 Ld. Raym. 824.

Daggett, in reply, stated that in Edwards v. Stapleton, Cro. Eliz. 551, Browning v. Fuller, Cro. Jac. 299, and Cutts v. Bennet, Id. 409, it was decided that a profert of letters testamentary is matter of substance. The reason of these decisions must be because the plaintiff may be called upon to prove them to be legal and genuine.

THE COURT said that they were satisfied by the authorities read by Mr. Goddard that the plaintiff could not be called upon in this stage of the proceeding to prove his claim to the character of executor.

LIVINGSTON, Circuit Justice, said that he was of a different opinion in the morning, but was convinced by the authorities. As to the cases read by Mr. Daggett from Cro. Eliz. and Cro. Jac., it might well be matter of substance that profert of letters testamentary should be made; that the plea of ne unques executor may be tendered, while, nevertheless, the plaintiff could not be compelled to prove himself executor on trial to the jury.

In the course of the trial to the jury, the counsel for the defendant read several letters from the testator, Christopher Champlin, to the defendant, from which it appeared that the testator did not consider the defendant, James Tilley, as a member of the firm of William Tilley & Co. In one of these letters, six other letters purporting to be written by William Tilley & Co., and promising payment, were enclosed; and with them, the note on which this action was brought. The counsel for the defendant were proceeding to read these enclosed letters; but an objection being made,

THE COURT said that the letters, whether written by William Tilley or not, were entirely irrelevant; though the letters of the testator were good evidence to prove that he did not suppose James Tilley to be a partner.

An account book was produced by the plaintiffs to prove that James Tilley was connected with his son William in business. In this book two entries were found in the handwriting of James Tilley, many in the hand of William Tilley, and some in the hand of other persons.

The counsel for the defendant objected to reading to the jury any charges made in the hand of William Tilley.

BY THE COURT. The book must go to the jury, as it has been proved, and indeed conceded, that James Tilley made a few entries in it. The jury are to decide whether the book, as it is, amounts to any proof of partnership.

The jury found a verdict for the defendant.

His counsel then moved that judgment should be entered up for both defendants, though one of them had been defaulted.

THE COURT said this was the correct

mode of proceeding; for if the jury had found that one defendant assumed and promised, and the other did not, judgment must have been entered up for both, the declaration being founded on a joint promise only.

NOTE. Parties—Objection to, When must be Made. Any objection to the character of the parties must be made, if at all, at an early stage in the cause; it is of a preliminary nature and cannot be raised on the general issue. See Bank v. Ford, 27 Conn. 289; Bank v. Church, 29 Conn. 148, citing case in text. As to foreign administrators and executors as parties, and their rights and powers, see Curtis v. Smith [Case No. 3,505]; Hobart v. Turnpike Co., 15 Conn. 147, where case in text is cited.

Case No. 2,587.

CHAMPNEY v. BANCROFT.

[1 Story, 423.] [1]

Circuit Court, D. Massachusetts. May Term, 1841.

FEES OF CUSTOMS OFFICERS—PAYMENT BY COLLECTOR—ACT OF MARCH 2, 1799.

1. The act of 2d of March, 1799 [1 Stat. 627], c. 129 (amended by the act of 1816 [3 Stat. 306], c. 95), authorizes the collector to pay the fees due to the officers of the customs, out of the revenue of the United States. *Held*, that this act creates no lien or specific claim on moneys in his hands, arising from the revenue.

2. That an ex-collector, who is not in office, cannot lawfully appropriate the moneys of the United States, in his hands, to such a payment; for the act is an official act, and the authority can be exercised only by the collector actually in office.

At law. Assumpsit for money had and received. The case came before the court upon a statement of facts agreed upon by the parties. It was as follows: The plaintiff [John Champney] was a weigher and gauger in the custom house at Boston, before and from January 1st, 1838, to March 31st, 1841. The defendant [George Bancroft] was collector during that period. From January 1st, 1838, to July 7th, 1838, the plaintiff was paid $125 a month, besides his official expenses, as his fees, and the defendant refused to pay him any more. If his compensation during that period was to be measured by the acts of 1799, c. 129, § 2, and 1816, c. 95, he would have been entitled to receive $724.96 6-7 in addition, and this sum he demands. From July 7th, 1838, to the close of the year, the plaintiff was paid for his fees, $125 a month, besides his official expenses. The plaintiff claims $750 in addition, to make up the sum of $1,500, for that period. More than that sum would have accrued under the acts of 1799 and 1816. In the year 1839, no act was passed, limiting the fees of weighers and gaugers, and the plaintiff was paid according to the two acts of 1799 and 1816, which exceeded $1,500, after deducting official expenses. From the 1st of January, 1840, to the 21st of July, in that year, the plaintiff received his fees, according to the acts of 1799 and 1816, which exceeded the rate of $1,500 per annum, after deducting official expenses. From the 21st of July, 1840, to the close of the year, the plaintiff was paid $125 monthly, besides official expenses. He claims a further payment of $513.45 3-7, for that period. The plaintiff rendered quarterly accounts, charging the fees at the rate at which they were paid to him, and yearly abstracts, which were sent to the comptroller, and the defendant regularly rendered his accounts for the years 1838, 1839, and 1840, to the comptroller, containing the same payments, which were regularly audited and passed. The plaintiff gave monthly receipts for said payments "on account" or "towards" his compensation, and made no protest of his demand for further compensation. But it is agreed, that the defendant had refused to allow anything more than was paid. The defendant resigned his office, and the resignation took effect March 31st, 1841. On the 31st of March, 1841, the plaintiff made an abstract of his services, for the period between January 1st, 1838, and June 7th, 1838, and demanded the balance of $724.96 6-7, upon which the defendant certified in writing as follows:—"Collector's Office, District of Boston and Charlestown. I hereby certify, that the foregoing abstract is a true copy from the records of this office. On a strict construction of the law, the collector would seem to have been authorized to pay the whole amount. I prefer, however, to leave it for the decision of the comptroller. The law of limitation did not pass till after the above balance had accrued. Signed, George Bancroft, Collector." Upon the foregoing facts, the case is submitted for the opinion of the court; and judgment is to be entered accordingly.

Mr. Rantoul, for plaintiff.

Mr. Dexter, Dist. Atty., for defendant.

Mr. Rantoul cited U. S. v. Duvall [Case No. 15,015]; U. S. v. Dickson, 15 Pet. [40 U. S.] 161; and Act April 26, 1816, c. 95.

STORY, Circuit Justice. The act of March 2, 1799 [1 Stat. 627], c. 22, amended by the act of 1816, c. 95, authorizes the fees, due to the officers of the customs, "to be paid by the collector out of the revenue, and to be charged to the United States." But upon the statement of facts, I am very clear, that the present action for money had and received is not maintainable for several reasons. In the first place, the defendant (Bancroft) is not now in office; and even if he had moneys of the United States in his hands, he could not now lawfully appropriate them to the payment of the fees, if any are due to the plaintiff, since it is an official act, and can be properly done only by the collector, who is actually in office. In the next place, the moneys of the United States in the hands of the collector, arising from the revenue, are not specifically appropriated by law to the payment of these partic-

[1] [Reported by William W. Story, Esq.]

ular fees, so as to create a lien or claim thereon in favor of any officer; but a mere authority is given to the collector to pay them out of the moneys of the United States, arising from the revenue, in his hands. If he does not pay the fees, the claim remains valid against the government, and the new collector is now at liberty to pay them, if they are properly chargeable. I give no opinion whatsoever upon the question, whether the claim of the plaintiff for fees is valid or not. That is not a point necessary for the present decision. Plaintiff nonsuited.

CHANA (UNITED STATES v.). See Case No. 14,780.

Case No. 2,588.

CHANCE v. UNION MUT. LIFE INS. CO.

Circuit Court, E. D. Missouri. Sept., 1876.

[Cited in White v. Insurance Co., Case No. 17,545. Nowhere reported; opinion not now accessible.]

Case No. 2,589.

The CHANCELLOR.

[4 Ben. 153.][1]

District Court, S. D. New York. May, 1870.

COLLISION AT SEA — SHIP AND FISHING VESSEL—VESSEL AT ANCHOR—FOG—SIGNALS—SPEED.

1. The schooner B., an American fishing vessel, while at anchor on the Grand Bank of Newfoundland, was run down in a dense fog by the ship C. and sunk, on the 22d of September, 1866. The ship was going at the rate of about six knots an hour, under full sail except studding sails, and a fog horn was being blown upon her, at intervals of about ten seconds. No horn was blown or bell rung on the schooner during the day of the collision, till after the horn of the ship was heard, when a horn was blown, and, on hearing a second blast from the ship's horn, the horn was again blown and then a bell was rung. On hearing the horn from the schooner, the ship's wheel was ordered to be put to port, and had been got about half over to port, when the bell was heard, and it was ordered to be put hard-a-starboard, but before it was got half way over to starboard the collision occurred: *Held*, that usually, in a suit in rem for collision, the first question is, whether the vessel sued was in fault, and not till that fact is established does the inquiry arise whether the libellant's vessel was in fault.

2. The schooner being at anchor was grossly in fault, in not sounding her bell, as required by article 10 of the regulations for preventing collisions, and in blowing a horn on hearing the horn from the ship.

[Cited in The Scotia, Case No. 12,513.]

3. In view of the sounds she heard from the schooner, the manoeuvres of the ship were the proper ones.

4. These violations of the law by the schooner being shown, the burden of proof was upon her to show that the collision was in no degree owing to them.

5. The requirement of article 10, of the regulations for preventing collisions, that a bell shall be sounded at least every five minutes, whenever there is a fog, means, that, in any case, the bell must be sounded as often as once in five minutes, and as much oftener as the special circumstances of the case shall require.

6. The speed of vessels in a fog should be moderate.

[Cited in The Hansa, Case No. 6,037.]

7. The burden of proof was upon the schooner to show that the collision was owing to too great speed on the part of the ship; and, this not being shown affirmatively, the schooner alone was liable for the collision.

[In admiralty. Libel by the owners of the schooner Bride against the ship Chancellor for damages for the loss of the schooner by collision.]

J. H. Choate, for libellant.

W. R. Beebe and C. Donohue, for claimant.

BLATCHFORD, District Judge. The schooner Bride, an American fishing vessel, owned by the libellant and one Henry B. Taylor, who was her master, and was on board of her, as such, at the time, was at anchor on the Grand Bank of Newfoundland, on the 22d of September, 1866, in the pursuit of her business as a fishing vessel, in a dense fog, when, at about twenty minutes past four o'clock in the afternoon of that day, she was run down and sunk by the ship Chancellor, then on a voyage from New York to Liverpool. The starboard side of the schooner was struck by the stem of the ship, and, of ten persons composing the company of the schooner, all perished but one. This suit is brought to recover the sum of $8,400 as damages for the loss of the schooner and her outfit, and of the fish and oil on board of her at the time. The interest which belonged to Taylor has become vested in the libellant.

There are several facts in the case which are undisputed. The wind at the time was from south south-west to south-west, blowing a moderate breeze. The ship was heading east by south half south, the wind being, therefore, from half a point to two points and a half abaft the beam of the ship on her starboard side. The fog had been prevailing for four or five days, and was so thick that nothing could be seen more than half the length of the ship ahead. The ship was on her starboard tack, under all her canvas except her studding sails, and going about six knots an hour, and a fog horn was being blown upon her at intervals of about ten seconds, by a lookout man who was stationed on the top gallant forecastle. There were two men at her wheel, the master was standing on the starboard quarter near the wheel, and had been there for about half an hour before the collision, and the officers and crew were all of them on deck. There were four officers and twenty-eight men before the mast. The latitude of the ship, at noon that day, was 45° 30′ north, and her longitude at the same time was, by dead reckoning, about 49° west. The schooner had anchored at

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

the place where she was struck, on the previous evening. She was in about thirty fathoms of water, and at a point between thirty and forty miles to the southward of the eastern shoals of the Grand Bank of Newfoundland.

The libel avers, that, as soon as the proximity of the ship was known or suspected on board of the schooner, the master of the schooner blew loud blasts upon a horn, and her mate rang loudly a bell upon her forecastle. The answer avers, that it is the custom, on the Grand Banks, in fogs, for vessels under way to blow, at intervals of fifteen or twenty seconds, a fog horn, and for vessels at anchor to sound, at intervals of a few seconds, a bell, and in that way give notice to approaching vessels as to whether they are under way or at anchor; that the ship had a full watch on deck, with two men at the wheel, and a competent lookout; that a fog horn was sounded on board at intervals of from ten to fifteen seconds; that, while the ship was sailing through the fog, a horn was heard ahead, and, as the sound indicated, a little on the starboard bow; that the wheel of the ship was then put to port, no object being at the time visible ahead; and that, by the time the wheel had been put half way down, a bell was heard, and almost immediately the schooner loomed up ahead in the fog and at anchor, and the wheel was at once ordered to be put hard a-starboard, but, before the order could be fully obeyed, and the course of the ship be changed, she came in contact with the schooner.

Ordinarily, in a suit in rem for a collision, the first inquiry to be made is, whether the vessel sued was in fault, and not until it is established on the part of the libellant, that the vessel sued was in fault, does any inquiry arise, as to whether the libellant's vessel was in fault. But, in this case, the facts are such, that the determination of the question whether the ship was in fault, must depend upon the determination of the question whether the schooner was in fault. The 10th article of the "regulation for preventing collisions on the water," contained in the act of April 29th, 1864 (13 Stat. 60), provides as follows: "Whenever there is a fog, whether by day or night, the fog signals described below shall be carried and used, and shall be sounded at least every five minutes, viz: (a) Steamships under way shall use a steam-whistle placed before the funnel, not less than eight feet from the deck. (b) Sailing ships under way shall use a fog horn. (c) Steamships and sailing ships, when not under way, shall use a bell." In this case, the evidence shows, that the company of the schooner were all of them on deck, except the cook and the captain; that four of them had their lines out, fishing; that no bell had been rung or any horn blown on the schooner during the day, although she had a bell hung on a post near the windlass, and several horns convenient of access, one of them being hung in the companion way leading to the cabin from the deck; that, suddenly, a blast from the ship's horn was heard on board of the schooner; that the captain of the schooner then came on deck and blew a horn; that then the sound of a horn from the ship was again heard on board of the schooner; that the captain of the schooner then blew a horn a second time, and the bell of the schooner was rung, and the ship was heard and seen close upon the schooner; that the lookout on the topgallant forecastle of the ship heard and reported the sound of the horn from the schooner, nothing being visible through the fog, but it does not appear, that the sound of more than one of the blowings of the horn on the schooner was heard on the ship before the collision; that, immediately on the hearing of the horn from the schooner, the wheel of the ship was ordered by her master to be put to port, the sound of the horn being heard faintly by him from ahead but a little on the starboard bow of the ship; that the helm of the ship had been got about half to port, when a bell was heard from the schooner; that thereupon the helm of the ship was ordered by her master to be put hard a-starboard, but, before it was got half over to the starboard, the collision occurred; that, when the master of the ship heard the horn from the schooner, he, from the course of the sound and the direction of the wind, took it to be from a vessel under canvas, under way, on her port tack, and, therefore, crossing his bows from his starboard to his port side; that he, therefore, ported his helm, to let her pass on his port side; and that, on hearing her bell, he concluded she was at anchor, and a little on his starboard hand, and, consequently, tailing to his port hand, and, therefore, he then starboarded, to pass under her stern. It is quite apparent, from the proofs, that, when the horn of the schooner was first heard on board of the ship, the ship was so close upon the schooner that a collision was almost inevitable; that there was no substantial, if there was any, change in the course of the ship, by either the porting or the starboarding of her helm; and that the manoeuvres of the ship were the proper ones, in view of the sound she heard from the schooner. Now, on all these facts, it is impossible to deny that the schooner was grossly in fault. She violated the law of navigation by lying at anchor without sounding her bell at all. When aroused to a sense of her danger and her duty, by hearing the fog horn of the ship, she violated the law again by sounding a horn instead of a bell, and by not sounding a bell until after she had heard the horn of the ship a second time. These violations of law being shown, the burden of proof is upon the schooner to show that the collision was in no degree owing to any such violation. Waring v. Clarke, 5

How. [46 U. S.] 441, 465. In this case, the schooner has, I think, failed to show that the collision was not in some degree attributable to the violations of law by the schooner. She has not shown that, if she had sounded a bell from time to time, and as often as was demanded, in view of the thickness of the fog, and of the location of her anchorage, and of the state of the wind, prior to her having heard the fog horn of the ship, such bell would not have been heard by the ship, and thus have indicated a vessel at anchor, and tailing, with the wind, towards the port side of the ship, in season for the ship to have had a chance of avoiding the collision, by starboarding the moment the bell was heard, and passing under the stern of the schooner. Nor has the schooner shown, that if, when she sounded a horn, after hearing the horn of the ship, she had sounded a bell instead, there would not have been time for the ship to have, at least, mitigated the collision, by starboarding instead of porting. As the schooner was motionless, it is apparent that but a slight change of direction in the heading of the ship towards the stern of the schooner, a comparatively short distance away, would either have caused her to clear the schooner, or to strike the schooner a glancing or angular and, probably, less disastrous blow, near the stern of the schooner. I think, on the evidence, that, with the vigilance and promptitude of movement which are shown to have existed on board of the ship, the proper and timely use of the bell by the schooner, both before and after the fog horn of the ship was heard, would have changed the state of things materially. In regard to the use of the bell by the schooner before the horn of the ship was heard, it is to be observed, that the requirement of article 10 is, that the bell shall be sounded at least every five minutes, whenever there is a fog. This does not mean that it shall be a sufficient compliance with the law to sound the bell as often as once every five minutes, in any fog. It means that it shall not be a sufficient compliance with the law to sound the bell less often than once every five minutes, in any fog. The 20th article declares that nothing in the rules shall exonerate any vessel from the consequences of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case. In any fog, the bell of a vessel at anchor must be sounded at least once in every five minutes, and as much oftener as the thickness of the fog, or the fact that she is anchored in a route frequented by other vessels, or the state of the wind or weather, or the ordinary practice of seamen at the locus in quo, or the special circumstances attending the case, may require, as a proper precaution, the neglect of which there is reasonable cause to believe may prove disastrous. It is shown, by the proofs in this case, that it is the custom, on the Grand Banks, in a fog, for a vessel at anchor to ring a bell every ten or fifteen seconds, and for a vessel under canvas, under way, to blow a horn at the same intervals. Such a custom is a reasonable one, and is one of the precautions required by the ordinary practice of seamen, referred to in article 20, and is to be rigidly enforced by the courts. It is a custom in harmony with the requirements of article 10. The bell must be sounded, or the horn must be blown, or the steam whistle must be used, as much oftener than once in every five minutes, as is required by the use of reasonable precaution under the circumstances of each case. In the present case, the fog was of extraordinary thickness, the schooner was lying in the track of merchant ships running from New York to Liverpool, and the vessel under canvas, which struck her, was using a fog horn every ten seconds. Yet the schooner was guilty of such gross neglect as to sound no bell at any time before hearing the horn of the ship. The schooner was, therefore, in fault, and responsible for the collision, at least, in part.

Was the ship in fault? The general charge made in the libel against the ship is, that she was recklessly, negligently or carelessly managed by those navigating her. There is, in the libel, no specific allegation as to what the faulty management on the part of the ship was. As already stated, no fault can be found with what was done on board of the ship, after the proximity of the schooner was made known. The ship was manoeuvred as she ought to have been, in view of the indications given by the sound from the schooner. A fog horn, a little on the starboard bow of the ship, with the wind just abaft the beam of the ship on her starboard side, indicated a vessel under canvas, under way, crossing from the starboard side to the port side of the ship, and, therefore, the helm of the ship was properly put to port. The bell indicated a vessel not under way, and probably at anchor, and, with the wind as it was, if at anchor, tailing to the port side of the ship, and, therefore, the helm of the ship was properly put to starboard. Nor was any thing left undone on board of the ship, after the sound from the schooner was heard, which ought to have been done. The only serious charge against the ship is, that she was sailing at too great a speed, in view of the thickness of the fog. The testimony is, that the breeze was a moderate one, that the ship was going about six knots an hour, and that she had all her canvas on except her studding sails. In the case of The Itinerant, 2 W. Rob. Adm. 236, 243 (decided in 1844), Dr. Lushington says: "It is unquestionably the duty of every master of a ship, whether in an intense fog or great darkness, to exercise the utmost vigilance, and to put his vessel under command, so as to secure the best chance of avoiding all accidents, even though such precautions may occasion some delay in the prosecution of the voyage.

It may be that for such purpose it would be his duty to take in his studding sails; but such is the constantly varying combination of circumstances, arising from locality, wind, tide, number of vessels in the track, and other considerations, that the court cannot venture to lay down any general rule which would absolutely apply in all cases. In the present instance, the opinion of the court is, that it might have been prudent for the Itinerant to have taken in her studding sails; but the court is also of opinion, and so were the gentlemen by whom it was assisted at the hearing of this case, that the collision was not occasioned by the omission of the Itinerant so to do, but that the state of the weather was such that the accident would have occurred, even although this precaution had been adopted." In the case of The Lord Saumarez, 6 Notes Cas. 600 (decided in 1848), Dr. Lushington says, addressing the Trinity masters: "It appears that shortly previous to and up to the time of the collision, the Lord Saumarez was proceeding under all her sails set, with the exception of having taken in her lower studding sails; and it has been contended, on the one side, that, considering the state of the wind and weather and the locality, the Lord Saumarez ought not to have carried so large a press of sail; while, on the other hand it is said, that, whatever might be the quantity of sail she carried, it was not at all instrumental to the collision and to the damage in question. In support of the latter averment, the case of The Itinerant was cited. Now it is most important that this question should not be subject to misapprehension, and you will excuse me for referring to what took place in The Itinerant, and showing what is the real principle which the court adopted, sanctioned by the gentlemen of the Trinity House, in this matter. Perhaps I had better first state the general principle. When a ship is carrying a great press of sail, it does not necessarily follow, though it may be an act of imprudence, that it contributes to the collision itself; and, if it is not the cause of the collision, but simply an act of imprudence, not promoting the collision, it is a circumstance to be entirely laid out of the case. But if, on the other hand, looking to the state of the wind and the weather, an improper press of sail was contributory to the collision, then it is a misdemeanor for which the party so acting must suffer. In the case of The Itinerant * * * the court pronounced that the collision was the result of inevitable accident. * * * Now, in that case, the fog was of the very densest character, so that the two vessels could not descry each other until they were in almost immediate contact; and, although the gentlemen by whom I was then assisted were of opinion that the Itinerant was, in one sense of the word, to blame in carrying so great a press of sail, yet, looking at the whole case, they considered that the carrying such sail was not contributory to the collision, and, under these circumstances, I could not hold that vessel to blame. But let it not go forth, as by your authority, that, whatever may be the circumstances of the case a vessel is at liberty to carry a great press of sail, to the imperilling the safety of other ships. That never was a doctrine laid down by this court or by your board. In the present case, looking at all the circumstances and at the locality, considering whether it was a track in which it was likely to meet other vessels, you will have the goodness to state to me presently, whether you are of opinion that the carrying so large a press of sail, was or was not contributory to this collision; whether, if less sail had been carried, some time would have been allowed, after the discovery of the vessel, to adopt those measures which ought to have been taken to avoid the collision." The decree was against the Lord Saumarez, because it was held that the primary cause of the collision was her putting her helm to starboard, contrary to the rules laid down by the Trinity House, but the Trinity masters remarked, that, in the situation in which that vessel was, it would have been more prudent for her to have had no studding sails at all. I have cited these eminently just and practical views of Dr. Lushington, not only because of their applicability to the present case, but for the purpose of showing how little countenance is given by courts of admiralty, to such views of the duty of the masters of vessels which are sailing in a fog, as were advanced by the witnesses examined on the part of the claimant in this case. One of them stated that he never shortened sail, in all his experience, in a fog, his view being, that the faster the ship goes, the quicker she will answer her helm, and, therefore, the less the danger of colliding with another vessel. Another witness stated, that the proper course, in a fog, is, not to shorten sail at all, but to go as fast as you can, and take the chances, using every prudent precaution. Another stated, that he never made less sail on account of a fog, and that the rule is to go as fast as you can, consistently with wind and weather. Another stated, that it is prudent to go as fast as you can, through a fog, as long as the masts hold in. Another stated, that he never diminishes his speed in a fog on the Banks, his object being to get through the fog as quickly as possible, lest he should be run into. Another stated, that he always crosses the Banks in a fog as fast as he can, and that it is not more dangerous to a vessel, at anchor there, in a fog, for another vessel to go fast than to go at less speed. One of these witnesses is the master of a steamer plying regularly between New York and Liverpool. He says, that, while crossing the Banks in a fog, it is not his custom to diminish his rate of speed at all; that he generally goes ten or eleven knots an hour, through a fog, on the Banks; and that from three hundred to four hundred yards is

the furthest distance at which you can hear a fog horn or a bell. This practice, if it be one, of not diminishing speed in a fog on the Banks, is directly, so far as steamers are concerned, in the face of the 16th article of the sailing rules, which provides that every steamship shall, when in a fog, go at a moderate speed. The rule that there must not be too much speed in a fog has also been applied to sailing vessels, under varying circumstances, depending upon the particular facts of the case. The Virgil, 2 W. Rob. Adm. 201; The Victoria, 3 W. Rob. Adm. 49; The Pepperell, 1 Swab. 12; The Robert & Ann v. The Lloyds, Holt, Rule of the Road, 55. Two prominent ideas were advanced by the witnesses for the claimant in this case, as justifying undiminished speed in a fog on the Banks. One was, that the danger to any vessel in a fog is greater the longer she remains in the fog. The other was, that the faster a vessel is going the more quickly will she mind her helm, and thus the better will she be able, on a signal of danger, to avoid colliding with another vessel, in a fog. Neither of these ideas has any sanction in the law, and any vessel which acts upon them takes upon herself the consequences of recklessness. The first idea disregards wholly the rights and the safety of other vessels. The other idea presupposes that a signal of danger, proceeding from a vessel unseen in a fog, to another vessel, will necessarily be heard so seasonably, and acted upon so intelligently, by the latter, as to secure, by a proper movement of her helm, the avoidance of a collision. The true rule of law is laid down by Dr. Lushington, in the case of The Virgil, 2 W. Rob. Adm. 201, 205. He says: "If a vessel charged with having occasioned a collision, should be sailing at the rate of eight or nine miles an hour, when she ought to have proceeded only at the speed of three or four, it will be no valid excuse for the master to aver that he could not prevent the accident at the moment it occurred, if he could have used measures of precaution that would have rendered the accident less probable. It may undoubtedly be important that a voyage should be completed in the most speedy manner, but such speed must be combined with safety to other vessels sailing in an opposite course. This is the doctrine of the courts of admiralty, in cases of this kind."

I have made these observations because of the character of the testimony introduced on the part of the claimant in this case, and because no sanction is intended to be given, by the decision in this case, to the doctrines advanced on the part of the claimant, through his witnesses, as to the rule by which vessels have a right to govern themselves, in regard to the proper rate of speed in a fog. Each case must be judged of by its own circumstances, for, what would be not too great a rate of speed in a fog, under one state of facts, would be too great a rate, under another state of facts. Yet, there are general rules for the government of vessels, as to their rate of speed in a fog, based upon uniformity of principle and leading to uniformity of decision. The Itinerant, 2 W. Rob. Adm. 236, 242.

In the present case, in view of the fault on the part of the schooner in not sounding her bell at all, while at anchor, before she heard the horn of the ship, and in view of her further fault in misleading the ship, by sounding her horn, instead of her bell, after she had heard the horn of the ship, and in view of the fact that, the burden of proof being on the schooner, to show that the collision was not the consequence of such faults, she has not so shown, and in view of the fact, that the burden of proof is on the schooner, to show that the collision was owing, in any degree, to the too great speed of the ship, I cannot come to the conclusion, on the evidence, that it is shown affirmatively that a too great speed on the part of the ship contributed to the collision. On the contrary, the weight of the evidence is, that, if the schooner had not committed the faults she did, the ship would not, even at the speed she had, have collided with the schooner. The evidence does not show any such actual known proximity of other vessels, in the vicinity of the place of collision, at or about the time of the collision, or any such probability of meeting other vessels there, either under way or at anchor, as to make the actual speed of the ship at the time, in view of the wind, and of the sail she had on, and of all other attending circumstances, a reckless one. Therefore, I cannot pronounce the ship in fault. The libel must be dismissed, with costs.

Case No. 2,590.

In re CHANDLER.

[9 N. B. R. 514;[1] 13 Am. Law Reg. (N. S.) 310; 6 Chi. Leg. News, 229.]

District Court, N. D. Illinois. April 9, 1874.

BANKRUPTCY—PROOF OF DEBTS—WAGER CONTRACT.

A speculative option where the object of the parties is not a sale and delivery of the goods, but a settlement in money on differences—commonly called a "put,"—is a wagering contract and void, either as within the statutes against gambling or as against public policy, and is not a provable debt in bankruptcy.

[Cited in Re Green, Case No. 5,751; Clarke v. Foss, Id. 2,852.]

[The question in this case arises on the report of H. N. Hibbard, Esq., one of the registers of this court, on an application by the assignee of the bankrupts for an order to expunge the claims of the parties named, as well as a large number of other claims, depending on substantially the same facts. It appears from the testimony submitted with the register's report that in the month of

[1] [Reprinted from 9 N. B. R. 514, by permission.]

May, 1872, and for several years prior thereto, the bankrupts, Peyton R. Chandler and the firm of Chandler, Pomeroy & Co., were engaged in the business of buying and selling grain on the Chicago market, and as members of the board of trade of this city; that Chandler, Pomeroy & Co. were brokers and commission merchants, and Peyton R. Chandler dealt mainly on his own account, as a capitalist, through Chandler, Pomeroy & Co., who acted as his brokers.] [2]

The bankrupts, Peyton R. Chandler, and the firm of Chandler, Pomeroy & Co., were engaged in buying and selling grain on the Chicago market, and as members of the board of trade of that city. In May, 1872, Peyton R. Chandler conceived the idea of making a corner in oats for the month of June then ensuing, and with that view he purchased all the "cash oats" as they arrived in the market, and took all the "options" offered him for June delivery—his purpose being to own all the oats in the market, and compel those who had sold "options" for June to pay his price; or, in other words, to settle with him by paying such differences as should exist between the prices at which he purchased the options and the price he should establish for cash oats on the last day of June, when his options matured. In pursuance of this plan, he purchased, between the 15th of May and the 18th of June, two million five hundred thousand bushels of cash oats, being all, or substantially all, the cash oats on the market, and also bought June "options" to the amount of two million nine hundred and thirty-nine thousand four hundred bushels. The total amount of oats in store in Chicago on the 18th of June was only two million seven hundred thousand bushels, and the total amount received during the remainder of the month was only eight hundred thousand bushels. As incidental to and part of the machinery of this corner, Chandler also sold what are called "puts," or privileges of delivering to him oats during the month of June for forty-one cents a bushel. These "put" contracts read as follows: "Received of E. F. $50, in consideration of which we give him, or the holder of this contract, the privilege of delivering to us or not, prior to 3 o'clock p. m. of June 30th, 1872, by notification or delivery, 10,000 bushels No. 2 oats, regular receipts, at 41 cents per bushel, in store, and, if delivered, we agree to receive and pay for the same at the above price. Chandler, Pomeroy & Co. P. R. Chandler. Chicago, June —, 1872."

The amount paid by the purchaser of these "puts" was one-half cent per bushel for whatever quantity was named in the contracts. The total quantity of oats called for by these "puts" amounted to about three million seven hundred thousand bushels. When Chandler commenced to buy oats with a view to the corner, the price in the Chicago market was about thirty-nine cents a bushel. After he took possession of the market he put the price to forty-one cents and upwards, and held it there until the 18th of June. In the meantime the price had declined in New York and other markets, so that oats to ship were not worth over thirty-three to thirty-five cents, and July options for this market were not worth over thirty-six cents. On the 18th of June, P. R. Chandler and Chandler, Pomeroy & Co. failed, and the price declined before the close of business that day from forty-one to thirty cents, and continued to decline during the remainder of the month, so that at one time they were as low as twenty-six cents per bushel. Between the time of the failure and three o'clock on the 30th of June, the holders of the "puts" claim to have made tender to the bankrupts of the quantity of oats called for by their respective tickets, and the oats not being accepted and paid for, they sold them upon the market that day or the next, under the rules of the board of trade, and proved their claims for the differences between the price named in the "put" and that for which they sold. The total amount of claims thus proved was about four hundred thousand dollars, and the total amount received by the bankrupts for these puts was less than nineteen thousand dollars. The assignee of Chandler moved to expunge the claims of this kind from the list of debts proved.

Harding, McCoy & Pratt and Wirt & Dexter, for assignee.

Hitchcock & Dupee, Goudy & Chandler, and Dent & Black, for creditors.

BLODGETT, District Judge. The proof shows conclusively that the plans of Chandler and the fact that he was manipulating the market with express reference to a corner in oats for June, were well known and understood on the board of trade, while the number of these "put" claims, about one hundred and twenty-five, all, or substantially all, in favor of members of the board, show that the struggle between Chandler, who was endeavoring to hold up prices, and the sellers of "options" and holders of "puts," who were endeavoring to break the price, was quite generally participated in by members of the board. In other words, it was notorious that Chandler was endeavoring to keep the price at forty-one cents or upwards, while the sellers of "options" and holders of "puts" were endeavoring to break down the price. It is true that in this testimony some of the claimants say there was no "corner," or that they did not know that there was a corner, but the cross-examination shows that they knew Chandler was trying to make a corner, and they say he did not do it because he failed before the end of the month, so that by their own admission, they knew what he was attempting, knew the reasons for his purchase of such large quantities of "cash

[2] [From 6 Chi. Leg. News, 229.]

oats," and options, and knew he did not sustain his corner because the "short" interest broke him down, and the moment a man bought a "put," he became identified with the short interest—his interests were antagonistic to Chandler.

The assignee attacks these claims upon the ground that they are fraudulent as against the other creditors of the bankrupt, the main ground, and the only one which I shall consider, being that they are wager-contracts, and therefore void. Without taking time to discuss all the points raised by the able arguments which have been adduced, and the various reasons urged for and against these claims, it is enough to say that it seems to me that the contracts in question partake of all the characteristics of a wager. It is in substance an assertion by the seller of the "put" that oats cannot be purchased on that market before three o'clock p. m. of the 30th of June for less than forty-one cents a bushel, and an undertaking to pay the difference between forty-one cents and any market price. If he, Chandler, sustains the price at forty-one cents or above, he wins the half-cent a bushel paid for the "put," because the holder will not deliver, while if the price goes below that named he is to pay the difference. This is practically the contract. It is manifestly a bet upon the future price of the grain in question, as any which could be made upon the speed of a horse or the turn of a card. The evidence in this case shows that in nearly all the cases of settlements on "put" or "option" contracts, the grain is never delivered nor expected to be delivered, but the parties simply pay the difference, as settled by the prices. But, if that were not so in all cases, it is clear that in this case no delivery of the grain was intended by these "put" holders, because they knew that Chandler controlled all the oats in the market and fixed the price, and that their only expectation for success depended on their being able to break the market before their time for delivery expired. Some of them say—Bensley, I think—that they intended to deliver the oats, but it is absurd to suppose that they intended to deliver, unless they could do so for less than forty-one cents. They intended to deliver if they could break Chandler, or prevent his "corner" from culminating, as the jockey may intend to walk his own horse over the course after he has poisoned or lamed that of his competitor. They did not intend to deliver, if Chandler succeeded. Thus a struggle inevitably ensued between Chandler and the holders of this immense amount of "puts" and "options," Chandler alone on one side attempting to hold up the price, and all the rest seeking to put it down. The fact that the sellers of "options" and holders of "puts" were able to get resolutions through the board of trade, making new warehouses, where oats had never been stored before, "regular" for the performance of these contracts, shows the intensity of the contest and the overwhelming influences with which Chandler had to contend. I do not mean to be understood as saying that the fact that Chandler sold "puts" to so many as to create an overwhelming opposition, makes the transaction any more or less a wager than if he had only sold one "put," but it shows the notoriety of the whole proceedings. From the very nature of the transaction the interest of the holder of the "put" is to break down the price and that of the seller is to maintain it. The number engaged in this transaction, and the quantities involved, demonstrate that neither party expected any grain to be delivered. Chandler expected to hold up the price, in which event no grain would be offered him, and the other parties must have known they could not get the grain to deliver unless they first broke Chandler, as he held all the grain, and then, although they might tender, he could not receive, so that in payment no actual delivery was anticipated. They made their tenders only as a method of establishing differences after he had failed, and was powerless.

That transactions of this kind are only wagers is abundantly established by authorities. Grizewood v. Blane, 11 C. B. 538; Brua's Appeal, 55 Pa. St. 298; Kirkpatrick v. Bonsall [72 Pa. St. 155], MS. Op. Sup. Ct. Pa.; Ex parte Marnham, 2 De Gex, F. & J. 634; Cassard v. Hinman, 1 Bosw. 207. It is true those cases arose under statutes making such transactions void as gaming contracts. But the test applied was: Did the parties intend to sell on one side and buy on the other the stocks which purported to be the subject matter of the transaction, or did they only intend to adjust the differences? And as it was found that they only meant differences when they said shares, the contracts were held to be essentially gambling contracts, and therefore void. It is said, however, that there is no statute in this state expressly prohibiting contracts of this kind, as there is in England and Pennsylvania; and, as the supreme court of this state has decided that wagers are not necessarily void, therefore, these contracts—not being inhibited by any express law of this state—are not void. There is no dispute that contracts of wager are valid at common law, unless affected with some special cause of invalidity. Ball v. Gilbert, 12 Metc. [Mass.] 397. But wagers which are contrary to public policy have always been held by the courts to be essentially void, without statutory prohibition, and cannot be made the ground of an action. Hartley v. Rice, 10 East. 22. And a high authority in the profession has stated the law on the subject of the validity of wagers with great force and clearness, when he says: "As the moral sense of the present day regards all gaming or wagering contracts as inconsistent with the interests of the community, and at variance with the laws of morality,

the exception necessarily becomes the rule." [Godsall v. Bolder] 2 Smith, Lead. Cas. 306. Indeed, any one rising from a full examination of the law applicable to wagers, as expounded by the courts, would undoubtedly testify that while he has found in the books, and especially among the older text writers and cases, general expressions to the effect that wagers were valid at common law, he has found the cases where they have been enforced to be extremely rare, and the courts have been astute to find reasons for not enforcing them.

Following this general current of authority, the supreme court of this state, under the statute prohibiting gaming, has decided that the wagers upon horse-races are void, and cannot be enforced; and that money paid on such wagers can be recovered back. [Tatman v. Strader] 23 Ill. 493; [Garrison v. McGregor] 51 Ill. 473. The language of the Illinois statute on which these decisions are based, is, in substance, that all promises made, &c., where the consideration or any part thereof shall be money won by gaming, &c., shall be void. The language of 8 & 9 Vict., on which Grizewood v. Blane and other English cases were decided, is: "All contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void." The precise question made in this case has never been before the supreme court of this state, to my knowledge, and I am not aware that it has ever been raised at the circuit, except in a late case before his honor Tree, J., of this city when he held that "option contracts for grain, when the parties intended only to pay the differences and not to deliver grain, were void, as wagering contracts." I quote him as reported in the daily papers of this city. But it hardly seems possible that any court called upon to construe the Illinois statute in the light of the expositions already made by our courts and of the English decisions upon a statute so substantially similar, could hesitate to pronounce these contracts wagers, and void as contrary to the statute. But even if not within the letter or spirit of the statute of this state, the common law authorities quoted, show that all wagers contrary to the public policy are void without reference to any statute. And, as the contracts under consideration are essentially nothing but bets upon the price of oats in this market within the time limited, and as it is obvious that the effect of such transactions is to beget wild speculations, to derange prices to make prices artificially high or low, as the interests, strength and skill of the manipulators shall dictate, thereby tending to destroy healthy business and unsettle legitimate commerce, there can be no doubt of the injurious tendency of such contracts, and that they should be held void as against public policy. As is most cogently said by the learned judge who delivered the opinion in the case cited from 55 Pa. St. 298: "Anything which induces men to risk their money or property without any other hope of return than to get for nothing any given amount from another, is gambling, and demoralizes the community, no matter by what name it may be called."

The financial disaster and ruin which followed "Black Friday," in New York, and the scarcely less damaging local consequences which followed the various "corners" which have either succeeded or been attempted in this city, furnish conclusive proof, if proof were needed, that such gambling operations should be held void, as contrary to public policy. The total amount paid by the claimants in these cases was less than nineteen thousand dollars, and yet the amount they claim is within the fraction of four hundred thousand dollars—a disparity between the consideration paid, and the sum demanded which strikes the mind at once as so grossly inequitable that the judicial conscience is shocked, and revolts from being made the instrument for enforcing such outrageous injustice. I do not intend to be understood as holding that every option contract for the delivery of grain or stock, or that every "put" is necessarily void, but only that all these contracts, in the light of the testimony before the court, were, in their essential features, gambling contracts. The parties, when they made them, did not intend to deliver the grain, but only at the utmost to settle the differences. They knew they could not obtain the grain to deliver if Chandler sustained his "corner," and their action in buying a "put" was virtually a bet on their part that he could not accomplish what they all knew he was endeavoring to do, that is, keep up the price through June to his own figures, and virtually a bet on his part that he could do so.

It is shown in the proof and urged in the argument, that the "put" is in itself a very harmless contract—that dealers frequently resort to them as a method of insuring prices. It is answer enough to this to say that the proof fails to show that such was the object of any of these claimants. Chandler was taking all the cash oats offered at the price named in the "puts" and upward, and none, with the exception of Bensley, claim that they had any oats to fill the "puts," at the time they bought, or bought for that purpose till after Chandler's failure. It is perhaps possible to imagine a dealer with a stock of grain on hand which he wishes to hold for an advance, who may take a privilege of this kind to insure himself against a decline while waiting for an advance. But the very act of offering to sell a "put" either implies that the seller has control of the market, so that he expects to make his own price, or else it is a mere reckless as-

sertion of the seller's opinion that the price will be maintained, either of which partakes of the character of a bet.

"A wager," says Bouvier, "is a contract by which two or more parties agree that a sum of money or other thing shall be paid or delivered to one of them on the happening, or not happening, of an uncertain event." To say that these contracts were taken for the purpose of insurance is too far-fetched an excuse, and evidently an afterthought. In what I have said I do not intend to vindicate Chandler. His conduct was as reprehensible as that of the claimants. All were engaged in an immoral and illegal transaction, and this court ought not to allow its powers to be prostituted to the enforcement of these contracts for either party. Money lost at play or in gaming cannot be recovered except where an action is given by statute; but, as I have already intimated my opinion that these cases are within the statute of this state on the subject of gaming under which money paid may be recovered back, I shall allow the claimants to prove their claims for the amounts actually paid by them respectively, which is a half cent per bushel on the grain named on their tickets.

Case No. 2,591.

In re CHANDLER.

[1 Lowell, 478;[1] 4 N. B. R. 213 (Quarto, 66.]

District Court, D. Massachusetts. Oct., 1870.

BANKRUPTCY—"MANUFACTURER"—ACT OF BANKRUPTCY—SUSPENSION OF PAYMENT OF COMMERCIAL PAPER.

1. One who prepares for market and sells lumber, the growth of his own land, is a manufacturer within the meaning of the bankrupt act as amended by the act of July 14, 1870 [16 Stat. 276].

2. The commercial paper mentioned in section 39 of the bankrupt act [14 Stat. 536] includes not only the notes, bills, &c., given by a merchant or other person mentioned in the section in the ordinary course of his business, but all negotiable paper. The terms are descriptive of the kind of paper, and not of the mode in which it was in fact issued or used in the given case.

[Cited in Re Stevens, Case No. 13,393; Re Clemens, Id. 2,877.]

3. The failure of an accommodation indorser to pay the note for fourteen days after his liability has been duly fixed, is an act of bankruptcy, if there is no defence to the note in the hands of its holder, and if the indorser is a manufacturer.

[Cited in Re Carter, Case No. 2,470; Re Clemens, Id. 2,878; Whiting v. Wellington, 10 Fed. 815.]

Petition in invitum heard by the court on an agreed statement of facts with some supplementary evidence admitted by consent. The defendant was a member of the bar, but had of late retired from active practice and carried on, among other things, a steam sawmill, in which he prepared, by his agents, boards and shingles from lumber grown on his own land, and sold them in the market. He was liable on a large number of negotiable notes which he had indorsed for the accommodation of H. Woodman, and Woodman was liable on a less number indorsed for the accommodation of the defendant. The petitioner held one of the former notes which he bought for value before its maturity, and which had been dishonored and duly protested more than fourteen days before the petition was filed.

H. D. Hyde, for petitioner.

The defendant is a trader by reason of his lumber business, and of his practice of raising money by exchange of notes. If not a trader he is a manufacturer. The note held by the petitioner is commercial paper.

G. S. Hillard, for defendant.

There is no evidence of trading. The English cases, which are very numerous and perhaps not entirely harmonious, yet all agree that one who merely sells the produce of his own land is not a trader. The note set out in the petition is not commercial paper within the true intent of section 39. In re Lowenstein [Case No. 8,574]; In re McDermott Patent Bolt Manuf'g Co. [Id. 8,750],—which decide that the paper must not only be given by a merchant, but in the course of his business.

LOWELL, J. I am disposed to agree with the argument of the defendant's counsel that one cannot be a trader unless he buys as well as sells, but is not Mr. Chandler a manufacturer? [But this rather strengthens the second position of the petitioner, that such a person may be a manufacturer, because it shows a reason for the recent amendment by which manufacturers were added to the traders, etc., in the statute.][2] One who works up lumber on a considerable scale is popularly called a manufacturer of that article, and such lumber is spoken of as manufactured in our tariff acts and treasury regulations, and in the lately repealed [reciprocity][2] treaty regulating commerce with Canada. If so, the fact that the manufacturer uses only lumber which he grows himself does not appear to be material. It is not like the case, put in argument, of a farmer making cider or cheese, for two reasons: These products when made by the farmer exclusively from his own farm, are not usually made on so large a scale as to be called a manufacture, as the word is now commonly used, and the making is one merely incidental to the cultivation of his land, like curing his hay, &c. But in the case of the lumber business, the land may be almost said to be incident to the lumber, which usually forms its chief value, and the manufacture itself is the main source of prof-

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

[2] [From 4 N. B. R. 213 (Quarto, 66).]

it, independently of any cultivation or other use of the land. In this respect the business of the defendant seems more analogous to that of a miner, who is made subject to the act, and as to whom it would hardly be contended that the ownership of the land was material.

If, then, the defendant is a manufacturer, has he suspended payment of his commercial paper? Upon this point I am referred to two cases [in the southern district of New York,—In re Lowenstein [Case No. 8,574]; In re McDermott Patent Bolt Manuf'g Co. [Id. 8,750],—in which Judge Blatchford ruled][2] that the paper mentioned in the statute is such as is given by a merchant or trader in the direct course of his business, and not for a mere loan of money, though the money may have been used in his business, and still less for any dealing outside of his trade. Some cases that were not cited are of a different tenor: Heinsheimer v. Shea [Case No. 6,328]; In re Nickodemus [Id. 10,254]; In re Hollis [Id. 6,621]. In these cases the term commercial paper is said to be descriptive of a certain sort of contract [or security].[2] Thus in Nickodemus' Case, Judge Withey expresses the opinion that it refers to bills of exchange, promissory notes, and negotiable bank checks, paper governed by the rules which have their origin and are established upon the custom of merchants. "Such paper," he says, "is usually denominated commercial paper, and we must presume congress used the term in its common acceptation, rather than in a more restricted sense." Similar opinions are given in the other cases cited. Judge Withey finds support for this construction in the fact that bankers, who are not engaged in commerce, strictly so called, are within the act, and this view is much strengthened by the amendment, which adds brokers, manufacturers, and miners to the persons the dishonor of whose obligations is an act of bankruptcy. It is of the utmost consequence to preserve the uniformity which the constitution and the law intend should be established in this important branch of commercial jurisprudence, and this uniformity will in so far fail to be attained as the statute is differently construed by different tribunals. In this case, however, since I find the diversity already existing, I must choose between the opposing views, and after the most careful deliberation I consider the more enlarged construction to be the true one. Bills of exchange have their origin and derive their peculiar properties from the custom of merchants. Thomas Malynes, merchant, writing in 1629, before promissory notes had come into use in England, thus quaintly expressed himself: "The nature of a bill of exchange is so noble and excelling all other dealings between merchants that the proceedings therein are extraordinary and singular, and not subject to any prescription by law or otherwise, but merely subsisting of a reverend custom used and solemnized concerning the same." Lex Mercatoria, pt. 3, c. 5. And he explains at great length how different the rights and duties of the parties to such a contract are from those arising under any contract known to the common law of England. It is familiar learning that the mode of declaring on a bill of exchange was, that it had become due and payable to the plaintiff according to the custom of merchants, and this was a necessary allegation. When notes of hand became common, similar declarations were framed upon them, but the courts refused to admit the validity of a custom to pay a note to the indorsee without an express promise to that effect, because, they said, it would tend to defraud the promisor, who might have already paid the note to a former holder, and they denied to the holder the right to sue according to the custom of merchants. Clerke v. Martin, 2 Ld. Raym. 757. Immediately after this last decision, the statute 2 & 3 Anne, c. 9, afterwards made perpetual, was passed, which recited the fact of such a decision, and proceeded for the encouragement of trade to place negotiable notes, for the payment of money, upon the same footing as inland bills of exchange, and declared that they should be assignable to and suable by the holder according to the custom of merchants. This phrase is used repeatedly throughout the act. This statute has been copied in many of our states, and adopted in others as part of their common law. Story, Prom. Notes, § 6, and note 2; 3 Kent, Comm. 72, and note a.

Such negotiable paper therefore stands by usage and by statute upon the custom of merchants, and is controlled and regulated by such custom. And these regulations are always treated as part of the law merchant. Now in saying that any person belonging to one of certain designated classes should be deemed a bankrupt if he failed to pay his commercial paper, it seems to me that congress simply referred to a well known and very conclusive test of insolvency. If a trader allows his paper to go to protest, he is said to have failed or suspended. The expressions are used as equivalent. It is like the closing of the counting-room and denying one's self to creditors of the old English bankrupt law [and it will be observed that while congress has not, thought fit to say that every insolvent person may be made bankrupt against his will, yet any one who has shown by certain conclusive acts or neglects like avoiding process, buying in person, and suffering paper to remain dishonored, that he cannot hope to pay his debts, may be proceeded against].[2] In this point of view, it makes no difference in reason that the particular note which is dishonored was not given in the regular course of the business of the promisor; the obligation to pay and the inference from neglect are equally stringent. In the bankrupt court we have

[2] [From 4 N. B. R. 213 (Quarto, 66).]

[2] [From 4 N. B. R. 213 (Quarto, 66).]

occasion to know that accommodation notes are often so made as to simulate notes given for merchandise, because the latter command a higher price in the market, but the rights of the bonâ fide holder are the same in both cases. It seems more just and reasonable to conclude that congress intended to designate a certain kind of promise, well known to and governed by the law merchant, and not to give a peculiar sanctity to such as happens between the first parties to it to have originated in a particular way, thus instituting an inquiry which appears wholly immaterial to the purpose in hand, and not admissible in any other form of action, and unjust to the holder of the paper. It is as if the law had enumerated the various kinds of promise, instead of designating them by a comprehensive term, which Judge Withey says is commonly used to designate such paper. While, therefore, I agree with the defendant that commercial means mercantile, and that merchandise means pertaining to trade, yet I can by no means adopt the conclusion that the particular bill or note must be in any way connected with commerce or trade, but rather that it must be of that class which commerce introduced and still deals in. If congress had said that when a merchant, &c., had stopped payment, he should be deemed bankrupt, unnecessary litigation might have arisen out of the non-payment of open accounts which are much used of late years, between wholesale dealers and their customers in trade, and they therefore fixed upon that kind of promise which is payable on a day certain, and the dishonor of which is a sure test of insolvency. The defendant testified to his understanding that "commercial paper" was used in State street in contradistinction to "accommodation paper." Judge Withey, on the other hand, in the passage already twice cited, says the phrase is commonly used to mean such paper as comes within the purview of the law merchant. No doubt a distinction is made in the market between these classes of notes or bills, but I do not profess to be acquainted with [or to have been shown][2] any usage so general throughout the country as to enable me to construe the phrase used in the statute as a term of art intended to distinguish between them, or as having any other technical meaning. In the books on trade the term used is "real bills," to designate those given in a genuine transaction between dealers, and I have heard the expression "business paper" applied in the same way. But I am not satisfied that the phrase in the statute is intended to have that meaning, or that it in fact has it according to any wide-spread usage. It seems improbable, because such paper is equally sacred in the hands of the bonâ fide holder, and the failure to pay it is as sure a test of insolvency, and an inquiry into the origin of such contracts is never admissible for any purpose or in any court in a suit by such a holder. If there is any defence which affects the holder, the remedy is ample, because the failure to pay such a note would not be a suspension of payment; but beyond that the inquiry would be unreasonable and embarrassing, and would often present advantages to a defendant whose dealings have been somewhat irregular and unusual, which I do not believe the statute intended to give. Many, perhaps most, of those traders who are obliged to suspend payment, have been injured by speculations beyond the legitimate line of their trade, but their failure is equally certain, and the rights of all classes of their creditors are the same as if they had continued to deal in the course most familiar to them. One of the judges has intimated, though it was not necessary for him to decide, that accommodation paper might perhaps be excluded by the word his of the statute. But upon further reflection I think it would appear to him, as it does to me, that his commercial paper, as applied to one proceeded against in bankruptcy, merely means paper which he is bound to pay, without reference to its origin. If a banker, &c., has indorsed a note, the indorsement is his; and if he has received due notice of dishonor, he is liable to pay the note; and if he has thereafter failed to pay it the failure is his; and this although some one else, who was bound to save him harmless, has failed to do so, and thus has broken two promises, while the indorser has broken but one. The one is sufficient to establish his failure to meet his obligations.

I must therefore hold that the act of bankruptcy alleged in the petition is proved. It is a great satisfaction to me to know that this decision can be reviewed in the circuit court, and I hope the respondent will take the necessary steps to that end. A recent rule of the circuit court points out the time and manner of applying to the general supervisory power of that court.

Petition sustained. Defendant adjudged bankrupt. Warrant not to issue for ten days unless appeal is waived.

[2] [From 4 N. B. R. 213 (Quarto, 66).]

Case No. 2591a.

CHANDLER v. The ANNIE BUCKMAN.

[21 Betts, D. C. MS. 112.]

District Court, S. D. New York. May Term, 1853.

SEAMEN—DISABLED BY DISEASE.

[A sailor is not entitled to be treated at the expense of the ship, nor to wages, while disabled by disease brought on by his own vices, nor when, being in a diseased state unknown to the master and owners, he ships as an able man.]

[In admiralty. Libel in rem by Stephen Chandler against the ship Annie Buckman, for wages.]

[Before BETTS, District Judge.]

(Cause submitted on written argument by libellant's proctor.)

(1) The libellant seeks the recovery of a balance of $54, wages on a voyage from China to New York. The master offered him as gratuity $44, denying he was entitled to recover anything. But the libellant refused to accept the offer.

(2) The testimony of the master is competent, and, being the only evidence in the cause, must govern the decision.

(3) The libellant shipped as an able seaman, but came on board tainted with the effects of an old and loathsome disease, which, shortly after, broke out in his limbs, and disabled him from all useful service for a large part of the voyage.

(4) A sailor is not entitled to be treated on shipboard at the expense of the ship, nor to wages, whilst disabled by disease brought on by his own vices, nor when he, being in a diseased state, ships as an able man, the master and owners being ignorant of his real condition.

Libel dismissed, with costs.

CHANDLER (BROWN v.). See Case No. 1,998.

Case No. 2,591b.

CHANDLER v. BYRD et al.

[Hempst. 222.] [1]

Superior Court, D. Arkansas. Jan., 1833.

MISJOINDER OF PARTIES — WAIVER OF DEFECT — ACTION ON JOINT AND SEVERAL BOND.

1. On a joint and several bond, the plaintiff may sue one or all of the obligors, but not an intermediate number.

2. But an error of this kind is waived unless taken advantage of by plea in abatement.

3. Defects in pleading only reachable by special demurrer at common law, must be disregarded, special demurrers having been abolished by statute.

In error to Pulaski circuit court.

Before ESKRIDGE, CROSS, and CLAYTON, Judges.

OPINION OF THE COURT. This is a writ of error to the circuit court of Pulaski, to reverse a judgment in an action of debt, wherein Sarah Chandler was plaintiff, and Richard C. Byrd and John H. Cocke defendants. The declaration alleges "that Richard C. Byrd, John H. Cocke, and A. W. Cotton, (now deceased,) by their certain writing obligatory, signed with their own proper hands, and sealed with seals, a certified copy of which writing obligatory is now here shown to this court, the original on file among and belonging to the records of the superior court for the territory of Arkansas, and cannot be produced to this court," etc. The defendants filed a general demurrer to the plaintiff's declaration, which was sustained, and final judgment rendered against the plaintiff for costs.

Two questions present themselves for the consideration of this court; first, whether the action was correctly brought against R. C. Byrd and John H. Cocke, there having been a third obligor to the instrument upon which the suit is founded. The supreme court of the United States, in the case of Minor v. Mechanics' Bank of Alexandria, 1 Pet. [26 U. S.] 46, has settled this point. That court says, that on a joint and several bond the plaintiff may sue one or all of the obligors, but in strictness of law no intermediate number; he must sue all or one. But if an error of this kind is not taken advantage of by plea in abatement, it is waived by pleading to the merits. "The reason is, that the obligation is still the deed of all the obligors who are sued, though not solely their deed, and therefore it is no variance in point of law between the deed declared on and that proved." The same doctrine is clearly illustrated in the case of Cabell v. Vaughan, 1 Saund. 291, note 4. The act of 1816 (Geyer, Dig. 241), it is conceived, does not change the common law in this particular. The object of that act was chiefly to establish the liability of the representatives of deceased joint obligors.

The second question is, whether there is a proper profert of the instrument upon which the action is founded. Admitting the declaration in this respect to be defective according to the rules of the common law, it is an objection of which the party could only avail himself by special demurrer, and special demurrer having been abolished by act of the last legislature, the objection taken to this declaration in this respect is no longer tenable. Judgment reversed.

CHANDLER (CHAMBERLAIN v.). See Case No. 2,575.

Case No. 2,592.

CHANDLER v. DODGE COUNTY.[1]

Circuit Court, D. Nebraska. May Term, 1879.[2]

MUNICIPAL AID BONDS—VALIDITY—TOLL BRIDGE.

At law. This was an action brought by George B. Chandler to recover the amount of certain coupons attached to certain bonds issued by the board of county commissioners of the county of Dodge, in the state of Nebraska, on behalf of the precinct of Fremont in said county. The plaintiff (now defendant in error) purchased the coupons sued on before maturity, and for a valuable consideration. The controversy in the case relates to the validity of the bonds and of the plain-

[1] [Reported by Samuel H. Hempstead, Esq.]

[1] [Nowhere reported; no opinion delivered.]

[2] [Affirmed in County Com'rs v. Chandler, 96 U. S. 205.]

tiff's title to the coupons. By a law of the state of Nebraska, passed February 15th, 1869, it was enacted that any county in the state should be authorized to issue bonds to aid in the construction of any railroad or other work of internal improvement, the amount to be determined by the county commissioners of such county, not exceeding ten per cent. of the assessed valuation of all taxable property in said county: provided, the county commissioners should first submit the question of issuing such bonds to a vote of the legal voters of said county, in the manner provided by chapter 9 of the Revised Statutes of Nebraska for submitting to the people of a county the question of borrowing money. By a subsequent section, it was enacted that any precinct in any organized county of the state should have the privilege of voting to aid works of internal improvement, and be entitled to all the privileges conferred upon counties and cities; and that in such cases the precinct election should be governed in the same manner, so far as applicable, and the county commissioners should issue special bonds for the precinct.

In the present case, the bonds purport on their face to have been thus issued. The following is a copy of one of them:

"United States of America, State of Nebraska. It is hereby certified that Fremont precinct, in the county of Dodge, in the state of Nebraska, is indebted unto the bearer in the sum of $1,000, payable on or before twenty years after date, with interest at the rate of ten per cent. per annum from date. Interest payable annually, on the presentation of the proper coupons hereto annexed. Principal payable at the office of the county treasurer, in Fremont, Dodge county, Nebraska. Interest payable at the Ocean National Bank, in the city of New York. This bond is one of a series issued in pursuance of and in accordance with a vote of the electors of said Fremont precinct, at a special election held on the 11th day of November, A. D. 1870, at which time the following proposition was submitted: 'Shall the county commissioners of Dodge county, Nebraska, issue their special bonds on Fremont precinct, in said county, to the amount not to exceed $50,000, to be expended and appropriated by the county commissioners, or as much thereof as is necessary, in building a wagon bridge across the Platte river, in said precinct; said bonds to be made payable on or before twenty years after date, bearing interest at the rate of ten per cent. per annum, payable annually;' which proposition was duly elected, adopted and accepted by a majority of the electors of said precinct voting in favor of the proposition. And whereas the Smith Bridge Company of Toledo, Ohio, have entered into a contract with said county commissioners to furnish the necessary materials and to build and construct said bridge referred to in the foregoing proposition; therefore, this bond with others is issued in pursuance thereof, as well as under provisions of an act of the legislature of the state of Nebraska, approved February 15th, A. D. 1869, entitled 'An act to enable counties, cities and precincts to borrow moneys on their bonds, or to issue bonds to aid in the construction or completion of works of internal improvements in this state, and to legalize bonds already issued for such purposes.' In witness whereof, we, the said county commissioners of said Dodge county, have hereunto set our hands, this first day of September, A. D. 1871." (Signed and sealed by the county commissioners.)

It is conceded that the precinct regularly voted for an issue of bonds to the amount named therein, to be appropriated for building a bridge across the Platte river; but the defendant, in its answer, set forth the notice of the election, by which it appears that the proposition submitted to the people was to build a toll-bridge and not a free bridge; and that the bridge was accordingly built and operated as a toll-bridge. The notice of election further declared that the tolls were to be used for the purpose of raising a sinking fund to pay the principal, interest, repairs and expenses of the bridge, and were to be regulated from time to time by the county commissioners.[3]

Plaintiff demurred to the answer on the ground that it did not state facts sufficient to constitute a defense. Demurrer sustained.

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

Upon the consideration of said demurrer, final judgment having been rendered thereon for the plaintiff, the opinions of the judges holding said court, namely, the circuit judge and the district judge, were opposed upon the following questions thereon arising, to wit: 1st. Whether the said answer sets up a sufficient defense in law to the causes of action stated in the petition. 2nd. Whether the recital in the bond charged the holder thereof with notice of the proposition which was in fact the one submitted to a vote of the people as contained in and shown by the records of the county. 3rd. Whether the facts that the bonds were issued for a toll-bridge of the character of the one set forth in the proposition submitted to the voters of said Fremont precinct, as shown in the answer, makes them invalid in the hands of a holder thereof for value before due, without other notice than that imparted on the face of the bonds. And said points being at the same time stated under the direction of said judges, it was ordered that said points should be certified to the supreme court of the United States, according to the statutes in such case provided.

[NOTE. The supreme court in County Com'rs v. Chandler, 96 U. S. 205, answered in

[3] [The above statement of facts is taken from the opinion, by Mr. Justice Bradley, in County Com'rs v. Chandler, 96 U. S. 205.]

the negative the first and third questions certified to them, held that the second question was immaterial, and affirmed the judgment of the district court sustaining the demurrer. An application to the supreme court of Nebraska for a mandamus to compel the board of commissioners of Dodge county to meet and levy a tax on all the property in Fremont precinct, in said county, to pay the judgment recovered by plaintiff in the circuit court, was subsequently denied. State ex rel. Chandler v. Dodge Co., 10 Neb. 20, 4 N. W. 370. The state decision is cited in Osborne v. County Com'rs of Adams Co., 7 Fed. 443.]

Case No. 2,593.

CHANDLER v. LADD.

[1 McA. Pat. Cas. 493.]

Circuit Court, District of Columbia. March, 1857.

PATENTS — "LEVEL" — INTERFERENCE — NON-APPEARANCE OF PATENTEE — COMMISSIONER'S DECISION ON PATENTABILITY—PRACTICE ON APPEAL —INVENTION—PERFECTING — UTILITY — REDUCTION TO PRACTICAL USE.

[1. The rule of law requiring the commissioner of patents to lay before the judge the grounds of his decision, fully set forth in writing, touching all the points involved by the reasons of appeal from his decision, should be strictly followed.]

[2. The practice of the patent office in deciding as to the patentability of the invention before declaring an interference is proper, and such a decision, being important as to the subsequent steps to be taken by the parties, should be made with deliberation.]

[3. That, as between an invention claimed and an invention patented, there is a difference of construction which allows the use of the former in a different way from the latter, although it may rarely be required so to be used, does not render such difference fictitious, nor deprive it of the quality of a useful invention.]

[4. It is not necessary that the utility of a patented invention should be great. If the invention is an improvement at all, it is sufficient if it is of a different construction from former articles of the same kind, and of any use. Morgan v. Seaward, 2 Mees. & W. 544, followed.]

[5. It is not necessary that the thing for which a patent is sought should be the best of its kind, but if its intended use is practicable the invention is patentable. Many v. Jagger, Case No. 9,055, applied.]

[6. Although an invention has not been reduced to actual, practical use, yet, if it appears to be capable of such reduction, other things not opposing, it is patentable.]

[7. Where an interference has been declared between an invention claimed and a patent theretofore granted, and the patentee, although notified, fails to appear or take testimony, it is error for the commissioner to refuse to grant the patent applied for because of failure to furnish unequivocal proof of priority of invention, and because that granting the application might restrain the patentee from making and selling his patented article, as the action of the commissioner could in no wise affect the patentee's rights, where it appears that the applicant furnished the best proof under the circumstances, his principal witness having died pending the hearing.]

[8. The first inventor has the prior right to a patent, if he uses reasonable diligence in adapting and perfecting his invention, although the second inventor has in fact perfected the same, and reduced it to practical, positive form.]

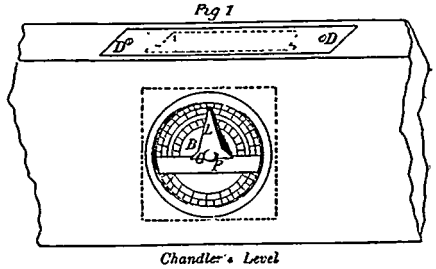
[9. The invention of Thomas A. Chandler for a level having a graduated circle with a rotating pointer (for which patent No. 17,023 was subsequently issued) possesses patentable novelty, and is prior to the invention for which patent No. 7,263 was granted to William G. Ladd, and to the invention for which Samuel Reed applies for a patent.]

[10. "Graduated," in connection with said invention, has the meaning of "to mark with degrees, regular intervals, or divisions."]

[Appeal from the commissioner of patents.

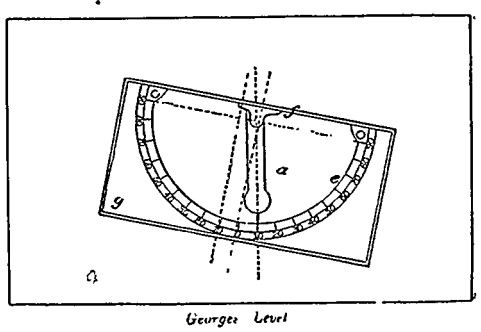
[On interference. Application by Thomas A. Chandler for a patent for a level having a graduated circle with a rotary pointer. Interference declared with patent No. 7,263, granted to William G. Ladd, Jr., April 9, 1850, and with the claim of Samuel Reed for invention of a similar level. From a decision awarding priority of invention to William G. Ladd, Jr., and to Reed, the applicant, Chandler, appeals.]

The question of the patentability of Chandler's device was reopened by the commissioner in his reply to the reasons of appeal. The discussion upon this subject will be readily understood by reference to the subjoined cuts, showing Chandler's level and the level patented to M. Georges, figured in the Brevet d'Invention, first series, vol. 52, p. 16, (plates,) which was principally relied upon by the commissioner as an anticipation of Chandler's alleged invention.



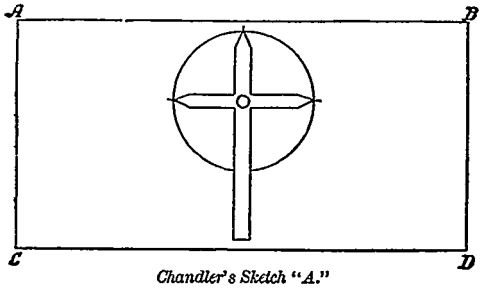
Chandler's Level

In Chandler's level, a graduated circle with a rotating pointer or index finger L is placed on one of the sides of the stock and wholly within the faces of the level, so that either the top or bottom face of the instrument can be applied to the surface to be tested. By this arrangement the index can be caused to face front or back, as circumstances require, by simply turning the level on its longitudinal axis.



Georges Level

In the level figured in the Brevet d'Invention, the pendulum is hinged near the upper face of the instrument, and sweeps over a graduated semi-circle, so that the bottom face of the level must necessarily be applied to the surface whose inclination is to be determined. It was contended in behalf of Chandler that by reason of this difference in construction and arrangement his instrument can be used to greater advantage and under circumstances where it would be impossible to use Georges' device. As an illustration of the increased capacity of the instrument, a case was supposed where the level is placed in a confined space, from which it cannot be removed, and within which it cannot be turned around end for end. If, now, the spectator is at the back of the instrument, there will be no way in which he can obtain a view of the index on the Georges device so as to take the inclination. In the case of Chandler's device, however, he may apply the other face of the instrument to the surface by turning the instrument upon its longitudinal axis, thus bringing the index to the rear, so as to be visible to him in that position. The commissioner contended that the circumstances supposed had no real existence in practice; or, in other words, that they would so rarely occur that they could not affect the essential identity of the devices as ordinarily used. He further contended that the claim was not in any event properly limited to express the difference developed by this example. Upon the merits of the case, the commissioner contended that, with this understanding of the restricted nature of the invention, the proofs failed to show with sufficient clearness that Chandler had in view at the time he made his sketch A, upon which he relies to show his invention, the feature of novelty. The sketch in question was substantially as here represented.



Chandler's Sketch "A."

The commissioner contended that this sketch does not necessarily show that Chandler had an entire graduated circle to be used as he now claims. There are only three graduation marks upon the sketch, and the commissioner described a variety of ways in which such an instrument might be used without involving the idea of the present invention. He noticed the fact, also, that the circle is eccentric to the sides, and that the index would extend below the face if the instrument were reversed. Ladd's patented level had other features of construction which rendered it independently patentable in the opinion of the commissioner. The patent subsequently issued to Chandler, in accordance with the decision of April 14th, 1857, No. 17,023. The patent to Ladd was granted April 9th, 1850, No. 7,263.

P. H. Watson, for appellant.

Examiners Lane and Baldwin, for commissioner.

MORSELL, Circuit Judge. On the 30th of September, 1851, the above-named Thomas A. Chandler filed his petition and schedule. The amended specification is dated the 27th day of May, 1852. It contains a full and particular description of the invention, and states the claim as follows: "What I claim is the combination of an entire graduated circle, provided with a pendulum and index, with the two parallel sides of the level stock, whereby I am enabled to apply either side of said stock to the surface whose direction is to be ascertained, and at the same time have the index facing the operator in whatever position he may be placed. I do not claim the level stock with its opposite sides parallel, nor the graduated indicating circle or dial, nor the indicator with two horizontal and one vertical pointer, nor the knife edge bearing upon which the indicator and pendulum are mounted, nor the pendulum, because separately and for other purposes they are well known; but they have never before been combined to form a level, nor has a level of any kind ever before been made capable of performing the functions of this combination. Therefore, I claim the level composed of the before-enumerated parts, in combination, whereby, among other things, either edge of the instrument may be used uppermost with its face or dial towards the operator, and when any two of the pointers are screened from sight by an intervening body, the third will indicate the inclination of the surface to which the instrument is applied, and the angles at the head and foot of a rafter will be indicated at the same time." Interferences were afterwards declared with the patented claim of the said William G. Ladd, Jr., and with the claim of Samuel Reed. Mr. Ladd's claim, as appears from his specification, is in the following words: "What I claim as my invention, and desire to have secured to me by letters-patent, is a level for determining a horizontal and perpendicular line and the inclination of any slope with the same, constructed substantially as hereinabove set forth—that is, with a shallow cylindrical vessel or a tube in the shape of an entire ring, half filled with quicksilver, or other liquid, in combination with a graduated annular dial, whether a floating needle or in-

dicator be used or not, the whole arrangement being substantially as hereinabove set forth." Patented April 9th, 1850. For the purpose of deciding said issue made by the said interference, the said parties were allowed to take testimony, upon the return of which the commissioner, on consideration thereof, on the 21st of January, 1853, decided as follows: "This case came up for hearing on the 17th instant. The claim of said Chandler and Reed is for the combination of an entire graduated circle, furnished with a pendulum and index, with the two parallel sides of the level stock. On examination of the evidence produced on the part of said Chandler to show that the said improvement was used by him as early as the year 1840, it is found that the graduation of the circle was not made to appear in that evidence, and that, therefore, the invention of the combination claimed, of which that graduation is an essential element, is not proved therein. The evidence on the part of said Reed being unaccompanied with proof of notice to the other parties of the time and place of taking the same, as required by the rules prescribed in such cases, is necessarily excluded. On the part of said Ladd, no evidence has been produced. By the records of this office, it appears that the application of the said Ladd for his patent—the same being for a level containing the equivalent of the combination claimed by the said Chandler and Reed—was filed on the 1st day of February, 1850; that the application of the said Chandler was filed on the 30th day of September, 1851, and that the original application of said Reed, of which his present application is a renewal, was filed on the 30th day of December, 1851. In view, therefore, of the evidence before the office, the priority of invention as between the parties to this interference is hereby awarded to the said William G. Ladd, Jr." From this decision the said Thomas A. Chandler hath appealed as aforesaid and hath filed his reasons of appeal. The first of which is because upon the examination of the said application it does not appear that the improved pendulum level, claimed by this applicant as his invention, had been invented or discovered by any other person in this country prior to the invention thereof by him, or that it had been patented or described in any printed publication in this or in any foreign country, or had been in public use or on sale with this applicant's consent or allowance prior to the date of his said application, or that the said invention is not useful and valuable. Second. Because the level of William G. Ladd, Jr., was invented subsequent to that of this applicant, as is shown by the testimony in the case, and the honorable commissioner therefore erred in ascribing to said Ladd the priority of invention. Third. Because it fully appears from the testimony that the invention of this applicant was anterior to that of Samuel Reed, and the honorable commissioner therefore erred in deciding priority of invention in favor of Reed. Fourth. Because no pendulum level known prior to the date of this applicant's invention possesses all the advantages or is capable of performing all the functions of his level.

In the commissioner's report dated 5th January, 1857, after the reasons of appeal in this case were filed, he says: "For the reasons of decision in this case, the office will refer to the accompanying copies of letters addressed to the applicant, such only being copied as are deemed sufficient to give all the grounds assigned by the commissioner for his decision. Little need be said here in addition to what has been said in these letters, the copies of which are made a part of this document. I will only add here the suggestion that the reason which may fairly be assigned why in the level referred to in the Brevets d'Invention more than a semicircle was not used was that the maker saw that the instrument would conveniently do all that was required of it without it. In fact, the first question that always arises in getting up any instrument of the class is, How long an arc do I want?—do I need the whole circle?—or, can I do with only a portion of it, and what portion? If these questions are not formally stated and dwelt upon, they are still practically and in effect necessarily asked and answered. In the old plumb-line quadrant of altitude, they resulted in the adoption of a quarter of a circumference. In the level cited in the Brevets d'Invention, for good reasons half the circumference was used, and for equally good reasons the other half was not used. In this point of view, the greater or less extension of the graduated arc upon the rectangular level stock, as in other instruments of the general class, seems to the office to be clearly a matter for the exercise merely of arbitrary choice and discretion, not involving any new invention. It will be seen that one of the official letters here copied proceeds on the supposition that a level in Rees' Cyclopaedia had been referred to in a former letter of the office. This was an oversight—the one really referred to being that in the Brevets d'Invention; and that part of the argument which is not appropriate to the last mentioned is of no special importance, though it would be regarded as having its weight in the absence of the closer reference given. The commissioner desires that this, and the letters to which he refers as a part, shall be taken for his reasons of the decision." The rule of law declares that it shall be the duty of the commissioner to lay before the judge the grounds of his decision, fully set forth in writing, touching all the points involved by the reasons of appeal, to which the revision shall be confined. The irregularity of the course which it is desired thus to be pursued will at once be perceived by the com-

missioner to be something more than mere form. I have, however, examined the letters and their effect on the point of novelty, as far as it is understood to be in question in connection with any part of the issue, which is as much as under any circumstances ought to be here noticed. During the pendency of the application, the various objections and the nature of them were stated and insisted on by the commissioner. It seems, however, to have resulted, on the 24th May, 1852, in submitting the matter in controversy to the examination of four examiners, two of whom reported in favor of a claim according to the amendment and disclaimer suggested, which was afterwards substantially adopted by the appellant. The decision of interference followed shortly afterwards in these words: "In the matter of your (Chandler's) pendulum level, the feature in question covered by your claim has been decided to be patentable, and on the 18th instant notice was given to the party who filed the rejected application mentioned." This decision as to the patentability of the invention has always, in the practical course of the office, been pursued before declaring an interference and putting the parties to the trouble and expense of obtaining proof; and certainly it was reasonable and right, and the decision should be with a deliberation becoming the subsequent important step necessarily to be taken by the parties to maintain their claims to priority of invention. There are a few letters subsequent to this event. The only one which it is important to mention is the one of the 22d of January, 1853, which awards priority of invention to William G. Ladd, Jr. It is difficult to understand what the commissioner meant by the letter of 11th of February, 1853. It seems to consider the patentability of the claim still open. Upon this state of the case, according to notice duly given of the time and place of hearing, the commissioner laid before the judge his decision and reply to the reasons of appeal, with the said reasons of appeal and the original papers and the evidence in the cause; on which occasion, an examiner appeared on behalf of the office, and the appellant by his attorney; and for the purpose of explaining the nature of the said invention, Mr. Lane and Mr. Baldwin, two of the examiners of the office aforesaid, were examined on oath before me; which evidence on said examination was reduced to writing, and will be sent with my decision. The parts only which are deemed most material will be here stated. Mr. Lane, in defining the term "graduated," says: "It is a general term, used to signify the dividing of a line into parts which can be read off." He states what he considers to be the difference between the graduated semi-circle and the entire graduated circle; that the difference of function in the latter is not of such importance, especially when considered in connection with the obvious nature of the means of producing it, as to constitute more than a colorable difference. His answer to the eleventh interrogatory is: "Both levels are in the same box; it is equally difficult to get both out into the air; and the fact about applying the level is partly owing to the fact that one has the entire graduated circle and the other only a graduated semi-circle, and partly to the fact that they are boxed up so that they cannot be got out." The substance of the same question is repeated in the fifteenth interrogatory. In answer, he says there is no other material difference.

Mr. Baldwin, being next examined, is asked to state the principle of the two levels. He answers: "The principle of operation is the same; that is to say, each will determine the inclination of a plane, by marking with the pendulum the degree of inclination on a graduated scale; but the instrument, with the entire circle graduated, will always show to the operator occupying one position the degree of inclination, while the semi-circle must be reversed in determining the inclination of the same planes—the two opposite sides of a pyramid for example, and to see this registration the operator would be compelled to change his position, or the operator would be obliged to reverse the ends of the level in the case last supposed; and in some positions, where the level would be useful, this might be found impossible, as, for example, in a shaft or tunnel." In answer to a question propounded for the purpose, he says: "If the invention of the entire graduated circle made the instrument operative, where the instrument with the semi-circle would not be, it would seem to present a patentable invention beyond question; and even if it operated better in some particulars than in others, the graduated circle, or an improvement on the semi-circle for the specific purpose to which the improved operation referred, might also be patentable." To a question propounded for the purpose, he answers: "The model of Samuel Reed does not seem to have contemplated the use of the opposite edges of the level as parallel planes, but to have used sights on the top to determine the plane for long distances. If he did contemplate such use of his instrument, it is the same invention substantially as that of Chandler, with the exception of the substitution of the mercurial indicator for the pendulum. In William G. Ladd, Jr.'s patent, this instrument is substantially the same as Chandler's. Both of these cases would probably embrace the combination constituting the first clause of Chandler's claim. The model of James Eames does not involve the invention claimed by Chandler's first claim. M. Georges' level is limited to the semi-circle, and will of course not operate under all circumstances like that of either of those having an entire graduated circle, for the reasons given in my first answer." He is asked: "Please examine the drawing marked 'Exhibit A,' and annexed to the dep-

osition of M. L. Dunlop, and state whether it represents the combination claimed by the appellant in his first claim." Answer: "The drawing represents a level having parallel sides, and a circle graduated by a marked division into parts—three of which indicate quarters of the circle—and a pendulum indicator, and of course it involves the combination embraced in the first clause of Chandler's claim." Written arguments were made by the counsel for the appellant and on the part of the office, and the case was submitted. Regularly, and according to the usual practice, the only question which the present issue would present on this appeal, as arising before the commissioner, would be that of priority. The argument before me on behalf of the commissioner is on two grounds: First. That the invention as claimed is not patentable, for want of invention. Secondly. Because of priority in William G. Ladd, Jr.

The first reason of appeal involves the consideration of the question under the first head. It is in proof that the construction of the appellant's level is different, and capable of performing functions of which no level known to the commissioner was capable. This does not seem to be denied; but it is contended that this difference is not invention; that it is formal, not substantial; merely colorable. The argument of the commissioner seems to be intended to show that the objections are sustained. The commissioner takes the position that the office has stated that the level with the graduated semi-circle, the other elements of the combination being the same, enables the operator to measure the angle of inclination of any surface with the index facing him, in whatever position he may be placed. This, in point of fact, seems to be inconsistent with what Mr. Lane, the examiner, has said in his testimony as a witness, in which he says that of two levels in all respects precisely alike, except that one has a semi-circle and the other an entire circle, the one with the circle can be applied to a given surface in a given place with the index facing towards the operator, so that he may see whether or not the surface is level; and the other level with the semi-circle cannot be so applied. The next position is that the appellant's description of his claim does not set forth the particular functions of the level, or any indication that it refers to aught else than a definition of the natural capabilities of the level in regard to the variety of positions it can assume; that it does not refer to the application of the level under obstacles or confinement, since, certainly, obstacles could readily be contrived to prevent its application to a given surface. The conclusion to which the commissioner comes on this point is: "It is certainly fair to apply the same rule of construction to the language which the office has employed to define the extent to which the level with a graduated semi-circle is capable of assuming different relative positions." To make his meaning more clear, the commissioner has given a very full amplification. He says: "The difference between the two levels is thus completely defined by this language, when taken in connection, as it was intended to be, with that of the claim, as also it is in the statement made by Mr. Lane before the court; and this difference or distinction between the two levels, so defined by the different extent to which, without obstruction, they are capable of assuming different relative positions," he says: "I will for greater clearness call A; and aside from the question of the meaning of former language of the office, it is plain now what is meant by A. * * * Another point arises, and that is the advantage which the level with the entire graduated circle has, by virtue of the difference A (the principal element of which difference, as defined in the claim, is that it can be applied, supposing no obstruction, with either side of its stock to the surface) over the level with the graduated semi-circle, when we come to have the level confined in a space (a tunnel, for instance) from which it cannot readily be taken out, and in which it has so little room that it cannot be turned end for end. The special occasion of this kind I will call B. Now, the advantage which arises out of A when the occasion B occurs is palpable, and the office is by no means disposed to ignore it, supposing B to have a real existence. * * * If the occasion B do have to a material extent a real existence in practice, it shall impart importance to A; but if B do not have a real existence in practice, and is only a fictitious occasion, then A shall not receive importance from it."

The point of the argument thus far appears to be for the purpose of showing by a construction fairly applicable to both levels, (for the reasons stated by him,) that in giving the description and definitions at the various times when he has been called upon to do so, he has been entirely consistent as to the semi-circle, intending to mean a limitation of its application to instances without obstruction. I have stated this part of the argument, not with any view to criticise it, but to show that a due respect has been paid to it. As to the question to which the commissioner considers himself finally brought—"that the feature of the invention in its combination is not real, but fictitious, because not known in fact in practice; that the occasion has not arisen in actual practice; and that it would not occur once in the lifetime of one level in a hundred or a thousand"—and as to the reply to the instance of the aqueduct and tunnel, the principles involved in this part of the argument cannot be acceded to. The fact of the difference of which the invention consists is certainly not fictitious. It has been looked upon; it has occular demonstration; nay, it has been admitted by the commissioner; and

although it may not be an ordinary occurrence, that it is required to be so used, yet, even if used in the admitted rare instance, that would be no sufficient reason to deny useful invention. So with respect to the little difficulty a skillful workman would have in making it, one thing is certain—it never has been made or used in its present combination; and why, therefore, is it not a useful invention? The commissioner himself on a former occasion, and some of the examiners, have said the feature is patentable; and the able Examiner Baldwin has fully examined it, and has pronounced it, under the circumstances stated by him, to be patentable. And now I will state a rule of patent law which directly, in my judgment, bears on the case. In Norm. Pat. p. 23, § 4, quoting from Baron Alderson's opinion in the case of Morgan v. Seaward [2 Mees. & W. 544], it is said: "It is not necessary that the utility should be great; it is sufficient if the invention is an improvement at all. If it is of a different construction from former articles of the same kind, and of any use, that is sufficient. If a new description of steam-engine could be used where other engines would not answer, that would be sufficient; it need not be likely to come into general use." This case seems to me to run on all-fours with the case before me, and I cannot help thinking that it may satisfy the commissioner that he has been in error on this point. There is still another case applicable to this point, to be found in Curt. Pat. (New Ed.) p. 37, footnote,—a decision of Mr. Justice Nelson in the case of Many v. Jagger [Case No. 9,055], in which the judge says: "To maintain a patent, it is not necessary that the thing should be the best of its kind; but if the use for which it was intended is practicable, that is sufficient to sustain it as a useful invention." I will add, in addition, that the law is well settled that, although the invention has not been reduced to actual practical use, yet if it appear to be capable of being so reduced, it will be sufficient (other things not opposing) to entitle the party to a patent.

It now only remains to consider the question of priority of invention between the appellant and Ladd and Reed. With respect to Reed, he has offered no testimony legally, and therefore he may be considered out of the question. With respect to the other defendant (Ladd), he can carry his invention back only to the time of filing his specification on the 1st day of February, 1850.

In considering the testimony, it will be proper to notice the affidavit of Chandler, in which he states that he had relied upon the testimony of Calvin D. Bristol, late of the county of Dupage, Illinois, to substantiate his claim to said improvement in levels; but, by a dispensation of Providence, the said Bristol departed this life in the month of September last past, and in consequence he was under the necessity of relying upon the testimony of M. L. Dunlop, who during the years 1837, 1838, and 1839 was head clerk for the contractors, Messrs. Hugunin & Brown, on the Illinois and Michigan canal, where his said improvement was first used, and who was frequently on the work and familiar with the machinery during the year 1840, after he had retired from the principal charge of the work, and is now acting justice of the peace in the said county of Cook. He has carefully examined the sketch marked "Exhibit A," drawn by the said M. L. Dunlop, and purporting to represent his said improvement in pendulum levels; that this pen sketch is substantially a correct representation of a level constructed by him for the purpose of leveling the drilling-machines on the works of said Brown in the year 1840. The deposition of said M. L. Dunlop, which appears to have been regularly taken 22d of December, 1852, is as follows: That during the years 1837, 1838, and 1839, he was principal clerk for Messrs. Hugunin & Brown, contractors on the Illinois and Michigan Canal, at Rupotors, Illinois; that he was familiar with all the machinery used in their said work; he became acquainted with Thomas A. Chandler, the preceding deponent, in the fall of 1837, and the said Chandler was machinist and superintendent of the mechanical department in said work most of the time, until the deponent left the work in the month of September, 1839; and after that time, and during the year 1840, he was frequently on the work aforesaid, and frequently saw the said level as claimed to have been constructed by the said Thomas A. Chandler, of which the pen sketch annexed, marked "Exhibit A," is a correct representation of said level as was used by the said Chandler to level the drilling-machines on said work—P P P being arms or pointers, C the circle. The stock was made of wood, while the pin and pointers were of iron. He understood at the time that said Chandler was the maker and inventor of said level, and that he fully believes that such is the fact. He was knowing to C. D. Bristol having charge of one of the drilling-machines on which said levels were placed. It is generally understood that the said Bristol died of cholera at his residence in Dupage county during the month of September last.

The decision on the subject of the evidence, as before stated, is placed upon the ground that the graduation of the circle was not made to appear in the evidence; and the rule which he, the commissioner, says in his argument should be adopted is that the testimony on the part of Chandler ought to exhibit the most unequivocal proof that in the level described therein he had the difference A distinctly in view before the grant of a patent would be proper. Such

proof, on a careful examination of the testimony, is clearly wanting. And this very rigid rule should be adopted because of the peculiarity of the case in this particular—that granting the patent for the appellant's claim might have the effect of restraining Ladd from the right of making and selling his level. Now, in this, I think the commissioner is mistaken, because it is a well-settled principle of law that after the commissioner has granted a patent, and delivered it, nothing he can do afterwards can affect the patentee's rights under the patent. Ladd is a patentee. Again, Ladd is in the issue against the appellee, and, although duly notified, has failed to take any testimony, or even to appear and cross-examine the witness; nor does it appear that he was before the commissioner—certainly not before the judge—contesting or denying the sufficiency of the evidence on that or any other of the various grounds stated by the commissioner. What is then (not to say the legal but) the common-sense inference? Again, as before said, the act of the commissioner cannot affect Ladd's title under the patent, but the rejection against the appellant would be fatal. Again, it appears from his affidavit that during the protracted investigation in this case he lost by death his principal witness. Further, Ladd's title, which it is admitted can be only carried back to the time of filing his petition, which is comparatively recent, is supported by only his own oath, and this, with the patent, is prima facie evidence only of his right, which may be repelled by a greater weight of evidence, whether offered as in the original order or otherwise. Better evidence than the nature of the case will admit of ought not to be required. The evidence in its nature as to this particular point is not so much for the purpose of showing that the instrument showing the invention was perfected and matured, as for showing the particular periods of the conception of the idea embracing the invention, and showing that it was then known. For perfecting and maturing the instrument, by which it could be reduced to practice, he had a right to make his experiments, if necessary, even for a greater length of time than taken in this case before filing his petition and specification, which, when done, should have relation back, so as to protect his priority. In the familiar case of Reed v. Cutter [Case No. 11,645], the plaintiff was a patentee suing for an infringement of his patent, and in which the court, among other things, decides as follows: "The clause of the fifteenth section now under consideration seems to qualify that right, by providing that in such cases he who invents first shall have the prior right, if he is using reasonable diligence in adapting and perfecting the same, although the second inventor has in fact perfected the same and reduced the same to practice in a positive form. It thus gives full effect to the well-known maxim, that he has the better right who is prior in point of time, namely, in making the discovery or invention."

In this case the evidence offered in defense to show another to be the prior inventor was evidence in its character tending to prove the fact of prior invention, because it might be deemed sufficient by the jury. I trust I have thus shown that if the evidence would be sufficient were it as an original question, it certainly ought to be so considered in this case; and then I have the concession of the commissioner that it would be deemed sufficiently suggestive to the mechanic or instrument-maker of any such pendulum level as that, for instance, in the Brevets d'Invention. "In other words, the office would say, as an original question, that it was sufficiently suggestive of a pendulum level in general." The subject has been placed upon still stronger grounds—that the evidence does show unequivocally the entire graduated circle, and instances of the practical use of the instrument successfully. That the instrument about which the witness testified, and a rough sketch of which he gave, had been in useful operation for some time, is positively proved. As to the meaning of the term "graduated," Craig's Etymological, Technological, and Pronouncing Dictionary is referred to, which gives it this definition: "To mark with degrees, regular intervals, or divisions." It is contended in argument that Mr. Lane admits that the circle in Exhibit A is marked off into divisions by three marks (the fourth mark being screened from view behind the pendulum). It is plainly to be seen that it is; and it is thence concluded that, according to said definition, Chandler's original level did contain the feature of an entire graduated circle. The commissioner in his argument says that there is no proof to show that the sides of the pendulum bar were truly adjusted, so that the mean of their two readings would give a correct result. He says further: "This, then, is a level that manifestly presents no idea of using it with either side up; that is, with either side applied to the surface whose direction is to be ascertained." The commissioner, in respect to this, is mistaken as to the facts. The Exhibit A represents the two parallel sides of the level stock. This is plainly shown by inspection and actual measurement, and demonstrated by a model level made in accordance with that sketch, and now before me. And it very satisfactorily shows, also, that it can be used with either side up; that is, with either side applied to the surface whose direction is to be ascertained. This error in point of fact no doubt contributed in a great degree to the incorrect conclusion of the commissioner's argument on this most important point of evidence, which would have been avoided if at the time of writing this part of the argument the sketch had been before him. To show more clearly that the rough

sketch made by the witness, and a part of his testimony, has not been duly appreciated by the commissioner, see the testimony of Mr. Examiner Baldwin, hereinbefore recited, and a part of which I will here again repeat. He says: "The drawing Exhibit A of Chandler's testimony represents a level having parallel sides and a circle graduated by a marked division into parts (three of which indicate quarters of the circle), and a pendulum indicator, and of course it involves the combination embraced in the first clause of Chandler's claim." And if I may be allowed again to repeat another part of the testimony of the same learned examiner as to the points of novelty and patentability of the claim in this case, having before him the various levels exhibited in this case, with the graduated circles and semi-circles, respectively, he said both were alike as related to the general principal upon which their operation depends—that is, the stability of the indicator under the influence of gravitation—while the stock and graduated circle are turned to accommodate themselves to the varied surfaces whose inclination is to be observed.

With the views which have been taken, I think the testimony fully supports the priority of the appellant in his claim aforesaid. And, upon the whole case, I think the invention aforesaid patentable, and that the decision of the commissioner in this case is erroneous, and ought to be reversed.

[NOTE. In accordance with this decision, patent No. 17,023 was issued to Thomas A. Chandler, April 14, 1857.]

CHANDLER (MANKIN v.). See Case No. 9,030.

CHANDLER (PRITCHARD v.). See Case No. 11,436.

Case No. 2,594.

CHANDLER v. SIDDLE.

[3 Dill. 477;[1] 10 N. B. R. 236; 1 Cent. Law J. 341.]

Circuit Court, D. Iowa. May Term, 1874.

BANKRUPT ACT—INSOLVENT CORPORATIONS—RECEIVER'S POWER TO SUE—LIABILITY OF STOCKHOLDER.

1. The bankrupt act does not furnish the sole remedy for winding up insolvent corporations or companies.

2. Power of a receiver to sue in the courts of another state considered.

[Cited in Holmes v. Sherwood, 16 Fed. 727; Olney v. Tanner, 10 Fed. 104.]

3. A call or assessment, or some equivalent action, held essential to the liability of the defendant on his contract to purchase shares of stock in an incorporated company.

[Cited in Glenn v. Soule, 22 Fed. 418.]

Action at law. The plaintiff alleges that he is the receiver of the Lamar Insurance Company, of Illinois, appointed by a court of chancery, in Chicago, in a suit in which two persons who are named were plaintiffs, and the said insurance company was defendant—the exact nature of which does not appear. It is alleged that the said company had, before said suit in Illinois was brought, become insolvent and ceased to do business. The petition herein also alleges that on August 15, 1873, the said court of chancery in said cause made an order as follows: "And the said receiver is hereby authorized and empowered to compromise with any one or more of the stockholders of the said corporation defendant, and to take and receive from him or them such sum of money or such percentage on the amount due from such stockholders as in the judgment of said receiver will be just and equitable, and a fair proportion for such stockholder to pay toward discharging the debts of the corporation. And upon such payment and settlement said receiver is hereby directed to give up and surrender to the party or parties so paying, the stock, bond, or obligation of said parties, and to release and discharge the same. And it is further ordered, adjudged and decreed that in case said receiver shall bring any suit to enforce the payment of any stock or other obligation due to said corporation, he shall bring said suit for and enforce such claim for the full amount of the debt or demand due, and the said decree of this court entered on the 18th of January, 1873, and the matters therein contained, so far as the same relate to the assessment of twenty per cent, the call of fifteen per cent, and the collection of such per cent, and call, be and the same is hereby, as to all future and further proceedings, vacated and declared to be of no force or effect, and said decree shall not operate as a bar to such recovery, nor shall said decree, or the matters therein contained, defeat or bar any suit which said receiver may hereafter bring to enforce payment of any debt due to said corporation." The present suit is brought by the receiver to collect eighty per cent, the balance alleged to be due from the defendant on a contract to purchase ten shares of stock in the said insurance company. The contract is in writing, and is in substance that the defendant promises to pay for said stock, $1,000, in this manner: five per cent down, and three installments of five per cent, in three, six and nine months. "The balance being subject to the call of the directors as they may be instructed by majority of the stockholders represented at any regular meeting." It is this balance that the receiver seeks to recover. The charter of the company is not set forth in the pleadings, nor the powers and authority of the receiver, otherwise than appears above.

The defendants demurred to the petition, and, on argument, the points below mentioned were ruled.

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

Parker & Twomey, for receiver.

James T. Lane, Gatch, Wright & Kennedy, for defendant.

MILLER, Circuit Justice, orally delivered the opinion of the court, holding: 1. That proceedings in bankruptcy are not an exclusive method of winding up insolvent corporations or companies. The bankrupt act does not, ipso facto, suspend state laws for the collection of debts. The act of congress of February 13, 1873 (17 Stat. 436), is a complete answer to the position that the sole remedy against an insolvent insurance company is in the bankruptcy court.

2. It is, perhaps, true, that where duly appointed and authorized, a receiver may, ordinarily, sue in another state. This power, when it exists, arises from comity, in the absence of special statute regulations, and it is, in general, subordinate to the right of local creditors as respects property within the jurisdiction where such a suit is brought. The effect of the bankrupt act on the general doctrine does not arise on the record before me. And in view of the uncertain nature of the proceedings in which the present plaintiff was appointed, I give no definite opinion concerning his powers in respect of suits brought in this district. See Booth v. Clark, 17 How. [58 U. S.] 322.

3. In this action at law, in which neither the corporation nor its stockholders other than the defendant are before the court, and in which the suit is on the contract of subscription for the entire eighty per cent alleged to be due, I am of opinion, considering the terms of that contract, and that no call or assessment is alleged, either by the company before the insolvency or by the court since, that the petition does not state a cause of action. In other words, in this action at law on the contract, there must be a call or assessment, or something standing in the place thereof, and equivalent thereto, either by the company or by a proper court, in order to make the defendant liable. This does not appear either by the averments of the petition or on the exhibits thereto, and hence the demurrer must be sustained, but the plaintiff may amend, and, in doing so, I advise him to set forth the charter of the company and the nature of the chancery proceeding in Illinois. Ordered accordingly.

Case No. 2,595.

CHANEY v. BASKET et al.

[6 Reporter, 769.] [1]

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

GIFT CAUSA MORTIS—CHOSES IN ACTION—MONEY ON DEPOSIT—DELIVERY OF CERTIFICATE OF DEPOSIT.

1. Choses in action, whether negotiable or not, may be the subjects of gifts causa mortis.

2. Money on deposit may be delivered as a gift causa mortis by a delivery of the certificate of deposit; but there must be at the time on the part of the donor an intention to transfer to the donee the present dominion and ownership of the money, subject, of course, to the usual condition attached to such gifts.

Bill by the administrator of one Chaney, deceased, to obtain a certain certificate of indebtedness for $23,514.70. The defendant, Basket, claims that sixty days before his death, Chaney, in full possession of all his mental faculties, but in apprehension of death from a disorder with which he was then suffering, with his own hand wrote and signed the following certificate, to wit: "Pay to Martin Basket, of Henderson, Ky., and no one else, then, not till my death. My life seems to be uncertain; I may live through this spell, then I will attend to it myself. (Signed.) H. M. Chaney." And delivered the said certificate so indorsed to the defendant, Basket; that Chaney died of said disorder, and said certificate so indorsed remained in his (Basket's) possession until he placed it in the hands of his counsel, the defendants, Shackelford and Richardson; and that the certificate was a gift to him in trust, as well for himself as his brothers and sisters, at his option. The money represented by the certificate was on deposit with the Evansville National Bank, Indiana. During the sixty days that elapsed from the delivery of the indorsed certificate to Basket, until his (Chaney's) death, in January, 1876, he was generally up about his premises, looking after his business, as he had been for months previously. It appears from a post mortem that he had also suffered from consumption. The testimony conclusively shows that at the time the certificate was delivered by him to Basket the said Chaney was not in extremis, and that he did not act in the apprehension of immediate death. On this point there was no serious controversy. His domicil being in the state of Tennessee at the time of his death, the laws of that state determine the succession to his personal property.

A. & J. E. Inglehart and T. T. Foreman, for complainant.

Shackelford & Richardson, Denby & Kumler, J. W. Gordon, and J. J. Turner, for respondents.

GRESHAM, District Judge (after stating the facts). Gifts causa mortis must be of personal property or choses in action actually delivered by the donor to the donee, in apprehension of approaching death from an existing disorder or other impending peril, and death must ensue from such existing disorder or other impending peril without any complete intermission. But without further effort to define such gifts, it is sufficient to say that they are not good and are never upheld without certain essential requisites, one of which is delivery, actual or constructive, to the donee, or some one in trust for him, of the

[1] [Reported by permission.]

subject-matter of the gift. If the subject of the gift be capable of actual delivery, the delivery must be actual. Such gifts afford tempting opportunities for fraud, and therefore the Roman law requires them to be executed in the presence of five witnesses. And, inasmuch as delivery lessens the opportunity for fraud, it has always been held an absolute requisite to their validity. Money on deposit may be delivered by a delivery of the certificate of deposit, provided there be the intention at the time to transfer to the donee the dominion and ownership. It is now settled that choses in action, whether negotiable or not, may be the subjects of gifts causa mortis. Brunson v. Brunson, Meigs, 633; Brown v. Moore, 3 Head. 671; Meach v. Meach, 24 Vt. 591; Hanson v. Millett, 55 Me. 184; Cutting v. Gilman, 41 N. H. 151. The money itself was not delivered to Basket, nor was the certificate so assigned to him as to enable him to get possession of it. With the certificate, as indorsed, he had no right to demand the money from the bank. If on his demand the bank had paid the money, such payment would not have protected the bank against another demand by the donor. The indorsement was not of such a character as to enable him therewith to reduce the money to his possession. He could not, by virtue of the indorsement, have compelled the delivery of the money to him by the bank during the life of the donor. The donor, by the indorsement, had not parted with the possession or dominion of the property. It was still under his control. The language of the indorsement is certainly inartistic, but its meaning is patent. In legal effect it is, "if I die in my present illness, it is my intention that the money evidenced by this certificate of deposit shall belong to Martin Basket. When I thus die, and not before, it shall be paid to him." With this clear intention of the donor not to part with his money as long as he lived, it will not do to say that delivery of the certificate was a constructive delivery of the money evidenced by it. But it is said that the subject of a gift causa mortis vests in the donee only at the death of the donor, and that therefore the conditions expressed in the assignment would have been implied, if the certificate has been delivered, with a blank indorsement, or no indorsement at all. It must be conceded that some of the authorities seem to support this view. A will is the disposition of one's estate, to take effect after his death. Any disposition of property to take effect upon the death of the owner or donor is testamentary. It is the essence of a bequest that it take effect on the death of the testator. It appears by the very terms of the assignment that no present title or interest in the money could pass to the donee during the life of the donor. No instrument of writing can be both a last will and testament, and a gift causa mortis. The indorsement was testamentary in character, and if it has been properly executed according to the statutes of Tennessee, it doubtless might have been probated as the donor's will.

There is a wide difference between a legacy and a gift. Both possession and title must pass to the donee to constitute a gift. This applies as well to gifts causa mortis as to gifts inter vivos. The title must pass inter vivos, or it never can pass, but will go to the donor's legal representative. In a gift inter vivos, the donor reserves no right of revocation; in a gift causa mortis he does. The donee of a gift causa mortis holds the thing given not as a bailee of the donor, but as present owner on the condition attached to such gifts. A gift causa mortis vests in the donee a present but inchoate or defeasible title until the happening of the event necessary to render it absolute, and therein it differs from gifts testamentary and inter vivos. This question is discussed in Gass v. Simpson, 4 Cold. 293. "The property," say the court, "must pass at the time, and be intended to pass at the giver's death. * * * At the death of the donor the title becomes complete and absolute by relation from the date of the gift, and that without any consent or other act on the part of the executor or administrator; consequently the gift is not inter vivos." Duncan v. Duncans, 5 Litt. [Ky.] 12. In Parish v. Stone, 14 Pick. 198, the transfer of choses in action as gifts causa mortis is discussed. "These cases," said Chief Justice Shaw, in delivering the opinion of the court, "all go on the assumption that the bond, note, or other security is a valid and subsisting obligation for the payment of a sum of money, and the gift is in effect a gift of the money, by a gift and delivery of the instrument which shows its existence and affords the means of reducing it to possession." In the case at bar, the certificate was delivered, as the language of the indorsement clearly shows, with no intention of a present gift of the money, with authority to the donee to reduce it to possession. On the contrary, the indorsement was of such a character as to absolutely prohibit the donee from claiming any present title to the money, or any right to reduce it to his possession during the life of the donor. Decree that the certificate of deposit be delivered to the complainant, and that the money evidenced by it be paid to him.

(Other authorities noted were: 2 Kent, Comm. marg. p. 444; Story, Eq. Jur. §§ 605, 606, note 1; 1 Williams, Ex'rs, 651; 2 Whart. Ev. 17.)

Decree accordingly.

Case No. 2,596.

CHANNING v. REILEY.

[4 Cranch, C. C. 528.][1]

Circuit Court, District of Columbia. March Term, 1835.

FOLLOWING STATE DECISION.

This court will give to a discharge under the insolvent law of a state the same effect here as it would have in the state in which it was granted.

Bayard Smith, for defendant, moved to enter his appearance without special bail, the defendant having been discharged under the insolvent law of New York.

Mr. Wallach, contra, stated that this action was brought upon a judgment recovered in Ohio by the plaintiff, who was then a citizen of Connecticut. The discharge produced by the defendant was under the insolvent law of New York.

Mr. Wallach cited White v. Canfield, 7 Johns. 117; Sicard v. Whale, 11 Johns. 194; Hayton v. Wilkinson [Case No. 6,272]; Whittemore v. Adams, 2 Cow. 626; James v. Allen, 1 Dall. [1 U. S.] 188; Peck v. Hozier, 14 Johns. 346; S. P. 2 Wash. C. C. 157 [Webster v. Massey, Case No. 17,336]; Sherrill v. Hopkins, 1 Cow. 103; Sturges v. Crowninshield and McMillan v. McNeill, 4 Wheat. [17 U. S.] 122, 209; Van Raugh v. Van Arsdaln, 3 Caines, 154; Campbell v. Claudius [Case No. 2,356].

Mr. Smith cited [M'Kim v. Marshall] 1 Har. & J. 101; Richmond v. De Young, 3 Gill. & J. 66; and Penniman v. Meigs, 9 Johns. 325.

[Before CRANCH, Chief Judge, and MORSELL, Circuit Judge.]

CRANCH, Chief Judge. The decisions in the several state courts and in the circuit courts of the United States have been various. This court has always uniformly followed the decisions in the state courts of Pennsylvania and Maryland, as they stood at the time of the first case in which the court was called upon to decide upon the effect of a discharge under the insolvent law of one of the states. The rule adopted by this court, and from which it has never departed, is to give the discharge the same effect here that it would have in the state in which it was granted. The court thought that this rule was not only sanctioned, but required, by the first section of the fourth article of the constitution of the United States, which declares that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state;" and by the act of congress of the 26th of May, 1790 (1 Stat. 122), which declares that they "shall have such faith and credit given to them in every court within the United States, as they have by law or usage, in the courts of the state from whence the said records are, or shall be, taken. This court, to be consistent, must adhere to the rule thus adopted, and sanctioned by thirty years' practice, until a different rule shall have been authoritatively settled by a superior tribunal.

The question then, is, whether this discharge, under the law of New York, which is now produced by the defendant, would have protected him from arrest, or would have entitled him to appear without special bail, if this action had been brought in that state. None of the cases cited by Mr. Wallach show that it would not. They were all, except Sherrill v. Hopkins and Campbell v. Claudius [supra], cases of discharge under laws of other states; not of the state in which the defendants were arrested and sought to avail themselves of the benefit of the discharge. In the case of Sherrill v. Hopkins, the question was not whether the defendant should appear without bail, but whether the contract itself was discharged. Neither that case, nor the case of Sturges v. Crowninshield, nor McMillan v. McNeill [supra], touches the present question. In the case of Campbell v. Claudius [supra], Mr. Justice Washington said: "It is true that the courts of the state where the discharge is given may be bound to discharge on common bail, no matter where the debt was contracted; but the federal courts, or the courts of other states, are under no such obligation; and they ought not, on the ground of comity, to give it effect in their courts. The state laws as to rights, furnish rules of decision for the federal courts, under certain qualifications; but as to remedies, they have no binding force in those courts." This decision applies only to the court in which it was made, and is no authority elsewhere. What he says of the obligation of the state courts, is but a dictum; and it only denies the obligation, not the discretion of those courts, to admit the defendant to appear on common bail.

The cases, referred to by the plaintiff's counsel, are cited to show that the long course of cases in which this court has uniformly decided that they will give the same effect to a discharge under the insolvent law of a state which would be given to it by the courts of the state in which it was obtained, should be overruled. Some of the cases cited show that the creditor cannot be affected by an insolvent law of a state to whose jurisdiction he has not subjected himself, so far as the rights of the creditor are concerned; but none of them go so far as to say that if he resorts to the courts of that state, he is not bound by its laws, so far as his remedy is concerned. Nor is it denied in any of them that it is competent for a state court, or for this court, which exercises jurisdiction analogous to that of a state court, to permit a defendant to ap-

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

pear on common bail, who has surrendered all his property, and whose person has been thereupon discharged under an insolvent law of one of the states. In Byrne v. Carpenter [Case No. 2,271], this court at December term, 1807, or 1808, decided upon demurrer, that the discharge of the principal under the insolvent law, before the return of the ca. sa. was a good discharge of the bail. See, also, Sears v. Noon [Id. 12,590] June, 1820; King v. Sim [Id. 7,805]; Jones v. Lear [Id. 7,476] April, 1824; Robert Bailey's Case [Id. 731] 1821; and the cases cited in King v. Sim [supra].

We are informed also that the supreme court of the United States, at its last session, decided, in a case not yet reported, that the circuit courts of the United States are bound to give the same effect to an insolvent discharge which a court of the state in which the circuit court sits, would give to it. But however this may be, the rule of this court, as before stated, has been long established; and as there is no reason to doubt that if this suit had been brought in a state court in New York the defendant would have been permitted to appear upon common bail (9 Johns. 325), we must permit him so to appear in this court. When arrested in New York he was obliged to surrender all his property, wherever situated, before he could be discharged. An arrest is no satisfaction in itself. It is only the means of compelling the defendant to do what he has already done, that is, to surrender his property. If he cannot avail himself of this surrender, and if he should be arrested in a place where there is no insolvent law, as he would have neither property nor credit, the consequence might be perpetual imprisonment. I am, therefore, of opinion that the defendant should be permitted to appear without special bail.

MORSELL, Circuit Judge, concurred with the chief justice in the result of his opinion, but stated it as his opinion that where the discharge was not obtained in the state where the contract was made, the courts of another state could not permit the defendant to appear without special bail.

CHAPEL (UNITED STATES v.). See Case No. 14,781.

CHAPELS (UNITED STATES v.). See Case No. 14,782.

Case No. 2,597.

CHAPIN v. The E. BRAINARD.

BRAINARD et al. v. The TRAVELLER.

[N. Y. Times, July 1, 1854, p. 3.]

District Court, S. D. New York. June 30, 1854.

COLLISION—LOOKOUT—LIGHT.

[1. Though a doubt exists as to the presence of a proper lookout on a colliding steamer, yet, if it is apparent that everything possible under the circumstances was done, and that the failure to have such a lookout did not contribute to the collision, the steamer is not in fault for that reason, as, by the rule laid down in The Genesee Chief, 12 How. (53 U. S.) 443, the absence of a proper lookout is only prima facie evidence of negligence.]

[2. A schooner approaching a steamer having lights at her bow and stern at right angles, and those on board supposing the steamer to be a vessel at anchor, luffed to avoid her, thereby causing a collision. *Held*, that the schooner was in fault.]

In admiralty. This libel was filed by [Chester W. Chapin] the owner of the steamboat Traveller, to recover the amount of damages occasioned to her by a collision with the schooner on the morning of the 20th of November, 1853, about the break of day, near Riker's island. The Traveller was on her regular trip from New Haven to New York, and the schooner was bound through the Sound from New York.

Mr. Leveridge, for libellant.

Mr. Morton and Brainard & Rice, for claimants.

Before INGERSOLL, District Judge.

BY THE COURT. Some facts in this case are not disputed, and there are some about which the witnesses differ very much. The position of the vessels at the time of collision admits of no doubt. The schooner struck the Traveller on her larboard side, about 30 or 40 feet from the stem, at an angle of about 45°. The witnesses from both vessels state that to be the case, and there can be no doubt that such was the position. Just before the collision, the helm of the schooner was turned, so that she fell off. It appears very clearly that previous to such change of course, she must have been going about at right angles with the course of the Traveller. I think any man must come to that conclusion upon the evidence. The position in which the Traveller was, appears manifest by looking at the chart. She had passed Hunt's Point, and the pilot states that she made a direct course from Hunt's Point to the northern end of the North Brother. The schooner claims that she kept near the South Brother, but it seems to me conclusive that if the schooner was between the South Brother and Riker's island, and near the flats, as she claims to have been, it was impossible that they could have come together at an angle of 45°; she must have been in a different position to have met the steamboat as she did. But if the schooner was in the position described by those on board the Traveller, I can see that she might have met her as she did, in consequence of her luff. If the collision took place near the flats between the South Brother and Riker's island, it could not have happened as it did. It must have been therefore when she was in a different position from that now claimed by her. If it was when the boat was near to the North

Brother, then I can see how the vessels could have met each other at the angle of 45°.

It is claimed by the respondents that the steamer was in fault in having no proper lookout. The rule as laid down in the case of The Genesee Chief [12 How. (53 U. S.) 443] is, that unless a steamboat has forward a careful and faithful lookout, whose special business it is to look out, the absence of such lookout shall be deemed prima facie evidence of negligence. But it is only prima facie evidence, and may be removed by other evidence. It is doubtful whether there was on the steamboat such a lookout as is required by the case of The Genesee Chief, but if there had been it would not have helped the case. Nothing more could have been done on board the steamboat than was done. It is also claimed that the steamboat had not proper lights. The evidence is clear that there was a light at her bow, and another at her stern. The light at the bow was so placed as to throw its light forward, so that, if the schooner was going at right angles, it might easily have been unseen from her, while such was her direction. After she passed the South Brother, she luffed. It seems, from the evidence, that, for some reason or other, the light which was seen on board the Traveller was supposed by those on board the schooner to be a light on a vessel at anchor. The light was in motion, and the vessels were moving at right angles with each other. How, then, they could have supposed that the light was on a vessel at anchor, is unaccountable to me. But it appears, from the evidence, that they luffed to avoid this vessel at anchor, as they supposed it to be, and only discovered that it was a steamboat when it was too late to save themselves from the danger into which their luff had brought them. The steamboat does not appear to have been in fault, but the collision was caused by the fault of the schooner.

Decree, therefore, for libellants, with a reference.

Erastus Brainard et al. v. The Steamboat Traveller. This was a cross suit, arising out of the same collision, brought by the owners of the schooner. Libel dismissed, with costs.

Case No. 2,598.

CHAPIN et al. v. The HATTIE ROSS.

District Court, D. Connecticut. Aug. Term, 1866.

COLLISION—LIGHTS—LOOKOUT—BURDEN OF PROOF.

[1. A libel for damages caused by collision should particularly set out the facts relied on to charge the libeled vessel with fault.]

[2. Where the answer admits the failure to have proper lights set, the burden of proof is on the vessel to prove her freedom from fault.]

[3. An erroneous maneuver, made under apprehension of peril from an approaching vessel, and without opportunity for deliberation, is not chargeable as a fault.]

[4. That a vessel sunk by collision had an incompetent lookout, is not a fault, if his incompetence did not contribute to the disaster.]

[See The Young America, Case No. 18,179; The Victor, Id. 16,933; Shirley v. The Richmond, Id. 12,795; The Atlas, Id. 633; The Pennsylvania, Id. 10,950 and Id. 10,947; The Empire State, Id. 4,474.]

[In admiralty. Libel by Charles E. Chapin and others, owners of the brig Tornado, against the schooner Hattie Ross, for damages sustained by collision.]

SHIPMAN, District Judge. This libel is prosecuted to recover damages for the loss at sea of the brig Tornado in consequence of a collision with the schooner Hattie Ross. The collision occurred on the Atlantic ocean in latitude about 34° north, and longitude about 70° west, on the 18th of May 1865, between 12 and 1 o'clock in the morning. The pleadings in the cause are inexcusably imperfect and meagre. The libel is barely sufficient to warrant the court to found a decree upon it. Had exceptions been filed by the claimants to its sufficiency, the court would have at once ordered it amended, and the particular facts upon which a decree is asked for by the libellants set forth with proper fullness and precision. The principal material fact alleged is that the collision occurred in consequence of the omission of the Hattie Ross to carry the lights required by law, or any lights whatever. It is not alleged in the libel that the night was dark, nor is the state of the weather described at all. Neither the direction or velocity of the wind, or the course of the vessels, or their manner of approach or contact, is set forth. The libel does not even aver that the Tornado had the lights required by law, or any lights. It does charge that the schooner struck the brig amidships, cut into her and sunk her, and that the disaster was wholly owing to the failure of the schooner to carry lights. The answer admits the collision and its destructive consequences, denies that it was owing to the cause set up in the libel, and avers that it was wholly the result of negligence on part of the Tornado. The answer is quite as general as the libel.

The burden of proof in this case is clearly on the claimants. The Hattie Ross confessedly had no lights set. In cases of collision, where an ordinary and proper measure of precaution has been omitted, the burden of proof is on the vessel guilty of the omission to show that the collision was not caused by her neglect. The Lion, Spr. 44. This is emphatically the case where the omitted precaution was one required by statute. Waring v. Clarke, 5 How. [46 U. S.] 441. In the latter case the respondents had neglected to carry the lights required by the act of congress of July 7, 1838. See, also, The Margaret v. The Tascar, 15 Law T. (N. S.) 86. The evidence for the libellants rests on the

statements of the master, mate, and lookout on the Tornado. They all appear to have been on deck from the time the Hattie Ross was discovered till she collided with the brig. Saunders, who was at the wheel, was not examined as a witness. The night was rather dark, though stars were visible. Some clouds hung on the horizon. The wind was in the neighborhood of S. E.,—the witness on neither side being very exact on this point. The wind was moderate,—not stronger than a five or six knot breeze. The Tornado was bound from Philadelphia to New Orleans, and the Hattie Ross from New York to Porto Rico. The Tornado was on her port tack on a course southerly and westerly, and the Hattie Ross on her starboard tack and a course southerly and easterly. As already stated, the Tornado had four men on deck,—the captain, mate, lookout, and wheelsman. The Hattie Ross had two men on deck,—the second mate, who was at the wheel, and a man on the lookout. The three witnesses who were examined on part of the Tornado, and who were on deck at the time the Hattie Ross was discovered, all swear positively that she had her lights set (both green and red) in their proper places. This point is controverted by the witnesses from the Hattie Ross; but only the two in charge of the deck saw the Tornado until near the moment of collision, and they did not see her until she was quite near. That they did not see the lights of the brig, is not sufficient to overcome the evidence of the libellant's witnesses on this point. It is alleged by those on the Hattie Ross, that after the brig sunk, and her officers and crew were transferred to the former, they admitted that they had no lights. This is explicitly denied. On the whole evidence on this point, the court is satisfied that the Tornado had her colored lights set in conformity to the requirements of the act of congress. It is conceded that the schooner had no lights set.

It appears from the concurrent testimony of the master, mate, and lookout on the Tornado that they discovered the Hattie Ross, some time before the collision, to starboard, and supposed she was running with a free wind. That after watching her some time they saw she was standing towards the brig, when the captain of the brig ordered the wheel hard down and her head sheets let go, when, almost immediately, the schooner struck her and she soon sunk, all hands escaping to the schooner. There is considerable discrepancy between these witnesses in their estimates of the time which elapsed after they discovered the Hattie Ross till the collision. But estimates of time on such an occasion can never be exact. An attempt to make them so usually excites suspicion, and tends to discredit the witness who assumes to measure time with accuracy under such circumstances. The court is entirely satisfied that, while the schooner was discovered a considerable distance off, her course was mistaken by those on the brig, and this mistake was not discovered till it was too late to prevent a collision; or at least not till the vessels were so near as to excite great alarm on the Tornado. It was insisted on the argument that the captain of the brig ordered his wheel hard up instead of hard down, and that if he had not done so no collision would have taken place. The court will not stop to inquire into this alleged erroneous maneuver. Assuming it to have been an error, it was done under circumstances which make its consequences chargeable, not upon the Tornado, but on the Hattie Ross. Had the latter exhibited colored lights as required by law, there is every reason to believe that her course would have been made out by the Tornado, in ample time to have prevented a collision. The Tornado was not able to make out the course of the schooner until the vessels were very near each other, and then as the schooner was discovered to be approaching, and very near the brig, a movement must be made at once to avert the collision. The change had to be made by the brig instantly, with no opportunity for deliberation, and in the midst of more or less alarm and confusion. As was remarked by Chief Justice Taney in the case of The Genesee Chief v. Fitzhugh, 12 How. [53 U. S.] 443, "if an error was committed under such circumstances, it was not a fault." See, also, 1 Conkl. Adm. (Ed. 1857) pp. 388, 400, and cases there cited. The cases referred to by the author arose out of collisions between steamers and sailing vessels, but the same doctrine is applicable to the latter class of vessels colliding with each other.

If there were any doubt on the evidence for the libellants that the vessels were very near each other before the course of the schooner was made out by the brig, that doubt would be wholly dissipated by the testimony of the second mate of the schooner who was a witness for the claimants. He was in charge of the deck at and before the collision. In his examination in chief he says: "All I have got to say about the collision between the schooner and the brig Tornado is that I was at the wheel at the time, and the man on the lookout reported this vessel. I told him to take the wheel from me that I might go and see how she was. The minute I saw how the brig was I sung out to the man at the wheel of the Hattie Ross to put his wheel hard down. He jammed his wheel hard down, and I jumped on to the topgallant forecastle and sung out to them on board the Tornado to put their wheel hard down. The captain of the Tornado * * * sung out to the man at his wheel to heave his wheel hard up. Well we were shaking in the wind at the time those vessels came together." On being further questioned by the counsel for the claimants, this witness, when asked how near the Tornado was when he saw her, re-

plied "She was pretty close; I could not say how far off she was." This is not very clear or exact, but, on the cross-examination, this witness was asked, "How far from you was the Tornado when you got forward?" To which he replied: "Well, I could not exactly tell you. She was pretty close. I could not exactly say. I suppose, to my best judgment, she might be twice her length. She might be a little more or less. I could not say for certain." It is quite certain that, although the brig discovered the schooner some distance off, she could not make out her course till the vessels were in a most dangerous proximity. She appears to have ascertained the course of the schooner at about the same instant that the latter first sighted the br g. Had the Hattie Ross shown her colored lights as the law requires, there can be no doubt that the Tornado would have ascertained her course in ample time to have avoided the collision, as her officers and lookout were watching her, and endeavoring to make out the direction in which she was moving.

It was insisted on the hearing that the Tornado had no sufficient lookout. This is true. The man stationed for that purpose was a green hand—young and inexperienced. He was not such a lookout as the law requires. But as the schooner was discovered in time to have been avoided, and was narrowly watched by the officers of the Tornado for the purpose of ascertaining her course, but in vain, till it was too late, it is evident that the collision is not chargeable to the incompetence of the lookout. The schooner neglected a plain requirement of the statute, enacted for the very purpose of enabling her to disclose her course to an approaching vessel. Her fault in this respect was gross and inexcusable, and tended directly and immediately to produce the disaster. She has wholly failed to exculpate herself, and must be condemned to bear the consequences of the disaster.

Let a decree be entered for the libellants, with an order of reference to a commissioner to report the damages.

Case No. 2,599.

CHAPIN et al. v. NORTON et al.

[6 McLean, 500.] [1]

Circuit Court, D. Michigan. June Term, 1855.

CONTRACT—RIGHT TO ABANDON—DAMAGES FOR BREACH—ACCOUNT STATED.

1. Under a contract made by the complainants with the defendants, the complainants agreed to purchase all the lumber sawed by the defendants on Grand river, on the terms specified, taking it at the mill and transporting it to Chicago, &c. Among other conditions, the complainants agreed to furnish supplies for the hands of the defendants, &c., which, after about a year, they refused to do; on which the defendants abandoned the contract.

2. Where one party refuses to do a certain thing, under the contract, which was necessary to enable the other party to perform his part of the contract, he may abandon the contract. And in such case the party first refusing, is liable to the other for damages.

3. But such damages must be limited to the immediate consequences resulting from the refusal to perform the contract, and cannot extend to probable profits which might have been realized if the contract had been carried out.

4. The party who abandoned the contract on the failure of the other party to perform in a material part, is not liable for damages.

5. A large quantity of the lumber being in possession of the defaulting party, it would seem that he, having repudiated the contract, cannot afterwards claim the benefit of the contract, in disposing of the lumber on hand. Under any circumstances he would be entitled to a reasonable compensation for selling the lumber.

6. In the process of a continuing contract, if accounts are received and adjusted without objection, it is too late to make an objection at the trial.

7. And where an inconvenience is suffered by the delay of the other party, notice should be given.

Willing & Gray, for complainants.
Mr. Lathrop, for defendants.

OPINION OF THE COURT. This is a bill in chancery, in which the complainants ask the foreclosure of a mortgage. On the 20th of February, 1850, the parties entered into an agreement substantially as follows:—The complainants are lumber merchants and reside in Chicago, and they entered into an agreement with the defendants, who owned a steam saw mill on Grand river, in the state of Michigan, and were engaged in sawing lumber, to purchase all the lumber that they should manufacture at their mill, for five years, on the following terms: 1. Five dollars per thousand feet was to be paid for merchantable; two dollars fifty cents for culls, and one dollar per thousand for pine laths. 2. The complainants were to receive the lumber at the mill and sell it in Chicago, and in addition to the above prices, were to pay the defendants one-half the net profits. 3. They were to procure vessels to take the lumber from the mill to Chicago, the amount to be ascertained by tally on delivery at Chicago. 4. The complainants were to furnish to the defendants all the supplies needed to carry on their mill. 5. The lumber to be paid for on the receipt of the price of sale. 6. For all moneys advanced by complainants, they were to receive interest at ten per cent. 7. The expense of the transportation and all other expenses of sale, &c., were to be deducted out of the proceeds, before the division of the profits. 8. At the close of each month an account of sales was to be rendered to the defendants, and at the close of the year a settlement was to be had. At the date of the agreement, the complainants loaned to the defendants two thousand dollars and took from them a mortgage for the payment, with interest at ten per cent., in one and

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

two years; and also conditioned for the repayment of all advances made under the contract, and also for the performance of the contract. In November, 1851, the defendants refused to deliver any more lumber under the contract, alleging that the complainants had broken it by a refusal to furnish supplies. In February, 1852, the defendants commenced an action at law against the complainants, in Ottaway county, to recover damages for the alleged breach of the contract. That suit, under the act of congress, was removed to this court, and is still pending. In the fall of 1852 this bill was filed, to foreclose the mortgage. The answer admits the execution of the mortgage, but alleges that complainants first violated the contract, which released the defendants from all obligation under it. And they claim damages from the complainants.

In order that the decision of this case may finally settle the controversy, it was agreed by both parties that the matter between them, arising under the contract, shall be finally settled in this suit, and a decree entered against either party as the court shall decide. The complainants claim the mortgage and interest, amounting to the sum of two thousand eight hundred and sixty-six dollars and sixty-six cents; and also a balance on the account current, including interest, amounting to the sum of one hundred and seventy-nine dollars and forty-seven cents. These items make the sum of three thousand forty-six dollars and thirteen cents. And a large amount is claimed as damages for the failure of the defendants to perform the contract. The defendants claim damages from the complainants for breaking the contract, by refusing to furnish the necessary supplies, which compelled them to sell their lumber at a lower price than was stipulated in the contract, in order to continue their manufacture. And they allege that at the close of the fourth quarter, as appears by their own account, the complainants had on hand 573,122 feet of lumber, for which they have never accounted. And they say the interest and discounts have been regularly charged by them. The expenses charged are, they aver, unreasonable, and ought not to be allowed. And in the answer damages are claimed for stopping their mill by an injunction, obtained by complainants. Breaches of contract are also set up, as a ground for damages, in not sending for the lumber in proper time, by which means large amounts of it were piled upon the wharf at the mill, which caused great inconvenience and damage to the defendants. The accuracy of the accounts rendered by the complainants are questioned, and damage was suffered by the defendants, it is averred, by the complainant's selling at a longer time than was agreed on.

Before the question of damages is considered, it is important to ascertain whether the complainants or defendants are responsible for breaking up the contract. On this point the evidence is clear. Every one acquainted with the business in which the defendants are engaged, must be aware that it requires a large expenditure. A large number of hands must be constantly employed in procuring the logs and bringing them to the mill, and in sawing the lumber. Teams and vehicles must be used in the business. All these must be supported and wages paid to the hands. It appears thirty-five hands were employed in the above business, and sometimes, it is supposed, a greater number. Supplies, it appears, could not be purchased at Grand river, nor its vicinity, and the nearest market where the necessary articles could be purchased was Chicago. These supplies consisted of provisions for the hands, food for the cattle, and several expensive articles used in running the mill. And in the agreement the complainants undertook to furnish these supplies. We see from the account rendered that in the course of a year they required a large expenditure. From the nature of these supplies, the manufacture of lumber must stop if they were withheld. And, as appears from the evidence, they were withheld by the complainants. The pretence assigned was, that they had already made large advances under this head and could make no more. At this time, it appears, they had in their possession lumber that would more than cover the amount of the advances. And it also appears that large quantities of lumber were piled up at the mill, which it was their duty to remove. They must have known that withholding supplies at the beginning of winter, without notice, must stop the mill and greatly embarrass, if not ruin, the defendants.

From the evidence it appears, that the complainants were desirous, not only to get rid of the contract, but to possess themselves of the defendants' property. This motive was so often expressed to various persons at Chicago, and elsewhere, and so carried out by their acts that, reluctantly, we are brought to the conclusion that such was their intention. And to bring out this result, the defendants were to be led on unsuspectingly by certain devices, so that the refusal to furnish supplies would be most injurious to the defendants and beneficial to the complainants. The facts proved, necessarily lead to this conclusion. It is unnecessary to say, that in all contracts where certain things are to be done by the parties, a failure by one party will justify the other in abandoning the contract. But in a matter where the performance of the one party was necessary to enable the other party to perform, as in this case, the contract may be considered as abrogated. This view settles the question against the complainants' claim for damages, by reason of the acts of the defendants. They must stand upon their mortgage and matters of account.

The complainants claim mortgage money

and interest together, with a balance on account current of one hundred and forty-seven dollars and interest—the latter item may be affected by some other items in the account current, which are disputed. The other claims, except the one for interest, are cut off by the breach of the contract on their part. In their answers the defendants claim damages on account of the injunction in this case, which necessarily suspended the operation of their mill, and the cutting or removing of timber from their lands. This was no doubt very injurious to their interests, but it was an injury for which no redress can be given. The suspension resulted from the allowance of the injunction; and although the complainants were active in procuring the writ, yet they are protected by the act of the court. The counsel for the defense yields this point. Nor are the defendants entitled to damages for the reduction of the lumber received at Chicago, by the tally at that place. This claim is also very properly yielded by the defendants' counsel. The contract stipulates that the Chicago tally shall fix the amount of lumber received, and this amount must stand, unless a mistake or fraud shall be made to appear in taking it. It seems to be usual at Chicago to make a deduction in the lumber for shrinkage, and several witnesses think the amount deducted on this account not greater than usual. It does not appear that the charges of expense of the transportation of the lumber to Chicago, or in the tally and sale of it at that city, was objected to by defendants, when the monthly or quarterly accounts were rendered; and it is too late to raise the objection at the hearing, unless fraud or mistake can be shown. On the 1st of December, 1851, it appears the complainants had on hand 738,508 feet of lumber, and 98,450 pieces of lath; and the defendants insist that as complainants refused to go on with the contract, by a failure to furnish supplies, they are not entitled to the advantage arising, under the contract, for the sale of this lumber. There is much force in this suggestion. But the complainants could not be required to sell the lumber, without a reasonable compensation. It would seem proper that, as the complainants refused to perform their part of the contract, so as to authorize an abandonment of it by the defendants, in regard to the lumber on hand, they could not go on under the contract. This point is not now finally decided, but reserved.

There can be but little doubt that the defendants are entitled to damages for the refusal of the complainants to furnish supplies. But these damages must be limited to the act of refusal, and the immediate consequences resulting therefrom. The injury cannot be extended to the profits arising from the contract, if it had been performed by the complainants. Such damages are remote and contingent. But the contract was abandoned by defendants, which, under the circumstances, would limit their claim, as stated. The damages claimed on account of the large amount of lumber which accumulated at the mill, covering the wharf to the great inconvenience and damage of the defendants, by reason of the complainants' neglect to remove it, might have constituted a ground for allowance had the complainants been notified of the fact and requested to remove it. But, without such notice, there seems to be no ground for an allowance. The loss by fire of sixty thousand feet of lumber, at the mill, cannot be charged to the complainants, or any part of it. Interest is charged, in the current account, for payments made under the contract. If these payments were made in advance, the charge is a proper one; but if they were made on a sale of the lumber, as the contract required, no interest should be charged. The account current is not before me, but a succinct statement of items taken from the account. Without that account, a final decision is impracticable. Nothing more can be done than to require a report from a master on the items allowed to the defendants. It appears from the briefs, that from the 20th of February to the 1st of May, 1852, no account of sales was rendered, but only a statement of the profits. This would be unsatisfactory, if the complainants shall be required to account for the sale of this lumber under the contract.

It is therefore ordered that the account current and all the evidence in this case, be referred to a master in chancery, who shall report at the ensuing term, on the claims for damages as above stated. And the master will specially report: First. What would be the proceeds of the lumber on hand on the 1st December, 1851, at the current prices in Chicago, after allowing the usual per cent. for selling, the cost of transportation, and the money paid by the complainants under the contract. Second. What amount of damages was sustained by the defendants, under the restrictions stated, for refusing to furnish supplies. Third. What, if any, deductions should be made from the items of interest charged in the account current. Fourth. Any items incorrectly charged in the account current, through mistake or otherwise.

Case No. 2,600.

CHAPIN v. SIGER et al.

[4 McLean, 378.][1]

Circuit Court, D. Michigan. June Term, 1848.

BILL OF LADING — PAROL EVIDENCE — PROOF BY AGENT—NOTICE TO PRODUCE—PROOF OF DOCUMENTS—DEPOSITIONS—TROVER—DEMAND — CONVERSION — UNAUTHORIZED SALE BY CONSIGNEE.

1. An agent is a competent witness to prove what he did as agent. The court held that a bill of lading could not be contradicted by parol. But, that evidence might be given that the consignee had nctice that the goods belonged to a person different from the person named in the

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

bill. And that a corrected bill of lading was forwarded to the consignee.

2. Chapin gave instruction to defendant not to sell the property, but to store it until it would command better prices. A notice at the trial to produce an original letter or paper, will not be enforced unless the paper be in the possession of the party or his counsel.

3. A letter press copy, made at the same time, can not be received as an original paper.

4. Depositions to contradict a witness will not be received unless the question as to the fact was distinctly put to the witness.

[Cited in Conrad v. Griffey, 16 How. (57 U. S.) 47.]

5. A demand and refusal, or an actual conversion, necessary to sustain an action of trover.

6. When a sale is made in disregard of instructions, except for advances, the consignor may recover damages.

J. M. Howard, for plaintiff.

Bates & Watson, for defendants.

OPINION OF THE COURT. This is an action of trover for two hundred and three barrels of flour, which belonged to plaintiff. Plea, not guilty. A jury being sworn, Jeremiah S. Littlejohn was offered as a witness, and was objected to by defendants' counsel, on the ground of interest. He and his partner were shippers of the flour, and if he shall now be permitted to prove a conversion of the flour by the defendant, it may relieve the witness from responsibility. But the court held, that the witness and his partner acted as agents in shipping the flour, and there was no preponderating influence which would exclude him from giving testimony. In England the doctrine has been departed from, so far as to admit a witness interested, if not a party on the record, leaving his credit with the jury. But this witness has no interest which can exclude him. The witness states that he was acquainted with the firm of Siger, Brown & Co., of Buffalo. The two hundred and three barrels of flour were shipped from Detroit, to defendants, 19th November, 1846, on board the propeller St. Joseph. The witness was asked who was the owner of the property; which question the defendant objected to, because the ownership is shown by the bill of lading. 2 Starkie, Ev. 283, "where goods are shipped on account of the consignee, the property must be recognized as being in him." 2 Camp. 36. Goods shipped to consignee, consignor can not maintain an action for them. [Creery v. Holly] 14 Wend. 26; Abb. Shipp. 249; 4 Cow. & H. Notes, 1439. The court held that the bill of lading can not be contradicted. The property was shipped by Littlejohn & Co.; but the court permitted evidence that the consignee had notice the property belonged to Chapin, and that a corrected bill of lading was forwarded, which was admitted in evidence, requesting defendants to enter the flour on account of Chapin. In January 7, 1847, the defendants were told by witness that they had sent the shippers an account of the sales of this identical flour, and they admitted the fact; but witness objected, because it was in pursuance of orders given. Defendants admitted that they had received a letter informing them that Chapin owned the flour. In March or April, 1847, heard Chapin make a demand of the flour, 203 barrels, on a ware-house receipt; this was at Detroit; defendant said he was away from home, and did not know whether such a shipment had been made. Chapin demanded satisfaction; Siger refused to pay. This was before suit was commenced. Witness never did, in any way, satisfy the sale of the flour. At Buffalo, witness told the defendants that the flour belonged to Chapin, who had instructed witness, etc., not to have it sold, but to store it until better prices. Defendants said in the multiplicity of business they had overlooked the instruction. The letter of defendants giving an account of sales, was dated the 14th of December, 1846. The defendants admitted that the account included all the flour sent by the St. Joseph, 19th of November, 1846. Flour, in 1846, at Buffalo, was worth from $3.75 to $4. Some sales were made for $5. A letter press copy was offered in evidence, of a letter dated 31st December, 1846, to defendants. Notice was given to the defendants' counsel to produce the original. The counsel averred that they had not the original, and had never seen it. The court held, the notice was not reasonable, and that the defendants were not to be required to produce the original, unless it were in their possession, or in possession of their counsel, under such a notice. And that a letter-press copy, though written at the same time, could not be received as an original.

The defense made, was, that before the bill of lading was corrected, showing that the 203 barrels were owned by Chapin, defendants accepted on the shipment, bills drawn 19th November, 1846, exceeding the receipts for the sale of the flour, several hundred dollars. A bill, amounting to two thousand seven hundred and fifty-two dollars, was drawn on the shipment, the day it was made, which was accepted and paid, before the letter, correcting the error, was received. Afterward an advance was made on the same flour, on claim of Chapin. Depositions were offered to be read to impeach the statements of Littlejohn, by proving certain conversations with the defendants, respecting this transaction. The plaintiff's counsel objected, because, Littlejohn, when under examination, had not been asked in regard to these conversations. The court sustained the objections, but permitted Littlejohn to be called by the defendants, and the questions were asked him. The account rendered was proved to be correct; and that Littlejohn asked an advance, and, adding a few barrels, he obtained $650. Littlejohn said that they would be safe in making a further advance, as flour had risen, and that he was authorized to dispose of the 203 barrels. Another

witness states that the draft of $2,750 was accepted before the error was corrected. On the part of the defendants it is insisted, to sustain this action, the plaintiff must show a demand of the 203 barrels of flour. 2 Saund. Pl. & Ev. 414 and 883; 1 Camp. 429. And that the party on whom the demand is made must have it in his power to deliver the property. 2 H. Bl. 135. That excuses for not delivering, is not a conversion—the refusal to deliver must be absolute, or there must be a tortious conversion. 5 Barn. & C. 248. It is also contended if the defendants were in advance when the two hundred and three barrels were received, defendants had a lien on the flour, and they could retain it against the plaintiff. That the factor has a general lien for any balance.

The court instructed the jury that, to support the action, there must be a demand and refusal, or an actual conversion of the property, and that they must find the right of property was in the plaintiff. And the court said to the jury, that it did not appear, from the evidence, that any draft had been drawn against the two hundred and three barrels of flour, or that Chapin had received the proceeds of the same. From the defendants' letters, dated the 12th and 19th of February, 1847, the draft for $2,752, was drawn against other property, which was received about the same time, and perhaps, in the same vessel, with the two hundred and three barrels. If the jury shall find the facts as suggested by the court, and they are referred to the evidence, and they shall be satisfied that there was a demand and refusal to deliver the property, and that it was not sold by the plaintiff's orders, the defendants being notified that the plaintiff was the owner of the flour, and that they were not in advance to the plaintiff, their verdict would be for the plaintiff for such damages as shall be equitable. That the plaintiff would be entitled to the rise in the market, for a reasonable time after the demand was made. That if the sale was wrongfully made, at a time when the article was depressed, the defendants having no right or authority to sell, would not fix the rule of damages for the plaintiff.

The jury found for the plaintiff. A motion for a new trial was made and overruled.

Case No. 2,601.

In re CHAPMAN.

[9 Ben. 311.][1]

District Court, E. D. New York. Jan., 1878.

DISCHARGE — MERCHANT UNDER BANKRUPT ACT—BOOKS OF ACCOUNT—PREFERENCES.

1. One who buys from time to time paintings, but not in the course of his regular business, is not a merchant within the meaning of the bankrupt act [14 Stat. 534], although he places such pictures in a public gallery and sells them at auction; and he is not required to keep books of account.

2. When the bankrupt testifies that the occasion of his going into bankruptcy was an unforeseen increase of indebtedness occurring subsequently to payment in full made to certain creditors, the fact that he was actually insolvent at the time of making such payment does not compel the inference that bankruptcy was then contemplated. The design to give a preference must be established as a fact.

[In bankruptcy. In the matter of Henry T. Chapman.] Creditors of the bankrupt opposed his discharge, upon the ground that, being engaged in the purchase and sale of pictures for profit, he was a merchant and trader within the meaning of the bankrupt act and as such had kept no books of account, and on the further ground that he had, in contemplation of bankruptcy, made transfers of property to certain creditors, with the intent to prefer such creditors. It appeared upon the bankrupt's examination that, at the time he filed his petition in bankruptcy, he had for two years been a clerk with a mercantile house, and that prior thereto he had been for nineteen years in the employ of a bank, occupying every position except that of president. During a portion of this period the bankrupt was in the habit of buying, collecting, and selling oil paintings, at one time making a large sale of pictures at auction at a public gallery in New York.

B. F. Tracy, for bankrupt.

BENEDICT, District Judge. The bankrupt, whose discharge is opposed, was a bank cashier and clerk in New York City. The evidence in respect to his purchase and sale of oil paintings, does not, in my opinion, constitute him a merchant within the meaning of the bankrupt act. The objection to the discharge upon the ground, that, being a merchant, he failed to keep proper books of account, cannot therefore be sustained.

The objections founded upon the preferences alleged to have been made in contemplation of bankruptcy, must likewise fail for want of sufficient proof that they were so made. The payments complained of were made some two years prior to the filing of the petition. The bankrupt testifies that when they were made he had no intention of going into bankruptcy, and the circumstances attending the payments as disclosed by him, while they show an actual insolvency at the time, do not necessarily compel the inference that any act of bankruptcy or resort to proceedings in bankruptcy, was then contemplated. "To infer a design to give a preference to a favored creditor, and in the immediate expectation of bankruptcy from the mere fact of insolvency, is by no means a certain inference. The evidence must go further and establish as a fact the design to give the preference, a fact too important to be left upon conjecture." Jones v. Howland, 8 Metc. [Mass.] 385.

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

The unexpected increase of the bankrupt's liability in August, 1876, caused by the entry of a judgment for deficiency of over ten thousand dollars by one of the creditors now opposing the discharge, with the attendant circumstances, affords a reason for going into bankruptcy which did not exist at the time of the payments under consideration, and the bankrupt testifies that this was the circumstance that led him for the first time to contemplate proceedings in bankruptcy.

Upon the evidence before me I am therefore unable to hold it proved that the payments referred to in the specifications were made in contemplation of bankruptcy. The objections to the discharge must therefore be overruled.

Case No. 2,602.

The CHAPMAN.

[4 Sawy. 501.] [1]

District Court, N. D. California. Jan. 13, 1864.

PRIZE OF WAR—PIRACY.

1. Where a vessel was fitted out within a loyal state, for the purpose of cruising against the commerce of the United States, under a letter of marque, issued by the government of the so-called Confederate States, and was seized, libeled and condemned on the instance side of the court: *Held*, that the officers and crew of a United States man-of-war, who aided in the seizure, were not entitled, under the act of April 23, 1800 [2 Stat. 52], to a share of the proceeds as prize of war.

2. Neither were they entitled to such share under the act of August 5, 1861 [12 Stat. 314], as of a vessel fitted out for the commission of acts of piracy—the piracy referred to in that act being piracy under the laws of nations.

[In admiralty. Libel by the officers and crew of the United States vessel Cyane to recover one-half of the proceeds of the schooner Chapman.]

W. H. Sharp, U. S. Atty., and Alex. Campbell, for claimant.

B. S. Brooks and J. McHenry, for officers and crew.

HOFFMAN, District Judge. Late in the month of February, 1863, the revenue officers at this port were informed that certain persons in this city were engaged in fitting out the schooner Chapman as a privateer, to cruise under the flag of the Confederate States, against the commerce of the United States. A search for the schooner was at once instituted, and on ascertaining where she lay, detective officers were placed on watch, with instructions to report everything that took place on board of her either in the daytime or during the night. She shortly afterward commenced receiving cargo, amongst which were some very heavy cases, subsequently ascertained to contain guns.

On the fourteenth of March the vessel was cleared at the custom-house, and the authorities became satisfied that her preparations were completed and that she was about to sail. Fearing that she might attempt to get to sea at high tide in the evening, a steam-tug was chartered and placed, with fires banked, in an adjoining slip, ready to start at a moment's notice. On board of her were the collector, the naval officer and the surveyor, together with Mr. Lees, a detective officer, and a squad of policemen. No movement was made by the schooner during the night, but a large number of persons were observed to go on board of her and conceal themselves in the hold. About daylight, the crew of the schooner commenced loosening her fasts and hauling out beyond a vessel that lay near. She shortly afterward went further out into the stream, and began to hoist her jib and mainsail. About ten days previously, information of what was going on had been communicated by the revenue officers to Colonel Drum, adjutant-general of this department, and an order had been obtained from him, directing Captain Winder, commanding Fort Alcatraz, to receive and hold as prisoners any persons whom the revenue officers might bring to the island. There being no revenue cutter then on this station, Captain Shirly, of the United States ship Cyane, was also applied to by the collector and surveyor, and a written order to his executive officer was obtained, directing him to furnish two boats' crews of armed men at any hour of the day or night that they might be called for by the custom-house authorities. An arrangement was accordingly made between the officer of the deck of the Cyane and Messrs. Farwell and McLean, who visited him for that purpose on the night of the fourteenth, that if the vessel should drop out from the slip, and there should be no indications of the presence of the custom-house officers, the boats should be dispatched and the vessel seized.

The schooner having dropped out, as has been stated, and the steam-tug not having moved, the boats of the Cyane were manned and started for the schooner. These proceedings were observed from the tug; but at that moment a person appeared on the wharf and hailed the schooner, and the custom-house officers, being desirous of arresting all the persons concerned in the enterprise, delayed, for a short time, the steam-tug, in order to give an opportunity to this person to get on board. Not having heard the hail, the Cyane's boats continued their course, and arriving first at the schooner, boarded and took possession of her. About ten or fifteen minutes afterward, the tug, with the custom-house officers and police officers, came alongside. A search of the vessel and of the persons of the crew was immediately made, and the vessel was towed by the tug to Fort Alcatraz. These proceedings seem to have been conducted under the exclusive direction of the custom-house offi-

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

cials, who assumed entire control. The Cyane's boats returned to the ship, leaving, however, an officer and four men on board the Chapman. On reaching Alcatraz, the prisoners were landed and turned over to Captain Winder. The vessel was then unladen, and was subsequently towed up and anchored under the guns of the Cyane.

At the next term of the circuit court, indictments against the prisoners were found, and three of the principal offenders were tried, convicted and sentenced. The vessel was also libeled in the district court as forfeited to the United States, under the acts of August 5 and August 6, 1861. No claim was interposed, and she was condemned by default, sold, and her proceeds brought into the registry for distribution. At this stage of the proceeding, the commander of the Cyane, Paul Shirly, intervened, claiming for himself and his officers and men a share of the fund.

Without dwelling on the somewhat peculiar circumstances under which the seizure of the vessel was effected, or on the fact that no proceedings to condemn her or her cargo as a prize of war have been instituted, I proceed to consider the grounds on which the alleged captors base their claim to a moiety of the proceeds. These are: 1. That the vessel and cargo were enemies' property, and, therefore, good prize of war; and, 2. That the captors are entitled to a moiety of the proceeds under the provisions of section 1 of the act of August 5, 1861, entitled "An act supplementary to an act entitled an act to protect the commerce of the United States and to punish the crime of piracy."

1. Is the vessel and cargo to be considered enemies' property? It is not to be questioned, since the recent decisions of the supreme court, that a civil war, with all the consequences to the residents of the seceded states of a public territorial war, or a bellum inter gentes has existed in this country since the act of July, 1861 [12 Stat. 283], by which its existence was recognized. The minority of the judges dated its commencement from that time, as they deemed an act of congress essential, under the constitution, to create a state of war, and that until the legislature acted, the hostile proceedings were to be regarded as an insurrection, for which the guilty parties alone were to be held personally responsible. The majority of the judges held that civil war was a material fact which the court was bound to notice, and that the proclamations of blockade by the president were a recognition of a state of war as actually existing. But the court was unanimous in regarding the war as existing in a legal sense, with all the consequences of war, both as respects the belligerents and neutrals from the date of the act of congress referred to. In the exercise of the belligerent rights thus created, the United States have established blockades, exercised the right of search, authorized the capture and condemnation of neutrals carrying contraband or attempting to run the blockade, and declared liable to seizure and confiscation the property of the de facto residents of the so-called Confederate States as enemies' property, irrespective of the personal conduct or sentiments of the owners. The rules of war have also been applied to the conduct of military and naval operations—the prisoners captured have been held as prisoners of war, and a cartel has been agreed on providing for their exchange, and including those taken on regularly commissioned privateers, as well as in the land forces of the enemy.

But while thus yielding to the inexorable fact, and conceding the rights of belligerents to the insurgents, in this deplorable civil war, it cannot be pretended that they or their adherents have any other or further rights than those of belligerents in an international war or a bellum inter gentes. All persons who voluntarily reside within the dominions of a sovereign and accept the protection of his laws, owe to him an allegiance. If they conspire against his authority and levy war upon him, or give aid and comfort to his enemies, they are traitors, not enemies, and are punished, not jure belli, but by the exercise of the municipal right inherent in every sovereign within his own territory over those who receive his protection. The persons, therefore, who in this case, in a loyal state, and within the undisputed territory of the United States, set on foot a hostile enterprise, and engaged in the existing rebellion, were justly dealt with as traitors, not enemies, and the instruments intended to be used in the prosecution of their guilty design were properly libeled on the instance side of the court as forfeited to the United States for breach of its municipal laws. It is therefore clear that the claim of the petitioners, under the act of April 13, 1800, which gives to the captors a portion of the proceeds of all vessels and goods "which shall be adjudged good prize," is wholly inadmissible; for the Chapman and her cargo have not been so adjudged, nor could they have been, had a proceeding for that purpose been instituted.

2. But it is contended that the petitioners are entitled to a moiety of the proceeds under the first section of the act of August 5, 1861. That section provides, that "any vessel or boat which shall be built, purchased, fitted out in whole or in part, or held for the purpose of being employed in the commission of any piratical aggression, search, restraint, depredation, or seizure, or in the commission of any other act of piracy, as defined by the law of nations, shall be liable to be captured and brought into any port of the United States, if found upon the high seas, or to be seized if found in any port or place within the United States, whether the same shall have actually sailed upon any piratical expedition or not, and whether any act of

piracy shall have been committed upon or from such vessel or boat or not; and any such vessel or boat may be adjudged and condemned, if captured by a vessel authorized, as hereinafter mentioned, to the use of the United States, and to that of the captors; and if seized by a collector, surveyor, or marshal, to the use of the United States, after due process and trial in like manner as is provided in section four of the act to which this act is supplementary, which section is hereby made in all respects applicable to cases arising under this act."

The act of March 3, 1819 [3 Stat. 512], subjected to capture only those vessels or boats which should commit or attempt any piratical aggression, search, restraint, depredation or seizure, while the supplementary act of 1861 subjects to capture on the high seas, and to seizure in port, vessels built, purchased, fitted out, in whole or in part, or held for the purpose of being employed in the commission of any such piratical aggression, search, restraint, etc. It is plain that the piratical acts contemplated in both statutes are the same, the only difference between the acts being, that the earlier statute extends only to vessels which have committed or attempted them, while the later statute includes vessels intended to be employed in committing them. That the offenses thus referred to are such only as would be deemed piratical under the laws of nations, is, I think, evident from the language of both statutes.

The second section of the act of 1819, authorizes the capture of any vessel which shall have committed or attempted any piratical aggression upon any vessel of the United States, or the citizens thereof, or upon any other vessel. The authority here given is not merely over vessels of the United States, or over citizens of the United States, but it is extended over all vessels guilty of piratical aggressions upon vessels of the United States, or the citizens thereof, or upon any other vessel. It cannot be presumed that congress meant to direct the capture of a foreign vessel and crew, for an aggression on the high seas upon another foreign vessel, unless the aggression was piratical under the laws of nations—an offense of which any nation may take cognizance.

The third section, while it authorizes the commander and crew of any merchant vessel of the United States to resist any piratical aggression made upon her, and to retake any United States vessel which may have been unlawfully seized, expressly excepts seizures by public armed vessels of nations in amity with the United States, thus indicating that the seizures referred to are piratical seizures jure gentium, and not seizures by commissioned national vessels, however irregular or unlawful the latter may be.

The fifth section provides that "if any person or persons whosoever shall, on the high seas, commit the crime of piracy, as defined by the laws of nations," etc., every such offender shall, on conviction, be punished with death. The piracy here referred to is thus expressly declared to be piracy, "as defined by the laws of nations," and it is reasonable to suppose that it is the same crime as those referred to in the preceding sections for the commission, or attempt to commit which, vessels were made subject to capture, either by public or private vessels of the United States.

The act of 1861 describes the vessels which it makes liable to capture or seizure, as those which shall be built, purchased, fitted out, or held for the purpose of being employed in the commission of any piratical aggression, search, depredation, or seizure, or in the commission of any other act of piracy, as defined by the laws of nations. This act is expressly declared to be supplementary to the act of 1819, and the description of the piracy in the last clause of the section cited, when taken in connection with the language of the earlier statute, indicates that the aggressions, seizures, etc., referred to, were such only as under the laws of nations would be piratical. It is to be noted, also, that the vessels described are those built, fitted out, etc., for the purpose of being employed in the commission of any piratical aggression, etc. It is not necessary that they should have been fitted out by American citizens, or in American ports, nor that the intended aggression should be upon American vessels or citizens. In thus authorizing the capture on the high seas of all vessels, whether American or foreign, fitted out or held for the commission of piracy, congress must be presumed to have referred to vessels designing to commit crimes, of which, if consummated, the United States could have taken cognizance. This they clearly could not do of an act not amounting to piracy under the laws of nations, committed by foreigners, in a foreign vessel, on the high seas, in regard to another foreign vessel. It is probable, however, that the fitting out, etc., referred to is a fitting out within the United States, or of an American vessel; for it is not perceived, by what authority the United States can direct the capture, on the high seas, of a foreign vessel, which has been fitted out and held in a foreign port, for piratical purposes, unless she is, at the time of her capture, on a piratical cruise, and is a pirate under the laws of nations.

Construing, then, the act of 1861 to refer to aggressions, depredations, etc., which are piracies, as defined by the laws of nations, the inquiry arises, was the enterprise in which the Chapman was engaged of that character? It appeared in proofs that the parties who originated the plan were provided with a blank letter of marque, issued by the authorities of the so-called Confederate States. Their design was to sail from this port with guns, ammunition, etc., on

board their vessel, and a crew sufficient to man a privateer. They were first to proceed to the island of Guadalupe, where the guns, ammunition, and men were to be landed. The vessel was then to go to Mazatlan, for which port she had been cleared at the custom-house; and, having delivered her cargo, filled up her letter of marque, and transmitted a copy of her crew list, etc., to the rebel authorities, to return to Guadalupe, take her armament on board, hoist the Confederate flag, and proceed on her cruise against the vessels of the United States.

In the celebrated argument by Mr. (afterward Chief Justice) Marshall, in the Robbins Case [Case No. 11,878], it is said: "In truth, the right of every nation to punish, is limited in its nature to offenses against the nation inflicting the punishment. This principle is believed to be universally true. It comprehends every possible violation of its laws on its own territory, and it extends to violations committed elsewhere, by persons it has a right to bind. It extends, also, to general piracy. A pirate, under the laws of nations, is an enemy of the human race. Being the enemy of all, he is liable to be punished by all. Any act which denotes this universal hostility, is an act of piracy. Not only an actual robbery, therefore, but cruising on the high seas without commission, and with intent to rob, is piracy. This is an offense against every nation, and is, therefore, alike punishable by all. But an offense, which in its nature only affects a particular nation, is only punishable by that nation. It is by confounding general piracy with piracy by statute, that indistinct ideas have been produced, respecting the power to punish offenses committed on the high seas. A statute may make any offense piracy, committed within the jurisdiction of the nation passing the statute, and such offense will be punishable by that nation. But piracy, under the law of nations, which alone is punishable by all nations, can only consist in an act which is an offense against all. No particular nation can increase or diminish the list of offenses thus punishable."

In the case of U. S. v. The Malek Adhel [2 How. (43 U. S.) 210], a construction of the word "piratical," used in the act of 1819, and repeated in that of 1861, was given by the supreme court: "Where the act uses the word 'piratical,' it does so in a general sense, importing that the aggression is unauthorized by the laws of nations, hostile in its character, wanton and criminal in its commission, and utterly without any sanction from any public authority or sovereign power. In short, it means that the act belongs to the class of offenses which pirates are in the habit of perpetrating, whether they do it for purposes of plunder, or for purposes of hatred, revenge, or wanton abuse of power.

"A pirate is deemed, and properly deemed, hostis humani generis. But why is he so deemed? Because he commits hostilities upon the subjects and property of any or all nations, without any regard to right or duty, or any pretense of public authority. If he willfully sinks or destroys an innocent merchant-ship, without any other object than to gratify his lawless appetite for mischief, it is just as much a piratical aggression, in the sense of the law of nations and the act of congress, as if he did it solely and exclusively for the sake of plunder—lucri causa. The law looks to it as an act of hostility, and, being committed by a vessel not commissioned and engaged in lawful warfare, it treats it as the act of a pirate, and of one who is emphatically hostis humani generis." 2 How. [43 U. S.] 232.

In Palmer's Case, 3 Wheat. [16 U. S.] 610, it was held by the supreme court that the crime of robbery, committed by a person who is not a citizen of the United States, on the high seas, on board of a ship belonging exclusively to subjects of a foreign state, is not piracy under the act, and is not punishable in the courts of the United States. It was also held that when a civil war rages in a foreign nation, one part of which separates itself from the old established government, and erects itself into a distinct government, the courts of the United States must view such newly constituted government as it is viewed by the legislative and executive departments of the government of the United States. If that government remains neutral, but recognizes the existence of a civil war, the courts cannot consider as criminal those acts of hostility which war authorizes and which the new government may direct against its enemy.

In a subsequent case (U. S. v. Klintock, 5 Wheat. [18 U. S.] 152), it was held that robbery committed by any persons on board of a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever, is within the meaning of the act, and is punishable in the courts of the United States. "The general terms of the act," says Mr. Chief Justice Marshall, "ought not to be applied to offenses against the particular sovereignty of any foreign power, but we think they ought to be applied to offenses committed against all nations, including the United States, by persons who, by common consent, are equally amenable to the laws of all nations."

This distinction between piracies under the laws of nations, which are everywhere justiciable, and those offenses to which that term has been arbitrarily applied by the municipal codes of particular nations, and which are therefore only cognizable before the tribunals having jurisdiction either territorial, actual, or implied, or over the person of the offender, is recognized not only in numerous

cases, but by all writers on international law. See Lawr. Wheat. 247, in notis.

All agree that piracy, under the laws of nations, is the offense of depredating on the seas without authority or commission from any sovereign or belligerent state. It is the act of outlaws and rovers, in defiance of all law, and acknowledging no law whatever. A person, therefore, who commits hostilities under a commission from a party to a recognized civil war, is not guilty of piracy. He stands in the same position as if he held a commission from an established government, so far, at least, as regards all the world except the other party to the contest; nor will even any irregularity as to acts done jure belli, fix the character of a pirate upon him. "His acts may be unlawful; when measured by the laws of nations or treaty stipulations, the individuals concerned in them may be treated as trespassers, and the nation to which they belong may be held responsible; but the parties concerned are not guilty of piracy." Op. Mr. Butler, 3 Op. Atty. Gen. 121.

It is to be observed that this opinion was given in a case of capture, by a Texan armed and commissioned schooner, of a United States vessel engaged in supplying contraband goods to the army of Mexico, at a time when a state of civil war existed between Texas and Mexico, but before the independence of the former had been recognized by the United States. The principle thus laid down is in entire accordance with the claims and the concessions of the United States in similar cases—and with the practice of foreign nations. Thus, even before our own formal declaration of independence, France and Spain opened their ports to the North American colonists and treated them as an independent people. Their private as well as their public cruisers were not only admitted into the ports of those countries, but the same friendly disposition was manifested by all the other European powers except Portugal. Ann. Reg. 1776, p. 182.

In 1779 the states general refused to deliver up to England prizes brought into the Texel by Paul Jones; and for many years afterward compensation was persistently demanded from Denmark by the United States for three prizes carried by Paul Jones into a port of Norway, then under the government of Denmark, by whom they were delivered up to England. So, too, during the existence of the civil war between Spain and her colonies, and previous to the acknowledgment of the independence of the latter by the United States, the colonies were deemed by them belligerent nations, and entitled to all the sovereign rights of war against their enemy. U. S. v. Palmer, already cited; The Divina Pastora, 4 Wheat. [17 U. S.] 52; The Santissima Trinidad, 7 Wheat. [20 U. S.] 287.

During the Greek revolution the same course was pursued by England. To a complaint of the porte against allowing the Greeks belligerent rights, Mr. Canning replied that "the character of belligerency was not so much a principle as a fact; that a certain degree of force and consistency acquired by a mass of population engaged in war entitled that population to be treated as belligerents, and even if their title was questionable, rendered it the interest of all civilized nations so to treat them."

The same principles are emphatically recognized by the supreme court in the recent cases of The Hiawatha, Amy Warwick, etc., 2 Black [67 U. S.] 638. "War," says Mr. Justice Grier, delivering the opinion of the court, "has been well defined to be 'that state in which a nation prosecutes its right by force.' The parties belligerent in a war are independent nations. But it is not necessary to constitute war that both parties should be acknowledged as independent nations or sovereign states. A war may exist where one of the belligerents claims sovereign rights as against the other. * * * When the party in rebellion occupies and holds, in a hostile manner, a certain portion of territory, have declared their independence, have cast off their allegiance, have organized armies, have commenced hostilities against their former sovereign, the world acknowledges them as belligerents and the contest a war. * * * The laws of war as established among nations have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars. 'A civil war,' says Vattel, 'breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as constituting at least for a time, two separate bodies, two distinct societies. Having no common superior to judge between them, they stand in precisely the same predicament as two nations who engage in a contest and have recourse to arms. This being the case, it is very evident that the common laws of war—those maxims of humanity, moderation and honor—ought to be observed by both parties in every civil war. Should the sovereign conceive that he has a right to hang up his prisoners, the opposite party will make reprisals, etc., etc.; the war will become cruel and horrible, and every day more destructive to the nation.'" The court further observes: "It is not the less a civil war with belligerent parties in hostile array, because it may be called an 'insurrection' by one side, and the insurgents be considered as rebels and traitors. It is not necessary that the independence of the revolted province or state be

acknowledged in order to constitute it a party belligerent in war according to the laws of nations."

The same principles are also recognized in the dissenting opinion of Mr. Justice Nelson: "In the case of a rebellion or resistance by a portion of the people of a country against the established government, there is no doubt that, if in its progress and enlargement the government thus sought to be overthrown sees fit, it may by the competent power recognize and declare the existence of a state of civil war, which will draw after it all the consequences and rights of war between the contending parties, as in the case of a public war. Mr. Wheaton observes, speaking of civil war: 'But the general usage of nations regards such a war as entitling all the contending parties to all the rights of war as against each other, and even as respects neutrals.'"

In the case of the privateersmen of The Savannah, tried in New York under a charge of piracy [case unreported], it was observed by the presiding judge, that "if it were necessary on the part of the government to bring the crime charged in the present case against the prisoners within the definition of robbery and piracy as known to the common law of nations, there would be great difficulty in doing so; perhaps under the counts, certainly upon the evidence. For that shows, if anything, an intent to depredate upon the vessels and property of one nation only, the United States, which falls far short of the spirit and intent that are said to constitute essential elements of the crime." It has already been stated that the prosecutions for piracy against these and other privateersmen were subsequently dropped, and they were admitted to the rights of war, and included in the cartel for the exchange of prisoners.

From the foregoing it is, I think, evident that when a civil war exists, hostilities committed by vessels upon the high seas, under a commission or letter of marque from the insurrectionary government, against the sovereign or citizens of the government against which they have rebelled, are not, by the laws of nations, acts of piracy. A fortiori when the existence of a state of civil war has been recognized by the sovereign through the executive, legislative and judicial departments of his government, and when he has claimed and exercised the rights of war, not only against the insurgents, but in respect to neutrals, by establishing blockades, searching vessels, capturing contraband of war, and condemning jure belli property owned by persons domiciled within the revolted territory, as enemies' property.

It follows that the enterprise for which the schooner Chapman was fitted out was not piratical, within the meaning of that term as defined by the laws of nations. The crime committed by the persons concerned was treason; not merely treason in the sense in which it is committed by those who, within the limits and subject to the de facto authority of the so-called Confederate States government, adhere to the rebellion, but aggravated by the fact that it was committed by persons two of whom were citizens of this state, and the third a foreigner, but all of whom were residing within the undisputed territory of the United States, and receiving the protection of the laws of the Union. Their crime would none the less have been treason if the Confederate States had been a foreign and independent nation, with whom the United States was at war. But the projected enterprise was not, in my judgment, piratical, under the laws of nations, or within the meaning of the act of August 5, 1861.

It follows that the seizure and condemnation of the Chapman and her cargo could not properly have been made under that act, and that the petitioners are not entitled to a share of the proceeds as therein provided. The act by which the vessel was made liable, is the act of August 6, 1861, by which all property intended to be used in aiding, abetting or promoting the existing insurrection, etc., is made liable to seizure and condemnation. The third section provides that in case any person shall file an information with the district attorney, the proceedings shall be for the use of such informer and of the United States in equal parts. The claims of the informer in this case are recognized by the district attorney, and the contest has in effect been between the informer and the officers and crew of the Cyane, who claim half of the proceeds as prize.

For the reasons given above, I am of opinion that the latter are not entitled; but that the proceeds should be divided, after paying the seamen, between the United States and the informer, as directed in the act of August 6, 1861. A claim has been put in by the seamen shipped on board the schooner for their wages. There is no reason to suppose that these men had any knowledge of the guilty nature of the voyage. They were shipped as mariners, and had no connection with the persons placed on board and secreted in the hold of the vessel during the night preceding her departure, and who were to form the crew or fighting force of the privateer. The men were on board the vessel before her seizure. They were detained as prisoners on board the Cyane for a few days, and subsequently as witnesses. But for this latter detention they have been paid as provided by law. I think that they should be allowed one month's pay—to this I understand the United States make no objection.

Case No. 2,603.

CHAPMAN v. BARGER.

[4 Dill. 557.][1]

Circuit Court, D. Iowa. 1877.

REMOVAL—EJECTMENT — PETITION BY OCCUPYING CLAIMANT.

The statutes of Iowa allow an "occupying claimant," who is an unsuccessful defendant in an ejectment suit, the right to retain possession of the land after judgment against him, until the value of his improvements (if made under color of title and in good faith) are ascertained, provided he files his petition therefor after judgment against him, but before the plaintiff causes the same to be executed, which petition must be filed in the main action. After judgment for the plaintiff in the main action, the defendant, under the Iowa statutes, filed his petition in the suit as an "occupying claimant," to have the value of his improvements ascertained, etc.; whereupon the plaintiff in the main suit filed his petition, under the act of congress of March 3, 1875 [18 Stat. 471], for the removal of the cause to the circuit court of the United States: *Held*, not removable, being a mere dependence upon the original suit.

[Cited in Webber v. Humphreys, Case No. 17,326; Pratt v. Albright, 9 Fed. 637; Buford v. Strother, 10 Fed. 409; Filer v. Levy, 17 Fed. 613; Poole v. Thatcherdeft, 19 Fed. 51.]

This cause was removed to this court by the plaintiff in the main suit (Chapman), under the act of congress of March 3, 1875. The defendant (the "occupying claimant") moves to remand it to the state court.

Mr. Hawley, for plaintiff.

Duncombe & Springer, for defendant.

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

DILLON, Circuit Judge. Action of ejectment in state court, and judgment for the plaintiff. Under the Iowa statute relating to occupying claimants, the defendant filed his petition to be allowed for his improvements, in that suit, after judgment in favor of the plaintiff. After the petition of the occupying claimant for improvements was thus filed, the plaintiff in the main action filed his petition for removal of the cause under the act of March 3, 1875. We hold that the petition of the occupying claimant cannot be removed, as it is, under the Iowa statute, and decisions of the supreme court of the state, essentially part of and ancillary to the main suit. The main suit is at an end, and a judgment has been rendered therein in the state court. That judgment must remain in the state court. It cannot be brought here. The petition of the occupying claimant (whose rights are wholly statutory) is a dependence of the main suit, and cannot be separately removed. Under the legislation of Iowa in respect of occupying claimants, as construed by the state supreme court, and in view of the relief to which each party is entitled, it is apparent that the rights of the parties must be adjudicated in one and the same court. Case remanded.

NOTE. The same question subsequently came before Mr. Justice Miller, and was ruled in the same way. The construction of the Iowa "occupying claimant" statute: Litchfield v. Johnson [Case No. 8,387]; Wells v. Riley [Id. 17,404].

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

CHAPMAN (BUTTS v.). See Case No. 2,257.

CHAPMAN (CRUMP v.). See Case No. 3,455.

CHAPMAN (ELLICOTT v.). See Case No. 4,385.

CHAPMAN v. The EMPIRE STATE. See Cases Nos. 4,473–4,475.

Case No. 2,604.

CHAPMAN v. FENWICK.

[4 Cranch, C. C. 431.][1]

Circuit Court, District of Columbia. March Term, 1834.[2]

MANUMISSION OF SLAVES — PREJUDICE OF CREDITORS—CHARGING DEBTS ON REALTY.

1. A testatrix charged her lands, as well as her personal assets, with the payment of her debts and legacies, and by her will manumitted certain of her slaves, to take effect at her death. The personal assets were not sufficient, without the slaves, but with the real estate were more than sufficient, to pay the debts. *Held*, that such manumission was not in prejudice of the creditors, and that the slaves were entitled to their freedom.

[See note at end of case.]

2. If the manumission is to be considered as a specific legacy, the assent of the executor was given by suffering the negroes to go at large as free for a period of eight years after the death of the testatrix.

3. If there be a fund for the payment of debts and pecuniary legacies, the executor may be compelled to assent to a specific legacy.

4. A specific legacy shall not abate or contribute, if there be enough without it.

5. A devise of real estate, "after payment of the debts," is a charge of the debts upon the real estate.

6. An assent to a legacy cannot be revoked.

7. Emancipation by will stands on stronger ground than a specific legacy, and does not need the assent of the executor.

8. The burden of proof lies on the creditors to show that an emancipation by will is "in their prejudice."

This was a petition for freedom [by two negroes, Eliza and Kitty Chapman] under the will of Mrs. Frances Edelin, and the act of Maryland of 1796 (chapter 67, § 13).

Mr. Key, for petitioners, cited two cases decided by this court, namely, Thompson v. Clarke, June, 1817 [Case No. 13,951], and Fidelio v. Dermott, June, 1807 [Id. 4,754]; Gains-

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

[2] [Affirmed in Fenwick v. Chapman, 9 Pet. (34 U. S.) 461.]

borough v. Gainsborough, 2 Vern. 252; 2 Fonb. 291.

W. L. Brent, for respondent [Robert Fenwick], cited and relied upon the case of George v. Corse's Adm'r, 2 Har. & G. 1.

CRANCH, Chief Judge (THRUSTON, Circuit Judge, absent). Mrs. Frances Edelin, the then owner of the petitioners, on the 2d of November, 1825, made her will, in which she says, "After my debts and funeral charges are paid, I devise and bequeath as follows: I give and bequeath to my nephew John B. Edelin the store-house and lot," &c. (describing it). She then goes on to make sundry other devises of real estate, the last of which is to her nephew Richard James Edelin, of a small house and lot, "with the proviso that the negroes which are hereinafter mentioned to be free to live in the back room of the said house." She then bequeaths to the same nephew a mulatto man named Henry, and to her nephew John B. Edelin, she gives a negro boy named John; to her brother George, a black man named Bill; and to her niece Eliza Queen, a negro girl named Harriett, and a locket and ring. Then follows this clause: "Item, negro woman Letty, her daughter Kitty, a mulatto, with her three children, to wit, Eliza, Robert, and Kitty Jane, with future increase, and an old woman named Lucy, I do hereby declare them free at and after my death; and they shall have the right to live in and occupy the back-room in the house and lot I have given and bequeathed to my nephew, Richard James Edelin. To the two older negro women I give them and bequeath ten dollars a year to each of them as long as they live; and ten dollars a year, during two years after my death, exclusive of the year in which I die, to mulatto Kitty." She then charges the land, devised to her nephews, with annuities of ten dollars to each of the negroes, Lucy, Letty and Kitty. Exclusive of the specific devises and bequests, her estate was insufficient to pay the testatrix's debts; and it is admitted that the personal estate alone, exclusive of the value of the petitioners, was also insufficient without the aid of the real; but that the real and personal estate, exclusive of the value of the petitioners, was sufficient. From the death of the testatrix, in November or December, 1825, until July, 1833, the petitioners have been suffered by the executor to go at large, and act as free. On the 16th of July, 1833, upon the ex parte petition of the executor, stating that the testatrix, by her will, directed that certain of the negroes contained in the inventory, should be free, after her death; that he has since discovered that there will not be assets enough to discharge her debts, and praying that the negroes may be sold; the orphans' court ordered the executor "to sell all the personal estate." By the executor's account, settled with the orphans' court on the same 16th of July, 1833, in which he is charged with these negroes, valued at $805, the balance against him appeared to be $745.90, which, by a subsequent account rendered on the 12th of November, 1833, he appears to have accounted for to the satisfaction of the orphans' court; so that, if the petitioners obtain their freedom, he will have overpaid the sum of $752.27. But the executor had, between July and November, 1833, sold the petitioners to the defendant, Robert Fenwick, so that, if the petitioners obtain their freedom, the executor will have to refund the purchase money to the defendant, and look to the real estate.

The question for the decision of the court is whether, under these circumstances, the manumitting clause of the will be, or be not, "in prejudice of creditors?" By the act of Maryland of 1796 (chapter 67, § 13), it is enacted, "That it shall be lawful for any person or persons competent, in law, to make a valid will, to grant freedom to, and effect the manumission of, any slave or slaves belonging to such person or persons, by his or their last will; and such manumission may be made to take effect at the death of the testator, or at such other periods as may be limited in such will; but no manumission, hereafter to be made by will, shall be effectual to give freedom to any slave or slaves, if the same shall be in prejudice of creditors." If the manumission is to be considered as a legacy, the the assent of the executor is necessary to perfect the title of the petitioners. For, as the executor is liable for the debts of his testator, to the full extent of the assets, and, as the debts must be paid before legacies, unless the assets are sufficient for both, it is necessary, for his own protection, that he should have the power of withholding the legacies until it is ascertained that the residue of the assets will be sufficient to pay all debts. "But, if there is a fund to pay the debts, and the executor then refuses his assent to a legacy, he may be compelled to give it, either by the spiritual court" (in England), "or by a court of equity." March, 96; Jac. Law Dict. tit. "Legacy." In case of deficiency of assets, however, all the general legacies must abate, proportionably, in order to pay the debts; but a specific legacy is not to abate at all, or allow anything, by way of abatement, unless there be not sufficient without it. Webb v. Webb, 2 Vern. 111. If a manumission by will be a legacy, it is a specific legacy; for it can admit of no satisfaction but the thing itself.

A testator has a right to dispose of all his personal estate in specific legacies, and charge his lands with the payment of his debts. The creditors have no right to anything but payment of their debts. It is wholly unimportant to them out of which fund they are paid; and they have no right to compel the executor to sell the property specifically bequeathed, if the fund provided by the will be sufficient. Their remedy at law is against the executor, to charge him

de bonis testatoris, in the first instance. It is true the executor could not plead plene administravit in consequence of delivering to the legatees their respective legacies; but he might raise the money out of the lands, and pay the debts; and it would be his duty to do so; for the will is his law, and he is bound to execute it according to the intention of the testator. And when lands, devised to an executor, for payment of debts, are sold by the executor, the money in his hands will be assets at law. Hawker v. Buckland, 2 Vern. 106; Greaves v. Powell, Id. 248; Anon., Id. 405. It seems to us clear, that, by this will, the testatrix has charged her real estate, as well as her personal, with the payment of her debts. She commences her will, thus: "After my debts and funeral charges are paid, I devise and bequeath as follows: I give and bequeath to my nephew, John B. Edelin, the store-house and lot," &c.; and this devise is followed by other devises of real estate to other nephews, and, among others, to Richard James Edelin; and she makes those two nephews her executors, together with John Brown. These devises were to take place only after her debts and funeral charges should be paid; and she makes two of her devisees her executors. The word "devise" is exclusively applicable to real estate. In the case of Trott v. Vernon, 2 Vern. 708, the lord chancellor says: "It is but natural to suppose that all persons would provide for the payment of their just debts; and, directing them to be paid in the first place, imports, that, before any devise by his will should take place, his debts, etc., should be paid;" and he seemed to lay some stress upon the word "devise," and decreed the real estate to be liable to the payment of the debts. See, also, Beachcroft v. Beachcroft, Id. 690. When the real and the personal estate are both liable to the payment of the debts, it is entirely immaterial to the creditors whether either of them be or be not insufficient, by itself, if both together are sufficient; and, in such case, the bequest of a specific legacy cannot be said to be in prejudice of creditors. A will must be so construed and so executed as to carry into effect the whole intention of the testator. Here it was as clearly the intention of the testator that the petitioners should have their freedom, as that the debts should be paid.

If emancipation by will is to be considered as a specific legacy, to which the assent of the executor is necessary, that assent was given when the petitioners were permitted by him to go at large and act as if they were free; which they did, from the death of the testatrix, in 1825, to the year 1833. Much slighter circumstances than this have been considered sufficient evidence of the assent of an executor to a legacy. Went. Off. Ex'r, 225, says, "There may be an assent implied as well as express; for if, in the devise or bequest, the legatee be appointed to do some act, as in respect of the legacy, and the executor doth accept the performance thereof, this amounteth to an assent." "So, if a horse be bequeathed, and one, offering to buy him of the executor himself, he directeth him to go and buy the horse of the legatee; or if the executor himself offer money to the legatee, for the horse, this implieth an assent that it should be the legatee's by the will." And in Bac. Abr. "Legacy," L, it is said that "any expression or act done by the executor which shows his concurrence or agreement, to the thing demised, will amount to an assent." Godol. 148; Plowd. 525; 1 Vern. 90; Id. 460; 2 Vern. 358. And Wentworth, in pages 226 and 227, says: "If the executor do once declare his assent that the legatee shall have his legacy, he may then enter into it, or take it, notwithstanding the executor's countermand or revocation of his assent after." And in Bac. Abr. it is said that, "as an assent is but a perfecting act, the executor cannot, after he has once given it, revoke the same; neither can it be given on condition, or on any limitation or restriction whatsoever. March, 136; Cro. Jac. 614, 615; 2 Vent. 360; 1 Leon. 130, 131." And in Burnley v. Lambert, 1 Wash. [Va.] 312, the court of appeals of Virginia say: "After the assent of the executor, the legal property is completely vested in the legatee, and cannot, at law, be divested by the creditors." If the emancipation be a specific legacy, and if the assent of the executor has not been given, inasmuch as the real and personal estate are both equally charged by this will, and as that fund is admitted to be sufficient without the value of the petitioners, he may be compelled to assent. But emancipation stands on stronger ground than a specific legacy. The assent of the executor is not necessary to the perfection of the title. By the general provision of the 13th section of the Maryland act of 1796 (chapter 67), the manumission is complete and perfected; but liable to be defeated if it be "in prejudice of creditors;" a fact which is to be proved by the party denying the validity of the manumission. There is, in this respect, a marked distinction between the language used in the act of 1752, and that used in the act of 1796. The language of the fifth section of the former act is, "that any deed or writing whereby freedom shall be given," &c., "shall be good," &c., "so that such deed or writing be not in prejudice of creditors." The words, "so that," are here equivalent to "if;" and the construction would be the same as if the language had been "any writing," &c., shall be good, if it shall not be "in prejudice of creditors," and then the party claiming title to freedom would be obliged to show that the writing was not in prejudice of creditors. But the language of the act of 1796, after expressly repealing the act of 1752, is, "it shall be lawful for any person capable in law to make a valid will to grant freedom to, and

effect the manumission of, any slave, &c., by his last will;" "but no manumission, hereafter to be made by will, shall be effectual to give freedom to any slave or slaves if the same be in prejudice of creditors." Here the same rule of construction, which, under the act of 1752, would require the party claiming freedom under a writing, to show that the manumission would not be in prejudice of creditors, requires of the party denying the efficacy of the manumission, under the act of 1796, to show that the manumission is in prejudice of creditors. The words, "so that," in the act of 1752, and the word, "if," in that of 1796, create a condition. Under the first, the manumission itself is conditional; under the second, the inefficacy of the manumission is conditional. Hence, the burden of proof, under the former act, was upon the claimant of freedom; under the latter, it was upon the other side. It is not, however, material, in the present cause, on which party the burden of proof lies; for the fact is admitted, that the real and personal estate are sufficient, without the value of the petitioners, to pay all the debts, so that the manumission cannot be in prejudice of creditors.

But here we are met by the judgment of the court of appeals in Maryland, in the case of George v. Corse's Adm'r, 2 Har. & G. 1, in which it was decided by three of the judges that in a suit by negroes against the executor of the will of a testator who manumitted the negroes by his will, and expressly directed his real estate to be sold by his executor for the payment of his debts, if the personal estate, exclusive of the negroes, should be insufficient to pay all his debt, the question could not be decided whether the manumission was in prejudice; because the executor was not competent to admit the fact, that the real and personal estate, exclusive of the negroes, was sufficient to pay all the debts; and the reason, given by one of the judges, is, that "it would be an issue to which the creditors are no party, and to protect whose interest nobody appears." That, "as far as relates to the personalty, the executor is competent to act for all who are concerned; but in trying the facts whether there be assets by descent in the hands of the heir, and what is the amount thereof, he has no interest, either personally or in right of representation. Virtute officii he is neither bound to acquire, nor presumed to possess, any knowledge upon the subject. With the title he is unacquainted; with the value of the land, equally uninformed." In this opinion we are unable to concur. When lands are devised to the executor to be sold for the payment of debts, or when the lands are charged with the payment of the debts, and a power is given to the executor to sell them, the lands are as much a fund in his hands for that purpose, as the goods and chattels; and he represents the creditors, in regard to the lands, so far as their interests are concerned, as much as he does in regard to the personal estate; and the creditors are as much a party to the issue in respect of the lands, as they are in respect of the goods and chattels. When he is charged with the sale of his testator's lands, for the payment of debts, he is as much bound to inquire in regard to the lands as he is in regard to the personal estate; for it is his duty to execute the whole of his testator's will; and in such a case the creditors have as good a right to look to the land, through him, for the payment of their debts, as they have to look to the goods and chattels through him. If under such a will, the sufficiency of the real estate for the payment of the debts cannot be tried in a suit against the executor, and if the negroes are bound to show that the manumission is not in prejudice of creditors, how can they obtain their freedom? Their only remedy is by petition, in a court of law, against the person who claims them as slaves. Neither the heirs nor the creditors can be made parties; for neither of them claims title to the petitioners; and if the executor does not represent the creditors, are they represented by the vendee of the executor? and will his admission of the sufficiency of the real estate be more prejudicial to the creditors than that of the executor?

If every manumission, by will, is taken to be prima facie in prejudice of creditors, and if the burden of proof be on the petitioners, nothing seems to us more clear than that it is competent to them to show, either that there are no creditors to be prejudiced; or that, if there be creditors, they cannot be prejudiced; whoever may be the person claiming to hold them under the testator. It would be strange indeed, if, in a suit against the only person claiming title to them, and the only person against whom they can maintain a suit to vindicate their right, they should be forbidden to give evidence of the fact which it is contended they are bound to show before their title can be complete. Can it be said, that they are to wait until some creditor shall have obtained judgment against the executor de bonis testatoris, and have seized the petitioners as a part of those goods? This would put it in the power of the executor to postpone, indefinitely, the enjoyment of their right, in case the fund provided by the testator for the payment of the debts should be sufficient. It would, however, probably, be admitted by the judges of the court of appeals in Maryland, who decided the case of George v. Corse's Adm'r, that in such a suit it is competent for the petitioners to show that there was a sufficiency of personal estate, but not of the real, although the fund provided by the testator for the payment of the debts should be the proceeds of sales of real estate to be made by the executor for that purpose. But, for the reasons before stated, we think there is no difference, in this respect, between the

right of the executor in such a case, and in such a suit, to represent the creditors, in regard to the real estate, and his right to represent them in regard to the personal estate.

Upon the whole, therefore, we are of opinion, that in the present case the testatrix, by her will, bound her real estate, as well as her personal, for the payment of her debts, and that, as it is admitted by the defendant, who is the vendee of the executor, that the real and personal estate of the testatrix, exclusive of the petitioners, was, at her death, sufficient to pay all her debts, the manumission of the petitioners, by the will, was not in prejudice of her creditors, and that the judgment, upon the case stated, must be rendered for the petitioners.

[NOTE. Respondent brought error, and the supreme court affirmed the judgment of the circuit court upon the grounds, as set forth in the opinion delivered by Mr. Justice Wayne, to wit: That the evident intention of the testatrix, as gathered from the will, was to manumit the slaves, as far as she had power by the Maryland law so to do; that such manumission was not in prejudice of creditors, within the Maryland statutes; that by the words of the will the debts became a charge upon the real estate after exhaustion of the personalty; that, the executor having permitted the slaves to go at large, his assent could not be recalled, nor could it be revoked under an order of the orphans' court for the sale of the testatrix's personal estate; and that it appearing that testatrix left sufficient real estate to pay all debts, without the sale of the manumitted slaves, they were entitled to their freedom, although there was a deficiency of personalty. Fenwick v. Chapman, 9 Pet. (34 U. S.) 461.]

CHAPMAN (JAYCOX v.). See Case No. 7,243.

CHAPMAN (JOHNSON v.). See Case No. 7,378.

Case No. 2,605.

CHAPMAN v. The LUCERNE.

[39 Hunt, Mer. Mag. 332.]

District Court, S. D. New York. 1858.

PILOTAGE.

[An abandoned bark towed from Norfolk to New York is not liable for the fees of a pilot who does not board her, nor exercise control or direction of her navigation.]

In admiralty.

Before BETTS, District Judge.

This suit was brought [by Daniel C. Chapman against the bark Lucerne] to recover the sum of $30.50, alleged to be due the libelant as pilotage. The bark, on a voyage from the coast of Africa to this port, put into Norfolk in distress, and was there abandoned by her owner to the underwriters. By their direction a steam-tug was sent from here to her, with a pilot and four seamen, to tow her to New York, the owner having no privity with that proceeding. The pilot who went did not go on board the bark at all, but remained on board the tug, which towed the bark to this port, and for those services he brings this suit.

HELD BY THE COURT. That the bark being unnavigable and brought home solely by the power of the tug, was not in a condition bringing her within the provisions of the state statute under which the libelant claims. Laws 1857, c. 243, § 29. That the libelant, on the facts, was employed by the underwriters, and not by the owner or master of the bark; and that he performed no service to her, but remained on board the tug. Though told by the master of the tug off Barnegat to take charge of the bark, his charge only consisted in remaining on board the tug without having any control or direction of her navigation, and the libelant could not exercise in behalf of the bark, being towed as an inert body, his functions as pilot, nor even attempt to undertake them. That the libelant, upon the facts and law of the case, fails to establish any right of action against the bark. Libel dismissed with costs.

CHAPMAN (PETTERSON v.). See Case No. 11,042.

CHAPMAN (READ v.). See Case No. 11,605.

Case No. 2,606.

CHAPMAN v. REPUBLIC LIFE INS. CO.

[6 Biss. 238;[1] 4 Ins. Law J. 511; 7 Chi. Leg. News, 186; 5 Bigelow, Ins. Cas. 110.]

Circuit Court, N. D. Illinois. Nov., 1874.

INSURANCE—SUICIDE—INSANITY—"ACT"—"INTENTION."

1. It is competent for an insurance company to restrict its liability by a clause avoiding liability "in case of the death of the insured by his or her own act or intention, whether sane or insane," and in such case no degree of insanity will avoid the condition.

2. The words "act" and "intention" mean the same as the word "act" alone, for act implies intention.

This was an action at law [by Emeline L. Chapman] upon a policy of insurance issued by the defendant [the Republic Life Insurance Company], dated on the 23d day of July, 1873, whereby said company insured the life of Dennie Chapman in the sum of twenty-five hundred dollars, for the use and benefit of his wife, the plaintiff. The declaration was in the usual form, and alleged that the said Dennie Chapman, after the issue of the said policy of insurance, and while the same remained in force, to wit, on the sixteenth day of September, in the year 1873, died, and that due notice and proofs of death were furnished to the defendant, as required by said policy; and that the defendant, notwithstanding its said obligation and undertaking to pay said sum in the event

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

of the death of the said Dennie Chapman, had refused and did still refuse so to do. To this declaration the defendant pleaded among other pleas, that the said policy of insurance contained the following provision: "In case of the death of the said insured, by his or her own act or intention, whether sane or insane, or of death in consequence of the violation of law * * * then and in such case it is stipulated by all the parties in interest that the company shall not be liable for the sum insured," and averred that the death of said Dennie Chapman, mentioned in the said declaration, was caused by his own act and intention; that said death was caused and produced by a pistol-shot fired by the said Chapman into the head and face of him, the said Chapman, with the intention and for the purpose of then and there causing his own death. To this plea the plaintiff replied in substance, that at the time when the said Dennie Chapman came to his death, as stated in the said plea, he was mentally insane, and in consequence and by reason of such mental insanity, was wholly incapable of exercising any intention in reference to the act which caused his death, and that said deed was wholly the result of his mental insanity, and that he was impelled thereto without any volition of his own by an insane impulse which his mental and physical faculties were unable to resist, and that from his mental insanity he was wholly unable to comprehend the natural character, effect and consequence, of the act which resulted in his death.

To this replication the plaintiff demurred [raising thereby a question of law as to the effect to be given to the portion of the policy set out in the plea].[2]

Clarkson & Van Schaack, for plaintiff.

Bennett, Kretzinger & Veeder, for defendant.

BLODGETT, District Judge. It was contended on the part of the plaintiff that this case differed essentially from that of Bigelow v. Berkshire County Life Ins. Co. [unreported], decided by this court in favor of the defendant several months since, in this: That the policy in that case provided that "if the assured should die by his own act, sane or insane," the policy should become void, while in this policy the provision is "in case of the death of the insured by his or her own act and intention, whether sane or insane," the policy shall become inoperative. And much stress is laid by the plaintiff upon the interpolation of the word "intention" into this policy, which was not in the policy in the Bigelow Case.

To my mind, the use of the word "intention" in the policy before us, does not essentially vary or strengthen the legal meaning of the sentence from that of the policy in the Bigelow Case. The word "act" necessarily implies intention, and it seems to me the policy in this case differs in no material import from the one already decided by this court; that is to say, you get just as strong a sentence, and it means practically just as much, to say that the company shall not be liable if the assured comes to his death by his own act, sane or insane, as if you say the company shall not be liable if the assured comes to his death by his own act and intention, sane or insane. The real question in this case is, what was the clause in question intended to protect the insurance company against, and was it lawful for it to so attempt to protect itself?

The supreme court of the United States, in Life Ins. Co. v. Terry, 15 Wall. [82 U. S.] 580, had construed the clause in a policy of life insurance, providing that the company should not be liable if the assured should die by his own hand, to mean, in effect, that if the insured being in the possession of his ordinary reasoning faculties, should from anger, pride, jealousy, or a desire to escape the ills of life, intentionally take his own life, there would be no liability; but, when the reasoning faculties of the assured were so far impaired that he was not able to comprehend the moral character, the general nature, consequences and effect of the act he was about to commit, or when he was impelled thereto by an insane impulse which he had not the power to resist, such death was not within the clause, and the insurer was liable. Evidently with a view to guard itself against the effect of this decision, the defendant has resorted to the clause in question, avoiding its liability in cases of death by the hand of the assured, in cases where the suicide was committed while the insured was insane, as well as sane.

I have no doubt of the right of an insurance company to thus protect itself against liability. Certainly it is competent for an insurance company to say that it will not hold itself responsible for the acts of the insured when in a state of insanity; and the real question is, can the court, with such a contract as this before us, attempt to measure the degree of insanity?

It is agreed by this contract, that the defendant shall not be liable for the death of the assured, by his own act, when insane. The plaintiff, by his replication, admits that the assured came to his death by his own act when in a state of insanity, but claims that because the insanity was so extreme and complete as to entirely overthrow the moral and mental faculties, therefore the defendant remains liable. Will the court attempt to measure the degree of insanity under which the assured was laboring at the time he took his own life? It seems to me not. It is enough for the purposes of relieving the defendant from liability on this contract, that the assured took his own life as is admitted by the pleadings. The degree of insanity makes no difference.

[2] [From 7 Chi. Leg. News, 186.]

There are but few adjudged cases bearing directly upon this question, the cause in this form being comparatively new. The one nearest in point is the case of Pierce v. Travelers' Ins. Co., 34 Wis. 389, where the language of the condition was that the company should not be liable if the assured died by a suicide, felonious or otherwise, sane or insane, and the court hold that the intention manifested by the words of the policy was so plain as to seem incapable of further explanation, and unless there was something in the policy of the law that forbids such a stipulation, the court had nothing to do but to give effect to the contract.

As the court in that case found nothing in the policy of the law forbidding such a stipulation, and as nothing is seen in this case or has been suggested, making it incompetent for the defendant to protect itself against the insane act of persons holding its policies, we think effect must be given to the condition, and the replication must be held to be bad. Demurrer sustained.

NOTE. To the same effect see Knickerbocker Life Ins. Co. v. Peters [42 Md. 414]. Where the provision in a policy was that it should be void "in case he (the insured) should die by his own hand, sane or insane," it was held that the words, "death by his own hand" had reference to the criminal self-destruction, and that the words "sane or insane" could have no further effect than to hold the policy void if the assured intended self-destruction while in a state of insanity, and not in case of death by accident. De Gogorza v. Knickerbocker Life Ins. Co. [65 N. Y. 232]. See, also, Bliss on Life Insurance, p. 393.

Case No. 2,607.

CHAPMAN v. SCHOOL DISTRICT et al.

[Deady, 108.] [1]

Circuit Court, D. Oregon. Jan. 9, 1865.

EQUITY PLEADING—EXCEPTIONS TO ANSWER—IMPERTINENCE—MATTER IN ABATEMENT—TOWN SITE LAW OF 1844—ENTRY UNDER—DONATION ACT OF 1850—EFFECT—RIGHTS OF SETTLER—PATENT AS EVIDENCE OF COMPLIANCE WITH ACT.

1. Exceptions to an answer in equity for impertinence are only allowed where it is apparent that the matter excepted to, is not material or relevant, or is stated with needless prolixity.

2. An allegation in an answer, however evasive or insufficient, which is responsive to the bill, is not liable to exception for impertinence.

3. The act of May 23, 1844 (5 Stat. 657), commonly called the "Town Site Law" was not in force in Oregon prior to the passage of the act of July 17, 1854 (10 Stat. 305), and an entry and patent in pursuance of it, to land settled upon prior to that time under the donation act of September 27, 1850 (9 Stat. 496), is simply void.

4. The donation act was the first law of congress affecting the public lands in Oregon, and it is a grant in the present and gives the fee simple to the donee thereunder from the date of his settlement; but, until the complete performance of the conditions subsequent to such settlement, the estate granted is a base or conditional fee and liable to be defeated and revert to the donor by a failure to perform such conditions.

[Cited in Fields v. Squires, Case No. 4,776; Lamb v. Davenport, Id. 8,015; Bear v. Luse, Id. 1,179; Sanger v. Sargent, Id. 12,319. Followed in Fitzpatrick v. Dubois, Id. 4,842.]

5. A defendant in a suit in equity cannot by means of his answer, obtain any relief concerning the subject matter of the suit, and a prayer therefor in such answer is impertinent.

6. Matter in abatement of a suit in equity cannot be alleged by way of answer, but must be set up in a plea.

[Cited in Dowell v. Cardwell, Case No. 4,039.]

7. The right of the settler under the donation act to the land claimed by him, ultimately depends upon the settlement and the performance of the subsequent conditions of residence, cultivation, and proof.

[Cited in Wythe v. Haskell, Case No. 18,118.]

8. The patent to the settler is conclusive evidence of the performance of such conditions in a court of law and primary in a court of equity; but such patent cannot limit or restrain the estate granted by the act, which vests in the donor independently of and prior to the issuing thereof.

9. An exception for impertinence must be allowed in whole or not at all.

William W. Page, for complainant.

Joseph N. Dolph, for city of Portland.

Lansing Stout, for school district No. 1.

DEADY, District Judge. This is a suit in equity to quiet title to real property, and was commenced October 22, 1864. The complainant alleges for cause of suit against these defendants, that he is seised in fee simple of the undivided one fourth part of lot 3, in block 29 of the town of Portland, in the district of Oregon—the defendant Stark being seised in fee simple of the other three fourths of said lot. That the defendants—school district No. 1, and the city of Portland—wrongfully claim and pretend to have an interest or estate in the premises, adverse to the complainant and the defendant Stark, and that such claim impairs the value of the plaintiff's estate in the premises, in the market, and prays a decree of the court to quiet his title, etc. The defendants—school district No. 1 and the city of Portland—were duly served with process, and appeared and answered the bill—the latter on December 5, 1864. The defendant Stark has not been served or appeared in the suit. To the answer of the city of Portland, the complainant excepts for impertinence. The exceptions are eleven in number and include all the answer, except so much of it as is in direct response to the allegations of the bill, and also the Exhibits A, B, C and D. Exceptions for impertinence are only allowed when it is apparent that the matter excepted to is not material or relevant, or is stated with needless prolixity. If it may be material, the exception will not be allowed, as that would

[1] [Reported by Hon. Matthew P. Deady, District Judge.]

leave the defendant without remedy, but the allegations excepted to, will be allowed to remain in the answer, and the effect thereof, if found to be true, determined on the final hearing.

The first exception is taken to that portion of the answer which alleges the occupancy of the Portland land claim, including the premises in dispute, by Daniel H. Lownsdale and Stephen Coffin, on and prior to November 26, 1849, and until about December 13, 1849, when W. W. Chapman was admitted into the possession, jointly with said Lownsdale and Coffin; and that during the period of their possession these occupants laid off and sold blocks and lots upon said land claim, with the avowed intention of obtaining title from the United States, and making to the purchasers of such blocks and lots sufficient deeds therefor. This allegation standing by itself would be clearly impertinent, as it nowhere appears by the answer that either Lownsdale, Coffin or Chapman, ever had or now have any legal or equitable interest in the premises. They had the bare, naked possession before the passage of the donation law, but subsequently parted with it, before the passage of that act. But this allegation is proper matter of inducement to the matter contained in the two following exceptions, and will depend upon the disposition made of them.

The second exception is taken to that portion of the answer which alleges the execution of a bond for a deed to the premises in controversy, by Lownsdale and Coffin, on November 26, 1849, to the citizens of Portland, or some association thereof, to be thereafter organized; that the conditions of the bond have been performed by such citizens, and that they have ever since remained in possession thereof. Standing alone, the matter contained in this exception would be impertinent, for the reasons applicable to the first exception—the want of interest in the premises by either of the obligors in the bond, Lownsdale and Coffin. But this is also proper matter of inducement to what follows in the next exception, and may be passed over until that is considered.

The third exception is taken to that portion of the answer which alleges, that Daniel H. Lownsdale being in San Francisco, on the first of March, 1850, there entered into an agreement with the defendant Benjamin Stark, by which he released to said Stark the possession of a portion of said Portland land claim, including the premises in controversy, which agreement was ratified by the co-occupants of Lownsdale, namely, Coffin and Chapman, on April 13, 1850, and that the defendant Stark by the terms of said agreement and for a valuable consideration, bound himself to ratify and confirm all sales and conveyances of blocks and lots, including by name and special description the premises in controversy, in the part of said claim to him released, and made prior to the date thereof; and that said Stark subsequently occupied said land with the avowed intention of obtaining title from the United States, and ratifying and confirming the prior sales therein, as in said agreement specified, and that during this time and up to the time Stark obtained a patent from the United States for such land, the citizens of Portland were in the possession of the premises in controversy and made valuable improvements thereon, with the assent of said Stark. This exception is not allowed, and therefore neither the first nor the second ones. Several important questions arise upon the allegations, which will be reserved for the final hearing, and determined by the final decree. This ruling only goes so far as to decide that I do not deem this matter clearly immaterial or irrelevant.

The fourth exception is taken to that portion of the answer which alleges that Stark claims to be the owner in fee of an undivided three fourths of the lot in question, by virtue of a patent to him from the United States, dated December 8, 1860, and that the complainant claims by virtue of some conveyance from Stark. This exception will be disallowed. I do not think the matter immaterial. It is some kind of an admission or statement of the right of the complainant and his co-tenant, Stark. It is true it is made in an evasive manner, not being a direct averment or admission, made by the defendant as he asserts or admits the fact to be, but only the defendant's statement of what Stark and the complainant claim. For this reason it may be insufficient, but not impertinent.

The fifth exception is taken to that portion of the answer, which alleges that the conveyance from Stark to the complainant, is without consideration and sham, and that the complainant, at and before the execution thereof, had notice of this defendant's equities as before stated. This exception will be disallowed. So far, the answer of the defendant is substantially that it has the equitable estate in the premises—at least I suppose this is the conclusion which the defendant will seek to deduce and maintain from the allegations embraced in the exceptions already passed upon and disallowed. In this view of the case it is material for the defendant to aver and show, that the complainants received the conveyance from Stark, the owner of the legal title, without consideration or at least with notice of the defendant's prior equity.

The sixth exception is taken to that portion of the answer, which alleges the occupancy of the Portland land claim at, prior, and since September 1, 1844, as a town site by divers people, citizens of the United States, and otherwise; that the city of Portland was incorporated on January 23, 1851, and that on February 1, 1858, the corporate authorities of said city, caused an entry to be

made in the proper land office, of 307.49 acres of the Portland land claim and town site, including the lot in question; and that in pursuance of said entry on December 7, 1860, a patent issued to said city for said lands from the United States, and for the use and benefit of the occupants thereof. This portion of the answer is based upon the assumption, that the law of congress, of May 23, 1844, and commonly called the "Town Site Law," was in force in Oregon prior to the time it was specially extended here, by act of July 14, 1854. In Lownsdale v. Portland [Case No. 8,578], I had occasion to pass upon this question. Time and reflection have only confirmed in my mind, the correctness of the conclusions arrived at in that case.

The donation law of September 27, 1850, was the first and only law affecting the right to or interest in public lands in Oregon, until the special extension of the town site law to this country. This entry by the city, and patent to it in pursuance thereof, being without color of law or authority, are simply void, and no right to the premises in controversy can be upheld by them. Although the town site law was in force in Oregon in the years 1858-60, when these proceedings took place, no land could be appropriated under it, for the benefit of occupants of town sites, which had already been granted to others by the terms and conditions of the donation law. The donation law is a grant in the present, and gives the fee simple to every settler who avails himself of its provisions from the date of his settlement. Lessieur v. Price, 12 How. [53 U. S.] 76; 11 Opin. 29. True, until the completion of the subsequent conditions of residence and cultivation and proof thereof, it is an estate upon condition—what is known at common law as a base or conditional fee, subject to be defeated or lost by a failure to perform the conditions upon which it is held. But it is an estate in fee nevertheless, and upon the completion of the residence and cultivation or other conditions, it becomes absolute and unqualified. Such was the grant to Stark and other settlers under the donation act, and proceedings under the town site law could not affect the right to lands settled under the donation act prior to that time. Whether a corporation like the city of Portland or any corporation, could hold as an occupant under the town site law, is very questionable, but not necessary to decide. This exception is allowed.

The seventh exception is taken to that portion of the answer which alleges that on November 4, 1857, Daniel H. Lownsdale and his assignees, Thomas Carter and Joseph S. Smith, conveyed the lot in question to J. T. Holmes and Wm. L. McEwan, and that on November 19, 1857, Wm. M. King, assuming to act for the subscribers to the building on said lot, made a conveyance thereof to said Holmes and McEwan, and that under these conveyances these grantees took possession of the lot and held the same adversely to the city, at the time the patent was issued under the town site law; and that sometime in 1860, Holmes conveyed an undivided half of the lot to the city of Portland. This exception is allowed. As neither Lownsdale, Carter nor Smith, are shown or averred to have had any interest in the premises, either legal or equitable, Holmes and McEwan took nothing by their conveyance to them; and consequently Holmes had no interest to convey to the city, and conveyed none. The allegation concerning the deed from King, is that he assumed to act as agent for the subscribers to the building. He might as well assume to act for anybody else. No authority is shown, nor is any averred; nor does it appear how these subscribers themselves could convey property to the city of Portland, which the defendant claims they or other citizens of Portland received for certain public uses and trusts, and none other. If the city of Portland is the legal successor of the persons to whom this property was sold, dedicated or covenanted to be conveyed, as alleged by the defendant, then this King deed could, at best, be only a conveyance from itself to itself; and if it was not such successor, then it does not appear how it could become so by force of a conveyance, executed by an assumed agent of some particular persons who are not shown or averred to have had any authority to convey themselves.

The eighth exception is taken to that portion of the answer, which alleges that the patent to Stark purports to be based upon certificate No. 69, and that said Stark falsely and fraudulently procured the proof to be made to the surveyor general of the residence and cultivation in such certificate mentioned; and that said Stark never did perform the residence and cultivation aforesaid; and that there is a reservation in the patent to Stark in favor of the rights of occupants of town lots under the city of Portland, and Stark occupied said patent with the avowed purpose of confirming the seisin of the occupants of such lots.

Before proceeding to consider this exception, I will state the ninth one, and consider them together. The ninth exception is taken to the prayer of the answer, and to that portion of it which alleges that Stark refuses to ratify and confirm the rights of the defendant to the lot in question, but brings this suit to defraud the defendant in this particular; and that in pursuance of such purpose, he caused a conveyance to be made to some real or fictitious person, the complainant in this suit. That said certificate 69 and patent in pursuance thereof are fraudulent and void as against this defendant, with a prayer that said patent to Stark and conveyance from the latter to the com-

plainant, may be set aside and held for nought, and that said complainant and defendants, school district No. 1 and Stark, be compelled to release to the city of Portland all right and title to the lot in question, and be forever restrained from setting up any right to the said lot by means of the premises, and for such other relief, etc.

It will be noticed that so much of the answer as is contained in these two exceptions, is in direct contradiction and inconsistent with that portion of the answer to which the exceptions have been disallowed. The former assume at least that the legal title is in Stark, but that the equitable estate is in the defendants, by virtue of certain contracts and agreements binding upon Stark. But the parts of the answer now under consideration, allege in effect, that Stark has no title, and that his certificate and patent are void, and should be so declared, because procured by fraud. Thus the defendant seeks to impugn the validity of the very source from which it seeks to derive its own alleged interest. But waiving this matter, it is plain that these exceptions must be allowed. The function of an answer is to make a defence to the case made in the complaint. A defendant by means of an answer cannot become a complainant and seek affirmative relief, either against the complainant or his co-defendants. The complainant in this suit alleges his legal title to the lot in question, and avers that the defendant, the city of Portland, pretends to have some estate or interest therein, and prays, that the defendant may answer in respect to this, and that the court would decree against such pretended estate or interest of the defendant. The defendant may answer and disclaim any interest or claim of interest in the premises, and that is the end of the suit; or, it may answer and set forth what estate or interest it has or claims to have in the premises, and upon the final hearing, the court must determine and decree concerning the nature and validity of such estate or interest. But by means of such answer the defendant cannot become a complainant and seek affirmative relief, as a specific performance of an agreement to convey, or a decree cancelling the patent of the defendant Stark, for fraud or mistake in procuring or issuing it, or a decree cancelling the conveyance of the defendant Stark to the complainant, or affirmative relief against a co-defendant, as a decree against such defendant restraining it from claiming any interest in the premises in question. Further, in the matter contained in the ninth exception, there is an allegation that the complainant is a "real or fictitious person." If this alternative allegation is allowed to have any effect, it amounts to an attempt to plead by way of answer in abatement of the suit, that the complainant is a fictitious person. Matter in abatement of the suit, as that the plaintiff is not a citizen of another state, or that there is no such person, as the alleged complainant, must be alleged by way of plea, and not answer. Equity Rule 39. The allegation concerning the reservation in Stark's patent, in favor of persons, occupants under the town site law, is of no more force in law than the patent to the city for the use of such occupants. Like the latter, being without authority of law, it is void. Ultimately the right to land under the donation law, depends upon the settlement and the performance of the subsequent conditions; of this performance the patent is conclusive evidence in a court of law, and primary in a court of equity. But the patent cannot limit or restrain the estate granted by the law, and which vests in the donee independent of the patent.

The tenth exception is to the Exhibit A, and is disallowed of course, the allegation referring to it having been allowed to remain in the answer.

The eleventh exception is to the Exhibits B, C and D. The exception to Exhibit B is not allowed because it is a necessary part of the allegation referring to it, which has been allowed to remain, at least a large portion of it is so necessary and the exception must be allowed in toto, or not at all. The Exhibit C, is the patent to Stark, and is referred to in the allegations embraced in the fourth exception. This exception is disallowed, but the matter excepted to, is simply an evasive admission of Stark's interest or estate in the premises in controversy, by virtue of the patent to him of December 8, 1860. In this connection and for all the purposes of the allegation, this reference to the patent is sufficient, and the exhibit is impertinent, and a needless addition to the bulk of the answer. This exception is allowed. The Exhibit D is the certificate 69, upon which it is alleged the patent issued. The exception to the allegation referring to this exhibit has been allowed, and the exception to the exhibit is allowed also, of course. The Exhibits B, C and D, being separate and distinct, I have treated the exception to them (No. 11), as a separate exception to each exhibit, and disallowed the one to B, and allowed the other two. This is necessary, as an exception for impertinence must be allowed in whole or not at all. In form, the exception is entire, but substantially it is separable into the number of exhibits excepted to.

Order that the exceptions to the answer of the defendant, the city of Portland, numbered one, two, three, four and five be disallowed at the costs of the complainant, and that such exceptions, numbered six, seven, eight, nine and ten be allowed at the costs of the defendant, and that exception number eleven as to the Exhibit B, be disallowed at the costs of the complainant, and as to the Exhibits C and D, that it be allowed at the costs of defendant.

[NOTE. For decision directing decree in favor of complainant after a hearing upon the merits, see Case No. 2,608, next following.]

Case No. 2,608.

CHAPMAN v. SCHOOL DISTRICT et al.

[Deady, 139.][1]

Circuit Court, D. Oregon. Feb. 27, 1866.

DEDICATION — PROOF — DONATION ACT OF 1850— BOND FOR CONVEYANCE—PUBLIC POLICY.

1. A dedication of land to public uses by parties in possession thereof, prior to the passage of the donation act of September 27, 1850 (9 Stat. 496), does not affect such land in the hands of other persons who may succeed them in such possession.

2. Although by the terms of the donation act, the land is granted to the settler, in consideration of his occupation thereof, prior, as well as subsequent to the passage of such act, the grant itself does not take effect prior to, or relate back beyond such passage, and therefore, a parol dedication or quitclaim to public use of a portion of such land by such settler, prior to the passage of such act, does not affect the after acquired estate in the premises.

[Cited in Myers v. Reed, 17 Fed. 405.]

3. A dedication by parol, being an attempt to pass an interest in lands, contrary to the statute of frauds, should not be allowed, unless plainly proven, and ought not to be inferred from facts not inconsistent with a contrary conclusion.

[See Robertson v. Wellsville, Case No. 11,930.]

4. A multitude are no more meritorious in the eyes of the law, than a single person, and it ought not to be presumed that the latter has parted with his property, without benefit to himself, because a whole community, however numerous, lay claim to it.

5. A dedication to public uses, alleged to have been made within the memory of living witnesses, cannot be proved by reputation.

6. A bond made by Lownsdale and Coffin, on November 26, 1849, for a deed to a lot, upon the sole consideration that the obligors therein—"the trustees of the school and meeting house of Portland, and their successors in office"—should do and perform certain things in the condition thereof written, is a mere gratuitous promise, until performance or an accepted promise of performance of such condition, and therefore will not be enforced against the obligors in equity.

7. School district No. 1 of the county of Multnomah, is not the successor of "the trustees" aforesaid, and therefore cannot claim any interest in such bond, or enforce it.

8. A condition in said bond that "the trustees" aforesaid, should be incorporated by legislative enactment, and thereby authorized to hold the lot aforesaid, for the use of the town of Portland, for school and meeting house purposes, "exclusive of any restrictions of any school law," is not void, as being contrary to public policy.

9. The city of Portland is not the successor of "the trustees" aforesaid, and is not authorized by law to take and administer the trust proposed in the condition of said bond, and therefore, cannot claim any interest in or enforce it.

10. There is no privity between Stark, the complainant's grantor, and the obligors in said bond, and he is not bound by it nor his grantee, the complainant.

In equity.

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[1] [Reported by Hon. Matthew P. Deady, District Judge.]

W. W. Page, for complainant.
Joseph N. Dolph, for city of Portland.
Lansing Stout, for school district No. 1.

DEADY, District Judge. This suit was before this court at the term of January, 1865, upon exceptions for impertinence to the answer of the city of Portland. Chapman v. School District [Case No. 2,607]. It is brought to quiet title to the complainant's interest in lot 3, in block 29, of the town of Portland. The bill alleges that the complainant is seized in fee simple of an undivided one fourth of said lot, and Benjamin Stark the other three fourths thereof; that the defendants—school district No. 1, and the city of Portland—wrongfully claim, and pretend to have some interest or estate in the premises, adverse to the complainant and defendant Stark, and prays a decree quieting his title, etc. Stark was not served with process and did not appear. The other two defendants filed separate amended answers on January 9 and 13, 1865, respectively.

The defendant, school district No. 1, denies the allegations of the complainant, and for further answer avers, that on November 26, 1849, Daniel H. Lownsdale and Stephen Coffin, they being then in the joint possession, under the laws of the provisional government of Oregon, of about 640 acres of the public lands, known as the Portland land claim, and including the lot in controversy, did sell to the citizens of Portland, lot No. 3, in block No. 29, and put them in possession of the same, for a valuable consideration, and did at the date last mentioned, also agree in writing to convey said lot to said citizens. A copy of this agreement is attached to the answer and marked "Exhibit A." That in accordance with such agreement the said citizens took possession of the lot and built a school house thereon, elected trustees and caused the same to be used as a public school for the education of the youth of Portland; that afterwards the said citizens were by law organized into school district No. 1, with power and authority, through directors, to conduct a school in the town of Portland; and that said school district did elect directors, who, in pursuance of an agreement with the trustees of the citizens of Portland aforesaid, made on November 24, 1852, did on behalf of such district, enter upon and occupy said lot and house for a public school, and thereafter such trustees ceased to occupy such lot and house for school purposes, "except by and through the defendant"—school district No. 1; that the defendant occupied the premises until 1857, when one McEwan entered upon them and excluded the defendant, and in 1863, gave the possession to the defendant Stark, for the purpose of defrauding the district of its use; that the defendant continued to act as school district No. 1, by virtue of the general school law of October 17,

1862, and is exclusively authorized to take charge of all property belonging to the citizens of Portland for school purposes, and is willing and now ready to maintain a school at the place in question; that Stark, at the time of the execution of the Exhibit A, claimed a portion of said land claim, including the premises in controversy, adversely to Lownsdale and Coffin, under the same laws, and in 1850 said Stark, and Lownsdale and Coffin, compromised their conflicting claims to the said land claim, and thereby established the boundary between them, so as to leave the premises in question within the land claim of said Stark, and that Stark, in consideration of the premises, agreed with Lownsdale and Coffin to recognize and confirm the acts and doings of the latter, concerning lot 3, in block 29, and with full notice of the same did then and there ratify and confirm the same; that afterwards Stark obtained the land conceded to him by the establishment of boundaries, as aforesaid, from the United States, as a settler under the donation law of September 27, 1850. That at the date of the compromise aforesaid, and after making claim as a settler under said donation law, said Stark did also set apart and dedicate the premises in controversy, to the citizens of Portland for the uses of a public school for the education of the youth of said town, and continued to recognize said dedication and public right from the time when he took possession of the same as aforesaid; and that Stark, in making claim under the donation law, claimed to be a settler on such land during all the period herein referred to, and prior to the time of the settlement of the conflicting boundaries between himself and Lownsdale and Coffin.

The amended answer of the city of Portland is substantially the same as that of the school district, except that it avers that the corporation of Portland, is entitled to the trust alleged to have been created by the bond of November 26, 1849, and the proceeding thereunder, and not the school district, and that all the conditions upon which said bond was made, have been performed by or on behalf of the citizens of Portland, and that the municipal corporation is legally entitled and capable of taking such trust and administering it.

The cause was heard upon the amended bill, answers, exhibits thereto and proofs. Upon careful consideration of these, I find the following conclusions of fact to be satisfactorily proven:

1. That on May 22, 1849, certain persons subscribed a writing whereby they agreed to pay severally, certain sums of money, to such persons as a majority of the subscribers should designate, for the purpose of building a school and meeting house in the town of Portland; and that such subscribers, at a meeting of the same, held at Portland, June 5, 1849, did elect William M. King, Stephen Coffin and William Warren, Sen., trustees, to carry into effect the purpose of such subscription, and did then and there authorize such trustees to purchase a lot and provide for the building of such school and meeting house in Portland.

2. That on July 2, 1849, the trustees aforesaid, by the name and description of the "trustees of the subscribers of the Portland school and meeting house," did agree in writing with William Warren, Jr., for the construction of "a house for the purpose of a school and meeting house," for which the contractor, Warren, was to receive from such trustees the sum of twenty-two hundred dollars.

3. That on November 26, 1849, Daniel H. Lownsdale and Stephen Coffin, were in the actual possession of the public land, commonly called the Portland land claim, which included the premises in controversy, and that being so in possession, the said Lownsdale and Coffin, did make and sign the following bond for a deed to said premises: "Know all men by these presents that we, Stephen Coffin and Daniel Lownsdale of the town of Portland, in the territory of Oregon, are bound and firmly held, in the penal sum of three hundred dollars, good and lawful money of the United States, unto the trustees of the school and town meeting house, in the aforesaid town of Portland, who now act as such, and to their successors in office, for the punctual payment of which, we bind ourselves, our heirs and administrators or executors firmly by these presents, in witness whereof, we have hereunto set our hands and affixed our seals, this 26th day of November, A. D. 1849. The conditions of the above obligation are such, that having this day sold unto the citizens of the town of Portland all that lot or parcel of land, known on the plat of said town, as lot number three in block twenty-nine, being fifty feet in front on First street, and running one hundred feet back, and lying on the western side of said street, and by these presents given possession of the same—Now, know you, that if the people of this beforenamed town of Portland, shall elect any number of trustees to frame a constitution for a body corporate, and they the said trustees, shall be authorized thus, as trustees of said property to hold the same for the use of the town of Portland, exclusive of any restrictions of any school law, and if they shall be thus constituted trustees by the legislative body of the territory of Oregon, and they be limited to use and keep the same for a school, or for holding town meetings, or holding such meetings for the improvement of youth, the advancement of science or such other purposes as they, the people of said town shall see fit; provided, however, that nothing but holding courts (in the absence of a more suitable place being provided by the county), shall interfere with the holding schools in the same, except in case of public emergency,

for holding public meetings. And if the said Stephen Coffin and Daniel H. Lownsdale, shall make or cause to be made, a quitclaim deed to the beforenamed lot, then this obligation shall be null and void, and of no effect, otherwise to remain in full force and virtue. (Signed) D. H. Lownsdale, Agent for Stephen Coffin. (Seal.) D. H. Lownsdale. (Seal.)" And that the foregoing instrument was received for record in the clerk's office of Multnomah county, on September 6, 1864, and there duly recorded.

4. That during the autumn of 1849, the "trustees of the subscribers to the Portland school and meeting house," caused to be built upon lot number three, in block number twenty-nine, described in the bond aforesaid, the house, as per contract with William Warren, Jr.

5. That on August 8, 1851, a large portion of the original "subscribers to and proprietors of the Portland school and meeting house," executed a writing, whereby they authorized William M. King, one of the trustees aforesaid, to sell at auction said house and lot, and to divide the proceeds between such subscribers.

6. That from the erection of the house, in 1849, until November 4, 1852, it was occupied from time to time for public meetings, both religious and secular, holding courts and private schools, under the express or implied sanction and permission of the trustees aforesaid, or some of them.

7. That on November 4, 1852, the directors of school district No. 1, took a lease in writing of the premises in controversy from William M. King and Z. C. Norton, acting on behalf of "the owners and proprietors" of the house aforesaid, for the term of twelve months, for the purpose of keeping a common school for the district therein, at the monthly rent of ten dollars.

8. That school district No. 1 has never been in the possession of the premises in question, or used, occupied or controlled them, otherwise than as above stated; and that the city of Portland has never been in the possession of the premises, or used, occupied or controlled them in any manner, although during all the time from the erection of the house to the year 1855 or 1857, the inhabitants of Portland, or some portion of them, did hold meetings there from time to time as above stated.

9. That the defendant, Benjamin Stark, was a settler upon a portion of the Portland land claim aforesaid, containing about forty acres, and including the premises in controversy, from September 1, 1849, and for four years thereafter, under and by virtue of the provisions of the act of congress, approved September 27, 1850, commonly called the donation law, whereby he became the donee and owner in fee simple of such forty acres, including the lot in controversy, and that in pursuance of such settlement, and the proper proof thereof, a patent therefor issued to the said Stark, from the United States, bearing date December 8, 1860, which patent was received for record in the clerk's office of Multnomah county, November 16, 1865, and there duly recorded.

10. That on September 12, 1864, the defendant Stark, by his duly authorized attorney in fact, William Cree, did convey by deed of quitclaim and release, the undivided one fourth part of the lot in controversy to the complainant, for a valuable consideration, which deed was received for record, in the clerk's office of the county of Multnomah, September 13, 1864, and there duly recorded; and that the complainant was at the commencement of this suit a citizen of the state of Maine, one of the United States, and had the legal estate in the undivided one fourth part of the premises in controversy.

11. That on March 1, 1850, and prior to the settlement on the Portland land claim by Lownsdale or Coffin, the defendant Stark claimed to be entitled to the possession of an undivided half of the whole of such claim, but that on the date last aforesaid, the said defendant Stark entered into an agreement in writing with said Lownsdale, whereby the said Stark and Lownsdale compromised and settled their conflicting claims to the possession of the land claim aforesaid, so that, among other things, the said Lownsdale released and quitclaimed to the said Stark the forty acres of said land claim above mentioned, in consideration of which, the said Stark among other things, agreed with the said Lownsdale to ratify and confirm the conveyances "made by the said Lownsdale previous to January 1, 1850," of the lot in controversy; and that subsequently Stephen Coffin ratified and assented to this agreement and settlement of the conflicting claims.

12. That said defendant Stark never made any dedication of the lot in question to either of his co-defendants, or to any public use whatever, although on several occasions since the year 1855, he, in casual conversation, expressed a purpose or willingness to convey the same to the city or public, provided they would reimburse him the expenses he had incurred in improving the property and the streets and walks around it, but that nothing was done by either party to carry out such purpose or intention.

13. That since the commencement of this suit, the defendants, "school district No. 1, and the city of Portland, have each, through the agency of the officers of such corporation, assessed the lot in question to said Stark as the owner thereof, and collected and received from him the taxes properly leviable upon said assessment."

14. That the town of Portland, including the Portland land claim aforesaid and the land claim of John H. Couch, was first erected and constituted a city corporate, by the name of the "City of Portland," by act of the legislature of the territory of Oregon, passed January 23, 1851. That by said act it was

provided, that the "mayor, recorder and council of said corporation shall be a body corporate and politic, * * * and shall be capable in their corporate name and capacity to acquire property, real, personal and mixed, for the use of said corporation, with power to sell and convey the same;" but that by such act no provision whatever was made, whereby the city of Portland or the inhabitants thereof could or might accept the trust specified in the bond from Lownsdale and Coffin, nor does such act contain any provision by which such corporation is authorized or permitted to receive, hold or use land for the purpose of education or religious meetings, or in anywise to provide for, conduct or carry on any such scheme or enterprise. This act was superseded by the act of January 31, 1853, which latter act was in turn superseded by the act of January 24, 1854. This last mentioned act was amended by acts passed respectively January 15, 1858, October 17, 1860, and October 17, 1862. The act of January 24, 1854, and the amendments thereto, were superseded by the act approved October 14, 1864, which still remains in force; but none of these acts, subsequent to the first, changed or enlarged the powers of the corporation, with reference to the subjects above mentioned.

15. That the defendant, the school district No. 1, is a public corporation existing under the laws of Oregon, now and since November 4, 1852, but at what time prior thereto it was organized and established does not appear. The first act passed in Oregon in relation to common or public schools, and authorizing and providing for the establishment and organization of school districts, was passed September 5, 1849. This act authorized and required the county school commissioners of the respective counties, before January, 1851, to lay off their respective counties into school districts, and allowed the people of any town or neighborhood, until this was done, to form school districts for themselves, "and perform all acts and duties therein, in accordance with the provisions of this act." The directors of a district constitute a corporation, and as such corporation might receive for the use of the district, lands whereon to build a school house. This act was amended by acts passed respectively January 15, 1852, and January 31, 1853. The act of September 5, 1849, and the acts amendatory thereof, were superseded by the act passed January 12, 1854. This latter act was also amended by the acts passed respectively January 31, 1855, and January 17, 1857. The act of January 12, 1854, and the acts amendatory thereof, were superseded by the act of October 17, 1862. All of these acts subsequent to the first, contain similar provisions for the establishment and organization of school districts, declare them to be corporations, and authorize them to purchase and hold lands, whereon to build school houses for the use of district schools, subject to the limitations and restrictions of the school law. But none of these acts authorize or permit a school district to hold lands generally, or to maintain any particular or special description of school. The school district is independent and separate from any town organization. It is established and its boundaries defined by a county officer, and these may be wholly changed and modified from time to time to suit the wants and convenience of the public interested, including that of the neighboring districts.

16. That the complainant had notice of the foregoing facts, at the date of the conveyance to him, by Stark.

Upon this state of facts, what is the law of the case, or what are the legal or equitable rights of the parties, to the premises in controversy, is the question for the court now to determine. The claim of the defendants before the court, or either of them, that Stark dedicated this land to public uses, being found untrue in point of fact, is thereby disposed of. But as this point was insisted upon in the argument with some degree of earnestness, it is proper to give it a more extended consideration. To do this properly, it is necessary to lay out of view such matters as have no legal bearing on the question. And first, this is not a case like some cited in the argument, where the particular public claiming a dedication, have been long in the uninterrupted use and enjoyment of the property. In such cases, the use or possession itself, though not sufficient to constitute a title under the statute of limitations, is treated as evidence of a dedication, and by the aid of indirect evidence, deduced from other independent facts and circumstances, may be sufficient, in the absence of proof to the contrary, to warrant a court in presuming that a dedication had actually been made. But this fact is wanting in this case—neither of the defendants before the court have ever been in the use and occupation of these premises, except in the solitary instance of the school district above mentioned, and that was as a tenant, and not adversely to Stark. There is no presumption then in favor of the claim of defendants, on the ground of user or occupation.

Again, upon the question of dedication by Stark, the acts and doings of Lownsdale and Coffin are not to be considered—they have no legal relation to the subject. As to this matter, Stark and these parties are strangers, without privity of any kind. By this is meant, that a dedication or promise of a dedication by Lownsdale or Coffin, does not bind Stark and is immaterial with reference to the present inquiry. The reason of this—as has been suggested, is because there is no privity of estate between Stark and these persons. At the date of the bond from Lownsdale and Coffin, they only had the naked possession of the land, under the laws of the provisional government of Oregon, without any estate or

interest in the premises whatever. Their acts and doings in no way bound the lands in the person who might succeed them in the possession. This state of things remained unchanged at the time of the agreement of March 1, 1850. The land was public domain—the title was in the United States, and congress passed no law by which any person could acquire any interest in this land, until September 27, 1850. Lownsdale v. Parrish, 21 How. [62 U. S.] 293. At the time of the agreement of March 1, 1850, Stark claimed to be entitled under the local law, to the possession of the undivided half of the whole claim of 640 acres, and in consideration that he would abandon such claim, Lownsdale thereby agreed and did abandon to Stark the exclusive possession of the forty acres of the claim, including this lot. Whatever, out of abundance of caution, may be the technical language of the agreement, this is the legal effect of it, because at that time, the possession, subject to the right of the United States, was all the parties had to bargain about or dispose of. This possession then, Stark took unencumbered by the previous acts and doings of any one—"as though the foot of man had never been on the land." Lownsdale v. Portland [Case No. 8,578]. Subsequently, by virtue of his settlement under the act of September 27, 1850, Stark acquired the legal estate in the premises from the United States. This estate, although upon condition at its inception, the commencement of the residence and cultivation, on September 1, 1849, became absolute and indefeasible upon the completion of the performance of these conditions, on September 1, 1853, four years thereafter. Since the passage of the act of September 27, 1850, Stark being then in possession, and having the legal estate in the premises, any dedication to public uses, by him or his authority, will bind him or those claiming under him with notice. It is also claimed by counsel for the school district, that a dedication prior to that time, and subsequent to September 1, 1849, made by Stark, is binding upon the after acquired estate, for the reason that the act of September 27, 1850, granted the land to the settler on account of his residence and cultivation prior thereto, as well as subsequent. That this would be the proper construction of the law, in the case of a conveyance with covenants of warranty, or any express stipulation or agreement from which it would reasonably appear, that the parties dealt or bargained with reference to the possibility or contingency of the grantor or vendor acquiring title from the United States, I am well satisfied. But a simple quitclaim by Stark, during his occupancy and before the passage of the act granting the land, would in no wise affect the after acquired estate in the premises. Although the act of congress grants the land, on account of the prior residence and cultivation, the grant itself, cannot be said to take effect before it was made—the time of the passage of the act. A grant of land by statute, for considerations transpiring years before, as for military services, takes effect from the date of the grant, and not the performance of the service. In point of time, the grant and the cause or consideration of it, may be identical or widely separated. This was a grant on account of residence and cultivation, on grounds of public policy—as to the future, to promote the settlement of the public lands, and as to the past, to reward those who had settled and held the country for the United States, amid extreme privation and suffering, against the dangerous and savage Indian, and in the face of a foreign power, early and strongly intrenched upon the soil, in the persons and people of the Hudson Bay Company.

I am inclined to hold that a parol dedication to public uses, rests upon no different ground than a quitclaim deed, and if made before September 27, 1850, although by a party then in possession, who afterwards took the legal estate under the act, it would not bind the afterward acquired estate. Doubtless, where a clear case of dedication, so far as the act is concerned, was made out, under such circumstances, a court of equity would be warranted in finding that the party had confirmed the act, after acquiring the estate, from evidence which in itself would be insufficient to establish the fact of an original dedication, or even might presume such a confirmation, in the absence of evidence to show that the donor had disavowed it at once, upon receiving the legal estate. Subject to these rules or principles, did Stark ever dedicate this lot to either of these defendants for public uses? Under the testimony, I am constrained to answer the question in the negative, and if necessary to go further, and say that he is not shown to have dedicated it to any public use whatever. A mere intention to make a dedication to public uses, does not constitute a dedication. Where it is claimed that a dedication has been made by parol, it ought to be shown plainly and distinctly, and not left to be inferred from facts and circumstances, at best indifferent in themselves, and not inconsistent with a contrary conclusion. Irwin v. Dixon, 9 How. [50 U. S.] 30, 31, and the cases there cited. A dedication by parol is an exception to the general and salutary rule of the law, which provides that no interest in lands shall pass without a writing. To allow this exception, except upon clear and satisfactory proof, that the dedication had received the clear assent of the owner—was actually and deliberately made—would be subversive of the policy of the law, and dangerous to private rights. A multitude, or a public corporation are no more meritorious in the eyes of the law or justice than a single individual. A man ought not to be presumed to have parted with his property, without benefit or consideration to himself, because a community, however numerous, lay claim to it. The owner of real prop-

erty may rest upon his title, and is not required to be always upon the premises, asserting his right, as against the world or any less number of persons, whom he may permit or suffer from time to time to be in the temporary occupancy or enjoyment of it. Particularly is this the case, where a private lot, laid out and marked upon the map as private property, is afterwards claimed for some special public use, like a site for a school or meeting house. Such a dedication, is in the nature of things, altogether more improbable than that of streets and public squares. The latter are entirely consistent with the donor's interest, being essential to the sale of lots, and conducive to the building up of the town—in fact, are paid for by the sale of the adjacent lots at enhanced prices. What might be satisfactory proof of the dedication of the one, would be altogether insufficient to prove the other. A person may be presumed to do what is manifestly just to the public and promotive of his own interest, as to dedicate streets to the public, as an inducement for them to buy the adjacent lots; when he ought not to be presumed to do what is not demanded by justice to the public and is contrary to that interest—as to dedicate his private property for a school or meeting house site. No adequate motive is shown to have induced such a dedication, and it ought not to be allowed unless upon clear and unequivocal proof of the fact.

The testimony upon this point only goes so far as to show that upon several occasions, in casual conversations with acquaintances, Stark expressed a willingness or readiness to convey this property to the city or the public of Portland, upon certain terms and conditions. But this was never done, for the sufficient reason, if no other, that the city or public never took any steps to obtain this conveyance, upon these or any other terms. But these conversations, construe them as you will, are no evidence of a dedication; on the contrary, they are an assertion of Stark's present title to the lot, coupled with a proposal to convey the same upon terms. They are not even evidence of a proposal to the public to convey, but are mere casual remarks to private persons. Again, if Stark, in early times, was in doubt as to what his legal rights were concerning this lot, on account of his agreement of March 1, 1850, he might very properly say, as it is claimed that he did, that he intended to maintain his right to this property, as against any private person, without thereby admitting that it was the property of the city, or that he had or would dedicate it to public uses of any kind. If the city had an interest in the premises, or was entitled to a conveyance of the lot, by reason of the agreement of March 1, 1850, that was a matter of law, and beyond Stark's control or decision, and he was not called upon to express his opinion in the premises, in the statement attributed to him by Shattuck's testimony. That writing speaks for itself, and if by force of it the city is entitled to the premises, it is so entitled, independent of any alleged dedication by Stark, and no pretence of a subsequent dedication by Stark will help it. These are the only facts, which have been proven, to show a dedication by Stark, and they are wholly insufficient for that purpose.

On the hearing, the defendants also offered the depositions of some witnesses, residents of Portland, to prove that by common reputation the property belonged in some way to the city. This testimony, besides being very meagre and unsatisfactory of its kind, was clearly inadmissible, and therefore ruled out. The matters testified to by these witnesses, are their own opinions of the controversy, or what they understood to be public opinion. They all relate to a transaction, within the memory of living witnesses, and the opinions and understanding—public repute, to which they refer, are subsequent to the commencement of this controversy, and appear to have grown out of it. Of its kind, even, it was very meagre and indefinite. 1 Greenl. Ev. § 130; McEwan v. Portland, 1 Or. 300. In this latter case, decided in 1860, the question of the admissibility of this testimony arose in an action for the possession of this same lot. Mr. Justice Stratton delivered the opinion of the court, and maintained the inadmissibility of the testimony, beyond all question, upon both reason and authority. To speak somewhat colloquially—if such hearsay testimony were allowed to be heard in courts of justice, it would be very easy (if not common), for a few active and interested persons to make a reputation on the subject of who was entitled to a particular property, and then prove it in court, by their own oaths. Such a proceeding might fitly be denominated—not improving but talking a gentleman out of his estate.

I next proceed to consider what right, if any, the defendants before the court, or either of them have or can claim, by virtue of the bond to convey, from Lownsdale and Coffin, of November 26, 1849. This bond is for a quitclaim deed to the lot in controversy. It is given, not to the public generally, nor to either of these defendants, but to the "trustees of the school and town meeting house of Portland, and their successors in office." True, the condition of the instrument recites, that the obligors had that day sold this lot unto the citizens of Portland, but the obligation is to these trustees. Indeed, no persons are specially named trustees, and the complainant's counsel objects that the bond is invalid on this account for uncertainty. But I think if such persons as are therein described, did in fact then exist, with the relation or office imputed to them by this description, that the designation is sufficiently certain. Looking

back of the bond, we are enabled to find the causes which led to the execution of the instrument, and to identify certainly, the persons intended by the description—trustees of the school and meeting house of Portland. What was the condition of the infant settlement, since grown into the city of Portland, in the spring of 1849? From the testimony in this case, and the admitted history of that period, it is evident that the population did not exceed one hundred persons, and that there were not to exceed ten or twelve houses of any kind in the place. Under these circumstances as shown by the subscription paper of May 22, 1849, and the minutes of the meeting of the subscribers thereto, dated June 5, 1849, some of the residents of the place and the adjoining neighborhood, agree to pay money to build a school and meeting house for their own use—the enterprise to be under the sole control and management of such persons as the subscribers, or a majority of them, may choose. These subscribers, on June 5, 1849, choose three trustees, and authorize them to purchase a lot and provide for the erection of the building. On July 2, 1849, these trustees let the contract to build the house, for the sum of $2,200, of which only $1,900 was ever raised and paid, and a portion of this amount was subscribed and paid after that period. Whilst the project was in this condition, the bond was executed, and I think it apparent, nay, beyond doubt, that the persons described in the bond as the "trustees of the school and meeting house of Portland," were the trustees of the subscribers to the school and meeting house, named in the minutes of the meeting of such subscribers, dated June 5, 1849. At the date of the election of these trustees, there was no such corporation in existence as a school district or the city of Portland. These trustees were appointed to represent and act only for the private individuals—the subscribers aforesaid. Under these circumstances, they purchased and took a bond for a deed to lot 3, from the then holders and occupants of the land claim, Lownsdale and Coffin—the former executing the instrument for himself and the latter. The penalty of the bond is three hundred dollars, but no consideration for the sale is mentioned or recited. The seal to the instrument imports a consideration, but, by the laws of this state, this presumption is disputable. From the nature of the transaction, the situation of the parties and the purpose intended, and from the absence of all evidence to the contrary, I am forced to the conclusion that the instrument was given without any pecuniary consideration —and without a consideration in law, this agreement could not be enforced. The only consideration which can be implied from facts in this case, to support this agreement, is that the trustees to whom it was made, should perform or procure the performance of the conditions upon which the contemplated conveyance is proposed to be made. The bond itself is a mere voluntary promise, and one sided; and until a performance of its conditions by the trustees, or perhaps an accepted promise of performance, it was in law only a proposition, revocable at the pleasure of those who made it. "Uses or trusts, to be raised by any covenant or agreement of a party in equity, must be founded upon some meritorious or valuable consideration, for courts of equity will not enforce a mere gratuitous gift (donum gratuitum), or a mere moral obligation." 2 Story, Eq. Jur. § 973.

The object of the obligor in the bond, Lownsdale, was evidently to facilitate and assist the trustees of the subscribers in their enterprise, and assist in founding a school on his property. But he has his own peculiar notions of how this should be done, and he provides that these shall be complied with, as a condition precedent to his making the conveyance. These conditions were substantially, that the people of Portland should elect trustees, and form a constitution for their government, in the management of this property and the conduct of the proposed institution, which trustees, with this form of government, were to be also incorporated by an act of the legislature of Oregon territory, and thereby authorized to hold and manage the proposed trust, subject to the limitations and restrictions in the bond specified. As it appears that the trustees of the subscribers went into possession at once, and built the house upon it, and that on March 1, 1850, Lownsdale still contemplated the proposition as in force; by the covenant which he took from Stark concerning the lot, the court may be warranted in presuming, as a matter of fact, that in the meantime there had been an undertaking on the part of the trustees to perform the conditions of the bond, and that such undertaking was a sufficient consideration to support the agreement on Lownsdale's part. As it is not necessary that the decision in this case should turn upon any doubtful question of law or fact, I will assume, that in this way there arose a sufficient consideration to support the bond. Then the question arises, has there been a compliance with that undertaking, by a performance of the conditions of the bond, by either of the defendants before this court, so as to entitle either of them to the trust proposed by the bond?

To begin with school district No. 1; is this the corporation contemplated in this bond? To this question it seems to me there can be but one answer—that it was not. It is impossible to come to any other conclusion, in the face of the express provisions in the bond, that the trustees or corporation to be constituted for the management of this property, were to hold the same for school or

meeting house purposes, "exclusive of any restrictions of any school law." At the very date of this bond, the first school law in the territory passed, September 5, 1849, under which school district No. 1 was organized and constituted a corporation, was in full force and effect. To exclude the operation of this or any other school law, in the management of this proposed trust, this condition is inserted in the bond. School district No. 1 is a public corporation of the state, the creature of this law, and can only take and hold real property as a site for school houses, wherein a common school is to be kept as provided by the general law. The trustees or corporation here intended was simply a private corporation, to hold and manage this trust, according to their own constitution of government, subject only to restrictions provided in the bond, and the principal of these, is that they are not to be subject to or controlled by the public law governing public schools—the very life of school district No. 1, and its only and exclusive authority to act in any matter.

Counsel for the school district admits the force of this objection, but seeks to avoid it, by claiming that this provision in the bond is void, as contrary to public policy and law. This claim cannot be supported by reason or authority. The restriction was only to the effect that this proposed institution should be governed by its own constitution or act of incorporation, and not otherwise, which is the case with every private school or college in the state. But if this condition be contrary to law or public policy, then the proposed trust would fail, and the property remain with the donor as though no agreement had been made concerning it. If the agreement was void in this respect, it was void in toto, for this was the first condition of it. A deed which purports to convey an estate contrary to law, is void, and nothing passes by it. So the objection of the counsel goes too far, because if well taken, it would follow that there is no valid agreement to convey this property to any one. It is also claimed by counsel for school district No. 1, that the neglect of the legislature, to enact the law contemplated by the bond, is not to be allowed to work a defeat of the proposed trust. But this assumes that the legislature were in some way bound to sanction this project, for a particular school in the town of Portland, which assumption conflicts with the freedom of the legislature. The legislature was not bound to create this particular corporation described in the bond, and if they had done it, there could be no pretence, that another corporation, school district No. 1, was intended or authorized to act as the trustee of this proposed trust. The legislature may have deemed it unwise or impolitic to provide for the establishment of this peculiar kind of a school, with special endowments, in the town of Portland, independent of and in conflict with the general system of common schools, already provided for throughout the territory by the act of September 5, 1849.

It seems to have been the policy of the legislature, to provide for a uniform system of public schools, all completely subject to the authority and control of one general public law. This policy appears since to have become fixed in the constitution, which prohibits the assembly from passing any special or local law—"providing for supporting common schools"—and also enjoins upon the assembly the duty of providing "by law for the establishment of a uniform and general system of common schools." Code Or. 107, 117. But the legislature had the power and the right to judge in the premises, and whether they acted wisely or unwisely, this court is not authorized to review their action, or supply the necessary legislation, by means of a judicial decree. But the fact undoubtedly is, that the people of Portland were offered this trust, upon the condition that they would select the trustees, and form a constitution of government for the school, and procure the legislative sanction to the same, by an act creating these trustees a body corporate for that purpose. That the people of Portland, or any one on their behalf, ever undertook or attempted to accomplish, or perform any of these conditions, there is not an iota of evidence, but the contrary is necessarily inferred from all the facts and circumstances. This also involved the consent of the subscribers to the building fund, or their trustees, who were a special association of individuals, and not the people at large of Portland. That they never assented to this trust, or agreed that their organization and subscription should be merged in or transferred to this proposed corporation or trustees, is plainly deducible from the fact, that on August 8, 1851, a large number of them signed a writing, authorizing one of their trustees, to sell the building and lot, and divide the proceeds among the subscribers, in proportion to the amount paid by each.

Again, school district No. 1 does not necessarily represent the people of Portland in any particular. To-day, its territorial limits may coincide with those of the city of Portland, and to-morrow they may include other territory, or new districts may be created within these limits, leaving district No. 1 to include only a small portion of the people of the town. School district No. 1 is a public corporation subject to be changed, modified or abolished by the legislature of the state, without reference to the conditions or purposes of the trust specified in the bond of Lownsdale and Coffin. From these premises and for these reasons I conclude, that school district No. 1 has no interest, either legal or equitable, in the lot in controversy, because it is incapable of receiving or managing the

proposed trust, nor in contemplation of the agreement was it ever intended that it should.

What are the rights, if any, of the city of Portland, by virtue of this bond? At the outset, I admit that the bond may be construed without doing violence to its terms, so as to permit a municipal corporation, created and organized for civil and political purposes—such as the government of the town of Portland, to take and administer the trust therein proposed. But I do not think such construction the most reasonable one, and it appears altogether improbable, when we take into consideration the facts and circumstances attending and immediately preceding the making of the bond. But supposing all this to be otherwise, has the city of Portland ever been authorized to take and administer this trust as proposed in the bond? Certainly not, expressly. In all the legislation concerning the municipal corporation of Portland, from the first to the last, it cannot be pretended that there is any express language which covers this case, or even recognizes the existence of the proposed trust. Is such a purpose or authority to be fairly implied from these acts, or any of them? Not that I have been able to ascertain. The purposes for which land may be acquired and held by the corporation of Portland, are expressly enumerated, and they are all in aid of some municipal power expressly granted to the city. The subjects of education, secular or religious, public or private, the advancement of science or the improvement of youth are not even hinted at in any of these acts, and they contain no general grant of power from which this particular power or authority can be implied or inferred.

It seems to have been the policy of the territory as of the state since, to exclude towns and cities, as such, from the control and management of public education, and reserve that power to the organization called the school district, subject to the control of the legislature. The corporation of Portland is not authorized or empowered to keep or maintain a school of any kind, and this trust is proposed upon this condition expressly. If accepted or claimed by the city, it must be taken upon the terms and conditions prescribed. The bond, even if made for a pecuniary consideration, was a voluntary act. The obligor had a right to impose the conditions that he did. There was no law to compel him to sell or give his property for the use of a school. Whoever claims the benefit of this obligation, as trustee, must show at least a capacity in law to take and hold it upon the conditions which accompany it. The property cannot be held or claimed under the bond for any other purpose than that therein specified. From these premises and for these reasons, I conclude that the city of Portland has no interest, either legal or equitable, in the lot in controversy, because it is incapable of receiving the proposed trust, and in contemplation of law it was never intended that it should.

What then appears to be the condition of the subject matter of this proposed trust, considered with reference to the bond, and the facts which led to and followed its execution? The truth of the matter seems to be this—sundry individuals in and about Portland, being about to build a private school and meeting house, (for however public in point of fact the intended use might be, yet in contemplation of law it was a private enterprise, just as an association to build and manage a wharf or market house would be,) the occupant of the land claim gave the trustees of this enterprise a bond for a deed to lot 3, provided they would modify their plan, and thereafter proceed according to the conditions prescribed therein. The house was soon built by these trustees, and used from time to time for private schools, religious meeting and public meetings, but no attention was paid to the conditions of the bond or any steps taken by any one to procure the appointment of the trustees and the creation of the corporation contemplated. In other words, the project proved abortive and was abandoned. A portion of the original subscribers, whose money built the house, authorized its sale, and on that authority one of the original trustees transferred or attempted to transfer the propety to some private parties. The house being practically vacant, McEwan entered under this sale and occupied until ousted by Stark in 1859, who has maintained the possession of it to this day. In the meantime, about 1857, the city was induced to set up a claim to it, on the ground of its being in some way public property, but never succeeded in obtaining possession of it. The trust never took effect—the purpose for which the bond was made was never carried out—the conditions were never complied with. Until this was done, not even the trustees of the original subscribers to whom the bond was made, could demand the performance of its obligation—the execution of the deed. The bond itself conveyed no interest in the land, it was only a promise to convey upon conditions, and the title or estate in the premises, if he had any, remained with the obligor. Near seventeen years have elapsed since the date of the bond, and nothing has been done or attempted to be done, towards accepting or carrying on this proffered trust. It probably came soon to be regarded as a visionary matter, and was abondoned for the public or common school system provided by law.

But admitting that one or the other of these corporations is entitled to take the trust specified in this bond, does the right affect the land as against the owner, Stark? The covenants between Stark and Lownsdale in the writing of March 1, 1850, are not to the obligees in the bond, and Stark is not personally liable

upon them to either of these defendants, even if they were entitled to a performance of the bond as against Lownsdale and Coffin or their legal representatives. But independent of any covenant, if Stark had purchased this land of Lownsdale and Coffin, with notice of a prior contract to convey to others, equity would compel him to perform the contract of the vendor. The original purchaser would have a lien upon the land for the purchase money as against the second vendee, Stark, which equity would enforce by decreeing a conveyance or a sale of the land to reimburse the first purchaser, unless in the meantime other controlling equities had intervened. Champion v. Brown, 6 Johns. Ch. 402; 2 Story, Eq. Jur. §§ 784, 788. But this doctrine only applies where there is a privity of estate or of representation. If Stark derived title from the obligors in the bond, then this case would come within the rule, unless the long delay of his co-defendants to assert their supposed rights, would induce a court to refuse a decree for a conveyance. But there is no privity of estate between Stark. and Lownsdale and Coffin. Lownsdale and Coffin, at the time they abandoned the possession of the forty acres to Stark, were mere occupants of the public land. They had only the naked possession, which terminated with their occupancy and the commencement of Stark's possession. They had no estate in the land to convey to Stark, and conveyed none. Lownsdale v. Portland [Case No. 8,578]. Stark took the land as an original settler, under the act of September 27, 1850, and derives his title directly from the United States, by virtue of such settlement. Therefore, if this bond had been a deed for lot 3, and made directly to the defendants or either of them, and there was no question as to their capacity in law to take such a trust, yet they would be without interest in the premises, because Lownsdale and Coffin had none to convey. There being no privity of estate between Stark and the grantors in such a deed, the grantees therein could not claim the land as against Stark, or those claiming under him. On the other hand, the defendants are not parties to the covenants between Stark and Lownsdale, and therefore he is not personally liable to them, or either of them, on account of them.

So, upon every aspect of the case, it appears to me that the well settled rules of law are against the claims of the defendants, school district No. 1 or the city of Portland. Nor does it seem to me inappropriate, in a suit of equity, considering the allegations of the defendant's answers, for the court to declare, that as against these defendants or either of them, who seek at this late day, after the property has become valuable, to entitle themselves to the benefit of this supposed trust, the right of the defendant Stark coincides with the equity and justice of the case. These defendants appear to me to be not only without right, but without merit. Their claim seems to be an afterthought, put forward long after the really meritorious parties, the original subscribers, had abandoned the scheme as visionary and impracticable.

Decree in favor of the complainant, according to the prayer of his bill, quieting his title against the claims of the defendants or either of them, and that as against such defendants, he be taken and held to be the owner in fee, and have the legal estate in one undivided fourth part of the lot in controversy, and for the costs and disbursements, one moiety thereof to be paid by each of the defendants, before the court.

Case No. 2,609.

CHAPMAN et al. v. SCOTT.

[1 Cranch, C. C. 302.][1]

Circuit Court, District of Columbia. March, 1806.

ENJOINING PROCEEDINGS ON JUDGMENT.

The absence of a witness at the trial at law, is no ground of equity to obtain an injunction to stay proceedings at law on the judgment.

Injunction [by Chapman and Wise against Scott] to stay a judgment at law.

CRANCH, Chief Judge. The simple and only ground of equity stated in the bill is, that the complainant had a good defence at law, and duly summoned his father as a witness to prove it, ("which will appear from the annexed summons.") But that when the cause came on to trial, the complainant's father was so much indisposed, that he could not, in time, attend as a witness for the complainant, and judgment was obtained at law against him. The summons was served not by a marshal or other officer, but by the son of the witness. The answer denies the ground of defence at law, but does not say any thing of the absence of the witness at the trial. If, therefore, the equity of the bill is sufficient to warrant an injunction, it cannot be dissolved. The mere fact of the absence of a material witness at the time of trial, is not of itself a sufficient ground for an injunction, because the court of law who tried the cause, was fully competent to give relief, by a continuance or a new trial. The bill does not even aver that an application was made to the court of law for that relief; and if it had, and the court had erroneously refused it, or had improperly exercised its discretion in refusing it, it is not competent for a court of equity to revise and correct the errors of a court of law in a case in which the latter had complete jurisdiction, equitable as well as legal. There being therefore, no ground of equity in the bill, the injunction must be dissolved.

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

CHAPMAN (THORNTON v.). See Case No. 13,997.

Case No. 2,610.

CHAPMAN et al. v. TOY LONG et al.

[4 Sawy. 28;[1] 1 Morr. Min. Rep. 497.]

Circuit Court, D. Oregon. July 31, 1876.

EQUITY—MINING CLAIM—PLACER CLAIMS—WASTE, INJUNCTION TO RESTRAIN—INJUNCTION TO RESTRAIN THE WORKING OF A MINING CLAIM—LOCATOR OF MINING CLAIM—CHINAMEN, RIGHTS OF, IN THE UNITED STATES.

1. A person who seeks the aid of a court of equity to protect his interest in a mining claim located under the mining laws of the United States, must show a substantial compliance with such laws.

2. Placer claims may be located and occupied jointly.

3. The technical distinction between waste and a mere trespass, has been long disregarded by courts of equity, and the rule now is, that wherever a trespass is attended with irreparable mischief or a multiplicity of suits or vexatious litigation, an injunction will be allowed the same as if it were a case of waste.

4. An injunction will be allowed to restrain the working of a placer gold mine located by the complainants under the United States mining acts, while in the possession of persons not qualified to take and hold such lands.

5. Under the mining laws of the United States, the locator of a mining claim becomes the assignee of the United States, and so long as he complies with the conditions imposed by them and the license to occupy remains in force, the right of the locator to the possession of the land, and to appropriate to his own use the minerals therein, is full and complete; and he need not take any step to purchase the same unless he thinks proper.

[Cited in U. S. v. Nelson, Case No. 15,864.]

6. Article 6 of the treaty of July 28, 1868, with China, in effect secures to Chinamen the right to reside in the United States upon the same terms as the subjects of Great Britain and France, and this implies the right to follow any lawful pursuit or calling not prohibited to the subjects of these two powers.

[Cited in Baker v. Portland, Case No. 777.]

In equity.

Motion for a provisional injunction.

B. F. Dowell and Addison C. Gibbs, for complainants.

Walter W. Thayer, for defendants.

DEADY, District Judge. The complainants, Matthias Chapman, Aaron B. Klise, James Herd, Lorenzo A. Sturgis, and John M. Chapman, allege in their amended complaint that they are citizens of the United States, and that Toy Long and his four co-defendants are "yellow alien Chinamen, who have not declared their intention to become citizens of the United States;" that on February 21, 1875, the miners of Poorman and Jackass creeks district, situate in Jackson county, state of Oregon, duly established rules and regulations for the mines in said district, by which a "claim was declared to be one hundred yards square," and every citizen of the United States allowed to hold one creek and one bank claim by location; that said rules and regulations were duly recorded in said county on February 24, 1876; that on February 28, 1876, the complainants, acting under said rules and regulations, and the act of congress of May 10, 1872 [17 Stat. 91], "to promote the development of the mining resources of the United States," duly located and caused to be surveyed by the proper United States surveyor, certain mineral lands particularly described by metes and bounds on said Poorman creek, lying in township 38 south and 3 range west, of the Wallamet meridian, constituting a parallelogram 20 chains in length and 9-10 chains in width; that on February 29, 1876, the complainants duly posted a notice of their claim to said lands, and caused a copy of the same to be recorded in said county, and a certified copy of such record to be duly posted on said premises on April 15, 1876, of all which the defendants had due notice; that the legal title to the premises is in the United States, and the complainants are entitled to the possession of the same for the purpose of mining for the gold therein, and that such possessory right is of the value of $600. That the defendants, on said February 28, and divers times between that time and the commencement of this suit—May 1, 1876—trespassed upon said premises by mining thereon and carrying away the gold from the same under a claim of right to do so, to the depreciation of the value of said premises; that the defendants are prohibited, by the act of congress and the mining regulations aforesaid, from mining said lands; that they are insolvent and of "bad reputation for truth and veracity;" that the complainants have no means of proving the amount of gold taken from the premises "by these untruthful defendants" except their own testimony, and that said defendants, unless restrained by the order of this court, will do irreparable damage to the premises. The complainants therefore pray for an account, the appointment of a receiver, a decree that the pretended claim of the defendants is illegal and void, and that they be perpetually enjoined from trespassing upon said premises. On June 6 a motion for a provisional injunction was argued and submitted by counsel, upon the complaint.

The occupation and purchase of mineral lands of the United States is regulated by chapter 6 of title 32 of the Revised Statutes, the same being a compilation of the pre-existing acts of July 26, 1866 [14 Stat. 251], July 9, 1870 [16 Stat. 217], May 10, 1872 [17 Stat. 91], and March 3, 1873 [17 Stat. 607], upon that subject. Section 2319 of the Revised Statutes declares that "all valuable mineral deposits in lands belonging to the United States" are "free and open to exploration and purchase, and the lands in which they are found to occupation and pur-

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

chase by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States." Section 2324 of the Revised Statutes also authorizes "the miners of each mining district" to make rules "not in conflict with the laws of the United States or the state * * * governing the location, manner of recording, amount of work necessary to hold possession of a mining claim," subject to certain requirements, which are briefly these: 1. The location must be marked on the ground so that its boundaries can be traced; 2. The record of the claim must contain the date of the location, "the name or names of the locators," and such a description of the claim, by reference to some natural object or permanent monument, as will identify the same; 3. The performance of $100 worth of work or improvement on each claim located after May 10, 1872, yearly, until the issuing of a patent therefor. But when claims are "held in common," such expenditure may be made upon any one claim; and upon the failure of any one of several co-owners to contribute his proportion of these expenditures, his interest shall "become the property of his co-owners who have made the required expenditures."

The law of the state (Code Or. p. 687, §§ 5, 6) provides that the county clerk shall record the notice of a miners' meeting organizing a mining district, and empowers miners "to make local laws in relation to the possession of water rights and working of placer claims * * * subject to the laws of the United States."

The mining laws of the district in question provide that each person shall be allowed to hold one creek and one bank claim of one hundred yards square by location; that one day's work in each week shall be done on each claim as long as there is "a ground sluice-head of water in the creek; provided, if the claims are together, the work may be done on any one of them;" that no "Mongolian or alien who has not declared his intention to become a citizen of the United States," shall hold or work any claim; that if any person shall employ any Mongolian or such alien to work on a mining claim for one month, or shall employ any Chinaman who was not in Oregon at the adoption of the state constitution, to work such claim "for ten days before the entry of the same at the land-office," he shall forfeit the same, and it shall be open to relocation by "any eligible" person.

The reference to the adoption of the constitution of the state grows out of section 8 of article 15 of that instrument, which reads as follows: "No Chinaman, not a resident of the state at the adoption of the constitution, shall ever hold any real estate or mining claim, or work any mining claim therein." This constitution was adopted by the popular vote on November 9, 1857, but did not go into effect until the admission of the state into the Union, February 14, 1859.

Counsel for the defendants object to the allowance of the motion because it appears that the location includes too much ground —nearly ten claims of one hundred yards square, instead of five—and is therefore illegal. As already stated, the complaint describes the premises by metes and bounds, showing them to be in form a parallelogram of about one hundred and ninety-eight yards in width and four hundred and forty yards in length, and lying on the right or west bank of Poorman creek. But it contains no allegation, as it should, concerning the character of the claims inclosed within these limits, as to whether they are all creek or bank claims, or of both kinds, and if so, in what proportion. Neither does it appear that the plaintiffs are in the actual possession of the premises, but rather the contrary. Their rights then are merely such as result from having located the premises as mineral lands, under the mining laws and regulations, and that, too, over the heads of others already in the actual occupation of them. When parties, under such circumstances, seek the aid of a court of equity—even if the alleged trespassers are Chinamen and not expressly authorized to occupy or enter mining lands—they must bring themselves within the law authorizing the location and show a substantial compliance with its terms.

In this case, it being apparent that the land located includes more than one claim to each locator and complainant, while the local law only allows a person to locate one claim, except where one is a creek and the other a bank claim, there ought to have been a distinct allegation in the complaint, to the effect that the premises comprised an equal number of such claims. And if there is not otherwise enough in the complaint to enable the court to ascertain this fact the location must be treated as an illegal one and the motion for an injunction denied. But it is manifest, from the description of the premises, that this location is equally composed of creek and bank claims, and therefore may contain two to each locator. A creek claim is a tract of one hundred yards square, one side of which abuts on the creek, or rather extends to the middle thread of it, while a bank claim is a tract of the same size lying back of and abutting upon a creek claim. This being so, all the land in this location between the creek and a line parallel thereto, and one hundred yards distant therefrom, is creek land, while that lying west of such line is bank land.

The complainants being each entitled to locate a creek and bank claim, together they might have included a tract on the creek two hundred yards wide and five hundred yards

long. As it is, they have only taken about ninety-seven thousand yards, or nine and one-half claims, instead of the one hundred thousand yards, or ten claims, which the law in its wisdom allowed them.

For this act of self-denial "the heathen Chinee," who appear to have no rights on Poorman creek that a miner is bound to respect, and who had probably bought this ground and long worked it as their own, are doubtless duly thankful. Yet, to compare small things with great, if at some distant day the moral of this predatory transaction should be called in question, the defendants will hardly have cause to exclaim with Lord Clive, when charged in the house of commons with helping himself to the treasury of Bengal after the signal victory of Plassey: "I am astonished at my own moderation."

On the argument of the motion it was also objected to the location, that parties could not locate placer claims jointly. But I find nothing in the law or regulations, or the nature of things to support this proposition. On the contrary, section 2324 of the Revised Statutes makes express mention of "co-owners" of mining locations, without reference to the fact of whether they are upon "placers" or rock in place; and provides for forfeiting the interest of any of such co-owners who may fail to contribute his share of the expenditures required by law, while section 2330 expressly provides for the joint entry and patent of contiguous placer claims owned by two or more persons, which necessarily implies that they may be located and occupied jointly before such purchase.

It is also insisted that the complainants must first obtain possession of the premises by an action at law before a court of equity will interfere to restrain the defendants from committing the threatened trespasses. The remedy by injunction was once confined to waste, or cases of trespass between parties who were privies in title, such as landlord and tenant, mortgagor and mortgagee, tenant of the particular estate and remainder man, and in those cases the complainant was of course not in possession. But the distinction between the trespass technically called waste, and the ordinary trespass between parties who are strangers or claiming adversely to one another, has been gradually disregarded by courts of equity, until it cannot now be said to exist. Wherever a trespass is attended with irreparable mischief or a multiplicity of suits or vexatious litigation, the remedy by injunction will be applied the same as if it were technical waste Story, Eq. Jur. §§ 918, 928; Adams' Eq. 109. An injunction is now allowed in all cases of trespass upon mines, upon the ground that the acts complained of are, or may be, an irreparable damage to this particular species of property. Id. § 918; Livingston v. Livingston, 6 Johns. Ch. 499; Mining Co. v. Fremont, 7 Cal. 320. And this doctrine is particularly applicable to the case of a continued trespass upon a placer gold mine—the value of which consists wholly of auriferous deposits, that may be worked out and removed without leaving any evidence of their quantity or value upon which to base an estimate or account, as in the case of coal, stone, and other minerals not precious. If, then, the complainants, by their location, have acquired a right to possess the premises and appropriate the minerals contained therein, the defendants can have no such right, and the exercise of it by them is an irreparable injury to the interest of the complainants, and the latter are entitled to the injunction asked for. Prior to the passage of the acts aforesaid concerning the mineral lands, strictly speaking, all persons who occupied them for the purpose of mining, were naked trespassers, at least as against the United States. As between the first occupants and third persons, from the necessity and convenience of the case, the courts held that the former were not trespassers, and were entitled to the protection of the law as persons in the possession of portions of the public domain, with the assumed assent of the owner. Mining Co. v. Fremont, Id. 319; People v. Shearer, 30 Cal. 655. But under the mining laws of the United States now in force, the locator of a mining claim, as to the right to the possession of the premises and to appropriate the minerals therein, becomes and is the assignee of the United States so long as the law remains in force and he complies with the conditions imposed by it. Until congress withdraws this license by a repeal of the law, the right of the locator to the possession of his claim and to appropriate to his own use the mineral deposits therein is full and complete, and he need not take any steps to purchase the land or obtain a patent for it. That is a matter left to his own option or sense of self-interest.

It is admitted that the complainants have taken all the steps necessary to make a technical location of this ground as placer mining claims. It is not necessary that they should show that they have done any work upon it. As the law stands, they have until next February to make the required expenditure upon it for the first year. Their right, then, under the law and regulations to the possession of the ground, and to appropriate the minerals found in it, is perfect, unless the occupancy of the defendants, at the time of the location, had the effect to exclude the premises from the operation of the mining acts, and therefore preclude the complainants from taking it up as mining land "belonging to the United States." With every desire to reach such a conclusion, I cannot see how such an effect can be given to the prior occupation of the defendants, without disregarding the plain letter and purpose of the law. The license contained in section 2319, supra, to explore, occupy and purchase any of the lands of the United States containing mineral deposits, is confined to

citizens of the United States, and those who have declared their intention to become such. The defendants, being aliens, are not within the purview of the law, and by an almost necessary implication, are prohibited from the exercise of the rights conferred by it. When there was no legislation upon the subject, the assumption that the occupant was in possession with the consent of the United States applied as well to aliens as citizens, and to Chinamen, as others. But since the passage of the acts prescribing who may occupy the public lands containing mineral deposits, there can be no presumption as against a person making a location under such acts, that a person not included therein is occupying any of such lands with the consent of the United States. As has been said, a locator under these acts, as to the possession of the soil and the appropriation of the minerals therein, for the time being, is the assignee of the United States, and as against an unqualified occupant of the premises he is entitled to the same remedies to which his assignor would be entitled. Nominally, these acts discriminate against the alien generally, but in fact against the dreaded Chinaman only; because all aliens, including the Congo negro, except the Mongolian, are permitted to become naturalized, and therefore qualified to locate and occupy mining lands under them.

Article 6 of the treaty with China, of July 28, 1868 (U. S. Pub. Treat. 148), provides that citizens and subjects of the two nations shall respectively enjoy the same privileges, immunities or exemptions, in respect to travel or residence "within the country of the other," as may there be enjoyed by the citizens or subjects of the most favored nation.

The right to reside in the country with the same privileges as the subjects of Great Britain or France, implies the right to follow any lawful calling or pursuit which is open to the subjects of these powers. Therefore the provisions in the mining regulations of Poorman creek, which, in effect, forbid Chinamen from working in a mining claim for themselves or others, as well as the clause of the state constitution, supra, to the same effect, seem to be in direct conflict with this article of the treaty; and if so, are therefore void. Practically the latter has always been a dead letter. Both it and the similar prohibition in relation to free negroes (section 35, art. 1, Const. Or.) were generally regarded, at the time of the formation of the state constitution, as a mere piece of brutum fulmen, intended to quiet the fears and placate the prejudices of a certain class of voters who were supposed to stand in dread of being overslaughed by an influx of these black and yellow people.

But whether the treaty reaches the point involved in this case, is a question that has not been argued by counsel, and therefore will not now be passed upon. Assuming that it does not, I am constrained to hold that the complainants, by their location, have, for the time being, become entitled to possession of the premises, and the right to appropriate the minerals therein to their own use; and that, therefore, the defendants, although in the peaceable possession of the claims when located by the complainants, are now in law trespassers upon the legal rights of the latter. Let an injunction issue commanding defendants to desist from working the premises until the further order of this court.

CHAPMAN (UNITED STATES v.). See Cases Nos. 14,783–14,785.

CHAPMAN (WELLS v.). See Case No. 17,391.

CHAPMAN (YOUNG v.). See Case No. 18,154.

Case No. 2,611.

CHAPON v. SMYTHE.

[11 Blatchf. 120.] [1]

Circuit Court, S. D. New York. April 25, 1873.

CUSTOMS DUTIES—"RIBBONS."

In construing the eighth section of the act of June 30, 1864 (13 Stat. 210), which imposes a duty of sixty per centum ad valorem on "all dress and piece silks, ribbons, and silk velvets, or velvets of which silk is the component material of chief value," that clause must be construed in the same manner as if the word "ribbons" read "silk ribbons."

At law. This was a suit [by Jules Chapon] against [Henry A. Smythe] the collector of the port of New York, to recover back duties paid under protest.

Sidney Webster, for plaintiff.

Henry E. Tremain, Asst. Dist. Atty., for defendant.

After the close of the evidence, SMALLEY, District Judge, said:

This is an action of assumpsit, to recover back duties alleged to have been illegally exacted by the defendant, as collector of the port of New York, on various importations of ribbons made by the plaintiff. The controversy is, as to whether the goods should have paid a duty of sixty per centum, or fifty per centum, ad valorem. The defendant claims that the law imposed the duty of sixty per centum, which he levied. The plaintiff claims that the law imposed only fifty per centum. The most important question in the case is one purely of law. There is only one question of fact for the jury to pass upon.

The eighth section of the act of June 30, 1864 (13 Stat. 210), provides, that, on and after the 1st of July, 1864, a duty of sixty per centum ad valorem shall be imposed on "all dress and piece silks, ribbons, and silk velvets, or velvets of which silk is the component material of chief value." It is claimed

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

by the defendant, that the word "ribbons," as so used, means all ribbons, no matter of what material manufactured, whether of silk, or of silk and cotton, or entirely of cotton. The word "ribbon" was first introduced into tariff acts in the sixteenth section of the act of March 2, 1861 (12 Stat. 186), which enumerates, among silk goods, "silk ribbons." The same expression, with the same context, is renewed in the second section of the subsequent act of August 5, 1861, (12 Stat. 293). In the act of June 30, 1864, fabrics made of different materials are classified in different sections. Thus, the sixth section of that act, which is a cotton section, contains an enumeration of various manufactures of cotton, the general duty imposed thereon being thirty-five per centum ad valorem. The seventh section of that act provides for linen goods; and the eighth section, which relates to the question before us, is a silk section.

It is conceded, in this case, by both parties, that there are three kinds of ribbons made, of one or both of two different materials. There are many fancy names given to such ribbons, but these are of no consequence here. There are ribbons made entirely of silk; others made of silk and cotton; and others made entirely of cotton. If the language of the statute is clear and unambiguous, it must, unquestionably, govern. If, however, the language in which the intention of congress is expressed is capable of two constructions, we must look at previous legislation, together with that of the same session of congress in relation to other articles. It is alleged, on the part of the defendant, that the word "ribbons," as used in the clause of the eighth section of the act of 1864 which is under consideration, means every description of ribbons. But, it must be borne in mind that the eighth section is a silk section, in which silk is the material, and the only material, specifically named. The defendant contends, however, that the word "ribbons" includes every description of ribbons, no matter of what material made, and that cotton ribbons would be included, at a duty of sixty per centum ad valorem. But, can it be supposed that congress intended to make cotton ribbons pay more than any other description of cotton goods? Other cotton fabrics pay thirty-five per centum. The court will not give to the clause such an interpretation, unless the language is clear and explicit. Is the language thus clear and explicit, or is it fairly capable of two constructions? My own conviction is, that the clause should be read as though the word "silk" was inserted before the word "ribbons," as it is before "velvets." I am by no means clear that this is not the only grammatical construction. But if it be not, the clause is fairly susceptible of this construction, if we consider the evident purpose of congress to make cotton goods pay one rate of duty, linen goods another rate, and silk goods another, and a still higher, rate.

It may be said, that the words, "or velvets of which silk is the component material of chief value," includes velvets of silk and cotton. That is true, but the inclusion is by express terms. If, therefore, congress intended to include ribbons "of which silk is the component material of chief value," as well as velvets, the words, "or ribbons," would have been inserted after the words "or velvets." The omission to do so indicates, I think, that congress did not intend to include ribbons, as "velvets of which silk is the component material of chief value."

I decide, therefore, for the purpose of this trial, that it was the intention of congress that only silk ribbons should pay a duty of sixty per centum, and that silk and cotton ribbons, with silk as the component material of chief value, should pay a duty of only fifty per centum, and that cotton ribbons should pay a duty of thirty-five per centum. Such a construction harmonizes all the sections of the act of 1864, which the construction contended for by the defendant does not, because, if the word "ribbons" includes every description of ribbons, it necessarily embraces cotton ribbons.

Much evidence has been offered, as to what article is known or called a ribbon. But, it is agreed, on both sides, that the fabrics in controversy were known to trade and commerce as ribbons; and, therefore, the word must apply to them. It is urged, that the construction which I have announced is in conflict with the opinion of the learned judges who decided the case of Lane v. Russell [Case No. 8,053]. Perhaps it is, but I think not necessarily so. In that case, there was an "agreed statement of facts;" and it does not appear that anything was said about cotton ribbons. It does not appear that the existence of such an article, in trade and commerce, as ribbons composed wholly of cotton, was made known to the court. No reference is made to such an article, either in the agreed statement or in the opinion of the court. If it had appeared to the learned judges that there were cotton ribbons, as well as silk ribbons, and silk and cotton ribbons, I am inclined to think they would have come to a different conclusion. But, whether they would or not, their decision is not necessarily binding upon this court. This court decides the law as it understands it; and so does the circuit court for Massachusetts. If either is wrong, there is a higher tribunal, a common superior, to correct either that court or this.

I am the more confirmed, however, in my conclusion, for another reason. The subject has attracted the attention of the secretary of the treasury, and he has examined it, and called upon his law advisers for their opinion. The solicitor of the treasury is the special law adviser of the treasury department, and one of the highest law officers of the government. He appears to have come to

the same conclusion as the one I now announce, to wit, that the section should be read as though the word "silk" were inserted before the word "ribbons." Not satisfied, however, with this opinion of the solicitor, the secretary applied to the attorney general, the highest law officer of the government. He gave the subject a careful examination, and, in an elaborate and well considered opinion, came to the same conclusion, to wit, that the clause should be read as if the word "silk" were written before the word "ribbons." In respect to every description of ribbons but velvet ribbons, duties are now levied, as I understand, in compliance with the construction thus given to this statute by the attorney general.

Therefore, the only question for the jury is this—How were the ribbons in question known in commerce in 1864, and when they were imported, which was in 1867? Were they known in the trade as silk goods or as silk and cotton goods? If they were known in the trade as silk ribbons, although they were not in point of fact made wholly of silk, they were liable to a duty of sixty per centum. It is conceded that these ribbons are not manufactured entirely of silk, but are made of silk and cotton, with silk as the component material of chief value. The evidence being that the ribbons were manufactured of silk and cotton, it is for the defendant to show, to the satisfaction of the jury, that they were known, and bought and sold in trade, in 1864, and at the date of their importation, as "silk ribbons." If the jury shall find that they were so known and bought and sold, at those dates, they will find a verdict for the defendant. If, on the contrary, the jury shall find, that, upon the evidence, the ribbons in controversy were not known in trade and commerce as silk ribbons, they will find a verdict for the plaintiff. These are the general propositions of law which will be given to the jury for their guidance, and I announce them in advance of the arguments to the jury, in order that the counsel may know to what questions of fact the testimony is to be applied, and what facts the jury will be directed to pass upon.

The jury found a verdict for the plaintiff.

Case No. 2,612.

In re CHAPPEL.

[4 N. B. R. (1871) 540 (Quarto, 176).][1]

District Court, N. D. New York.

ACT OF BANKRUPTCY—SETTING UP SUSPENSION OF PAYMENT OF COMMERCIAL PAPER.

1. The allegation of stoppage and suspension of payment on a certain day, upon commercial paper which was made and dated within the six months next preceding the actual filing of the petition, connected with the allegation that payment of the commercial paper (a due bill) had been demanded at different times, and that the respondent had failed to make such payment, was equivalent to an allegation of a demand for payment on that day.

2. Order of adjudication granted.

In bankruptcy.

Audley W. Gazzam and George Wadsworth, for petitioning creditors.

George Gorham, for bankrupt.

HALL, District Judge. This was a motion on the return of an order to show cause for the adjudication of the bankrupt on the grounds that he had committed an act of bankruptcy by suffering his property to be taken on legal process within six months next preceding the commencement of bankruptcy proceedings. And also on the ground that the bankrupt had suspended payment of his commercial paper (a due bill), and had not resumed payment of the same within a period of fourteen days, etc. It appearing that the allegation setting forth the act of bankruptcy as suffering the bankrupt's property to be taken on legal process, did not allege any specified day, but that the said act was committed on the —— day of ——, 1870, and that the only other allegation of the time of its commission, was, that it was committed within the six months next preceding the date of the petition, which was not dated, but which had been sworn to three days before it was filed, the court held the petition defective in this respect. As to the allegation that the bankrupt committed an act of bankruptcy on the 28th day of September, 1870, by suspension and non-resumption of his "commercial paper," within a period of fourteen days, the same not being a note, but a due bill, bearing date within the six months next preceding, and payable on demand, upon which there seemed indorsed several partial payments, objection was urged to adjudication on this specification, on the ground that there was no allegation of demand.

The court held that the allegation of stoppage and suspension of payment on the 28th of September, 1870, upon commercial paper which was made and dated within the six months next preceding the actual filing of the petition, connected with the allegation that payment of the due bill had been demanded at different times, and that the respondent had failed to make such payment, was equivalent to an allegation of a demand for payment on that day. Order of adjudication granted.

CHAPPEL v. The JOHN E. CLAYTON. See Case No. 7,338.

[1] [Reprinted by permission.]

Case No. 2,613.

CHAPPELLE v. OLNEY.

[1 Sawy. 401;[1] 4 Am. Law T. Rep. U. S. Cts. 30.]

Circuit Court, D. Oregon. Dec. 31, 1870.

LIMITATION DURING TIME OF INSURRECTION — AUTHORITY OF PRESIDENT TO DECLARE THAT INSURRECTION HAD CEASED—EXCEPTIONS TO STATE OF INSURRECTION IN ARKANSAS — RIGHT OF ACTION NOT TO SURVIVE TO WIFE—INTEREST DURING STATE OF INSURRECTION.

1. From and after the act of July 13, 1861 (12 Stat. 257), and the proclamation of August 16, 1861 (12 Stat. 1262), pursuant thereto, declaring the inhabitants of Arkansas to be in a state of insurrection against the United States, and until the termination of such insurrection, an inhabitant of Arkansas could not maintain an action in the courts within the state of Oregon against an inhabitant of the latter state, and therefore the period during which such insurrection existed is not to be counted as a part of the time limited for the commencement of such an action.

[See note at end of case.]

2. The act of July 13, 1861, impliedly authorized the president, so long as congress did not otherwise provide, to declare by proclamation that the insurrection before declared to exist by him, had ceased, as to the inhabitants of any state or section thereof.

3. The president having declared the inhabitants of Arkansas in a state of insurrection, the court does not judicially know that any portion of them, then or afterwards, were within the exceptions in the proclamation because they in fact maintained a loyal adhesion to the Union, or inhabited a portion of the state occupied and controlled by the forces of the United States.

4. A chose in action accruing to a woman during coverture survives to her, unless the husband reduce it to his exclusive possession during his life time; therefore, when a legacy was given to the wife, and she and her husband joined in a power of attorney authorizing O. to collect and receive the same for her use and benefit, the receipt of the money by O. during the life of the husband was not the possession of the latter, except for the use of the wife, and the right to recover the same from O. survived to her.

5. Interest is not recoverable upon a debt owing by an inhabitant of Oregon to an inhabitant of Arkansas during the period the inhabitants of the latter state were in a state of insurrection against the United States.

[At law. Action by Martha Chappelle against Cyrus Olney to recover moneys received by defendant to plaintiff's use.]

E. C. Bronaugh, for plaintiff.

W. Lair Hill, for defendant.

DEADY, District Judge. This action was commenced August 17, 1870. From the complaint it appears that the plaintiff is a resident and citizen of the state of Arkansas and the defendant of Oregon, and that the plaintiff has resided in Cross county, in the state of Arkansas, continuously since December 10, 1859. That in the year 1854, the plaintiff, then being one of the legatees in the last will and testament of Philip Thompson, deceased, late of Oregon, did, together with her late husband, Elisha W. Chappelle, constitute and appoint the defendant their agent and attorney to collect and receive for plaintiff's use and benefit, all sums of money accruing to plaintiff from the estate of said Thompson, and to hold the same subject to the order and demand of plaintiff and her said husband; in consideration whereof, the defendant undertook and promised plaintiff and her said husband to transmit to said husband for the use and benefit of plaintiff all such sums of money received by him as aforesaid, whenever he should be thereunto afterwards requested. That the defendant as agent and attorney as aforesaid received from said estate for plaintiff's use the sum total of $6,146 in gold and silver coin; and that on November 30, 1860, the sum of $4,950.54 of said moneys was remaining in the hands of defendant; and that upon said last mentioned date, said Elisha W. Chappelle requested defendant to forthwith transmit to him for plaintiff's use and benefit all such moneys then in his hands; and that the defendant neglected and refused to transmit or pay over the sum of money then in his hands or any part thereof, and still so neglects and refuses, to the damage of plaintiff $9,756.71.

On August 17, the defendant appeared and demurred to the complaint, and for cause of demurrer alleged: 1. That the action had not been commenced within the time limited by law. 2. That the facts stated are not sufficient to constitute a cause of action. On September 5 and 13 the demurrer was argued by counsel and submitted.

It appears from the complaint that the plaintiff's right of action did not accrue within six years next before the commencement of this action, but that a period of 9 years, 8 months and 17 days elapsed between the demand for the money and the bringing of the action. By the law of this state such an action as this is barred if not commenced within six years; but when the plaintiff is "an alien, subject or a citizen of a country at war with the United States, the time of the continuance of the war shall not be a part of the time limited for the commencement of the action." Code Or. 141, 144. It follows that the demurrer as to the first cause alleged is well taken, unless the plaintiff's right to sue the defendant was suspended at least 3 years, 8 months and 17 days by reason of the hostilities or war carried on between the United States and the states of the so-called "Southern Confederacy"—including Arkansas—between November 30, 1860, and the commencement of this action. If the right to sue was so suspended for any length of time, that period is not to be counted as a part of the six years within which the action may have been commenced.

By section 5 of the act of July 13, 1861 (12

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

Stat. 257), congress authorized the president, under certain circumstances therein mentioned, to declare by proclamation that the inhabitants of any state or section thereof were in a state of insurrection against the United States; "and thereupon all commercial intercourse by and between the same and the citizens thereof, and the citizens of the rest of the United States shall cease and be unlawful so long as such condition of hostility shall continue; and all goods and chattels, wares and merchandise, coming from said state or section into the other parts of the United States, and all proceeding to such state or section, by land or water, shall, together with the vessel or vehicle conveying the same, or conveying persons to or from such state or section, be forfeited to the United States."

This act was passed with direct reference to the rebellion or insurrection then being organized and maintained in certain states—including Arkansas—against the authority and government of the United States. In pursuance of this act the president on August 16, 1861 (12 Stat. 1262), by proclamation, declared the inhabitants of certain states—including Arkansas—to be in a state of insurrection against the United States, excepting, among others, the inhabitants of such parts of such states as "may maintain a loyal adhesion to the constitution and the Union, or may be, from time to time, occupied and controlled by forces of the United States engaged in the dispersion of said insurgents."

On April 2, 1866, the president by proclamation declared "that the insurrection which heretofore existed in certain states—including Arkansas—is at an end;" and on August 20, 1866, another presidential proclamation was issued declaring that the insurrection was at an end in Texas—this state not having been included in the proclamation last mentioned—and that the "said insurrection is at an end, and that peace, order, tranquillity and civil authority now exist in and throughout the whole of the United States of America."

From and after the date of the proclamation of August 16, 1861, all commercial intercourse was prohibited between the inhabitants of Arkansas and the people of the United States, and the transportation and removal of property to or from Arkansas to other parts of the United States not declared to be in a state of insurrection, was punishable by forfeiture thereof. For the time being the plaintiff was a citizen or inhabitant of a country at war with the United States, and therefore could not maintain an action in the courts within this state against the defendant to secure this money. 1 Kent, Comm. 66. The plaintiff's remedy was suspended until the cessation of hostilities and the restoration of peace and lawful intercourse between the people of the two countries. Id. 68.

The next question to be considered is, when did this state of insurrection or hostilities cease? Without stopping to consider whether the president has any power to declare the beginning or ending of an insurrection, except in pursuance of legislative authority, and conceding that all power over questions of war and peace, domestic or foreign, is vested by the constitution in congress, except that vested in the treaty making power, I am of the opinion that the authority conferred upon the executive by the act of July 13, 1861, to declare Arkansas in a state of insurrection, impliedly authorized him, if the state of things amounting to such insurrection should cease or change, to then declare it at an end, unless in the mean time congress had otherwise provided. Assuming that the insurrection, as to Arkansas, was at an end from and after the proclamation of April 2, 1866, the remedy of the plaintiff—the right to sue defendant for this money—was suspended for 4 years, 7 months and 16 days. Deducting this period from the time between the accruing of the right of action and the commencement of this action, leaves 5 years, 1 month and 1 day—a period of 10 months and 29 days less than that allowed by law within which to begin the action. This view of the matter is the most favorable one that can be taken for the defendant, for there is no ground upon which the court can assume that the insurrection, including the prohibition of intercourse between the people of the United States and Arkansas, terminated at an earlier date. Actual war—the marching of hostile forces and the conflict of opposing armies in battle—may have ceased sooner, but this proclamation is the earliest act of the government to which the attention of the court has been called which purports or has the effect to relieve the inhabitants of Arkansas from the status of insurrection and consequent non-intercourse, in which they were placed by the proclamation of August 16, 1861.

In U. S. v. Anderson, 9 Wall. [76 U. S.] 56, the question arose, when was the rebellion entirely suppressed? The circumstances were these: What is called the captured and abandoned property act, passed March 12, 1863 (12 Stat. 820), gave to the loyal owners of such property a right to bring suit against the United States in the court of claims to recover the proceeds thereof, "at any time within two years after the suppression of the rebellion." Anderson, a resident of Charleston, South Carolina, on June 5, 1868, commenced an action to recover the proceeds of certain cotton seized and sold by the United States. The defense was, that the action was barred by the limitation in the act of March 12, 1863, or in other words, that the action was not commenced "within two years after the suppression of the rebellion." By an act of congress passed March 2, 1867 (13 Stat. 422), it was declared

that the act passed June 20, 1864 (13 Stat. 144), to increase the pay of the army should "be continued in full force and effect for three years after the close of the rebellion as announced by the president of the United States, by proclamation bearing date August 20, 1866."

The court held that the limitation of two years did not commence to run until the rebellion was suppressed throughout the whole country, and that the proclamation of August 20, 1866, was the first official declaration on the part of the executive that the rebellion was wholly suppressed. The court also held that the act of March 2, 1867, was so far a legislative recognition of the proclamation declaring the insurrection at an end throughout the United States on August 20, 1866, and that that day would be considered as the day when the rebellion was suppressed, as respects the rights intended to be secured by the captured and abandoned property act.

The court also expressed the opinion that there is no reason why this declaration of congress should not be received as settling the question of when the rebellion was suppressed, "wherever private rights are affected by it." But the court premised this dictum by the declaration that it did not intend to decide anything more than the question: When was the rebellion entirely suppressed within the meaning of the limitation clause on the captured and abandoned property act?

The conclusion of the supreme court upon this question does not conflict with the opinion already expressed in this case, that for the purpose of enabling an inhabitant of Arkansas to maintain an action in the courts of Oregon, the insurrection and consequent disability of the plaintiff to sue were at an end, from and after the proclamation to that effect of April 2, 1866. For this purpose it was only necessary that the insurrection should have been declared at an end as to the inhabitants of Arkansas, and whether it still continued in Texas or not, did not affect the plaintiff's right to sue the defendant.

But as to this case, it makes no difference whether the insurrection as to the inhabitants of Arkansas, was at an end from and after the proclamation of April 2, 1866, or that of August 20, of the same year. In either case, after deducting the time during which the remedy of the plaintiff was suspended by the state of war or insurrection, the limitation of six years would not have run against her right of action.

On the argument counsel for defendant did not seriously question the correctness of these conclusions, but maintained that the action was barred unless it affirmatively appeared from the complaint that the plaintiff was not within the exception contained in the proclamation of August 16, 1861, or in other words, that the particular locality in Arkansas—Cross county—in which the plaintiff resided during the existence of the insurrection did not "maintain a loyal adhesion to the Union and the constitution," or was not "occupied and controlled by forces of the United States."

The plaintiff is not required to anticipate the defense of the statute of limitations, nor could the defendant at common law claim the benefit of it unless he pleaded it. But under the Code, when it appears from the statement of the cause of action in the complaint, that it did not accrue within the limitation prescribed by law, the defense may be made by demurrer. In such case I suppose the plaintiff should anticipate the defense by stating in the complaint any special matter which he relies upon to take the case out of the statute, or otherwise the demurrer will be sustained. But, as in this case, if such special matter is within the judicial knowledge of the court, it need not be stated in the complaint.

Here it appears upon the face of the complaint that the action was not commenced within six years from the time it accrued. If this were all, a demurrer that the action had not been commenced within the time limited would be a good defense. But it is also judicially known to the court that the inhabitants of Arkansas—which description includes the plaintiff under the allegations in the pleadings—were in a state of insurrection against the United States for a sufficient period after the action accrued to take the case out of the statute. But at this point the defendant asks the court to assume that Cross county was during this time within the exception in the proclamation,—that is, was either loyal to the Union or occupied by the forces of the United States, and therefore not in a state of insurrection. Now this is a matter of which, if true, the court cannot take judicial notice. The proclamation declares the whole state to be in a state of insurrection. No particular exceptions to this condition are recognized as then existing. The exceptions made, relate to no particular person or place, but only to such persons or places as may possibly then or thereafter—particularly thereafter—"maintain a loyal adhesion to the Union and constitution," or be "occupied and controlled by the forces of the United States." The exception in regard to the state of Virginia is positive and definite. It relates to the "inhabitants of that part of the state lying west of the Alleghany mountains." If then the particular portion of Arkansas in which the plaintiff resided during the hostilities between the United States and the Southern Confederacy was, as a matter of fact, loyal to the Union or occupied and controlled by United States forces, and therefore not in a state of insurrection, and the defendant relies upon these facts to bring the case within the bar of the statute, he should plead them and be prepared to prove them on the trial.

Upon the argument of the second cause of demurrer it was contended for the defendant that the chose in action—the legacy—was reduced to possession by the husband of plaintiff in his lifetime, and therefore the right to the same did not survive to her, but to the administrator of the husband. Upon a careful examination of the facts and authorities I am clear that the demurrer in this respect is not well taken. The husband was entitled to reduce this legacy to his possession in his lifetime, and then the property in it would have become absolutely his, and upon his decease gone to his administrator. But if he did not so reduce it to possession, his property in it being in the meantime only conditional, it would survive to his wife. 1 Bac. Abr. 700; Hayward v. Hayward, 20 Pick. 520; Schuyler v. Hoyle, 5 Johns. Ch. 196. In Hayward v. Hayward, and Schuyler v. Hoyle, supra, the questions raised by this branch of the demurrer are thoroughly examined and discussed, and the decisions of both the learned courts were in favor of the right of survivorship of the wife, and that, too, under circumstances not so strongly in her favor as are those of this case.

If the power of attorney given to defendant had been given by the husband alone, as it might have been, there would be force in the argument that the act itself evinced an intention to reduce the property to his own possession. But the power was from the wife as well as the husband. This fact itself shows a want of intention on the part of the husband to acquire the property for himself; and the possession of the defendant acquired under this joint power of attorney was not the separate possession of the husband, but of him and his wife.

It is well settled that if the husband sues alone, as he may, for money to which he is entitled in right of his wife, and recovers, the property thereby vests in him, and the right of ownership in the wife is cut off; but if the husband and wife sue jointly, and the husband dies, the wife as survivor would take the benefit of the recovery. 5 Johns. Ch. 210. The joining of the wife in the suit is held to be sufficient evidence of an intention on the part of the husband not to reduce the property to his own possession or recover it for the benefit of himself.

In this case, in addition to the wife's joining in the power of attorney, there is the express declaration therein, that the defendant was to receive and transmit this legacy to the husband for the use and benefit of the wife. This circumstance alone shows that it was not the intention of the husband to acquire possession of the property otherwise than for the plaintiff. Under these circumstances, the receipt of the money by the defendant was not the receipt of it by the husband otherwise than for the use and purpose mentioned in the power, and upon his death, whilst the money was still in the hands of the defendant, the right to sue for and recover it to her own use, survived to the wife.

This debt being payable directly to the plaintiff, interest is not recoverable upon it while she was an inhabitant of the district of country in a state of insurrection against the United States. Ward v. Smith, 7 Wall. [74 U. S.] 452.

[The demurrer must be overruled, with costs.] [2]

[NOTE. The statutes of limitations of the several states did not run, during the civil war, as to controversies between inhabitants of the Confederacy and inhabitants of the loyal states. Hanger v. Abbott, 6 Wall. (73 U. S.) 532; Levy v. Stewart, 11 Wall. (78 U. S.) 244; Stewart v. Kahn, Id. 493; U. S. v. Wiley, Id. 508; Brown v. Hiatts, 15 Wall. (82 U. S.) 177; Adger v. Alston, Id. 555.]

Case No. 2,614.

CHARD v. The KATE L. BRUCE.

[N. Y. Times. April 1, 1863.]

District Court, N. D. New York.

COLLISION—LACHES OF LIBELANT—1863.

[1. A claim for damages sustained by collision on Lake Erie cannot be maintained against a bona fide purchaser of the vessel at mortgage sale, without notice of the claim, more than one year after the collision, when the vessel continued to run on the lakes.]

[2. As a general rule, admiralty liens on vessels navigating the western lakes must be prosecuted within one year after such liens could have been prosecuted, or they will be considered stale.]

[In admiralty. Libel by Rufus J. Chard against the schooner Kate L. Bruce for damages caused by collision.]

Before HALL, District Judge.

This is a case of collision. The collision occurred near Turtle island, at the west end of Lake Erie, on May 16, 1858. The Bruce continued to run on the lakes between Chicago and Buffalo, until about the 10th of May, 1859, when she was sent down the St. Lawrence and taken around to Boston, Mass. While at Montreal she was taken into possession by parties holding a mortgage upon her, and on the 3d of August, 1859, she was sold under the mortgage as free from incumbrances, and for her fair value, to a bona fide purchaser, without notice, who afterward, and before notice of any claim, paid the purchase money. The notice of the sale under the mortgage was published in Buffalo, where the libelant resided, in a daily paper, from the 8th of July to the 1st of August, but no notice of this claim was given at the sale. The libelant claims as assignee of the owner of the vessel injured by the Bruce.

As a general rule, I have held that admiralty liens on vessels navigating our western lakes must be prosecuted within one year after such liens could have been prosecuted,

[2] [From 4 Am. Law T. Rep. U. S. Cts. 30.]

or that they will be considered as stale, and will not be enforced against a bona fide purchaser for value without notice. Under all the circumstances of this case, I think the claim should be considered a stale claim, which ought not to be enforced against the present owner of the Bruce. Libel dismissed, with costs.

CHARGE TO GRAND JURY. See Append. Fed. Cas.

CHARLES, The (EVANS v.). See Case No. 4,556.

Case No. 2,615.

CHARLES v. MATLOCK.

[3 Cranch, C. C. 230.][1]

Circuit Court, District of Columbia. Dec., 1827.

ENFORCEMENT OF INDENTURE OF APPRENTICESHIP.

Under the Maryland act of 1793 (chapter 45, § 6), a mechanic may take as an apprentice any male child until he arrive at the age of twenty-one years; and an indenture made by one justice of the peace only, for five years' service of the boy, was, under the seventh section of the act, enforced by the court, after the boy had been some time with the master, (who was a tailor,) and was able to earn eight or nine dollars a week by working at the trade; although one justice of the peace had no authority so to bind him, and although the age of the boy was not specified in the indenture, and although the indenture was not seen by the orphans' court, nor recorded, nor signed by the boy or his mother, who was his only living parent, nor was her approbation thereof notified by an indorsement on the same.

This was the petition of an infant [Edward Charles], to be discharged from the custody of the respondent [Simeon Matlock], who claimed him as his apprentice, under an indenture made by one justice of the peace only, for five years' service. The indenture did not specify the age of the boy, and was not recorded in the orphans' court, nor seen by that court, nor its approbation, or that of the mother, who was the only living parent, indorsed thereon.

The sixth section of the Maryland act of 1793 (chapter 45, § 6), is in these words:—"That it shall and may be lawful for any manufacturer or mechanic to take, as an apprentice, any male child until he shall arrive at the age of twenty-one years; provided, always, that the contract so made shall specify the age of the child at the time of making the said contract, and that the parent or parents of such child, if living, or, if an orphan, the orphans' court of such county as the child shall reside in, shall see the contract within two months after its execution, and notify their approbation thereof by indorsement on the same; and that the said contract shall be recorded among the records of the orphans' court, and the sum of three shillings shall be paid by the master of the said apprentice therefor; and, when so recorded, the said contract shall be of the same validity as if the same had been originally made with the parents of the said child, or with the orphans' court." By the seventh section of the same act it is, among other things, enacted, that "in case the contract, whether defective in form or not, hath been partly executed, the said county or criminal court, may award and compel the terms, or any part of the terms, to be performed by the master or mistress, or by the apprentice, as justice and equity may require; and the master or mistress of any apprentice may detain the said apprentice in his or her service till such apprentice is or shall be discharged by the court aforesaid; and the said master or mistress may maintain such action against strangers, as if such apprentice had been legally bound to serve."

Mr. Beale and Mr. Hellen, for the petitioner, contended that the indenture was void, and constituted no contract: 1st. Because one justice of the peace alone has no authority whatever to bind out a child as an apprentice, nor to make a contract for him. The law of Maryland only gives the power to the orphans' court, or to the father of the child, or to the trustees of the poor, (whose authority is limited to the children under their care in the poor-house of the county,) or two justices of the peace, when the orphans' court is not in session. The authority given by the sixth section, to a manufacturer, or a mechanic, to take as an apprentice any male child, is to take with the consent of the child, who is thereby authorized to enter into such a contract for himself, with the approbation of his parents, if any, or of the orphans' court, if he is an orphan. To make this a contract under that section, it must be shown that the boy made the contract on his part; that it specified his age; that his mother, or the orphans' court, saw the contract within two months after its execution, and notified their approbation by an indorsement on the same, and that it was recorded among the records of the orphans' court. At common law, he could make no such contract. His authority is entirely under the statute, and can be exercised only in the manner, and to the extent designated in the statute. Recording is all-important to the validity of a contract; as much so as the recording of a deed for land. The statute says: "And, when so recorded, the contract shall be of the same validity as if the same had been originally made with the parents of the said child, or with the orphans' court." There must be two parties to a contract. The parties to the contract, contemplated by the sixth section, are the mechanic and the boy. Here is no evidence whatever, that the boy entered into any contract. The indenture purports to be made between the

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

justice of the peace and the mechanic; and it does not appear that the assent of the boy was ever asked. In the case of Ballard v. Edmonston, in this court, at October term, 1823 [Case No. 817], the indenture was signed by the mother of the boy, and by Ballard, who was a tailor, but not by the boy. The indenture did not specify the age of the boy, but he was to serve nine years. He had served part of the time, and Mr. Ashton contended that it was a contract which the court could and ought to enforce under the seventh section of the act. Mr. Coxe, on the contrary, contended that that was not a contract defective in form only, and therefore within the seventh section, but it was no contract at all, as the mother had no right or authority to bind out her child. And of that opinion was the court, (Thruston, J., absent.) So in the case of Handy v. Brown, in this court, at December term, 1809 [Id. 6,019], this court (Fitzhugh, J., absent,) decided that an indenture entered into and signed by a boy of sixteen years of age, without any evidence of the assent of his parents, or of the orphans' court, was not a binding indenture under the Maryland law; and, if it could be considered as a contract for necessaries, yet it did not create the relations of master and apprentice.

Mr. Key, contra, considered the objection as going to the form of the contract only, except the assent of the mother, within the two months after the execution of the indenture, which he was ready now to prove, although her approbation had not been indorsed upon the contract.

CRANCH, Chief Judge. I think there was no contract binding the boy, because the age was not inserted; because neither the approbation of the father, nor mother, nor orphans' court was indorsed on the contract; because it was not recorded in the orphans' court; and because one justice of the peace had no authority to bind out an apprentice in any case whatever. These requisitions of the statute, I think, are necessary to the validity of the contract, agreeably to the decision in Ballard v. Edmonston [supra]. Whatever is necessary to the validity of the contract is matter of substance. An infant cannot contract under seal, but in the manner and to the extent prescribed by statute. A limited power must be strictly executed. The acts not having been done, which I deem necessary to the validity of the contract under the statute, I am of opinion that there was no contract.

THE COURT, however, considered the objections as objections to form only, except that to the want of the assent of the mother; but were of opinion that such assent may now be proved, although not indorsed within the two months; that the sixth section does not require the recording in any limited time, and that it may now be done, (upon this point, however, MORSELL, Circuit Judge, dissented), and that the time of service, being limited to five years, is equivalent to the insertion of the age of the child.

The petition was dismissed.

CHARLES (MUTUAL BENEFIT LIFE INS. CO. v.). See Case No. 9,975.

CHARLES (UNITED STATES v.). See Case No. 14,786.

CHARLES AVERY, The (SPENCER v.). See Case No. 13,232.

Case No. 2,616.

The CHARLES F. PERRY.

[1 Lowell, 475.] [1]

District Court, D. Massachusetts. Sept. 1870.

SEAMEN—EXTRA SERVICES.

A seaman who was shipped as cook on a foreign voyage, and who performed extra services as stevedore in a foreign port, may proceed in the admiralty for compensation for the extra services, though his wages as cook have been paid in full.

[Cited in The Artisan, Case No. 568.]

In admiralty. The libellant shipped at New York in January, 1870, on board the Charles F. Perry, for a voyage to Rosario, in South America, and back to Boston, at thirty dollars a month. At the foreign port he did the work of a stevedore, by the request of the master, and thus saved a considerable sum to the vessel, besides paying a man to do his work as cook. His services as stevedore were much more laborious and valuable than those of a cook. The special bargain alleged in the libel was not found by the court to be proved, but he was considered, on the facts, entitled to a quantum meruit.

C. G. Thomas, for libellant.

H. C. Hutchins & H. H. Currier, for claimants.

The court has no jurisdiction to enforce payment of a stevedore's wages. The Amstel [Case No. 339]; Phillips v. The Thomas Scattergood [Id. 11,106].

LOWELL, District Judge. I do not care to criticise the cases cited for the claimants, though I doubt their soundness. This is not a libel by a stevedore for stowing a vessel, but of a cook demanding extra wages for work done on board the vessel beyond the limits of his original contract, and not so sharply distinguished from it that he is obliged to split his bill into two parts, and proceed for one here and for the other at common law. This case is much like those in which Judge Sprague held that where the principal contract was maritime, the

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

jurisdiction of the admiralty would not be defeated by the fact that some incidental services were performed on land. The Mary [Case No. 9,188]; The Canton [Id. 2,388]; The Brookline [Id. 1,937]. There are many voyages in which the seamen perform more or less work on shore, as in a trading voyage to the west coast of America for hides, made famous by Mr. Dana's book; or in the pursuit of seals and sea elephants, voyages which I have often settled in this court. So captures in time of war made on land by boats' crews sent from a public ship are held to come within the province of the prize courts. Lindo v. Rodney, 2 Doug. 613, note. It is true that the admiralty courts in England, before the year 1861, were prohibited from entertaining suits upon special contracts, and they were accustomed to strike out of the libel any items of charge which had such an origin. But this illiberal and inconvenient course which was forced upon those courts by superior authority, against their protest, has never obtained in this country, and has now been abrogated in England.

I am clearly of opinion that where a seaman is entitled to payment for incidental services performed in the course of the voyage, whether by virtue of his original contract or not, his whole demand may be recovered in a suit against the vessel in this court, though a part of the work done, taken by itself, would not be considered of a maritime nature. I cannot see that it makes any difference whether the original contract or some additional and supplementary contract is appealed to. After the bargain is made the parties have the same rights as if it had been agreed in the beginning.

It is suggested, indeed, that here the contract wages have all been paid, leaving only those as stevedore to be recovered. But this is a mere accident. It may with as much truth be said that a sum equal to the wages has been paid, on account. The mode and time of payment cannot sever the demand and oust the jurisdiction, if the whole cause of action were fairly within the cognizance of this court before the payment was made.

Decree for the libellant for $84 and costs.

Case No. 2,617.

The CHARLES HENRY.

[1 Ben. 8.][1]

District Court, E. D. New York. Oct., 1865.

PRINCIPLE OF SALVAGE—DERELICT—DISTRIBUTION—PASSENGERS—LIBELS BY DIFFERENT SALVORS—COSTS—COUNSEL FEE.

1. Where a vessel fell in, off Cape Henlopen, with a wreck, which, on being boarded, proved to be a derelict, and the master put on board her a crew, consisting of his mate and cook and two men, who were being carried to New York at the expense of the owner of the salving vessel, who brought her in safety to New York, the value of the vessel and cargo being $3,700. *Held*, that the spirit of the rule which governs salvage awards, requires that while they should not be extravagant, they should always be generous.

2. That the rule in cases of derelict is to award a moiety, the burden being on the claimant to show that a different measure should be applied.

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

[See note to The Cayenne, Case No. 2,532.]

3. That the rule allowing compensation to the owners of the salving vessel is too firmly established to be shaken, and the habit of courts of admiralty is to award them a third.

4. That the responsibility thrown upon the master and his rank are to be considered in fixing the share to be paid to him.

5. That a passenger who was bold in advising the master to attempt the service, and active in helping to perform it, was entitled to an increased share on that account.

6. That passengers who refused to volunteer to assist when solicited, are not entitled to share in the award.

7. That there should be but one libel filed in ordinary salvage cases, and costs paid for but one.

8. That part of the costs might be paid out of the remaining share of the proceeds, but that there were no circumstances which called for an award of a counsel fee.

9. Ordered that the clerk's and proctor's fees be first paid out of the fund, and that half the remainder be divided into twenty-one shares, of which the owners were to have seven, the master five, and the passenger three. The remainder to be divided among the crew and the other passenger according to their wages. The passenger to rank with the mate. Marshal's fees and commissioner's costs to be paid out of the remaining proceeds.

In admiralty. The libel in this case was filed by John C. Rahming, the owner, and the master and crew of the schooner Georgiana, in behalf of themselves and all others interested against the schooner Charles Henry and her cargo, to recover salvage. The Charles Henry as well as her cargo was seized, under process, issued according to the prayer of the libel, and thereafter John Dempster Cousins, who was a passenger upon the Georgiana, not fully satisfied with the presentation of the case as made in the libel of the owner, appeared by his own proctor, and asked and obtained from the court leave to set forth his services and demands with more particularity in a supplemental allegation. Subsequently, Dominick Buckley, another of the passengers upon the Georgiana, filed a libel, setting forth his services in effecting the salvage, and process was issued in his behalf. Subsequently, by order of the court, the two causes were consolidated. No one appearing on the part of the Charles Henry or her cargo upon the return of the process, it was accordingly adjudged that the schooner and her cargo be condemned to pay salvage, and a reference was ordered to a commissioner, to take such testimony as the respective parties appearing might offer in support of their allegations, and report the same to the court.

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

Upon the coming in of the testimony taken before the commissioner, the various libellants appeared before the court, by their respective advocates, and presented their views upon the question of the amount of salvage to be awarded, and its distribution among the salvors.

There was little or no dispute as to the circumstances attending the saving of the vessel proceeded against, or the part taken by the parties who claimed to be the salvors. The proofs showed that about midday on the 24th of August last, when the Georgiana, bound to New York, was about thirty miles from Cape Henlopen, a wreck was descried, lying in her course. Upon coming up with it, the libellant, Cousins, proposed that it be boarded, and overcoming some slight objection on the part of the master, on account of the sea running, went into the stern boat, which was lowered, and with the master, the cook and two seamen, proceeded to the wreck. It proved to be the schooner Charles Henry, laden with coal, water-logged and abandoned. She was found to be in great disorder, full of water, with one pump choked, and the sea making a clean breach over her. She was, in fact, a derelict in a sinking condition, and, in the opinion of some of the witnesses, would have gone down within six hours if no aid had been afforded her. After trying the pumps, it was determined, upon a consultation between the master and Cousins, to make an effort to free her, and bring her into port. The effort proved successful. By active pumping she was freed from water, and sails were set. A crew, consisting of the mate of the Georgiana, two passengers, Cousins and Buckley, and the cook, were put in charge, with orders to follow the Georgiana, which latter vessel, by slackening sail, kept her in sight, and led the way, until, after the expiration of two days and eight hours, both vessels arrived safely in the port of New York.

The value of the Charles Henry and cargo amounted to about $3,700.

Benedict, Burr, & Benedict, for libellant Rahming.

Charles Edwards, for libellant Cousins.

J. J. Rogers, for libellant Buckley.

BENEDICT, District Judge. The facts of this case presents all the elements of a salvage service as frequently declared in courts of admiralty, and entitle the libellants to be rewarded as salvors according to the settled rule of the maritime law. This rule rests upon an enlarged view of public policy, and declares it to be for the interests of commerce, that when property at sea, and in danger, is saved by exertions voluntarily rendered, a suitable reward for such exertions should be given out of the property saved. It is for the safety and interest of commerce that this rule be always enforced in the liberal spirit which originated it, to the end that whenever disaster occurs upon the sea, all persons having opportunity to afford relief, shall feel assured that efforts expended in behalf of property in peril, if shown in a court of admiralty, will not fail to bring returns more advantageous to the salvors, than can be obtained by plunder of wrecks; and that time expended in salvage services, receives more ample reward than the ordinary recompense of freight or charter money. The spirit of the rule requires that salvage awards, while they should not be extravagant, should always be generous.

These considerations are not new. They have long been acted upon by foreign, as well as American courts of admiralty; and by merchants and underwriters in many cases, never brought before the courts. Indeed, I think it might be added that the merchants have generally applied the rule of the maritime law with a generosity more liberal than that sometimes exhibited by the courts.

The facts attending the saving of this wreck do not require at my hands any extended examination to enable me to determine the amount of salvage to be decreed. It is a case of a derelict, and no one appears as claimant. I content myself with adopting the language of Judge Story in the case of Rowe v. The Brig [Case No. 12,093]: "In cases of derelict, the old rule should still be considered as a subsisting but flexible rule, that, prima facie, the salvors are entitled to a moiety; and it is incumbent on the claimant to establish that, under the special circumstances of the case, a different measure ought to be applied."

I therefore award to these salvors one half the proceeds of this vessel and cargo, as their salvage reward in this case; and as the value of the property is not great, and no one has appeared to claim it and avoid the expense of the proceedings by payment or tender, and inasmuch as the expenses of the custody and storage of the cargo and of taking proof of the facts have been considerable, I shall direct that the proctor's and clerk's costs only, be deducted from the gross proceeds, and that the marshal's and commissioner's fees be paid out of the proceeds remaining, after payment of the salvage as awarded. It was urged upon the argument, that a counsel fee should also be awarded out of the fund, if not to each advocate, at least to the one originating the proceedings; but I see nothing in the case to call for such additional allowance.

There remains to determine in what proportions the salvage shall be distributed among the salvors. Upon this question it has been urged in behalf of the passengers, that the owner of the Georgiana should receive but a small, if any, part of the award, inasmuch as he did not personally partake of the risk or share in the labor. But I

cannot give to this proposition my assent. Were such a doctrine established, it would defeat the object of the law; for let owners understand that they derive no benefit from the performing of salvage services by their vessels, and orders to their masters to avoid rendering the services will soon follow.

The contrary rule is too firmly established to be now shaken. Courts of admiralty in all cases not only give consideration to the claim of an owner to participate in salvage awarded, but in the distribution give him a liberal share. As to what this share should be, while there is no rigid rule, there is in the court of admiralty a well established "habit."

In ordinary cases, the habit of the court is to give to the owners one-third of the amount —The Henry Ewbank [Case No. 6,376],—and no reason is seen for deviating from the rule in the present case. One-third of the salvage awarded will accordingly be paid to the owner of the Georgiana. The claim of the master of the Georgiana, Captain Foster, stands next in rank. The proof shows that the salvage service in question was performed under the immediate orders and superintendence of the master. He boarded the wreck, and directed the labor of preparing it for a successful voyage to a port of safety. He detailed his chief mate to navigate the wreck, and was thereby compelled to take upon himself double duty on his own vessel. He kept the wreck in sight until it was anchored in New York. The responsibility of the adventure from beginning to the end was upon him, and to this element in his case I give much consideration. As a class, the masters of our commercial vessels receive no extravagant compensation, while they are compelled to assume great responsibilities, and the full weight of this responsibility they are often made to feel when a voyage or adventure, although undertaken and conducted according to their best judgment, under the circumstances, proves in the end disadvantageous to the owner. I consider, therefore, not only the labor of this master, but his rank and responsibility, in fixing the portion to be given him, and shall give him a liberal reward. There remain the claims of the passengers and crew. It appears from the proofs, that the Georgiana had on board, in addition to her crew, six persons who were in the employ of the owner, and were being transported by him to New York at his expense. Two of these, Cousins and Buckley, formed part of the crew which navigated the wreck into port. On the part of Cousins, it is insisted that he is entitled to an original and liberal portion beyond that of any person composing that crew. I have examined the evidence touching the services of this libellant with care, but do not find that it discloses any extraordinary labor performed by him. So far as navigating the vessel into port is concerned, all on board shared in the labor alike, and little weight can be given to the fact that he helped to lower the stern boat, or was first on the deck of the schooner. Nor was any especial skill as a navigator at any time displayed or required on the part of this passenger. It is, however, shown that he had acted as chief mate on other vessels, and his counsel was sought by the master of the Georgiana, as to undertaking to save the schooner. He boldly urged action, and sustained his advice by taking the lead under the master, in the measures adopted to effect the salvage. A timorous opinion expressed by him, or less vigorous action on his part, might have led the master to avoid taking the responsibility of attempting to get the vessel into port, and for this reason a larger portion should be awarded to this passenger than can be claimed by the passenger Buckley, or even the mate. Cousins and Buckley were the only persons out of six passengers who took any part in effecting the salvage. The boat returned from the wreck for volunteers to form a crew, and none of the passengers would volunteer but Buckley. Because of their refusal to volunteer when solicited, I refuse these persons any portion of the reward. The Baltimore, 2 Dod. 132. The remainder of the salvage is to be distributed among the crew of the Georgiana. Buckley, however, should be included, and rank with the mate. I should refuse all costs of his libel to Buckley if there were not some special circumstances which justified an additional libel in his behalf. In ordinary cases, but one libel should be filed, and costs allowed for but one.

Let, therefore, the clerk's and proctor's costs, when taxed, be first paid out of the proceeds in court, and one-half the remainder be divided into twenty-one equal shares. Let the owner have seven shares. Let the master, Foster, have five shares. Let Cousins, the passenger, have three shares; and let the remaining six shares be divided among the crew, including Buckley, making six in all, according to their respective rates of wages as proven. Buckley to be rated with the mate, and the crippled sailor, who was upon the articles at nominal wages, to be rated at $10 per month. And let the costs of the marshal and the commissioner's fees, when taxed, be paid out of the remaining proceeds.

CHARLES MEARS, The (PARMLEE v.). See Case No. 10,766.

Case No. 2,618.

The CHARLES MORGAN.

[2 Flip. 274;[1] 18 Am. Law Reg. (N. S.) 624.]

District Court, S. D. Ohio. Oct. 24, 1878.

ADMIRALTY JURISDICTION — ACTION FOR DAMAGES FOR WRONGFUL DEATH.

The wife of a passenger brought a libel in rem to recover damages for the death of her

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

husband, caused by the negligence of the officers of the vessel. Plea to the jurisdiction. Jurisdiction sustained.

[Cited in Hollyday v. The David Reeves, Case No. 6,625; Holmes v. Oregon & C. Ry. Co., 5 Fed. 79; The Garland, Id. 924; The E. B. Ward, 17 Fed. 458; The Harrisburg, 119 U. S. 208, 7 Sup. Ct. 143.]

[See Armstrong v. Beadle, Case No. 541, note.]

In admiralty. This was an action in rem by the widow of Edwin Rusk against the steamboat Charles Morgan, to recover damages for the death of her husband. The libel alleged that her husband was a passenger upon said boat from New Orleans to Cincinnati, and that owing to the negligence and carelessness of the master and officers of the boat, in leaving the hatchway open at night, without light and guard, he fell through one of the hatchways into the hold of the vessel and was instantly killed. Prayer for damages. Claimant files a plea to the jurisdiction in the form of exceptions to the libel, on the ground, that in admiralty, as at common law, no action is maintainable for the wrongful death of another, either in personam or in rem.

P. J. Donham, for exception.
Henry Hooper, for libellant.

SWING, District Judge. From an examination of the English authorities, it is very clear, that no right of action existed at common law for the death of a human being. This doctrine is first announced in the case of Higgins v. Butcher, Yel. 89, which was an action brought by the husband for the death of his wife. Then came the celebrated case of Baker v. Bolton, 1 Camp. 493, which was also an action brought by the husband, to recover damages for the death of his wife. These are all the cases we have been able to find prior to the passage of Lord Campbell's act in 1846. But that this was the recognized doctrine is shown by the preamble of the act, which recites that "whereas no action at law is now maintainable against a person who, by his wrongful act, neglect or default, may have caused the death of another person," etc., and the act then proceeds by its provisions to give such right of action. This is further shown by the case of Glaholm v. Barker, 1 Ch. App. 226, in which Lord Justice Turner said: "Lord Campbell's act first introduced into the law of this country a remedy in case of injuries attended with the loss of life. The law up to the time of the passing of this act stood thus, that in case of death resulting from an injury, the remedy for the injury died with the person." The same doctrine is maintained in Osborn v. Gillett, L. R. 8 Exch. 88, and in Bac. Abr. "Master and Servant," O; Blake v. Midland Ry. Co., 18 Q. B. 93. In fact we have not been able to find a single reported case in which a contrary doctrine has been held. The English courts and law writers may not have founded this doctrine upon such principles, as may now appear sound to us; but, nevertheless, it cannot be disputed that such was the doctrine of the common law.

In the United States this principle is not so well settled, and yet the weight of authority is to the same effect, as will be seen by reference to the following cases: Carey v. Berkshire R. Co. and Skinner v. Housatonic Ry. Corp., 1 Cush. 475; Kearney v. Boston & W. R. Corp., 9 Cush. 109; Hollenbeck v. Berkshire R. Co., Id. 480; Pennsylvania R. Co. v. Henderson, 1 P. F. Smith [51 Pa. St.] 322; Whitford v. Panama R. Co., 23 N. Y. 470; Green v. Hudson River R. Co., 2 Keyes [*41 N. Y.] 294; Connecticut Life Ins. Co. v. New York & N. H. R. Co., 25 Conn. 265; Eden v. Lexington & F. R. Co., 14 B. Mon. 165; Worley v. Cincinnati, H. & D. R. Co., 1 Handy, 481; Hyatt v. Adams, 16 Mich. 180.

On the other hand, there is the case of Ford v. Monroe, 20 Wend. 210, in which, however, this question was not made; but it has since been overruled by the New York courts. See cases cited. The case of James v. Christy, 18 Mo. 162, is usually cited as maintaining the opposite doctrine, but it will be found that the decision of the case turned upon a special statute of Missouri. In Shields v. Yonge, 15 Ga. 349, the question was clearly made and decided, but none of the American cases seem to have been referred to by the learned judge who delivered the opinion of the court. And in Sullivan v. Union Pac. R. Co. [Case No. 13,599], the circuit judge made a vigorous assault upon the common law doctrine and refused to follow it; but this case was taken to the supreme court of the United States, and dismissed for want of jurisdiction, at the October term, 1877. As no opinion was delivered by the court, we are unable to say whether this point was considered. So that there is only the Georgia case, which seems to directly deny the common law doctrine. But that this principle or doctrine, that no such right of action existed, has been generally accepted in the United States, is further shown by the fact that in a large number of the states, such a right of action is expressly given by legislative enactment.

But it is urged on the part of the libellant, that whatever the common law principle may be, that the civil law permitted the action, and that the admiralty courts of the United States are not bound by the decisions of the common law. The decisions of the federal courts are not uniform upon this point, although the majority of them sustain it.

In Plummer v. Webb [Id. 11,234] it would seem that the direct question was not determined, but jurisdiction in admiralty was maintained by the United States district judge. The case was appealed to the circuit court, and after amendment of the libel, the action was dismissed by Justice Story for want of jurisdiction.

In Crapo v. Allen [Id. 3,360] it was held that actions in admiralty, for mere personal

torts, did not survive the death of the person injured. But in Cutting v. Seabury [Id. 3,521] the judge said it was not the settled law, that no action could be maintained for damages occurring upon the death of a human being, and that such right ought to exist; but the precise point was left undecided. It was held in the case of The City of Brussels [Id. 2,745], where a child had died from the negligence of the officers of the vessel, that this action could be maintained in rem, as arising upon the contract of passage. And in The Sea Gull [Id. 12,578] Chief Justice Chase decided that an action in rem could be maintained in admiralty by the husband for the death of his wife; and in The Highland Light [Id. 6,477] he affirmed the same doctrine. In the latter case the widow and son filed their libel in rem to recover damages for the death of the father and husband, and the same judge held, that while the action could not be maintained in rem, the action would lie in personam, and that the admiralty court had jurisdiction. This case seems to have been decided wholly upon the construction of the statute; while the former was based entirely upon the general right to maintain such an action in the admiralty court.

In Coggins v. Mary Helmsley [Case No. 14,109] it was held in an action by the wife of the chief mate of a schooner, which was run down by a steamship, causing the death of the husband, that an action in rem would lie in the admiralty court, to recover damages for his death; following the decision of Chief Justice Chase. I find, upon reference to the records of this court, that at the June term, 1870, the district court dismissed the libel of Thomas v. Sherlock [unreported] which sought to recover damages for the death of the husband of libellant, for want of jurisdiction. The case was appealed to the circuit court, and by consent of both parties the decree of the district court was affirmed. There is nothing in the record, however, to show that this point was raised and decided.

So far as I have been able to ascertain, these are all the cases in which the question at issue has been raised and determined. In Steamboat Co. v. Chase, 16 Wall. [83 U. S.] 522, Justice Clifford discusses the question, and after noticing the cases of Crapo v. Allen [supra] and The Sea Gull [supra], adds: "Difficulties, it must be conceded, will attend the solution of this question, but it is not necessary to decide it in this case."

As the case at bar will probably go to the supreme court of the United States, it will be better for all parties that the appeal should be taken after a trial upon its merits. I shall therefore overrule the exceptions to the jurisdiction of the court.

NOTE [from original report]. See on same subject and on cognate questions, The Ruckers, 4 C. Rob. Adm. 74, and note; De Lovio v. Boit [Case No. 3,776]; Domat, Civ. Law, 1550; 1 McQueen, 750; The Highland Light [Id. 6,477]; The Sea Gull [Id. 12,578]. In the last named case, the wife brought a libel in rem for damages, alleging that her husband was killed while rowing in Baltimore bay by reason of a collision with the vessel libelled. The court decided that it had jurisdiction, and that she was entitled to recover. See, also, 6 Ben. 317 [The Civilta, Case No. 2,775], and The Towanda [Case No. 14,109]. The case of Thomas v. Sherlock [unreported] was finally settled by paying the libellant an amount agreed upon between the parties, after which the decree as stated in the opinion was affirmed. See The Garland [5 Fed. 924]; Brown, J., (February 21, 1881,) holding the doctrine of the text. See, also, the opinion of Deady, J., sitting in admiralty for the district of Oregon, in Holmes v. Oregon & C. R. Co. (1880) 5 Fed. 75. The libel was for damages, alleging that Perkins, the intestate, was killed through the negligent conduct of defendant, while he was being transported across the Willamette river to Portland. The opinion is in accord with those of the other judges referred to herein. See, also, Gerrity v. The Kate Cann, 2 Fed. 241.

CHARLES MORGAN, The (MOORE v.). See Case No. 9,754.

CHARLES PITMAN, The (CARRIGAN v.). See Case No. 2,444.

Case No. 2,619.

The CHARLES R. STONE.

Circuit Court, E. D. New York.

[Affirming Case No. 2,620. Nowhere reported; opinion not now accessible.]

Case No. 2,620.

The CHARLES R. STONE.

[9 Ben. 182.] [1]

District Court, E. D. New York. June, 1877.[2]

COLLISION AT PIER—TUG AND TOW—HARBOR NAVIGATION—NEGLIGENCE.

1. Where a large oil-barge in tow of a tug, the C. R. S., which was endeavoring to turn her in the East river, sagged against vessels lying at the end of a pier, and the force of the blow drove one of the vessels, a tug with a flaring bow, on and over the bulwark of another tug, doing her damage: *Held*, that the oil-barge and her tug, having only sagged against the vessels by force of the tide and against their own efforts, were not guilty of any negligence.

[Distinguished in The Harry, 15 Fed. 161.]

2. That it is the duty of every vessel lying at a pier to be prepared to withstand such contact, it being one of the necessary incidents of harbor navigation; and that the negligence that caused the damage in this case was in allowing a tug with an unusually flaring bow to lie against the midships of another in such a position that, when pressed together, the strain must all come on the bulwarks of the inner vessel.

[Cited in The Echo, 19 Fed. 455; The N. B. Starbuck, 29 Fed. 798; The Howard, 30 Fed. 282; Mould v. The New York, 40 Fed. 902.]

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

[2] [Affirmed by circuit court (case not reported).]

In admiralty.

Beebe, Wilcox & Hobbs, for libellants.
Knox & Woodward, for claimants.

BENEDICT, District Judge. This action is brought to recover for injuries sustained by the tug Union, while lying at pier 19 in the East river, on the 15th day of April, 1876. The Union was moored at the end of the pier, and adjoining thereto, alongside of her, heading the same way, lay the tug Starbuck, while still outside of the Starbuck lay a large bark the Queen of the Sea.

The tug Chas. R. Stone was engaged in towing a large oil-barge, the Sweepstakes, alongside. While endeavoring to turn the barge in the East river, so as to head the strong flood tide then running, the Stone and Sweepstakes sagged up against the vessels at the end of pier 19. The Stone's engine was stopped at the time, and the vessels were borne by the mere force of the tide. When the Sweepstakes brought up no injury at all was sustained by the Sweepstakes or the Queen of the Sea, against which she sagged, but the Union lying inside was injured by the Starbuck being forced against her.

The Starbuck had a very flaring bow, and as she lay with her bow opposite the Union's midships, when the Queen of the Sea pushed the Starbuck, the bluff of the Starbuck's bow struck the bulwarks of the Union and broke the top timbers and rail, which is the damage complained of. If the Starbuck's bow had not been unusually flaring there would have been no damage, nor would there have been any injury if the bow of the Starbuck had been below the Union's water way; but the Starbuck's bow being higher than the Union's water way, and very flaring, the bow was pushed against the rail, which proved unable to sustain the pressure, and gave way.

The weight of the evidence shows that the force with which the Sweepstakes came up against the bark was not great. She simply sagged by force of the tide, and cannot be held guilty of negligence for so doing. Such a contact of vessels is one of the necessary incidents of harbor navigation, against which it is the duty of every vessel lying at the piers to be prepared; and the negligence that caused the injury in question consisted in permitting the Starbuck, with her unusually flaring bow, to lie in such a position in regard to the Union's midships, that when the vessels were pressed together by the action of the Sweepstakes, the strain came upon the bulwarks of the Union.

The libel must accordingly be dismissed, and with costs.

The decree was afterwards affirmed by the circuit court (case not reported).

CHARLESTON (GILCHRIST v.). See Case No. 5,420.

CHARLESTON GASLIGHT CO. (PERDICARIS v.). See Case No. 10,974.

CHARLESTOWN (MARSH v.). See Case No. 9,113.

Case No. 2,621.

The CHARLOTTE.

[Blatchf. Pr. Cas. 623.] [1]

District Court, S. D. New York. Feb. 14, 1865.

PRIZE—VIOLATION OF BLOCKADE.

Vessel and cargo condemned for a violation of the blockade.

BETTS, District Judge. The above vessel and cargo were captured, as prize of war, by a squadron of United States vessels-of-war, January 20, 1865, in Cape Fear river, off Smithville, North Carolina, and were brought into this court for adjudication. They were here arrested by the marshal, January 28, 1865, under process of monition and attachment, returnable in court February 14. Due notice was given thereof by public proclamation made in open court on that day; and, no person appearing to answer to such attachment, monition, and proclamation, it was, on motion of the United States Attorney, ordered by the court that an interlocutory judgment of condemnation by default be rendered against the said prize vessel and her cargo, pursuant to the course and practice of the court. The pleadings, the documentary proofs, and the depositions in preparation, were submitted by the United States attorney to the court, to ascertain and determine the legal liability of the prize to condemnation and forfeiture.

The vessel was of English build, and when arrested carried on board of her a British certificate of registry, issued at the custom house in London, bearing date August 26, 1864, with a further certificate indorsed thereon, by the custom house registrar at Halifax, November 17, 1864, that Thomas Edwin Cocker had then become master of the vessel. It thus appears prima facie upon the ship's title papers, produced from her, that she was a neutral vessel; which had departed from her home port and was arrested in the mouth of a blockaded port. The prize-master who brought the captured vessel into this port received with her no other papers than the aforesaid registry, and reports that he does not know that she had any papers on board.

Thomas E. Crocker, the master of the prize vessel, George Turner, the second mate, and Alexander Crawford, the ship's engineer, were examined in preparatorio, by the prize commissioner, on the second day of February, 1865. The master testifies that he is a subject of the queen of England; that he was present at the capture of the vessel on the 20th of January last, about 12 o'clock at night, at Smithville, in the Cape Fear river; that she was brought, immediately after her

[1] [Reported by Samuel Blatchford, Esq.]

capture, to this port; that she carried English colors; that she also had a Confederate flag, which was usually hoisted at the mast-head in going up Cape Fear river, when coming in; that the circumstances of the capture were, that the vessel was bound from Bermuda to Wilmington, North Carolina, and had passed the blockading squadron there, as she supposed, and ran right into Smithville, and was there intercepted and ordered to anchor by the United States squadron; that the capture was made, he supposes, by all four of the American vessels; that the owners were British subjects, resident in England; that he was appointed master at Halifax, by the owners in England, for the voyage; that there were no bills of lading for the cargo of the vessel, to his knowledge; that he signed none; that he knows of no papers on the vessel except the register; that all private papers on the ship were burned or destroyed on board as soon as it was discovered she was in the enemy's hands; that her cargo, amounting to about 150 tons burden, consisted of miscellaneous merchandise, composed principally of materials for wearing and military supplies; that the vessel had, under his command, made a previous voyage from Bermuda to Wilmington and back, bringing cotton out of Wilmington; that he supposes the cargo in this case belonged to the owners of the vessel; that he knew that Wilmington was held under blockade by the United States forces before he attempted to enter the port on this occasion; and that the vessel had previously entered the port of Wilmington, and come out while it was under blockade, and was making the attempt to violate the blockade again when captured.

The other two witnesses concur substantially in the evidence given by the master, with the exception that the first engineer states that a portion of the cargo which the prize had on board when captured was composed of goods contraband of war. It is unnecessary to repeat the evidence in full detail, as the evidence given by both of the witnesses fully supports the charge of violating the blockade by the prize in running into the port of Wilmington when arrested.

It is ordered and decreed that the vessel and cargo be condemned and forfeited for the cause in the libel alleged.

CHARLOTTE MINERVA, The (ENEAS v.). See Case No. 4,483.

Case No. 2,622.

The CHARLOTTE RAAB.

[Brown, Adm. 453.][1]

District Court, E. D. Michigan. July, 1873.

COLLISION—VESSEL IN STAYS—BURDEN OF PROOF.

1. If an injured vessel is shown to have been in stays at the time of the collision, the burden of proof is upon the colliding vessel to show that she was not in fault.

[Distinguished in The F. W. Gifford, Case No. 5,166; The James Bowen, Id. 7,192.]

2. The master of a vessel approaching another while in stays, has no right to speculate upon the chances of her coming completely about, getting under headway and avoiding him.]

[Cited in The Clytie, Case No. 2,913.]

This was a libel for a collision in the straits of Mackinac, between the schooner Charles Wall, of 691 tons, and the Charlotte Raab, a small three-masted schooner. The collision occurred about ten o'clock in the evening. The night was dark and somewhat cloudy, but not foggy, and the outlines of either vessel could be seen from the other at some distance. For an hour before the collision, both vessels had been sailing upon a course northeast by north, close-hauled upon the starboard tack, the Raab being about three points upon the weather quarter of the Wall, and about half a mile distant from her. The wind was due east, and the speed of both vessels was from 5 to 6 miles per hour. While sailing in this manner, the watch of the Wall discovered ice, as they supposed, on their lee bow, and immediately put their ship in stays to come about upon the port tack. While coming about they exhibited a torch to the Raab, and as she came near, shouted to her to keep out of the way. She came on, however, without changing her course, and a collision ensued by which the jibboom and head gear of the Wall were carried away, as well as the foremast and mainmast of the Raab. On the part of the Wall, it was alleged that the collision occurred while she was in stays, helpless and nearly motionless, while the cross-libel of the Raab charged that the Wall was under headway on the port tack, and that her duty to keep out of the way of the Raab, under the 12th article, had become operative.

H. B. Brown, for the Charles Wall.

W. A. Moore, for the Charlotte Raab.

LONGYEAR, District Judge. In the case of The Sea Nymph, Lush. 23, Dr. Lushington laid down the following rule: "A vessel proceeding in a cause of collision, and alleging herself to have been in stays at the time of the collision, and therefore helpless, is bound to prove in the first instance that such was the fact. The burden of proof then shifts, and the other side must then show that the collision was occasioned by the vessel proceeding being improperly put in stays, or was an inevitable accident." It is undisputed that the Wall did go into stays and came about, and that the Raab did not avoid her. But it is contended: 1. That the Wall was improperly put in stays, and 2, that she had in fact filled away, and was actually under way on the port tack before the collision, and that it had therefore become her

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

duty, under article 12, to keep out of the way of the Raab.

First. There is no allegation of fault in the answer or cross-libel upon which to base the first-named defense. But even if there were, it is not sustained by the proofs. The course of the Wall, while on the starboard tack, was toward a shoal, and while it is clear that in the absence of any other cause for coming about, she had not run out her tack, it is rendered reasonably certain by the proofs that there was a field of ice in such proximity to that course, if continued, as to justify the master of the Wall in his apprehensions of danger, and in arriving at and acting upon his determination to come about when he did. Neither were the proximity and relative position of the Raab such as to render it improper for the Wall to come in stays, the Raab, by all the testimony, with a single exception, being at least half a mile behind, and from two to three points to the windward of the Wall, affording her ample space, time and means of avoiding the Wall, either by keeping away or coming about herself.

Second. That the Wall had some headway at the time of the collision I think is reasonably certain from the character of the injury inflicted upon the Raab. But whether it was the result of her sails having filled on the port tack, or whether of her not having entirely lost her headway in stays, is not so easy to determine, the proofs being somewhat complicated. But I do not consider it necessary to a decision to determine that point, because, even if it be true that her sails had taken the wind on the port tack before the collision (as to which, to say the least, there is very grave doubt), it was so short a time before, and the Wall had gained so little headway on that account, that it was impossible for her by that means to have avoided the Raab, on account of the nearness to which the latter had then approached, and therefore the Wall had not come within the operation of article 12 when the collision occurred. I regard it of no consequence whether the Wall did or did not exhibit a light just before or at the time of coming in stays, because it is clear to my mind, from the proofs on the part of the Raab, that the Wall's coming in stays was reported to the master of the Raab, and that the latter fully comprehended the situation in ample time to have avoided the Wall. The master of the Raab chose to take the risk of the Wall getting around on the port tack in time to keep out of his way. The result shows he was mistaken. It is not a sufficient answer to this that the Wall was longer in coming about than vessels of her size usually take, as attempted to be shown by the experts, because her slowness does not appear to have been the result of her not being in ordinary trim or of want of good seamanship on the part of those in charge of her navigation. On the contrary, it does appear that she was in ordinary trim, and that her slowness was the result rather of her not being ordinarily handy or quick in coming about, which we have high authority for holding cannot be attributed as a fault. The Argo, Swab. 462; 1 Pars. Shipp. & Adm. 575. In any view of the case, I am satisfied that the master of the Raab was not justified in taking the risk he did. It results that, under the rule laid down by Dr. Lushington, in The Sea Nymph, just quoted, in which I fully concur, the Raab must be held wholly in fault. See, also, The Priscilla, L. R. 3 Adm. & Ecc. 125; The Nellie D. [Case No. 10,097]; Lown. Col. 61. Decree for the Charles Wall.

NOTE. The case of The Priscilla, here cited, was affirmed by the privy council, 1 Asp. 468, note. See, also, The Palatine, Id.

CHARLOTTESVILLE NAT. BANK (JOHNSTON v.). See Case No. 7,425.

CHARLOTTESVILLE NAT. BANK (SELIGMAN v.). See Case No. 12,642.

CHARLOTTE VANDERBILT, The (SQUIRES v.). See Case No. 13,271.

Case No. 2,623.

CHARTER OAK FIRE INS. CO. v. STAR INS. CO.

[6 Blatchf. 208.][1]

Circuit Court, D. Connecticut. Oct. 8, 1868.

REMOVAL—ORIGINAL SUIT.

Where a suit at law was brought, in a state court, on a policy of re-insurance, and, while it was pending, the plaintiff brought a suit in equity, in the same court, against the defendant to reform the policy, for mistake, and to prohibit the defendant from setting up, in defence, certain specified matters, and the defendant removed the suit in equity into this court, under the 12th section of the act of September 24th, 1789 (1 Stat. 79): *Held*, that the suit in equity was an original suit, and was properly removable under said section.

[Distinguished in Ladd v. West, 55 Fed. 354.]

This was a suit in equity [by the Charter Oak Fire Insurance Company], commenced in the superior court of Connecticut, for Hartford county, and removed into this court by the defendants [the Star Insurance Company], under the 12th section of the judiciary act of September 24, 1789 (1 Stat. 79). The plaintiffs now moved to remand the suit to the state court.

Before NELSON, Circuit Justice, and SHIPMAN, District Judge.

NELSON, Circuit Justice. The plaintiffs brought a suit at law, in the superior court of Connecticut, for Hartford county, against the defendants, a corporation created under the laws of New York, its place of business being at Ogdensburg, St. Lawrence county, New York, on a policy of re-insurance. The defendants appeared, and, on the trial, moved

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

for a nonsuit, which, according to the practice, reserved the question for the advice of the supreme court of errors. Pending this case, the same plaintiffs filed a bill before the same court sitting in chancery, to reform and correct the policy of re-insurance, claiming certain mistakes in it, and praying that the contract might be reformed, and the defendants be prohibited from setting up, in defence, certain specified matters. On the appearance of the defendants to this suit, the proper steps were taken by them to remove the cause to this court, they being non-residents, and coming within the 12th section of the judiciary act. The plaintiffs, with a view to obtain a decision of this court, as to the legality of this proceeding, have made this motion to remand the cause.

It is understood that the state court refused the application for the removal, on the ground that the case did not come within the act of congress. The argument is, that this suit is ancillary to, or in aid of, the suit at law, and is not an original suit, in the sense of the 12th section, but is supplemental to, and dependent on, the suit at law, pending in the same court, the court possessing jurisdiction both at law and in equity. We think this a mistaken view of the case. The remedy sought by this bill is founded on a familiar rule of equity jurisdiction, namely, accident and mistake, and which is the appropriate subject of an original bill in equity; and the fact that it is intended to aid a court of law, or to prevent a party from availing himself of an inequitable suit or defence in a court of law, in some other action, does not deprive the bill of its character as an original bill. Bills of a kindred character, such as bills for removing impediments to a trial at law, or advantages gained by fraud, and the like, bills of discovery, creditors' bills, &c., all in aid of suits at law, are the constant subjects of original jurisdiction in equity. If this bill had been brought in the superior court before the suit at law, and which it might have been, and, indeed, most fitly should have been, there could have been no doubt as to the character of the bill; and the circumstance that the plaintiffs chose to bring their suit at law first, can hardly be said to change such character. The jurisdiction of the court cannot depend upon the mere will, or choice, of a plaintiff, as to which suit he will commence first.

We perceive no difficulties in the execution of any decree that may be rendered in this court. If the contract shall be reformed, it will be competent evidence before the court of law, the reform will be as effective as if it had been decreed in the superior court, and the defendants will be as subject to the control of this jurisdiction as of that.

Upon the whole, we are of opinion that the cause has been properly removed.

CHARTER OAK LIFE INS. CO. (McGOWAN v.). See Case No. 8,807.

Case No. 2,624.

In re CHASE.

[22 Vt. 649.]

District Court, D. Vermont. Oct. Term, 1844.

BANKRUPTCY—ACT OF 1842—WHEN DISCHARGE REFUSED.

Where it appeared that a bankrupt was insolvent on the first day of February, 1842, the day the bankrupt law went into operation, and that he made a voluntary confession of judgment on that day, in favor of one of his creditors, for a sum in damages exceeding the value of all his attachable property, and that all his property was taken the same evening, by virtue of an execution upon such judgment, and afterwards was sold thereon, and that this was done by the bankrupt for the mere purpose of compelling another of his creditors to make a deduction in the rent of a certain farm, which the bankrupt then occupied as his tenant, and which rent was to become due March 1, 1842, and if that could not be effected then to defeat entirely the debt of that creditor, the debtor contemplating bankruptcy as the ultimate resort, and the petition in bankruptcy was filed March 30, 1842, the district court refused to grant to the bankrupt his discharge, notwithstanding the debt, upon which the judgment was confessed, was actually due at that time to the creditor in whose favor the confession was made.

In bankruptcy. This was a petition filed by Ephraim Chase, who had been duly decreed a bankrupt, for his discharge.

S. H. Hodges, for petitioner.

E. Edgerton, for creditors.

PRENTISS, District Judge. The case, without going into unnecessary details, is shortly this: The bankrupt, on the first of February, 1842, as appears from his schedule, was deeply insolvent, being indebted to various creditors to the amount of four thousand dollars, or more. Among the creditors was the firm of A. R. Vail & Co., to whom the bankrupt was indebted in a large sum. In the afternoon of the first of February the bankrupt confessed a judgment to A. R. Vail & Co. for the sum of $1,624.71, embracing the amount of certain notes given originally to them, and two or three notes executed to other persons and indorsed to them. Execution was immediately taken out on the judgment, and in the evening of the same day was levied on all the property of the bankrupt liable to attachment, or execution. The property was sold on the execution for $1,124.71, besides the costs of levy and sale. It is to be borne in mind, that the confession of judgment by the bankrupt was without any previous attachment, and for a sum sufficient to cover all his property, with the power to issue immediate execution. Execution was immediately issued, and all his property, except household furniture and other property exempt from attachment, was immediately taken upon it. From the manner of the transaction, the suddenness and haste with which the proceedings were begun and carried through, the transaction, from the very statement of it, connected with

the fact of the utter insolvency of the bankrupt, is liable to very strong suspicion.

But let us see how the case stands on the testimony; for it is proof, and not suspicion without proof, that is to decide it. There is no reason to doubt that the debt of A. R. Vail & Co. was a bona fide debt, and it is true that Aron R. Vail, one of the company, says he called on the bankrupt for security, and that the judgment was confessed on his request, as a means of saving cost. This testimony might be material, if the judgment had been for an amount covering only a part of the bankrupt's property; but the judgment being for an amount sufficient to absorb the whole of his property, and he being necessarily conscious that it must take the whole to satisfy it, it is immaterial whether it was given on the request and at the instance of the creditors, or not. But admitting it to be material, and that the request was accompanied with such a degree of urgency and importunity on the part of the creditors as would, under ordinary circumstances, repel the presumption of confession being voluntary, yet the question is whether the confession was really made in consequence of that importunity, or with a view entertained and acted upon altogether independent of it, defeating the rights of other creditors. This is a question of intention, and the intention is to be collected from all the circumstances of the case. If they clearly indicate an intention, on the part of the bankrupt, to give a preference, or to have all his property put beyond the reach of his other creditors by means of the judgment, the request or importunity of the creditors can avail nothing.

We have already stated the manner of the transaction; now let us look to some other circumstances which attended it. Besides there appearing to be no unwillingness to make the confession, but a very ready acquiescence and compliance on the part of the bankrupt, it is evident that he knew, at the time of the confession, that the execution would be levied the same evening. He told Harrison Ballard, in the evening, before the officer came, that he wanted to pay him, as he expected his creditors would break upon him; and he accordingly forthwith turned out to Ballard a cow, and at the same time turned out to his brother forty bushels of corn in the ear. After the officer had arrived, he told Marcus Bartlett that he had expected him, and had tried to give Bartlett a hint of it before. And Aron R. Vail, one of the creditors, says he thinks the bankrupt might have understood that the execution was to be levied the same evening after the execution of the judgment. But farther, the bankrupt told William B. Haskins, who went to see that the officer did not take some grain the bankrupt had turned out to him, that the creditors would not take anything he did not want they should take. He also told Ballard at the time he turned out the cow to him, that the creditors would not take any property, which was turned out to him, or his brother, though it remained there. The testimony, thus far, gives the transaction the appearance, at least, of being a very amicable one; for it shows that the bankrupt supposed, and acted under the belief, that there was a very good understanding subsisting between him and the execution creditors. Indeed, the transaction seems to have very little of an adverse character about it. When the officer came, who, as we have seen, was not an unexpected, and, I should judge, not an unacceptable visitor, the bankrupt, anticipating the wishes of this usually unwelcome functionary of the law, very promptly lighted his lantern and went with him to the barn, lighting him to where the property was. This, to be sure, of itself, is not a very important circumstance, but, being one of the characteristics of the transaction, disclosed by the testimony, is not unworthy of notice with the others. But the most material part of the testimony remains to be stated. It appears that the bankrupt, at the time of the confession of judgment, held a lease from Caleb Paris of a farm in Danby, for the term of six years from the first of March, 1837, at an annual rent of $700. Besides the rent for the year 1842, which was unpaid, he was indebted to Paris in the sum of $500, for cattle received from him by virtue of the lease. When the latter sum would be payable does not appear; but the rent would become due the first of March, and the lease would not expire until one year from that time. Now, Stephen Roberts testifies that, before the property was taken in execution, the bankrupt told him that unless he could make an arrangement with Paris, and get a reduction of the rent, he should not pay him, though he could; and after the property was taken, he told the witness, he expected to have the property back, if he succeeded in making an arrangement with Paris, which he thought he should be able to do. Allen Roberts also testifies that the bankrupt told him that he did not know but he should have all the property back, if he could make an arrangement with Paris. And Caleb Buffum says that, after the property was taken, the bankrupt told him that he could not afford to pay so much rent for the farm; that he would give $350 for the year's rent then due, and had the money in his pocket to pay for it, and would give $400 a year for the remainder of the term. On the witness' inquiring how he could carry on the farm without the stock and tools, he replied that he could have back the property, which had been taken, whenever he pleased. Now, upon this testimony, can any one be at a loss concerning the motive and object of the bankrupt in giving the confession of judgment? Was it not to bring Paris to terms, and force him to reduce the rent of the farm, by presenting to him the alternative of doing so or getting nothing?

The testimony of Vail, one of the execution creditors, goes rather to confirm this view of the case, than otherwise. He says there was no understanding with the bankrupt that he should have back the property levied upon except through an arrangement proposed by A. R. Vail & Co. to Paris, that if he would reduce the rent of the farm to three hundred and fifty or four hundred dollars, they would become responsible for the rent, and the property might go back into the hands of the bankrupt; which proposition, Vail says, was made at the suggestion of the bankrupt after the levy of the execution. This proves that after the execution was served, and all the property of the bankrupt was secured by seizure upon it, a proposition to reduce the rent, and have the property go back into the hands of the bankrupt, was in fact made to Paris. Now, was this proposition a mere afterthought, first suggested after the levy of the execution, or did it originate in a preconceived design, existing at or before the confession of the judgment? If no such design is proved to have been entertained by the creditors, the presumption is strong, from the testimony, that the bankrupt had the matter then in contemplation; for, before the property was taken, and, we may conclude, before the confession of judgment, for one followed the other almost immediately, he told Stephen Roberts, as we have already seen, that unless he could make an arrangement with Paris, and get a reduction of the rent, he should not pay him. Taking, then, the declarations of the bankrupt before and after the confession of judgment, and putting them together, I think it must be inferred that he consented to the judgment willingly, knowing that all his property would be immediately taken in execution, and expecting by that means to get the rent reduced, and then have the property restored to him. There is another part of the testimony, which ought not to be omitted. It appears that thirteen cows seized on the execution were afterwards returned to the bankrupt, kept by him ten or twelve days, and then sold by him to a clerk in the store of one of the execution creditors. The bankrupt, on his examination, says the cows were returned to him in consequence of a question arising, whether the cows belonged to him or to Paris; that he sold them to make a payment on the execution; and that after the sale they were driven away in the night time, for the purpose of concealing from Paris where they were.

From all the circumstances of this case, I repeat, I am forced to the conclusion, that the confession of the judgment was voluntary on the part of the bankrupt, and was given for the purpose of compelling Paris to reduce the rent of the farm, and, if that could not be effected, then to defeat his debt entirely, contemplating bankruptcy as the ultimate resort. The confession of judgment was on the first of February, the day the bankrupt law went into operation; the rent became due to Paris the first of March, and the petition in bankruptcy was filed the thirtieth of March, all following in regular succession, and all taking place within the space of two months. From the view I have taken of the case, it follows, that the bankrupt is not entitled to a discharge; and a discharge is accordingly refused him.

CHASE, The. See Cases Nos. 2,332–2,335.

CHASE v. The ALICE TAINTER. See Cases Nos. 194–196.

CHASE (BOWEN v.). See Case No. 1,720.

Case No. 2,625.

CHASE v. CHASE.

[Nowhere reported, opinion not now accessible.]

CHASE (CLARKE v.). See Case No. 2,845.

Case No. 2,626.

CHASE et al. v. CRARY et al.

[24 How. Pr. 159.]

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

COLLISION—BETWEEN TOWS — DEFECTIVE ENGINE —JOINT NEGLIGENCE — LIBEL AGAINST VESSELS JOINTLY—AGAINST OWNERS JOINTLY.

[1. A libel for damages caused by the joint negligence of two vessels may be maintained jointly against them. Smith v. The Creole and The Sampson, Case No. 13,033, followed. The Moxey, Case No. 9,894, distinguished.]

[2. Where the negligence of one vessel only is proved, the decree may be against her, and in favor of the other vessel. Smith v. The Creole and The Sampson, Case No. 13,033, followed.]

[3. A libel may likewise be maintained against the owners of the vessel jointly.]

[4. A tow stopped in time to enable an approaching tug and barge in tow to cross her bows. The latter slowed, stopped, and signaled the other to go ahead, which he did. The signaling tug failed to change her course, and, being unable to check her progress by backing, a collision took place. *Held*, that the signaling tug was in fault.]

[Distinguished in Boyer v. The Wisconsin and The Hector, Case No. 1,756.]

[5. Where a tug's engine is not strong enough to back against the wind, and thereby avoid a collision, she is guilty of negligence in exposing other vessels to danger by reason of the weakness of her engines.

[6. After a vessel damaged by collision has been repaired, the court will not allow for additional work alleged to be necessary to make the vessel good, unless the evidence clearly establishes the necessity.

[7. Speculative and uncertain testimony as to the depreciation of a vessel damaged by collision is insufficient to sustain an allowance therefor.]

In admiralty. This libel was filed by [Sylvanus G. Chase and others] the owners of

the lake boat Frank Carver, against [Humphrey H. Crary and others] the owners of the steam tug Catherine, and the owners of the steam tug Geo. Birkbeck, Jr., to recover the damages occasioned to the Carver while in tow of the Catherine by a collision with a lumber barge in tow of the Birkbeck on the 8th of November, 1854, in the East river. The Carver was on the larboard side of the Catherine, and the barge was on the starboard side of the Birkbeck, her bow projecting beyond the steamboat's stern. The Catherine was coming from the Atlantic docks, bound to pier No. 17, East river, at the rate of about three miles an hour. The Birkbeck was bound to a pier in Brooklyn, and when first seen appeared to be coming across the Catherine's bows. When about ten yards apart, the pilot of the Catherine gave orders to slow and back. The Birkbeck had slowed and stopped before; and about the time when the Catherine slowed, the Birkbeck backed her engine, but her forward progress was not stopped, nor was her course changed. The Catherine had been stopped in the water, but when about fifty feet apart, the pilot of the Birkbeck motioned her to go ahead, which was done; but notwithstanding, the barge struck the Carver head on, a little aft midships;—and the libel is filed, alleging joint negligence and fault on the part of the two steamboats. The respondents took the exception that there can be no joint negligence on the part of two steamboats, and that they would not be jointly liable even in rem.

C. Van Santvoord, for libellants.

D. McMahon, for claimants and respondents.

HELD BY THE COURT (INGERSOLL, District Judge): That the case of The Sampson [Smith v. The Creole, Case No. 13,033] is a case where a libel had been filed against two vessels in rem, without any such exception having been taken either by the counsel or by the court, which could hardly be if there were any validity in the exception, and that the case of The Moxey [Case No. 9,894], decided by Judge Betts in 1847, was different from this, in that the libel did not allege a joint negligence. That it must therefore be held that a libel against two vessels for joint negligence can be sustained. That, where the collision is occasioned by the joint negligence of those who have charge of the vessels as servants of the owners, then a libel may be sustained against the owners jointly, as well as against the vessels. That, as in the case of The Samson a charge of joint negligence may be made against two vessels, and the proof show negligence against only one; and in such a case the decree must be against that one, and in favor of the others. That, on the evidence in this case, there was negligence on the part of the Birkbeck, in not changing her course; and if, as her pilot says, her engine was not strong enough to back against the wind which was blowing, he was negligently exposing other vessels to be run down, by having so weak an engine. That there is no evidence of fault on the part of the Catherine. She slowed and stopped in time to enable the Birkbeck to avoid the collision, and had good reason to believe that the engine of the Birkbeck was strong enough to give her stern way against the wind, and that she would change her course, if necessary. That her going ahead was not the cause of the collision, which would have equally happened if she had not done so. That there was no fault on the part of the Carver, either in not having a man at her helm, or in not properly using fenders. The pilot of the Catherine told the man at the helm that he was not wanted there, and that the best was done with the fenders that could be done under the circumstances.

Libel dismissed as against Crary, the owner of the Catherine; and, as against the owners of the Birkbeck, decree for libellants, with a reference.

On the reference as to the damages, the libellants proved that they had never fully repaired the vessel. The witnesses proved the amount of repairs actually put on, and also testified that, to make the vessel as good as she was before, she would need some brace clamps on the opposite side from the injury, which would cost $67.40; while witnesses for the respondents testified that she would not need such clamps. The commissioner reported that the libellants should recover the amount of the repairs actually put on, and the cost of the brace and clamps, and $100 for depreciation in the market value of the vessel, and $25 for her detention. To this report the respondents excepted.

The matter, on exceptions, was argued by

Mr. Van Santvoord, for libellants.

Mr. McMahon, for respondents.

HELD BY THE COURT (INGERSOLL, District Judge): That, to enable the libellants to enforce their right to be made good, they must submit such evidence as will enable the court to say what sum will make them good. That the most satisfactory way of determining whether the brace clamps would be required would have been to repair the boat fully. This, however, was not done, and the evidence is not sufficient to satisfy the court that they are required. That the evidence of depreciation given is not sufficient to support that item. It is too speculative and uncertain. That the report must therefore be so modified as to strike out those two items.

CHASE (LEE v.). See Case No. 8,185.

CHASE (MATTHEW v.). See Case No. 9,283a.

Case No. 2,627.

CHASE v. SABIN et al.

[Holmes, 395;[1] 1 Ban. & A. 399; 6 O. G. 728.]

Circuit Court, D. Massachusetts. Sept., 1874.

PATENTS—"BUCKLES"—VALIDITY.

The reissue patent granted Lucius C. Chase, May 26, 1863, for improvement in buckles, *held* invalid for want of novelty in the invention described and claimed.

[In equity. Bill by Lucius C. Chase against Charles W. Sabin and others for alleged infringement of reissued letters patent No. 1,483, of May 26, 1863; the original patent, No. 26,013, having been granted to L. C. Chase, November 8, 1859.]

George E. Betton, for complainant.

James B. Robb, for defendants.

SHEPLEY, Circuit Judge. The invention described and claimed in the patent of the complainant, for an improvement in buckles, reissue No. 1,483, dated May 26, 1863, is for "confining a buckle to a strap or other article, by means of one or more rivets or screws passing through one or more wings or flanges, substantially as set forth, and for the purpose described." The specification describes the invention as laying a buckle, provided with one or more wings having one or more holes through it or them, flat upon the strap or material to which it is to be confined, and punching in it one or more holes corresponding with the hole or holes in the wing or wings, and putting through each one a rivet, and heading it. The defendants' answer to the bill of complaint alleges, among other things, that this invention was not new, but, before the date of the alleged invention, was known and used, among others, by Kasson Fraser, of Syracuse. The evidence in the case shows, conclusively, the use, by Fraser and others, as early as 1853, at Syracuse, of buckles provided with such a wing or flange as is described in the complainant's patent, and attached to a strap in the described manner. This is a perfect defence to the claim in the patent of the complainant, as the evidence proves an extensive use of the Fraser buckle since 1853. Bill dismissed, with costs.

Case No. 2,628.

CHASE v. SANBORN et al.

[4 Cliff. 306;[2] 6 O. G. 932.]

Circuit Court, D. New Hampshire. Oct. Term, 1874.

INFRINGEMENT OF COPYRIGHT — INJUNCTION — PROOF—NEW HAMPSHIRE STATE REPORTS—DAMAGES.

1. Under a bill for an injunction, and an account for the infringement of a copyright, substantial damages cannot be allowed, where it appears that the matters charged have not worked any prejudice to the complaining party.

[Cited in Hanson v. Jaccard Jewelry Co., 32 Fed. 204.]

2. No suit can be maintained against a party for infringement in a case where no evidence of copyright is introduced by the complainant.

3. The complainant must show, under the old copyright law, that a printed copy of the title-page of the book was deposited in the clerk's office of the district wherein the author resided, and also that this was done before publication, as required by section 4 of that act. He must also prove that within three months from the publication of the book, a copy thereof was delivered to the clerk of the said district court.

[Cited in Donnelley v. Ivers, 18 Fed. 594.]

4. The burden is on the complainant to prove his title to the copyright as well as the infringement.

5. Authors, as well as inventors, must comply with the conditions congress has seen fit to annex to their acquiring the exclusive privileges allowed them by law.

6. In New Hampshire the judges of the superior court prepare the head-notes to the opinions which they respectively deliver. The reporter, therefore, has no copyright in the volumes he edits, and can convey no exclusive right to any one else.

[Cited in Banks v. Manchester, 23 Fed. 145; Banks & Bros. v. West Pub. Co., 27 Fed. 61.]

Bill in equity [by William S. Chase, assignee, against Benning W. Sanborn and others], praying for an account and an injuction for the infringement of an alleged copyright on certain volumes of New Hampshire reports and a digest of decisions in the same state.

The claim of the complainant was that Gardner F. Lyon, deceased, became, by purchase of the authors, the proprietor of the copyright of the judicial reports mentioned, and also of the copyright of the digest; and that by means of the said purchases he became the true and lawful owner of the exclusive right and liberty of printing, reprinting, publishing, and vending the same; and that the complainant subsequently, and by the means alleged, became and was the true and lawful owner of the said several copyrights; and he charged that the respondents had infringed the same (as fully set forth in the bill of complaint), which, as he claimed, was contrary to equity and good conscience. He therefore prayed for process, and for an account, and for an injunction. Process was issued and served, and the respondents appeared and filed an answer. They admitted that the original purchaser of the copyrights of the judicial reports published the digest mentioned in the bill of complaint; that he caused what purports to be the proper entry to be inserted in the title-page thereof, but they did not admit that the required formula was ever entered in the clerk's office of the district court, as required by the act of congress. Certain other defences were also set up as follows:—

1. That the digest in question was made

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

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

up almost exclusively of the language of the head-notes of the cases included in it, and that it followed the language of the head-notes. That the state law made it the duty of each justice of the superior court of that state to prepare for the press correct reports of the decisions of the court thereafter pronounced by him, and that the state statute also created the office of a state reporter and made it his duty to edit the reports so furnished, and to provide for their sale by selling the copyright or by such other means as he might deem expedient, and directed that he should pay into the treasury of the state the net proceeds of such sale. Rev. St. N. H. 405. All of the reports mentioned, the answer alleged, were published at the several times stated in the bill of complaint, but the respondents alleged that they had no knowledge of what the arrangement was between the publishers and the reporters, though they believed that the former acquired all the rights of the state and of the reporters, and that the complainant purchased from them, or their executors, whatever rights he acquired under that arrangement.

2. That the title-page of the digest contained a statement that the required entry was made in the clerk's office of the district court, but they did not admit that such an entry was ever made in the clerk's office.

3. That the respondents published the digest as charged in the bill of complaint, but they denied that it was any infringement of any copyright secured by the complainant for several reasons:—Because the digest in question was made by the author upon an examination by him of each case in relation to which the respondents are charged with infringement, and that it was a new, separate, independent, and much-needed work. Because the head-notes, in the digest published by them, if in any instances they were the same as in the digest of the complainants, were taken from the opinions of the courts from the head-notes of the opinions prepared by the judge who delivered it, as the author had a right to do, even if the proprietor of the older digest had a copyright of the same, which was denied; and they denied that the digest published by them had incorporated any part of the former digest, except as herein stated.

Evidence was taken on both sides, when the complainants moved the court to send the cause to a master; but the respondents resisted that motion, insisting that the complainants showed no equity in their bill of complaint; and that the same should be dismissed. Hearing was had; but inasmuch as the usual course in such cases is to send the case to a master before determining the merits, the court came to the conclusion that it was not proper, in this case, to depart from the ordinary practice. Accordingly the cause was sent to a master, with directions to report, as set forth in the decretal order. The master made his report and the parties were again fully heard upon all the questions in the case. Among other things the master was directed to report whether the use, in the respondent's book, of the parts or features was taken from the complainant's books, and original therein, tended to prejudice, and if so, to what extent, the sale of the complainant's books. Opportunity for a full hearing was granted to the complainants; but the master reported that no evidence was introduced by him tending to show any such prejudice, and the court was of the opinion that the report of the master was correct, and it was confirmed.

Samuel C. Eastman and Asa Fowler, for complainant.

Charles R. Morrison, for respondents.

CLIFFORD, Circuit Justice. Authors of any book or books, map, chart, or musical composition, if citizens of the United States, shall have the sole right and liberty of printing, reprinting, publishing, and vending the same for the term of twenty-eight years from the time of recording the title thereof, as directed by law. 4 Stat. 436. Besides that it was required at that date that a printed copy of the title of such book or books, &c., should be deposited in the clerk's office of the district court of the district wherein the author or proprietor resided, and it was made the duty of such clerk to record the same in a book to be kept for that purpose, in the form prescribed in section 4 of that act. Such author or proprietor was also required, within three months from the publication of the book or books, &c., to deliver a copy of the same to the clerk of said district court. He was also required to give information that copyright was secured of the book, by inserting in the several copies of each edition published the formula prescribed in section 5 of that act, and the provision was that no person not complying with such requirement should be entitled to the benefit of the act. Instead of delivering a copy of the book, &c., to the clerk of the district court, the requirement now is that the author or proprietor shall transmit such copy free of postage within one month of the date of publication to the library of congress for the use of said library. 13 Stat. 540.

(After a reference to the master's report the court proceeds to say:—)

Viewed in the light of that report, it is clear that the complainant is not entitled to an account nor to an injunction. Nothing remains for consideration except the question whether the complainant is entitled to nominal damages, as it is very clear that substantial damages cannot be allowed in a case where it appears that the matters charged have not worked any prejudice to the complaining party. Nominal damages may perhaps be allowed, unless some one or more of the defences are sustained, which remains to be considered.

Evidence to show that the vendor of the complainant ever had a valid copy of the digest which it is charged the respondents have infringed is entirely wanting, which is all that need be said upon the subject. Damages cannot be recovered of a party for having used the matters published in a book which was never copyrighted, nor can a suit be maintained against a party for infringement in a case where there is no evidence of copyright introduced by the complainant.

Sufficient evidence was introduced by the complainant to show that a printed copy of the title-page was deposited in the clerk's office of the district court of the district wherein the author or proprietor of the several volumes of reports mentioned in the bill of complaint resided; but there is no evidence in the case that such deposit was made before publication, as required by section 4 of the copyright act. 4 Stat. 437. Proof was also introduced sufficient to show that the author or proprietor did deliver or cause to be delivered a copy of the said several volumes to the clerk of the said district court; but there is no evidence that the same were, in any case, so delivered within three months from the publication of the book, nor are there any facts or circumstances from which the court can supply, by inference, the want of direct evidence upon the subject, as there is no evidence whatever when publication was made. Persons claiming that they own the copyright of a book, in a suit for infringement, must prove their ownership by competent evidence, else their suit cannot be maintained, as the burden is upon the complainant to prove his title to copyright, as well as to prove infringement. Power is vested in congress to secure to authors and inventors, for limited times, the exclusive right to their respective writings and discoveries; and congress having exercised that power, authors, as well as inventors, must comply with the conditions which congress has seen fit to annex to the enjoyment of such exclusive right. Deposit of a printed copy of the title of the book must be made, before publication, in the clerk's office of the district court of the district wherein the author or proprietor shall reside, and he, the author or proprietor, must deliver a copy of the book to the clerk of said district court within three months from the publication of the same, else he is not entitled to the benefit of the act. Such are the abstract requirements of the act of congress; nor is it competent for the circuit court to disregard the requirement. Wheaton v. Peters, 8 Pet. [33 U. S.] 653; Reade v. Conquest, 9 C. B. (N. S.) 755.

3. Suppose it were otherwise, still the court is of the opinion that the complainant is not entitled to recover even nominal damages, as, by the statute law of the state, the judges of the court respectively were the authors of their opinions. Reporters of the decisions of the superior court were appointed by the governor with the advice of the council; but the second section of the same statute provides that each justice of said court shall prepare for the press, and furnish to the reporter, concise reports of the cases in which the judgment or opinion of the court, in matters of law pending at the law terms, was pronounced by him, within six months after the same is pronounced. Rev. St. 405. Section 5 of the same statute enacts that said reporter shall edit said reports as early as practicable, provide for the sale thereof by disposing of the copyright, or otherwise, as he may deem expedient, and the direction is that he shall pay into the state treasury the net proceeds, after deducting the reasonable and necessary expenses of publishing and selling. Of course, the judges respectively prepare the opinions, and the proof is equally full and decisive that they also prepared the head-notes to each of the cases reported in the several volumes of reports in question. Even grant that the copyright is not defective, still it cannot secure to the complainant what he does not own, nor could their vendors convey to them what they never owned. "Nemo dat quod non habet." Persons, therefore, who buy from one not the owner, acquire no property whatever in the thing purchased, as no one, in such a case, can convey any better title than he owns; unless the sale is made in market overt or under circumstances which show that the seller lawfully represented the owner. Foxley's Case, 5 Coke, 109a; 2 Bl. Comm. 449; 2 Kent, Comm. (11th Ed.) 224; Marsh v. Keating, 2 Clark & F. 260; Benj. Sales, 4; 1 Pars. Am. Law (5th Ed.) 520; Mitchell v. Hawley, 16 Wall. [83 U. S.] 550. None of the reporters were the authors of the opinions nor of the head-notes, and of course they had no copyright in the same, and it follows that, inasmuch as they had no such copyright in the opinions or head-notes, they could not convey any title to the grantor of the complainant, and that the latter acquired nothing in that regard by virtue of the several conveyances under which he claims. Having come to this conclusion, it is not necessary to decide whether the proofs introduced by the complainant show an infringement or not, as it is quite plain that the bill of complaint must be dismissed.

Bill of complaint dismissed, with costs.

Case No. 2,629.

CHASE v. SMITH.

[4 Cranch, C. C. 90.][1]

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

ACTION ON UNAUTHORIZED APPEAL BOND.

Although an appeal will not lie to the judgment of a justice of the peace upon a verdict

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

of a jury, yet, if the defendant does, in fact, appeal and give an appeal-bond, the plaintiff may maintain an action upon that bond.

Debt on an appeal-bond given upon an appeal from the judgment of a justice of the peace, upon the verdict of a jury. The declaration set forth the condition of the bond, which was in the usual form, except that it stated that the judgment was rendered upon the verdict of a jury before the justice. The breach assigned was the not prosecuting the appeal with effect; and not satisfying the judgment of the justice.

Z. C. Lee, for defendant, demurred to the declaration, without oyer of the bond; contending, that inasmuch as the condition of the bond, set out in the declaration, showed that the judgment was upon a verdict before the justice of the peace; and as this court, upon the appeal in the same case, decided that this court had not jurisdiction by appeal where the judgment of the justice was upon a verdict, the bond was void.

But THE COURT overruled the demurrer.

CHASE (SMITH v.). See Cases Nos. 13,022 and 13,023.

CHASE (UNITED STATES v.). See Cases Nos. 14,787 and 14,788.

CHASE v. VERMONT VAL. R. CO. See Cases Nos. 11,264 and 11,265.

Case No. 2,630.

CHASE et al. v. WALKER et al.

[3 Fish. Pat. Cas. 120.] [1]

Circuit Court, E. D. Pennsylvania. Nov., 1866.

EQUITABLE ASSIGNMENT OF PATENT — OF EXTENSION.

1. J. contracted to convey to W. a local interest in letters patent "to the utmost and fullest extent, as to duration, that he is or may be entitled to under the said letters patent." *Held*, that these words transferred an equitable title to the same local interest in an extension of said letters patent afterward obtained.

2. The words "said letters patent," apply as well to the letters patent as extended as to the original term.

3. Where a patentee conveys an original patent and "any further patent which he shall or may at any time hereafter procure for any improvement or improvements upon the invention patented," he must be understood to convey so much of an interest in any future extension of his original patent as may be necessary to the beneficial use of the improvements.

[See Littlefield v. Perry, 21 Wall. (88 U. S.) 205; Philadelphia, W. & B. R. Co. v. Trimble, 10 Wall. (77 U. S.) 367; Nicholson Pavement Co. v. Jenkins, 14 Wall. (81 U. S.) 452; Puetz v. Bransford, 31 Fed. 458; Aspinwall Manuf'g Co. v. Gill, 32 Fed. 697.]

This was a bill in equity filed [by Irah Chase, Jr., and Albert Clark, partners as Chase & Co.], to restrain defendants [Matthew Walker, Sr., and Daniel S. Walker, partners as M. Walker & Son], from infringing letters patent [No. 5,006], for "improvement in the process of manufacturing wire grating," granted to Henry Jenkins, March 6, 1847, reissued June 28, 1859 [No. 7,471], and extended for seven years from March 6, 1861. The bill alleged that after the extension of said patent the same was assigned by Jenkins, the patentee, to the New York Wire Railing Company, and by them conveyed to Chase & Co., the complainants.

The answer averred that prior to the assignment to the New York Wire Railing Company and during the original term of the letters patent, Jenkins, by his written contract, had conveyed to Daniel S. Walker the exclusive right, under said letters patent, within the state of Pennsylvania, except certain counties. It was alleged that this contract also conveyed an equitable interest in the extension of said letters patent, and that defendants had never used said invention except within the territory so conveyed. The answer further alleged that the conditions set forth in the contract had been fulfilled and that by proper assignments, all of the defendants were entitled to protection. This state of facts, it was claimed, constituted a license. The cause was heard on bill and answer. The contract between Jenkins and Walker, upon the construction of which the controversy turned, was as follows: "Whereas, Henry Jenkins, of Pottsville, Pennsylvania, did obtain letters patent of the United States of America for certain improvements in the process of manufacturing wire grating, etc., which letters patent bear date the 6th day of March, A. D. 1847, and also certain other letters patent of the United States of America for certain improvements in machinery for weaving wire grating, which said last-mentioned letters patent bear date the 7th day of March, A. D. 1847, now it is hereby agreed by and between the said Henry Jenkins and Daniel S. Walker, of the county of Philadelphia, in the state of Pennsylvania, as follows, that is to say: that the said Henry Jenkins, upon the payment of the following notes hereby acknowledged to be delivered to him, to wit: four notes drawn by Wickersham and Walker, in his favor, all dated this day, one for two hundred dollars payable at six months from date, another for three hundred dollars payable at nine months from date, another for the sum of six hundred and fifty-five dollars and twenty-eight cents at twelve months from date, and the other for six hundred and fifty-five dollars and twenty cents at eighteen months from date, that he, the said Henry Jenkins shall and will forthwith, by proper deed or assignment, assign and transfer unto the said Daniel S. Walker, his executors, administrators and assigns, the full, free, entire, and exclusive right, title, and privilege of using, exercising, and enjoying all and singular the powers, rights, benefits and advan-

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

tages conferred upon and vested in him, the said Henry Jenkins, under and by virtue of all the letters patent hereinbefore recited and mentioned, in and for the state of Pennsylvania, to the utmost and fullest extent as to duration, manner of enjoyment, or otherwise, howsoever that he is or may be entitled to, under the said letters patent, excepting, nevertheless, the right in and for the counties in the said state, viz.: Allegheny, Beaver, Mercer, Huntingdon, and Erie, and also excepting the right as applicable to and for screens for anthracite coal, and for no other use or purpose whatever in and for the following-named counties in said state, viz.: Schuylkill, Lehigh, Carbon, Pike, Luzerne, Wayne, Wyoming, Columbia, Northumberland, and Dauphin. And the said Henry Jenkins doth further covenant and agree that upon the payment of the aforesaid notes he will also forthwith assign and transfer unto the said Daniel S. Walker and his legal representatives aforesaid, any further patents or patent rights which he, the said Henry Jenkins, or any person for him, shall or may at any time hereafter procure for any improvement or improvements upon the invention patented as aforesaid, and also any and all renewals thereof in and for the said state with the like exceptions as are herein before expressed. Witness the hands and seals of said parties this twentieth day of January, A. D. 1849. It is furthermore agreed and understood that until there shall be default made in the payment of the aforesaid notes, that the said Daniel S. Walker and his assigns shall have and exercise the rights above agreed to be conveyed in the manner and form above expressed, exclusively. Witness the hands and seals of the said parties as above expressed. Henry Jenkins (seal.) Daniel S. Walker (seal.)"

This agreement was recorded in the patent office, April 20, 1849.

J. Cooke, Longstreth and Leonard Myers, for complainants.

George Harding, for defendants.

Before GRIER, Circuit Justice, and CADWALADER, District Judge.

CADWALADER, District Judge. It is Judge Grier's opinion, in which I concur, that this is a very clear case for the defendants. As the proceeding is in equity, it is immaterial whether the instrument of January 20, 1849, vested a legal or an equitable interest in the local privilege which it was intended to transfer.

The question is, whether this instrument sufficiently indicates an intention to transfer an interest which might endure beyond the original term of fourteen years. If such intention is in anywise apparent, the effect must be to transfer the local interest for the term of the extension of seven years, afterward obtained. The question may be resolved by considering two clauses of the instrument. They will be examined separately, and afterward together.

In the first, the patentee grants the exclusive local privilege to the utmost and fullest extent, as to duration, that he is or may be entitled to under the said letters patent. If the words "under the said letters patent" had been omitted, the effect of this clause could scarcely have been questionable. Independently of the contingency of an extension, the term could be neither less nor greater than the original fourteen years. Therefore, independently of this contingency, there could be no such comparative duration as to satisfy the words "utmost and fullest extent." The applicability of this remark is not excluded by the addition of the words "under said letters patent." In the reports of cases which have been cited in the argument, the original patent is, after an extension, considered as having been, from the first, for certain purposes, a patent for the extended term.

What is in one part of the act of congress [5 Stat. 117] called an extension is, indeed, in another part of the act called a renewal of the patent. But the practice of the patent office, prescribed expressly by the act, is not to issue a new patent, but merely to certify the extension upon the original patent.

In the second clause, the patentee covenants to assign any further patents or patent rights, which he may, at any time afterward, procure for any improvement or improvements upon the original invention, and also any and all renewals thereof in and for the said state. Independently of the arguments upon the context of this clause, and upon the different meanings which may be attributable to the word renewals, the substance of the provision for the transfer of subsequent patents for improvements must be considered. Any such subsequent patent would be for a term of fourteen years, which, whether it should be extended or not, must necessarily continue after the expiration of the term of the former patent for the original invention. Now the patentee can not be understood as having intended either to deprive himself of the right of applying for an extension of the original patent, or to reserve this right so as to frustrate the subsequent local use of the patented improvements under the transfer in question. But the subsequently patented improvements could not be used without the use of the original invention; and the parties can not have intended that, as to such improvements, he should be able to restrain the use of the original invention after the expiration of the original term. There was thus one purpose, at least, for which the local privilege must have extended beyond the original term.

Lastly, the two clauses will be considered together. Here the second, as a glossary to define the words of the first, will remove any doubt which might otherwise remain, as to their import. The words of the first clause

"utmost and fullest extent as to duration," are shown by the second clause to have extended for a specific purpose beyond the original term of fourteen years. If so, as the words of the first clause are not specific, but general, their intended application, as to the local privilege transferred, must have been the same for general purposes, including the extension in question. Notwithstanding the decree under which the bill was taken pro confesso, the cause was heard, by consent, as upon bill and answer. Moreover, the documents under which the parties respectively deduce title, were, by consent, read in evidence at the hearing.

The decree must be opened and set aside, and the bill dismissed, with costs.

Case No. 2,631.

CHASE v. WESSON et al.

[Holmes, 274;[1] 6 Fish. Pat. Cas. 517; 4 O. G. 476.]

Circuit Court, D. Massachusetts. Oct., 1873.

INFRINGEMENT OF PATENT—INJUNCTION.

A preliminary injunction was granted where the complainant had been long in the enjoyment of his rights under his patent, and there was no doubt as to the defendants' infringement, and the evidence failed to satisfy the court of the existence of articles alleged to have been in use before the date of the patented invention.

[Cited in Hat-Sweat Manuf'g Co. v. Davis Sewing Mach. Co., 32 Fed. 402; Carter & Co. v. Wollschlaeger, 53 Fed. 575.]

In equity. Motion for preliminary injunction to restrain [Edward Wesson and others from] infringement of reissued letters patent [No. 1,514] granted the complainant [L. C. Chase] July 28, 1863, for improvement in halter-rings [originally granted April 30, 1861, and numbered 32,180].

George E. Betton, for complainant.

George L. Roberts, for defendants.

SHEPLEY, Circuit Judge. Limiting the first claim in this patent to that only which was invented by the patentee,—i. e., his device, as described in his specification, of such a mode of attaching a halter-die or other harness-ring to a halter or harness-strap by means of rivets, in the described mode, passing through holes in the described flanges of the die or ring without the necessity of sewing, and dispensing with the use of any other material to form the "lap," in the mode and for the purpose described,—the patent is for a different invention from that described in the patent to Samuel C. Hawkins, No. 21,674, granted Oct. 5, 1858, which is relied upon to prove want of novelty in complainant's invention.

No exhibit is produced of any such harness-ring with two flanges, as some of the affiants on the part of defendants testify were in use before the date of the complainant's invention. The affidavits introduced by the complainant throw very grave doubt upon the question of the existence of any such devices at the dates indicated. These doubts are greatly confirmed by the omission to produce as exhibits in the case any such harness-rings as the witnesses describe, which could easily have been produced if they had existed and been in use for so long a time. It is not, therefore, at this stage of the case, necessary to decide what effect they would have upon the complainant's patent if the court were satisfied of their prior use.

As the complainant has been long in the enjoyment of his rights under the patent, and there is no doubt upon the question of infringement, the injunction will issue as prayed for in the bill, until the further order of the court. Order accordingly.

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

CHASE, The M. M. See Case No. 9,684.

CHASE, The R. P. See Case No. 12,099.

CHASKEL (NEW YORK RUBBER CO. v.). See Case No. 10,215.

CHASSELL (UNITED STATES v.). See Case No. 14,789.

CHASTENEY (WALDRON v.). See Case No. 17,058.

Case No. 2,631a.

Ex parte CHATFIELD.

[3 App. Com'r Pat. 221.]

Circuit Court, District of Columbia. Oct. 17, 1859.

PATENTS—NOVELTY.

[A patent will not be granted for a device differing only in form, but not in principle, from a device in prior use.]

[Appeal from the commissioner of patents.

[Application by Chatfield and Dutcher for letters patent for a device for elevating water by buckets. From a decision of the commissioner of patents rejecting the application, the applicants appeal.]

MORSELL, Circuit Judge. They say in their specifications: "Having thus fully described our invention, what we claim and desire to secure by letters patent of the United States is the endless chain of buckets, C, c, in combination with the driving wheels and pinions operated by weights and pulleys, and regulated by the fan, N, for the purpose of elevating water, the whole being constructed substantially as set forth."

The commissioner in his decision adopts the report of the examiner of the 4th of November, 1858, which is in these words: "The device in this case consists in the application of clock work to elevate water by means of an endless chain of buckets. The examiner in charge has referred to B——, Architecture, Hydr-Alique, pl. 6, &c., as showing an anticipation of means employed by the ap-

plicant for this purpose. The reference shows a series of buckets operating by clock work, the mechanism of which, after a careful examination, we are unable to discover differs in any essential particular from the device claimed by the applicant. We must therefore recommend that the application be finally rejected." The commissioner adds: "The aforegoing report is confirmed, and the application rejected. November 5, 1858." To this decision there were three reasons of appeal filed. The first is that the reference upon which our application for a patent has been refused is substantially different from our machine, and incapable of performing the functions or work for which our machine is intended, and to which it is peculiarly adapted.' The second and third are general, &c.

The commissioner's report reaffirms the report of the examiner adopted as the decision of the commissioner, as before said, saying: "The parties in the case claim a combination of mechanical devices for drawing water from wells or cisterns, which, in the judgment of the office, is substantially the same as shown in the reference upon which the application for a patent was rejected," &c. Upon due notice of the time and place appointed for the hearing of said appeal being given, all the original papers with the decision, reasons of appeal and report of the commissioner were laid before me. And the said appellant, by his attorney, appeared, filed his answer in writing, and submitted his case. I have paid every attention in carefully examining and weighing the argument of the appellants' counsel in this case, but its force has not been sufficient to satisfy me that there is any error in the commissioner's decision. I think that, although there is some difference in the form of the two devices (the one referred to and the one in this case), yet there is no substantial difference in the principle.

Case No. 2,632.

CHATFIELD v. The WOLGA.

[3 Law Rep. 387.]

District Court, D. Massachusetts. Dec. Term, 1840.

WATCH ON VESSEL IN PORT—CHARGING EXPENSE TO SEAMAN—CUSTOM—PROCESS IN REM WITHOUT NOTICE TO OWNERS.

1. The court refused to sanction a custom, not supported by strong proof, of having a watch on board vessels in foreign ports at the expense of the sailors.

2. Where process in rem is commenced without notice to the owners who reside within the district, no more costs will be allowed than in the case of a monition to show cause.

This was a libel in admiralty against the barque Wolga. The libellant was a seaman on board the vessel, on a voyage from New York to Antwerp and back to Boston, and claimed to recover the sum of forty-six dollars and thirty cents as wages. Thomas Richardson made answer in behalf of the barque and owners, in which it was admitted that the libellant had a just claim for nearly the whole sum demanded, deducting two dollars paid in Antwerp by the master for a watch on board the vessel; in regard to which, the answer set forth that it was customary and lawful for all masters of vessels that arrive in said port of Antwerp to hire people from the shore to watch the ship, at night, instead of compelling the seamen to keep such watch; and to charge a proportionate part of the expense of said watch to each of the seamen on board such ship, and to deduct the same from their wages; and that the same was a reasonable and general custom, and well known to both merchants and mariners; and that the master of said barque Wolga did, while in the port of Antwerp, hire such a watch during the night, and paid therefor a reasonable price, and that the said libellant well knew that such watch was hired, and never objected to the same, nor offered to keep watch himself, nor did in fact keep such watch; and that the just share and proportion of the expense of said watch, chargeable to the libellant, was the said sum of two dollars. Evidence was introduced in support of the alleged custom, and several masters of vessels testified to the existence of the custom, and that they had conformed to it, sometimes with the previous consent of the seamen, sometimes without; but had uniformly deducted the amount paid for a watch from the wages of the men, without objection on their part. Some captains, however, did not hire any watch.

Charles H. Parker, for libellant.
Mr. Dexter, for respondent.

DAVIS, District Judge, said, that in order to establish such a custom as the one contended for, it was necessary that the proof should be strict, and the custom uniform. The evidence in this case had satisfied neither of the requisitions. It appeared that the custom was sometimes observed, and sometimes departed from—the express assent of the crew sometimes obtained, and sometimes not. In this case, no express assent was set up, and the custom, not being uniform, could not bind the crew without such express assent. He further observed that the custom of permitting the men to be absent on shore, at night, was exceptionable and of immoral tendency, and if it were to be admitted at all, should be admitted only upon very strict proof. Wherefore he decreed that the libellant should recover his whole claim, with costs.

At a subsequent day the counsel for the respondent submitted to the court, that as the owners of the vessel lived in Boston, and process in rem issued without any previous notice to them by monition to show cause, whether any costs ought to be allowed;

and thereupon the court ordered that costs should be taxed for the respondent as if the hearing had been upon a monition to show cause, and that the additional expenses of the arrest be paid by the libellant.

CHAUNCEY v. The MARY BELLE ROBERTS. See Case No. 13,240.

CHEEK, The. See Cases Nos. 7,002–7,005.

CHEEK (WAGGENER v.). See Case No. 17,035.

CHEESEBROUGH (NEAFIE v.). See Case No. 10,064.

CHEESEBROUGH, The A. See Case No. 25.

CHEESEMAN (FEARING v.). See Case No. 4,710.

Case No. 2,633.

The CHEESEMAN et al. v. TWO FERRY-BOATS.

[2 Bond, 363.][1]

District Court, S. D. Ohio. Oct. Term, 1870.

JURISDICTION OF DISTRICT COURT — OHIO RIVER — REGULATION OF "COMMERCE AMONG THE STATES" — STEAM FERRY-BOATS — SALVAGE — COMPENSATION.

1. The district court of the United States for the southern district of Ohio, as a court of admiralty, has territorial jurisdiction in case of a seizure on the Ohio side of the Ohio river, at high-water mark.

2. The court also has admiralty jurisdiction over the Ohio, as a navigable river, by virtue of section 9 of the judiciary act of 1789, as construed by the supreme court of the United States.

3. Ferry-boats propelled by steam, and used as such between two cities in different states, are within the scope of congressional legislation, under the grant of power to regulate commerce "among the states," and are subject to the jurisdiction of the national courts in the exercise of their admiralty powers.

[Cited in Murray v. Ferry-Boat, 2 Fed. 90; The St. Louis, 48 Fed. 313.]

4. Ferry-boats, or any other property of value, adrift on the Ohio river and in peril, are the subjects of a salvage service.

[Cited in Salvor Wrecking Co. v. Sectional Dock Co., Case No. 12,273; Maltby v. Steam Derrick-Boat, Id. 9,000; The Old Natchez, 9 Fed. 477. Approved in same case, Id. 479.]

5. To constitute a good salvage service, it is enough to show that the property rescued was exposed to danger greater than is incurred in ordinary navigation, and it need not be proved that the danger was imminent or immediate.

6. The claim that the property was in possession of prior salvors is not sustained, if it appear that their efforts to save it had not been and would not be successful.

7. Those in possession are estopped from claiming as salvors, if they requested the aid of those who interposed and saved the property.

8. Where the facts in a case show a legal salvage service by the libellants, but not of the highest order of merit, they are not entitled to a high rate of compensation.

[1] [Reported by Lewis H. Bond, Esq., and here reprinted by permission.]

In admiralty.

Lincoln, Smith & Warnock, for libellants.
D. T. Wright, for claimant.

OPINION OF THE COURT. This is a libel in rem, in behalf of the steamboat J. W. Cheeseman and owners, to recover a salvage compensation for assistance and relief to two ferry-boats and their floats, alleged to have been in a condition of peril on the Ohio river. The libel contains the usual averments, and need not be recited at length. An answer has been filed by Samuel Wiggins, the owner of the ferry-boats and their appendages, in which he denies, in substance, that any salvage service has been rendered by the libellants, and insists, if such service was rendered, it is not a case within the admiralty jurisdiction of this court, and that no decree can therefore be rendered for compensation.

There is no controversy as to the material facts in the case, except as to one point, which will be noticed in the progress of this opinion. These facts, as alleged in the libel, and substantially sustained by the evidence, may be briefly stated as follows: These ferry-boats, with the floats attached, were lying at a wharf or landing on the Ohio side of the river, a short distance above the city of Cincinnati, in charge of a watchman placed on them by the owner. They had been built as ferry-boats to run between Cincinnati and the city of Covington, Ky., on the opposite side of the river. They were of the largest class of ferry-boats, intended to be propelled by steam power, and were well and strongly built. The engines and other necessary equipments were in position, and the boats were ready for service, but had not been in actual use. Their value is estimated at from $25,000 to $30,000. The Ohio river at the time was at a high stage, then being more than forty feet in the channel, and was rapidly rising. At an early hour in the morning, the ferry-boats, with their attachments, being lashed together, were loosed from the wharf or dock to which they were fastened by some object coming in violent collision with them from above. With the watchman and another person on board, they drifted out into the stream, and were rapidly carried down by the force of the current. There was an anchor on board of considerable weight and strength, which was thrown out shortly after the boats reached the current of the river, with the hope of stopping them in their descent, which broke and wholly failed of its purpose. As the boats progressed, several persons at different points, in the whole some eight or nine, came off from the shore in skiffs to aid in stopping and landing them. Some four or five different attempts were made for this purpose, by carrying out lines or hawsers and making them fast to stumps or trees on the shore, all of which were unsuccessful. In some instances the lines broke from

the great strain upon them; in others they slipped over the stumps to which they were fastened, and in one the stump or tree was pulled out of the ground. As the boats were floating swiftly down the stream—at a point just above Taylorsville, some sixteen miles below Cincinnati—the steamboat J. W. Cheeseman, a boat duly licensed and enrolled under the laws of the United States, was coming up with a heavy and valuable cargo, destined for Cincinnati and places above. The master of the steamer, seeing the ferry-boats adrift not far from the Kentucky shore, hailed the persons on board, and inquired if they needed aid in stopping and landing them. To this inquiry there was an affirmative reply, and the proper order was given for rendering this aid. The first attempt was to get the steamer between the ferry-boats and the shore, with the purpose of pulling them to the shore. This attempt failed, and the steamer then changed her position so as to come in contact with the ferry-boats from the outside, and push them in. After drifting down some three miles, the steamer was successful in landing and securing the boats. One of the ferry-boats had lost its rudder in its descent by striking against the shore, and this was the only injury sustained by them. The ferry-boats, with their machinery, were of great weight, and were rendered the more unwieldy from the quantity of drift which had accumulated under and around them. The Cheeseman was occupied in the service about three hours, and in the opinion of some of the witnesses, was exposed to some danger of injury from her interposition. Being heavily laden, and not having sufficient power of engine to tow the boats to Cincinnati, they were left in charge of persons placed on board by the master of the Cheeseman, with a view, as stated, of coming down the next day and towing them to the city. In the meantime the owner of the ferry-boats employed another steamer to take them up, and this service was not therefore performed by the libellants. Soon after the ferry-boats were brought up, and while lying at a wharf on the Ohio side, a little distance above Cincinnati, they were attached by process from this court in this suit. On this state of facts, it is insisted by the proctor for the respondent: 1. That this court, as a court of admiralty, has no jurisdiction. 2. That upon the merits, the libellants are not entitled to a decree as for a salvage service.

1. The jurisdiction of the court is challenged mainly on the ground that these ferry-boats, when seized in this suit, were lying at the shore on the Ohio side of the river, and not therefore within the territorial limits and jurisdiction of this court. This point has been urged at great length in the argument, and requires the notice of the court. It is insisted in its support that the district court of the United States for the southern district of Ohio can not take cognizance in admiralty of any case occurring on the Ohio river, for the reason that there is no express legislation by congress which authorizes it. The first and most obvious reply to this objection is, that these boats when seized were at the Ohio shore, when the Ohio river was at a high stage of water, and were clearly therefore within the state of Ohio and within the territorial limits of this district. The act of congress of February 10, 1855, dividing the state of Ohio into two judicial districts, after fixing the line separating the northern and southern districts, provides that all that part of the state lying south of that line shall compose one district, to be called the southern district of Ohio. There can be no doubt, therefore, that the boundary of this district on the south is the same as that fixed by the old constitution of the state of Ohio, which declares that the state shall be bounded "on the south by the Ohio river to the mouth of the Great Miami river." And this was regarded as in accordance with the deed of cession by the state of Virginia of March 1, 1784, of all the territory lying "northwest of the Ohio river."

It is not necessary, nor is it intended, to discuss the question whether from the terms used in the deed of cession, and the constitution of Ohio, the boundary of the state on the south extends to low-water mark in the Ohio river, or to a medium line between high and low-water mark. The state of Ohio has heretofore claimed, and will doubtless continue to claim, the latter as her true southern boundary. It is certain she will never concede to the states of Kentucky and Virginia the extension of their boundaries to the high-water line on the Ohio side. In this view the want of jurisdiction in this case, on the ground stated, has no basis on which it can rest, for the reason that these ferry-boats, when arrested, were within the jurisdictional limits of this district. This must be viewed as a conclusive answer to the argument against the jurisdiction of this court in this case. Since the decision of the case of The Genesee Chief, in 1851, 12 How. [53 U. S.] 443, there is no room for a doubt that the district courts of the United States have admiralty cognizance of all cases arising on the navigable rivers of the West. The supreme court, in that case, settled the doctrine—unalterably as I trust—that this jurisdiction does not depend on the ebb and flow of the tide, but on the navigability of the river. And they base this claim of jurisdiction on section 9 of the judiciary act of 1789 (1 Stat. 83), which provides that the district courts "shall have exclusive cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under the laws of imposts, navigation, or trade of the United States, where the seizure is made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas." Remarking on this provision, the court say: "The jurisdic-

tion is here made to depend on the navigable character of the water, and not on the ebb and flow of the tide. If the water was navigable, it was deemed to be public; and, if public, was regarded as within the legitimate scope of the admiralty jurisdiction."

It may be remarked here, that since the decision in the case of The Genesee Chief, this court, without doubt or scruple, has taken cognizance of admiralty suits occurring on the western rivers, when the boats proceeded against were brought within its jurisdiction and seized by its process. And among these cases there have been many in which damages were claimed for collisions, and some founded on claims for salvage services. The same course has been pursued, it is believed, by all the admiralty courts in the West. Several of the cases in which jurisdiction has thus been taken by the western courts have been appealed to the supreme court, and adjudicated there without a question of the rightfulness of its exercise. [Fretz v. Bull] 12 How. [53 U. S.] 466; [Walsh v. Rogers] 13 How. [54 U. S.] 283; [The New World v. King] 16 How. [57 U. S.] 469; [Ure v. Coffman] 19 How. [60 U. S.] 56; [New York & V. Co. v. Calderwood] Id. 245.

I will briefly refer to some other cases, in which the question of admiralty jurisdiction on the western waters was involved, and has been distinctly decided by the supreme court. The case of The Magnolia, 20 How. [61 U. S.] 296, was a suit for a collision on the Alabama river, above tide-water, and within the body of a county. The court say, in their opinion, in reference to the act of 1789: "If the flux and reflux of the tide be abandoned as an arbitrary and false test of a navigable river, it required no further legislation of congress to extend it to the Mississippi, Alabama, and other great rivers, navigable from the sea. If the waters over which this jurisdiction is claimed, be within this category, the act makes no distinction between them."

The ruling of the supreme court, in [Commercial Trans. Co. v. Fitzhugh] 1 Black [66 U. S.] 576, is clear and explicit on this question of jurisdiction. The suit was for a collision on the Hudson river, within the territorial limits of the northern district of New York, but the seizure was made in the southern district. The case was taken by appeal from the decree of the circuit court for the latter district to the supreme court. Exceptions were there urged to the jurisdiction of the lower courts: First, because it did not appear that the colliding boats were engaged in foreign commerce, or commerce between two states; second, because the collision took place within the body of a county; and third, because, if the case was properly cognizable in admiralty, the jurisdiction pertained to the northern district of New York. These exceptions were distinctly overruled by the supreme court as unsustainable on principle or authority. In their opinion the court say: "When the district courts were organized, they were authorized by congress to exercise exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of imposts, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas. That provision of the judiciary act remains in full force, and unrestricted, as applied to the navigable waters of the Hudson, and all the other navigable waters of the Atlantic coast, which empty into the sea, or the gulfs and bays that form a part of the sea. All such waters are in truth but arms of the sea, and are as much within the admiralty and maritime jurisdiction as the sea itself." And again, the court say: "If it appears, as in cases of collision, depredation on property, etc., that it was committed on navigable waters within the admiralty and maritime jurisdiction of the United States, the case is one properly cognizable in admiralty." The court, after distinctly setting aside the objection that the collision took place within the body of a county, also hold that the jurisdiction of the district court for the southern district of New York is not affected by the fact that the collision occurred within the northern district. And the doctrine is strongly asserted as to marine torts, that they may be sued for, either "in personam, in any district where the offending party resides, or in rem, wherever the offending thing is found within the jurisdiction of the court issuing the process." The source and extent of the jurisdiction of the district courts being thus clearly defined, this court has no hesitancy in taking cognizance of the case now before it. True, the claim in this suit is for a salvage service; and in the cases referred to, the suits were for collisions, sounding in tort. But there can be no question, that where the proceeding is in rem for salvage, the principles settled by the supreme court apply with the same force as in torts. Torts are said to be local in contradistinction to cases of maritime jurisdiction arising ex contractu; but they are only local in the sense that they must have been committed on the sea, or on some navigable water within the pale of admiralty cognizance. This fact being established, any district court within which the thing proceeded against is found and seized, has rightful jurisdiction. It follows, necessarily, that claims for salvage services may be prosecuted in the admiralty under the grant of admiralty jurisdiction as conferred by the act of 1789, as construed by the supreme court. The right to enforce such claims in the maritime courts dates back to the origin of such courts, and was unquestionably within the contemplation of the act just referred to.

The sole inquiry as a test of jurisdiction in this case seems, therefore, to be: Was the

service, for which compensation is sought in this action, performed on a navigable stream? And this question does not admit of a doubt. The Ohio river, in fact, as well as by judicial decision, is a navigable river. There is no force in the argument urged in opposition to this conclusion, that there are portions of the season when, from low water or ice, it can not be navigated. The supreme court, in the case of Nelson v. Leland, 22 How. [63 U. S.] 48, have decided, that the temporary interruption of the navigation of a river does not destroy its character as a navigable stream. The court say in that case: "Many of our leading rivers are sometimes unnavigable, but this can not affect their navigability at other times." And in the case of the Wheeling Bridge, 13 How. [54 U. S.] 561, the court, in their opinion, say: "That the Ohio river is navigable, is a historical fact which all courts may recognize."

2. But it is urged as a further objection to the jurisdiction of the court in this case, that these ferry-boats, not being intended for use in carrying on commerce and navigation, are not subject to the commercial power of the general government, and not, therefore, subject to the maritime law, or within the range of its protection. It is insisted that, on this ground, a court of admiralty can not take cognizance of a claim for a salvage service rendered to them, and that a claimant for compensation for such service must be remitted to the laws of the state within which the service was rendered for his indemnity. The decision of this point is not perhaps material, as the jurisdiction of the court is sustainable on another and a broader ground, to which I shall presently advert. But I am by no means ready to concede the point insisted on in the argument. On the contrary, I incline to the opinion that these ferry-boats, when in use as such, are within the legitimate range of congressional legislation under the constitutional grant of power to regulate commerce "among the several states," and therefore within the scope of the admiralty jurisdiction of the national courts. They are costly in their construction and equipment, are propelled by steam, and designed for the transit of persons and property across a navigable river, which constitutes a boundary between two states. Why are they not within the control of congress, and subject to such commercial regulations as they may prescribe, to be exercised, of course, so as not to interfere with, or detract from, the right of the states to regulate the ferries within their limits? This question is answered by the fact that congress have exercised such a power in the laws passed requiring all vessels or boats propelled by steam, and to be used for the conveyance of passengers, to be inspected and licensed. It can not be questioned, that a steam ferry-boat, carrying thousands of persons daily, is within both the letter and the spirit of these acts of congress. But without intending to discuss this question, I will refer very briefly to the celebrated case of Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1, as sustaining the conclusion indicated. I can not quote the whole of the luminous argument of Chief Justice Marshal in that case, nor will I do him the injustice of attempting to state an outine of the process by which he reaches his conclusions. His definition of commerce, as used in the constitution, is nearly equivalent to a demonstration. He says: "Commerce undoubtedly is traffic—but it is something more, it is intercourse." Is it not clear, that if a ferry-boat is used in carrying on both traffic and intercourse between states, it is fairly within the scope of such congressional legislation as does not conflict with the admitted rights of the states?

But it is further objected in this case, that there can be no decree in favor of the libellants for a salvage service, for the reason that the maritime law recognizes no service as a subject of admiralty cognizance, unless rendered to a boat or vessel, or the cargo of a boat or vessel, in peril of loss or destruction. The claim in the argument is, that no other property afloat on a navigable stream, however great its value or imminent its peril, can be the subject of a salvage service, in the sense of entitling the salvors to compensation by the decree of a court of admiralty. This question has not been directly passed upon by the supreme court, for the reason, probably, that such an objection has never before been made in any case in which it could have been urged. There are several cases which substantially involve this principle, and which, by fair inference, settle the question. I refer to those cases instituted in the district courts for injuries by steamboats on western rivers, by collisions with flat-boats and their cargoes, which have been taken by appeals to the supreme court. In none of these cases is there a doubt intimated, that they were properly cases of admiralty cognizance. The case of Fretz v. Bull, 12 How. [53 U. S.] 466, is one of the cases referred to. It was a suit for damages against the owners of a steamboat for running into and sinking a flat-boat on the Mississippi, laden with a valuable cargo. The cases of Culbertson v. Shaw, 18 How. [59 U. S.] 585, and Nelson v. Leland, 22 How. [63 U. S.] 48, are of the same character.

If, in collision cases, jurisdiction in admiralty can be maintained, when the injury is not to a vessel or the cargo of a vessel, it results inevitably that it may be maintained for a salvage service in saving property not within either of those categories. The principle involved is the same in both of these classes; but as a matter of policy and expediency there is a stronger reason for upholding this jurisdiction in suits for salvage than for collisions. In most cases, the common law courts of the states are competent to give a

full remedy for injuries by collision, but in salvage services they can only award compensation on the ground of quantum meruit, and can not regard those elements of a salvage service which it is the peculiar province of admiralty to consider, and which enter largely into the estimate of the allowance to be made.

Some references have been made in the argument to several writers of distinguished reputation, whose definitions of a salvage service restrict it to a service rendered to a vessel or the cargo of a vessel. It is not strange that English and American authors, with reference to the doctrine that admiralty jurisdiction was limited to the ebb and flow of the tide, should have stated the law of salvage in this restricted sense. Upon that theory such services would necessarily be rendered on the sea, or rivers within the ebb and flow of the tide, where it could rarely happen that the property saved was not either a vessel or its cargo. But since, in this country, this test of admiralty jurisdiction has been repudiated, it would seem necessarily to result that a salvage claim may be enforced in any case where valuable property in peril is saved on a navigable river, over which maritime jurisdiction extends. The American decisions fully sustain this view. In the case of The Emulous [Case No. 4,480], decided by Judge Story in 1832, nearly twenty years before the decision of the supreme court in the case of The Genesee Chief [supra], he does not limit a salvage service to a vessel or cargo, but expressly says, it extends to all property saved "on the sea or wrecked on the coast of the sea." The learned judge, in the light of the decision of the supreme court before referred to, would doubtless have added to his definition the words, or on any navigable river. In the case of The Emblem [Case No. 4,434], decided by the learned Judge Ware, in 1840, there is no intimation that a salvage claim is to be understood in the restricted sense contended for. In that case, salvage was awarded for saving the trunks of a passenger, containing a quantity of silver coin. The coin in the passenger's trunk was certainly no part of the cargo of the vessel, but it was property, and as such a proper subject of a salvage service. The judge says: "A person who preserves goods which are lost, or in danger of being lost by the fortunes of the sea, is entitled to a reward for that service." To the same effect is the doctrine as stated by Judge Curtis, late of the supreme court of the United States, in the case of Hennessey v. The Versailles [Id. 6,365]. That distinguished judge says: "The relief of property from an impending peril of the sea, by the voluntary exertions of those who are under no legal obligation to render assistance and the consequent ultimate safety of the property, constitutes a technical case of salvage." And Judge Marvin, in his late treatise on Wrecks and Salvage, gives the following definition: "Salvage is a compensation for maritime services rendered in saving property, or rescuing it from impending peril on the sea, or wrecked on the coast of a sea, or on a public navigable river or lake, where inter-state or foreign commerce is carried on." See, also, Abb. Adm. 293 [Raft of Spars, Case No. 11,528]; 1 Spr. 323 [Taber v. Jenny, Case No. 13,720].

This view of the law of salvage, as applicable to western rivers, must be adopted. The protection of the vast commerce on those waters requires it. It is well known that every year property of the value of millions is afloat on these channels of trade, in flatboats, barges, and other craft, not required to be enrolled or licensed, and which in no proper sense can be designated as ships or vessels. And there is no reason why the rights of salvors rendering meritorious services in saving such property from injury or destruction, should not be recognized and enforced in admiralty. Upon any other principle the interests of western commerce will suffer material injury. It is not to be expected that prompt and effective salvage services will be rendered without the expectation of such liberal compensation as a court of admiralty alone can award. The laws of the states, so far as they relate to property adrift which is of small value, are sufficient to meet the cases for which they are intended. But as to property of value, they make no provision for indemnity for the time, labor, and hazard required in its rescue when in peril. This service, in general, can be only effectively rendered by steamboats employed in their regular trips, and navigated at a heavy daily expense; and it is idle to suppose that owners or masters will lend their aid in saving property in danger of destruction, if they are to be turned over to the drift laws of the states for compensation, or are obliged to resort to the local courts for that purpose.

The only inquiry which remains is, whether upon the facts before the court there is evi dence of a legal salvage service which will sustain the libellants' claim. Their right to a decree on the merits is denied on two grounds: 1. That the ferry-boats, at the time the alleged salvage service was rendered, were in the possession of prior salvors, having the means to save them without the aid of the steamboat. 2. That the ferry-boats were not in such peril as to render the service of the steamboat a salvage service.

1. It is clear from the evidence, that neither the persons on board when these boats were first adrift, nor those who afterward came aboard before the interposition of the steamboat, were salvors in any proper sense of the term. It is of the essence of a legal salvage service that it should have been successful in saving the property. The proof in this case is entirely satisfactory, that after repeated trials by the persons on the ferry-boats, with all the means in their power,

they wholly failed to land the boats or materially to check their progress. Nor do the facts justify the conclusion that any subsequent efforts would have proved more successful. But on this point there is a fact proved which is conclusive. The master of the Cheeseman, when approaching the ferry-boats, inquired of those on board, if they needed his assistance in stopping and landing them, and in reply was informed that such aid was needed. This was a distinct admission that those on the ferry-boats had not the ability to stop and land them, and also proves that the steamboat did not interpose against the wishes of those aboard the ferry-boats.

2. As to the peril of these boats. On this point, it is proper to remark that the law in relation to the degree of danger to which saved property is exposed, has been recently a good deal modified by writers and judicial decisions on the subject. It was formerly held that it was an essential element of a good salvage service that the property should be in immediate and imminent peril. It is laid down by a distinguished writer on maritime law in a recent work, that "if the peril encountered be something distinctly beyond ordinary danger, something which exposes the property to destruction unless extraordinary assistance be rendered, it is enough to found a claim for salvage." 2 Pars. Mar. Law, 611. And in the case of The Independence [Case No. 7,014] the court say: "To be in a condition to have a salvage service rendered, a vessel must be subject to something more than the ordinary peril of the sea." And the learned judge distinctly affirms that it is not necessary that the peril should be such that escape without aid is impossible, or nearly so. The same doctrine has been laid down by the English admiralty courts. 3 W. Rob. 68; 1 W. Rob. 174; 3 W. Rob. 138.

There can be no question that the dangers to which these ferry-boats were exposed, though perhaps not imminent or immediate, were beyond those ordinarily attendant on river navigation. From the high stage of water and the swiftness of the current, they were in continual peril of being thrown violently against the shore, and of striking against trees, stumps, and rocks, and by these means of suffering essential injury, if not total wreck. But it is not material to inquire into the degree of danger to which the ferry-boats were exposed. By the request for assistance made by those on board, the owner is estopped from denying that the boats were in peril. The law, as stated by Judge Parsons, is, "that if the assistance of the salvors is requested by and rendered to the persons in charge of another vessel, they can not plead that they are not bound to pay for the services rendered, on the ground that the vessel would have been saved if left in her former position." 2 Pars. Mar. Law, 612.

Having no doubt as to the law on the points indicated, I have now only to fix the amount of compensation to be awarded to the libellants. On principles of public policy, as also in justice to meritorious salvors, judges and courts, both in England and in this country, have evinced no disposition to measure the rewards for such services on a stinted scale. But there is no unbending rule applicable to every case; and between the highest and the lowest order of merit, there is a wide range for the discretion of the judge. The law on this subject is well stated by Judge Curtis, in the case of Hennessey v. The Versailles [Case No. 6,365]. He says: "The value of the property saved, the degree of peril from which it was delivered, the risk of the property, and especially of the persons of the salvors, the severity and duration of their labors, the promptness of their interposition, and the skill exhibited by them, are all to be considered." It is clear, from the facts in this case, that there are no elements in the service rendered by the libellants entitling it to the highest, or even a high rate of compensation. There was no peril of life to any of the parties, nor was there any severe or long-continued labor, or any unusual personal hardship. Nor is it certain that there was any immediate danger of great injury to, or destruction of the ferry-boats. The witnesses for the libellant, it is true, swear that the steamboat was put to great hazard in rendering this service. On this point there is conflict in the evidence adduced by the parties. The respondents' witnesses say that the steamboat was in no danger. The truth no doubt lies between these extremes. The steamboat undoubtedly encountered some risks beyond those of ordinary navigation, but with skillful management it is impossible to conclude that there was any serious danger. Yet there were some elements in the service which entitle it to a measure of compensation beyond that of a mere quantum meruit. The ferry-boats, as already stated, were of great value, and the steamboat and cargo are valued at $30,000. The boat was engaged in its business of carrying freight and passengers. The river was at a high stage, and the current consequently rapid. A detention for even a few hours was a great loss to the boat. The service necessarily required high steam, involving a more than usual strain on the boat and the machinery The ferry-boats, with their floats and the accumulation of drift under and around them, were unwieldy, and not easily moved or controlled. And it was only upon a second trial, that the steamboat succeeded in stopping and getting them ashore.

Upon the whole, it seems to the court that an award of twelve hundred dollars to the salvors will fully meet the justice of the case. A decree for that sum will be entered, to be apportioned among the owners and officers and crew of the steamboat, as the court, by a future order, shall direct.

CHEESEMAN (UNITED STATES v.). See Case No. 14,790.

Case No. 2,634.

CHEEVER v. SHEDD et al.

[13 Blatchf. 258.] [1]

Circuit Court, D. Vermont. Feb. 28, 1876.

MUNICIPAL CORPORATIONS — OPENING AND GRADING STREETS—INJURY TO ADJOINING LAND.

1. A street 50 feet in width was laid out by the proper authority through the land of C., and the damages to C. were assessed. Such damages included remuneration for the land taken, for the deprivation of any right or privilege attached to it, and for the damage done by the lay out to the land connected with that which was covered by the street. A street of 50 feet in width was a fit and proper width for the public necessities at the locus in quo, the grade was a proper grade, and too much earth was not excavated. But, the public officers charged with doing the work cut the land at the extreme sides of the street perpendicularly, in a manner which would cause the adjoining land of C. to cave into the street, and subject him to expense and damage. On a bill filed by C. to restrain such officers from excavating in such manner, on the ground that they were doing the work without reasonable care, because they were not either providing a proper slope in the 50 feet width, or building a retaining wall in such width at their own expense: *Held*, that they had the right to excavate in such manner.

2. In the absence of statutory provisions, a municipal corporation or its agents are not liable for the consequential damage which is necessarily done, in the exercise of reasonable care, to adjoining land not taken for public use, in the execution of a public work imposed by the legislature upon the corporation, for the public benefit.

3. A municipal corporation may grade and change the grade of streets, from time to time, when it is necessary so to do, without protecting the earth or embankments of the adjoining proprietors, and is not liable for the consequential damage caused to them in adapting their land to the grade and protecting it.

[In equity. Bill by John H. Cheever for an injunction to restrain James A. Shedd, the superintendent of streets, and the street commissioners, of the city of Burlington, from constructing a highway in such a manner as to cause injury to complainant's land.]

Americus V. Spalding and Edward J. Phelps, for plaintiff.

Romeo H. Start and Torrey E. Wales, for defendants.

SHIPMAN, District Judge. In the year 1872, a new highway, of fifty feet in width, was duly laid out and established in the city of Burlington, by the proper court having jurisdiction over the subject, which highway said court directed should be completed on or before October 15th, 1873. The highway is 1,175 feet in length, extending from College street to Pearl street, and is an extension of a previously existing street, called Union street, so as to form a continuous street with Maiden lane, which last two named streets are also of fifty feet in width. The new street is within about fifty rods of the business centre of Burlington, a city of 18,000 inhabitants, and intersects two important streets, and will be considerably used for public travel. About —— feet in length and fifty feet in width of the land of John H. Cheever, the complainant, being a portion of a tract of several acres belonging to him, are taken for the street. The court which directed the lay out, the complainant appearing, and being heard thereon, adjudged that he was "entitled to no land damages in consequence of laying out and establishing said highway, the benefit to said Cheever's premises, through which said highway is laid out, being a full compensation for the land taken for said highway." It is necessary that said street should have the usual sidewalks, curbs and gutters which are customary in city streets, and it is fit and proper for the full accommodation of the public travel, that the whole street, including roadway and sidewalks, should be of fifty feet in width. The natural surface of the plaintiff's land, and of the other land over which this street passes, is uneven, being traversed by ravines or hollows, and by knolls or bluffs, and it was necessary, in order properly to construct the street, and to make a proper grade, that the knolls should be cut through and that the hollows should be filled. The city street commissioners, who had, by statute, the care and superintendence of the highways in the city, and whose duty it was "to make and repair all highways," in order to put the street in a proper condition for public use and travel, established a grade, which grade required three cuts on the land taken from the plaintiff, one of 168 feet in length and 10.2 feet in depth at the centre, one of 60 feet in length and 2.3 feet in depth at the centre, the third of 61 feet in length and a centre depth of 1.35 feet. The form of all the cuts was that of a knoll, sloping evenly each way. This grade is a proper one for the purposes of the street. All the earth which was taken from these cuts was used to fill the hollows in the street, but other earth could have been hauled for the same purpose from a greater distance. The street commissioners, in making these cuttings, cut down intentionally the soil and turf upon said street perpendicularly, or very nearly so, up to the extreme boundaries or lines of said street, and claimed and exercised the right to cut said highway perpendicularly up to the limits thereof. The soil is clay and quicksand, and the effect of the perpendicular excavation, unless the bank is protected, is, that the adjoining soil will slip, and be gradually sloughed off by the action of the rain and frost, until a slope has been formed sufficiently inclined to prevent further slipping. An unprotected perpendicular embankment of ten feet in height would be encroached upon, in two or three years, to an extent of five feet, before a proper slope

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

was formed. This result has already commenced upon the land of the complainant. If the city authorities have no right to cause this incidental injury to the adjoining land, their proper course is to use only such a width as will leave a sufficient slope, or to use the entire width and build a retaining wall. If the complainant is remediless, he must grade his land in conformity with the street line, or build a retaining wall himself. A suitable retaining wall would cost $500. Grading the land would probably be less expensive, and would be more advantageous to the owner of the land, in the event of any future disposition or sale of the property. The land of the complainant which has been taken for the street, is part of a large tract belonging to the complainant, used heretofore, with the buildings upon it, as a gentleman's mansion. Where the deep cut is made, the land is not ornamented with shrubbery and shade trees, as is the case with the portion adjacent to the house. The present suit is a bill for an injunction to restrain the defendants, who are the street commissioners and the superintendent of streets, from excavating in such a manner as to cause the injury to the adjacent land which has been mentioned. The superintendent has, by the city charter, the immediate care and supervision of the streets, and his duty is to see that they are properly constructed and kept in repair. After the bill was filed, a provisional injunction was granted, which is still in force. The bill proceeds upon the idea that the defendants are acting in the premises without reasonable care.

From the preceding statement, it will be seen, that the proper authority has directed the construction of a street of fifty feet in width, and has assessed the damages which will arise to the complainant from the taking of his land, which damages include all those which are immediately incident to and consequent upon the construction of the highway. An assessment of damages is for the direct and immediate damage resulting from the laying out of the highway. The owner is to be remunerated for the land taken, for the deprivation of "any right or privilege attached to it, and for the damage done by the lay out to the land connected with that which is covered by the highway, and of which it was a part." Clark v. Saybrook, 21 Conn. 313. When a part only of the land of the owner is taken for a public work, the damage which will necessarily result, from the use of the part which is taken, to the land which is not occupied by the public, is to be estimated. When the remaining land is separated by the new highway from outbuildings, or from a supply of water, or is left in unsalable condition, or unfit for occupancy, or is divided by high embankments which cause inconvenience, the effect of these and similar circumstances, and the effect which the appropriation will have in benefitting the remaining land, are to be taken into consideration in the estimate of damages. In the case of a new highway, the general grade which must be adopted, so as to conform to the existing grade of connecting streets, and so as to make a convenient highway, are obvious to the appraisers of damages, who inspect the premises and can see the injury and the special benefit which the opening of a highway must necessarily cause to the whole land. The presumption is, that the appraisal is for the value of the property taken and the damage which will specially result to the residue by such taking. But, it is truly said, that the appraisal assumes and presupposes that the highway is to be constructed with reasonable care, and if, "for want of reasonable care and skill in the construction of such work, unnecessary damage is caused, it is not warranted by the right of eminent domain." Sprague v. Worcester, 13 Gray, 195. Consequential damages which result to the remaining land, from want of reasonable care in the construction of the highway, are not included in the estimate of damages. It is contended that this highway was not constructed with reasonable care, by reason of the fact that it was excavated upon the extreme limits of the land taken, so as to cause the adjoining land to be deprived of its lateral support, and so as to inflict an actionable injury.

In order to determine whether reasonable care has been taken, it becomes necessary to consider the powers which municipal corporations possess in regard to the construction of highways, and in regard to the grade, and the alterations in the grade, of streets, whereby a consequential injury is caused to adjoining land. The defendants are public officers, and the duty has been imposed upon them by the legislature, of making and constructing highways in the city of Burlington. The law, while it imposes this duty upon public officers, also requires them to construct public works so as not wantonly or maliciously to injure adjoining proprietors, and so as to cause no unnecessary damage. They are not exempted from the obligation to use reasonable care. Mersey Dock Cases, 11 H. L. Cas. 713. The work must be done in such a reasonable and proper manner as to cause no damage which is not necessarily incident to the prosecution of the work. Thus, municipal corporations are required to build highways over water-courses in such a manner as not unreasonably to set the water back upon adjoining proprietors. Although a strip of land of seventy-five feet in width should be condemned to be taken for a street, yet, if the whole width should be excavated so as to injure adjoining proprietors, when a strip of fifty feet would amply accommodate the public needs, and such damage was not necessarily incident to a reasonable performance of the public work, such an excavation would be an unreasonable exercise of power. If the public officer "should abuse his authority, by digging down or raising up where it might

not be necessary for the reasonable repair and amendment of the road, he would be amenable to any suffering party for his damages." Callender v. Marsh, 1 Pick. 418. The public work should not be planned and should not be executed so as to inflict unnecessary damage; and, therefore, if a work is carried on in such a manner as unduly to injure the adjoining proprietor, the prosecution of such a work may be restrained by a court of equity.

But, the principle seems also to have been established, that, in the absence of statutory provisions, a municipal corporation or its agents are not liable for the consequential damage which is necessarily done, in the exercise of reasonable care, to adjoining land not taken for public use, in the execution of a public work imposed by the legislature upon the corporation, for the public benefit, although an individual who executes such an improvement upon his own land for his private benefit, might strictly be liable for such consequential injury. Sutton v. Clarke, 6 Taunt. 29; Boulton v. Crowther, 2 Barn. & C. 703; Mersey Dock Cases, 11 H. L. Cas. 713; Smith v. Washington, 20 How. [61 U. S.] 135; Radcliff v. Brooklyn, 4 Comst. [4 N. Y.] 195; Callender v. Marsh, 1 Pick. 418; O'Connor v. Pittsburgh, 18 Pa. St. 187; Hollister v. Union Co., 9 Conn. 436; Reynolds v. Shreveport, 13 La. Ann. 426; Murphy v. Chicago, 29 Ill. 279; Richardson v. Vermont Cent. R. Co., 25 Vt. 474. This doctrine is based upon the theory, that the act is done in the discharge of a duty which is imposed by the supreme power of the state upon the municipal corporation, and is done for the public benefit and not for private emolument. It is absolutely necessary for the public accommodation that streets should be raised and lowered. "Streets cannot be opened and kept in repair, or made safe or convenient for public use, without being made level, or as nearly so as the nature of the ground will permit. Hills must be cut down and hollows filled up, or in other words, the road must be 'graded' or 'reduced to a certain degree of ascent or descent,' which is the proper definition of the verb 'to grade.' If the duty imposed on the corporation requires this to be done, the power must be co-extensive with the duty." Smith v. Washington, 20 How. [61 U. S.] 148. This work, especially in a city, where population is crowded and land is valuable, will cause some damage to adjoining proprietors, and inflict hardship upon individuals. Such damage, when it has not been caused unnecessarily, is "damnum absque injuria," from the fact that the work which causes the damage is for a public benefit, and "private interests must yield to public accommodation. One cannot build his house on the top of a hill in the midst of a city, and require the grade of the street to conform to his convenience, at the expense of that of the public." Smith v. Washington, cited supra.

It is not intended that this principle should be considered as applicable to the acts of private corporations who are authorized by the legislature to construct works of a public character, such as canals or railroads, for, although such corporations are empowered to take land, upon the ground that the taking is for the public use, and although the works are to be used by the public, yet they are constructed primarily for the benefit and emolument of the private corporations who have them in charge, and who are not public agents. Hooker v. New Haven & Northampton Co., 15 Conn. 312.

In the application of these principles to the present case, it is to be observed, that it has been found that a street of fifty feet in width was a fit and proper width for the public necessities, at the place where the street was constructed, that the grade was a proper grade, and that, owing to the unevenness of the land, all the soil which was taken from the cuts was necessarily used to fill the hollows. The city was not, therefore, using an unnecessary or unreasonable quantity of land, or excavating too much earth. But, it is urged, with great force, that the defendants were not constructing the street with reasonable care, in this, that they were cutting the land at the extreme limits of the street perpendicularly, the inevitable effect of which method of construction is to cause the adjoining land to cave into the street, and to subject the owner to expense and damage; that, if an individual or private corporation excavates in such a manner that the adjacent land is deprived of the lateral support of the soil, and of adequate protection, such private person or corporation inflicts thereby an actionable injury upon the adjoining proprietor, and that, if the city desired to use their entire fifty feet of land, when such use caused an injury to the complainant, they should prevent the injury by building, at their own expense, a retaining wall, and the neglect to provide a protection is a want of reasonable care.

While all the decisions admit the doctrine that a public work must be constructed with reasonable care, the question of the extent of authority which a municipal corporation can exercise in respect to the grade of streets, whereby a consequential damage is caused to adjoining land, has been frequently before the courts. The strong weight of authority in this country is to the effect that such a corporation is authorized to grade and change the grade of streets from time to time, when it is necessary so to do, without protecting the earth or embankments of the adjoining proprietors, who are often subjected to expense in adapting their land to the grade, and in protecting their property from the consequential damage which is incident to the lowering of the street. The injury which is done to adjoining proprietors most frequently results from the changes of grade which become necessary, as a city increases in population and business, and the needs of the

public become more urgent, but not unfrequently results from the original grade upon which the street is constructed. Necessary grades and changes of grade are constantly being made in our cities, under the power to construct and repair streets, with no protection of the adjoining soil, by the municipal authorities, and such exercise of authority has been, with some exceptions, sustained by the courts of the different states. The justification has been upon the principle which has already been stated, viz., that a public officer is justified in inflicting consequential damage in the necessary prosecution of a public work imposed by the legislature upon a municipal corporation and prosecuted for the public benefit. The leading authorities have already been cited.

It may be said, that nearly all of the decisions which have been quoted refer to the regrading, or alteration of the grade, of a street. But, if there is no duty upon a city to protect the landowners against the consequences of a new excavation which is made after the street has been constructed, and after it has been long used, it is difficult to see why another standard or rule should be imposed when the street is first made passable for the public, and is to be brought to a proper level.

Although I am impressed with the seeming injustice and hardship of a method of constructing and repairing streets which throws upon the individual proprietor, if he has not been compensated for this consequential injury, a burden which would be onerous for the corporation to bear, I am constrained by the decisions of courts whose opinions are justly entitled to great weight, to hold, that a municipal corporation can properly construct and repair streets in this manner. It follows, that the defendants were constructing this street with the ordinary care which the law demands.

Let the bill be dismissed, without costs.

CHEEVES, The LANGDON. See Cases Nos. 8,063 and 8,064.

CHELSEA, The (WILLIAMSBURG FERRY CO. v.). See Case No. 17,747.

Case No. 2,635.

CHEMICAL NAT. BANK v. BAILEY et al.

NELSON v. SAME.

[12 Blatchf. 480;[1] Thomp. Nat. Bank Cas. 260; 21 Int. Rev. Rec. 109.]

Circuit Court, S. D. New York. April 1, 1875.

NATIONAL BANKS IN DEFAULT—INTEREST ON CLAIMS—REMEDY OF DEPOSITOR.

1. Where a national bank is declared in default by the comptroller of the currency, and a receiver of it is appointed by him, under the fiftieth section of the act of June 3, 1864 (13 Stat. 115), and a sufficient fund is realized from its assets to pay all claims against it and leave a surplus, the comptroller ought to allow interest on the claims, during the period of administration, before appropriating the surplus to the stockholders of the bank.

[See, also, Nat. Bank of Commonwealth v. Mechanics' Nat. Bank, 94 U. S. 437.]

2. An action of assumpsit, by the holder of a claim against the bank, to recover such interest, will not lie against the receiver of the bank, or against the comptroller of the currency, but will lie against the bank.

3. In such an action, interest is recoverable upon all demands originating in contracts conditioned for the payment of interest, and on all demands for money due and unpaid, by way of damages for the non-payment, after such demands became due.

4. Interest is recoverable on a balance due a depositor in such bank, although he has made no formal demand of payment.

[At law. Actions by the Chemical National Bank, against Isaac H. Bailey, receiver of the National Bank of the Commonwealth, John Jay Knox, comptroller of the currency, and the National Bank of the Commonwealth, and by Thomas Nelson against the same.]

E. Platt Johnson and Richard M. Henry, for plaintiff.

Edmund H. Smith, Ass't Dist. Atty., for defendants.

WALLACE, District Judge. It is stated by counsel, that these actions are brought to determine whether, when the comptroller of the currency has declared a national bank in default, and appointed a receiver under the provisions of the act under which such banks are organized, and a sufficient fund is realized from the assets to pay all claims against the bank and leave a surplus, the comptroller should, or should not, allow interest on the claims during the period of administration, before appropriating the surplus to the stockholders of the bank. It is to be assumed, from this statement, that the claims in question were due and payable when the comptroller took control of the affairs of the bank. If they were not, of course, no interest should be allowed upon them, except from such time as they may have become due, unless they were for demands conditioned for the payment of interest.

The equity of the creditors to receive interest on their claims for the time during which they have been precluded from receiving their principal, is obvious. On general principles, and by adjudications in point, their right is clear. Interest is allowed not only on strict legal grounds, where there is a contract for the payment of interest, or by way of damages, where there is a wrongful detention of a debt, but upon considerations of equity and natural justice, which always arise where a party is entitled to a payment of money and cannot obtain it, except by resort to a fund created by operation of law, the distribution of which is attended with

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

delay. It is upon this ground that, when, by statute, preference is given to one class of creditors over another, in the distribution of an estate, the preference includes interest on the preferred class of claims. In re Shultz, 11 Serg. & R. 182.

There is nothing in the provisions of the act under which this fund is to be distributed in conflict with this general rule. While the comptroller is not directed, by express terms, to allow interest to creditors, the act contains no language which, in terms, or by implication, prohibits him from doing so. The fiftieth section of the act of June 3, 1864 (13 Stat. 115), authorizes him, on becoming satisfied that an association has made default in the payment of any of its circulating notes, to appoint a receiver of its affairs, and place him in possession of its assets. The receiver is required to pay over all moneys realized from the assets to the treasurer of the United States, subject to the order of the comptroller, and it is the duty of the comptroller, from time to time, to make ratable dividends from such moneys, upon "all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction," and to distribute the remaining proceeds among the stockholders. His position in reference to the distribution of the fund confided to him is analogous to that of an assignee of an insolvent estate, or an administrator of the estate of a deceased person. Where an insolvent law provides that, after the payment of all debts proved, the assignee shall pay any surplus to the debtor, or his legal representatives, the creditors are entitled to interest on their debts during the period of administration, and without regard to the fact whether the debts are those upon contract conditioned for the payment of interest, or not. Brown v. Lamb, 6 Metc. [Mass.] 203; Atlas Bank v. Nahant Bank, 3 Metc. [Mass.] 581. Claims proved to his satisfaction are to be paid by the comptroller, as debts proved against an insolvent are to be paid by his assignee; and, in the one case as in the other, the interest is an incident of the debt or claim, and to be paid before distribution of the surplus.

Thus far the general question of liability for interest has been considered. It remains to consider other questions presented by the record, which are necessary to the proper determination of these actions in the form in which they have been brought. In each action the complaint counts in assumpsit, and a general demurrer has been interposed, alleging that the complaint does not state sufficient facts to constitute a cause of action. The practice of the courts of this state now prevails in actions at law in this court, and, by that practice, judgment may be rendered for or against one or more of several defendants.

It is clear, that this action cannot be maintained against the receiver or the comptroller. The receiver has no control over the assets, except to pay their proceeds to the treasurer of the United States, and would, therefore, not be liable to the plaintiff in any form of action. If an action could be maintained against the comptroller, it would be one to enforce a proper distribution of the fund, and, for this purpose, the action of assumpsit is not an appropriate remedy. As against these defendants, therefore, no cause of action is alleged in the complaint, and, as to them, the demurrer is well taken, and judgment must be ordered in their favor. As against the defendant the National Bank of the Commonwealth, the demurrer must be overruled. The corporation continues to exist for the purpose of being sued, notwithstanding the comptroller has intervened pursuant to the provisions of the act under which it was organized; and demands against it can be prosecuted to adjudication in any court of competent jurisdiction. Bank of Bethel v. Pahquioque Bank, 14 Wall. [81 U. S.] 383. In such an action interest is recoverable upon all demands originating in contracts conditioned for the payment of interest, and on all demands for money due and unpaid, by way of damages for the nonpayment after such demands became due. It is urged, that interest is not recoverable upon debts against the bank, because it has been prevented by law and by superior authority from paying the principal. It is a sufficient answer to this argument to say, that this proposition is not applicable, because the bank, by its own default, subjected itself to the proceedings of the comptroller, and it does not lie with the bank to assert any exemption from liability by reason of its own acts or defaults.

In one of these cases, a portion of the plaintiff's demand is for a balance due upon deposits made in the ordinary way with the bank, and it does not appear that any demand was made for the amount until a long time after the receiver had taken possession. Ordinarily, an action cannot be maintained by a depositor, against a bank, until a formal demand has been made; and, of course, no interest can be recovered except that arising after the demand. The bringing of an action does not amount to a demand, in such cases. Payne v. Gardiner, 29 N. Y. 146. But, if the bank, by words or conduct, denies the depositor's right to his balance, it becomes presently liable to an action, without formal demand, and interest would be recoverable, as damages. All the facts are set forth in the complaint, which justified and led to the action of the comptroller. The bank, by its default, initiated proceedings which resulted in a transfer of the moneys of its depositors to a receiver, and thus put it out of its own power to pay its depositors, when called upon to do so. A demand, under such circumstances, would have been an idle ceremony. The bank cannot be permitted to say that the depositor should have

made a demand, when, if made, it would have been nugatory and useless. It has been held, that, in cases of insolvency, where a debt is payable on demand, and no special demand is shown, interest is to be computed from the first publication of the proceedings in insolvency. Brown v. Lamb, 6 Metc. [Mass.] 203. Reason and analogy favor the application of the rule to the present case. Judgment is accordingly ordered for the plaintiff in each action, as against the bank.

CHENAULT (DORSEY v.). See Case No. 4,013.

CHENAULT (UNITED STATES v.). See Case No. 14,791.

Case No. 2,636.

In re CHENEY.

[5 Law Rep. 19.]

Circuit Court, D. Massachusetts. March 19, 1842.

IMPRISONMENT OF BANKRUPT ON EXECUTIONS—EFFECT OF DISCHARGE—HABEAS CORPUS—ATTACHMENT UNDER MESNE PROCESS — EFFECT OF DECREE OF BANKRUPTCY.

1. One who has been declared a bankrupt is not entitled, as of course, to be discharged from imprisonment under an execution which issued and was served upon him, and under which he was committed, before the petition in bankruptcy was filed.

2. But, when the bankrupt has obtained his certificate of discharge, he is entitled to be released from imprisonment for the debt by the district court of the United States, and also by the state courts.

3. Whether the certificate of discharge relates back to the time of the commencement of the proceedings, and renders an intermediate imprisonment unlawful, thereby founding an action for false imprisonment,—quaere.

4. All attachments of the property of the bankrupt upon mesne process, after the commencement of the proceedings in bankruptcy, are avoided by the decree of bankruptcy; the property of the bankrupt being devested out of him, and vested in the assignee, when appointed, by mere operation of law.

5. Whether the bankrupt obtains a certificate of discharge or not, the property passes to the assignee, and is distributable among his creditors.

6. An attachment upon property under mesne process, is not, in the strict sense of the law, a lien on the property, although it bears a resemblance to it.

7. When a bankrupt is confined in close custody, he may be produced in court, by a writ of habeas corpus, whenever his presence is necessary for further proceedings in bankruptcy, before the court or a commissioner thereof.

This was a case of a petition by Jonathan H. Cheney to the district court of the United States, in which he set forth that, on the eighteenth day of December last past, he was committed to jail in the city of Boston on an execution sued out of the court of common pleas for the commonwealth of Massachusetts, holden at Boston aforesaid, in and for the county of Suffolk, by one Edward Flood, of said Boston, hair dresser; that, on the said eighteenth day of December, one Frederick Kidder, of Cambridgeport, in said district, became bail for the petitioner, and that afterwards, to wit, on the first Tuesday of March instant, the petitioner was, by a decree of this honorable court, declared to be bankrupt, on his petition, duly filed; that the ninety days, for which, by the laws of Massachusetts, poor debtors may be bailed for the jail limits, expired on Friday, the 18th of March instant, and the said Kidder then surrendered the petitioner to close jail in said Boston, wherein the petitioner was then confined; that he was and would be thereby prevented from attending to the property belonging to his creditors in bankruptcy, and rendering any assistance to his assignee, or preparing for his own examination, as by law is required. Whereupon, he prayed to this honorable court that such relief might be granted to him as should to the court seem fitting to his case, and, moreover, that the keeper of the jail in Boston, and the sheriff of the county of Suffolk, and his deputies, as well as the said Flood, be by said court ordered to discharge said petitioner, or cause said petitioner to be discharged, from said confinement and jail, and that the petitioner might have such further and other relief, in law and equity, as to this honorable court might appear meet. Upon hearing the petition, the district court passed a decree that the following questions be adjourned into the circuit court of the United States, to be there heard and determined, namely: "Whether the said sheriff and his deputies, and the keeper of the said jail and the said Flood, or any or either of them, shall be ordered to discharge the said Cheney from confinement in said jail; and whether any and what other relief shall be granted to the said petitioner?"

Edward G. Loring, for petitioner.
A. H. Fiske, for creditor.

STORY, Circuit Justice. The short state of the case is this: The petitioner, Cheney, was committed to gaol on an execution issuing against him from the state court of Massachusetts, in favor of the execution creditor, Flood, on the 18th of December, 1841. On the same day he gave bond, with sureties, in conformity to the state laws, to surrender himself to close gaol within ninety days, if the execution were not otherwise discharged. On the eighth day of March, 1842, upon his petition, Cheney was decreed to be a bankrupt; and he has since been surrendered, in discharge of his bond, and is now in close gaol on the execution. The prayer of his petition is, to be discharged from his imprisonment, or to have other relief, adapted to his case, in order to enable him to act in and submit to all proper proceedings under the bankruptcy.

The question, then, turns upon this,—

whether the bankrupt is, immediately upon his being decreed a bankrupt, entitled, as of course, to be discharged from imprisonment under an execution which issued and was served upon him, and under which he was committed, before the petition in bankruptcy was filed. The argument is that his personal presence and assistance are necessary to enable the assignee to wind up his affairs, as well to accomplish the purposes of the act, by enforcing his attendance and examination upon interrogatories, under the proceedings in bankruptcy. And it is said that in England, under the bankrupt system, the bankrupt is held entitled to a discharge from imprisonment on execution for a limited period, to accomplish these very objects. But it is to be taken into consideration that this authority is derived, not from general principles, but from the positive provisions of the statutes of bankruptcy. No correspondent provisions exist in our statute. And the question, therefore, is reduced to this: Whether the district court, sitting in bankruptcy, and having the full powers of a court of equity in all cases of bankruptcy, has authority, in virtue of that jurisdiction, to order the discharge of the bankrupt in this stage of the proceedings. I say in this stage of the proceedings, because it would be a very different question, if the bankrupt had obtained his certificate of discharge from all his debts; for then he would be entitled to be released by the district court, by injunction or other process, as well as by the state court upon a writ of habeas corpus, from farther imprisonment; and any subsequent imprisonment of him for the execution debt, if discharged by the certificate, would be illegal, and subject all the parties concerned therein to an action for false imprisonment. My opinion is, that no such right or jurisdiction attaches to the district court to order the discharge of the bankrupt from the execution, in the present stage of the proceedings. This is not the case of a debtor in execution under process from any court of the United States, over which the court may possess a power (I do not mean to say, that, if it were, it would, under the circumstances of the present case, make any essential distinction) to prevent its process from being used oppressively, or abused contrary to the general requirements of the laws of the United States. But, here, the execution is from the state court, and the party stands committed under that execution, and he must be treated, notwithstanding his intermediate liberty, upon giving bond, to be at large within the gaol limits, to have been upon his surrender at all times in custody, under and in virtue of that execution. A debtor in execution is not less in custody upon execution, who is at large within the prison limits, under bond for the liberty of such limits, than if he were in close custody. In each case he may commit an escape; and if he goes beyond the gaol limits, having given bond, it is an escape, which is a breach of the bond, for which he and his sureties are liable. It is not like the case of bail upon mesne process, where the debtor, although in one sense in the custody or power of his bail for the purpose of a surrender, is deemed for all other purposes lawfully at large. Certainly the courts of the United States gave no authority to intermeddle with state process, except in cases, where, either expressly, or by necessary implication, such an authority is given by law. The state sovereignty is supreme within its own sphere; and the process thereof must have full effect and operation, until displaced by some other constitutional authority, which controls or qualifies it.

Now, upon what ground can it be said, in this case, that the bankrupt has a clear title to be released from imprisonment? He has not as yet obtained any certificate of discharge from the debt, or his other debts. Non constat, that he ever will obtain such a certificate. If he never does obtain it, he must still remain liable for the debt, and be bound by the execution to satisfy it. How then can he now be entitled to be discharged from imprisonment under the execution, since the debt is not satisfied and discharged, and it rests in contingency, whether it ever will be by any proceedings under the bankruptcy? The case is not so strong as that of an arrest in execution, issued after the proceedings in bankruptcy have commenced, and are in progress; and yet it might not perhaps, in such a case, make any difference in the application of the doctrine, unless, indeed, where the bankrupt was at the time of the arrest in attendance upon the court, or going to or returning from the court; for then, like the parties and witnesses in common suits in other courts, the bankrupt would be entitled to the common privilege and protection granted by law to all such persons, eundo, morando, et redeundo. The case, too, is not affected by the same considerations as apply to attachments of the property of the bankrupt, made after the commencement of proceedings in bankruptcy upon mesne process, or upon execution; for in such cases, clearly upon principle (whatever may be the rule in cases of prior attachments, on which I give no opinion), all such attachments are avoided by the decree in bankruptcy, by relation from the time of filing the petition; and all the property then possessed by the bankrupt is divested out of the bankrupt and vested in the assignee, when appointed, by mere operation of law, from the same period. And it is wholly immaterial, as to the invalidity of such attachments, whether the bankrupt subsequently obtains a certificate of discharge or not, since in either event the property is divested out of him and passes to the assignee, and is distributable among his creditors. The attachment cannot and ought not to be per-

mitted to create any obstruction to the full exercise of the powers and authorities of the courts in bankruptcy over the property; and the court may by injunction prohibit any interference of the officer and attaching creditor therewith. An attachment upon property under mesne process is not, indeed, in the strict sense of the law, a fixed lien on the property, although it may in some respects bear an analogy or resemblance to it. It is but a mode of executing process, giving contingent rights and contingent interests, and liable to be affected or displaced by many other subsequent operations. But from the moment a petition in bankruptcy is filed, the property of the bankrupt is, in contemplation of law, surrendered by him to the custody of the court; and the court will not permit its rights or duties or functions in regard to it to be interfered with or controlled by private creditors.

But it is asked, how, if the bankrupt is confined in close custody, he is to be produced in court, whenever his presence is necessary for farther proceedings in bankruptcy, before the court or a commissioner thereof? The true answer is, by a writ of habeas corpus, which the court is competent to grant, in virtue of its general powers, for the purposes of justice; and when these purposes are answered, the party is, toties quoties, to be remanded to the lawful custody of the gaoler. It may be inconvenient; it may be dilatory; it may be expensive to resort to this course; but the inconvenience, if practically found to be great, may be overcome by an act of congress. At present, I do not apprehend, however, that much practical inconvenience will arise under this head. In the first place, the creditor will not be permitted to prove the debt in bankruptcy, unless he consents to discharge the bankrupt from custody; and, indeed, the fifth section of the act of congress of 1841, c. 9 [5 Stat. 444], contemplates the proving of the debt in bankruptcy to be a waiver of all right of action and suit against the bankrupt, and a surrender of all proceedings already commenced, or judgments obtained against him. It is true, that the creditor may, if he has not proved his debt in bankruptcy, under some circumstances, independently of and not governed by the statute of Massachusetts (Rev. Laws, 1835, c. 97, § 59), by a voluntary discharge of his debtor, who is in execution, from imprisonment, release his debt, unless the debtor assents to the discharge, with an agreement that it shall not be a discharge of the debt. But the debtor will rarely or never withhold such assent; and certainly the court would not aid him in withholding it. On the other hand, there is a question, which may arise upon this subject, important for the consideration of the creditor (upon which, however, I give no opinion), which is, whether, if the bankrupt should obtain his discharge, it will not relate back to the time of filing his petition, and affect all debts proved under the bankruptcy, so as to make the intermediate imprisonment of the execution debtor unlawful, and thereby found an action for false imprisonment against the creditor. This difficulty can readily be avoided by the creditor, if he chooses, either by an agreement with the debtor, or by a voluntary proof of his debt in bankruptcy.

These are the most material considerations, which appear to me to be important to suggest upon the present occasion. Upon the whole it is my opinion that the petitioner is not entitled to any discharge from imprisonment, or to any other relief, in the present stage of the proceedings in bankruptcy; and I shall order it so to be certified to the district court. Decree accordingly.

Case No. 2,637.

In re CHENEY.

[19 N. B. R. 16.][1]

District Court, E. D. Michigan. 1879.

POWERS OF REGISTER IN BANKRUPTCY—ADJOURNMENT OF MEETING OF CREDITORS.

1. A register has power to adjourn a meeting of creditors when, in his judgment, the interest of the whole body of creditors, or of sound policy, requires it.

2. Creditors, when duly convened, have power to choose assignees—to declare dividends—to consider and act upon propositions for a composition. But it is for the register primarily, or for the district judge, on the register's certificate, to determine when and what meetings shall be held. The register's discretion in such action will not ordinarily be interfered with. A register who, against the remonstrance of the bankrupt's counsel, adjourned a composition meeting in order that creditors might be afforded the option of electing an assignee, was *held* to have exercised a proper discretion.

In bankruptcy. The register certifies that this cause is pending before him under a general order of reference entered on the 2d day of February last; that in obedience to such general order of reference he entered an adjudication and issued a warrant to the marshal to give notice of a meeting of creditors for the choice of an assignee on the 28th day of March; that, accompanying said general order of reference, a special order of reference was delivered to him, directing him to call a meeting of creditors for the purpose of considering a composition to be proposed by said bankrupts; that he fixed the 28th day of March for such meeting, and gave notice accordingly; that the marshal returned the warrant, certifying thereon that he had caused printed notices to be given, and "that the notices to the creditors were withheld by order of solicitors;" that he stated to the meeting it would become his duty, under the provisions of section 5033, to adjourn the meeting and direct that a new notice be given as required. He further

[1] [Reprinted by permission.]

stated that he thought there was an important object in having both meetings held at the same time, and that unless objection was made he would adjourn the composition meeting to the day to be fixed for the choice of an assignee. Mr. Moore objected on behalf of the bankrupts, and Mr. Warner on behalf of the creditor he represented. No objection was made by Mr. Campau, representing the other two creditors, unless it was to be inferred from his silence that he assented to the objection made by Mr. Moore. These objections, in his judgment, presented a question for determination by the district judge. He therefore adjourned the composition meeting to the earliest day which, as agreed by the parties, would afford time to obtain the determination of the district judge, namely, to April 1st, and the meeting for the choice of an assignee to April 17th.

G. W. Moore, for bankrupts, presented the following points:

I. (1) In this cause, a "case in bankruptcy was pending," a voluntary petition having been filed by the insolvents. (2) The debtors filed a petition for a composition, and had called a meeting, in accordance with section 5103, Rev. St. (3) On receiving this petition the register, solely of his own motion, assumed the right to make, and had entered, an adjudication upon said petition, and called a meeting for the election of an assignee in the cause to be held the same day as composition meeting. (4) The warrant for the meeting to elect assignee was not served, for the reason that no deposit had been made to secure fees and costs. The marshal stating in his return, it was by order of the solicitors of the debtors.

II. At the day and hour appointed to consider the composition, the register, without request from any creditor or the debtors, refused to permit any proceedings to be had, for the reason that the warrant for the meeting for the election of an assignee had not been executed, and thereupon, solely of his own motion, proceeded to adjourn the meeting, against the objections of the debtors and creditors there represented.

To this the following objections are made by the debtors and all the creditors represented: (1) That the composition meeting and proceedings thereupon are absolute rights given by section 5103 of the Revised Statutes of the United States, the sole condition precedent being that "a case in bankruptcy shall be pending." (2) That a first composition meeting is between the creditors proving claims and the debtors, and the duty of the register is simply to preside and record the proceedings then and there had. (3) That the meeting to elect an assignee has no necessary connection with a meeting to consider composition, and the register erred in so ruling. (4) That in the absence of well-founded objection made by some creditors authorized to make it, the call for the meeting having been regular, the refusal of the register to proceed was an arbitrary exercise of an assumed power, entailing needless and injurious delays and useless costs.

By HOVEY K. CLARKE, Register:

The question whether a register has power to adjourn a meeting of creditors, when, in his judgment, the interest of the whole body of creditors, or of sound policy, requires it, I should be willing to submit with the briefest possible statement of my views concerning it. I have supposed that it was unquestioned that, when presiding at a creditors' meeting, he has all the power of the court in conducting the meeting. So far as it concerns the acts which the law authorizes the creditors themselves to perform, he is simply their chairman. He takes and authenticates their votes. But when and where meetings of creditors shall be held, when they shall be adjourned, to what time, and for what reasons, these are questions which I have always supposed the creditors had no power to determine. As to these they were suitors only; not a court, as they are when electing an assignee, directing the amount of a dividend, or voting upon compositions. Questions of the order of proceeding, adjournment, and the like, primarily must be determined by the register, or, if any party requires, by the district judge, when presented to him by the register's certificate. Such has always been my practice, and so far as I know the practice elsewhere.

Other questions, however, in their practical application of much more importance than this, are presented by the issue raised before me, especially as they have been expanded by the "points" presented by Mr. Moore. These were prepared in response to my request that he should state in writing the grounds on which he denied the power of the register to adjourn the composition meeting with the object named, but they cover a wider field than I anticipated, not, however, without a proper bearing on the subject; and they require of me a fuller treatment than I supposed would be necessary when I authorized him to expect my certificate would be sent in to-day.

I have heretofore, and perhaps more than once, taken occasion to refer to what may be deemed the administrative duties of a register in bankruptcy. Beyond those which may be deemed judicial duties, he is required, as I suppose, to exercise a certain degree of supervision in the conduct of proceedings before him; he is to take care, especially in the important matter of notice to creditors, by every power which the law or general orders give him, that they are duly informed of all proceedings in which their rights or interests may be involved; and that he is not precluded from taking such action as will promote or secure their interest, because such action is not asked for by

the creditors who happen to be represented at the meeting. I think, therefore, that it does not strengthen the objection to the register's action in this instance that it was taken "on his own motion." This objection is first stated in the following form: "(3) On receiving this petition the register, solely of his own motion, assumed the right to make, and had entered, an adjudication upon said petition, and called a meeting for the election of an assignee in the cause to be held the same day as composition meeting."

The statement that the order of adjudication was entered on receiving the petition for the composition meeting under the provisions of section 5103, would probably not have been made if the record had been carefully examined. The adjudication was not made upon the petition for a composition meeting, but upon the general order of reference which was delivered at the same time with the special order, and which expressly directs the register to make adjudication thereon. It will further appear how unreasonable the allegation is that the call of a meeting for the election of an assignee was the assumption of a right by the register when section 5019 requires the warrant to be issued "forthwith," and general order IV. commits to the register the conduct of the proceedings.

Quite as unreasonable, I think, is the allegation that the refusal of the register to proceed to take the votes of the three creditors present upon the proposition for a composition "was an arbitrary exercise of an assumed power." The excitement of counsel must be great when he is unable to restrain the expression of such a charge as this, and with the deliberation also which putting it in writing implies; for if this was "an arbitrary exercise of an assumed power," the counsel who so charges has precluded himself from conceding that the register acted from a mistaken sense of duty. I should be sorry to think that this was intended, but I must be allowed to insist however, that if I have exceeded my duty it has been from no purpose or desire to wrong the bankrupts in this case. It so happens that I know nothing but good of either of them. I have no reason to doubt that their purpose to obtain a composition with their creditors is actuated by entirely honest motives. But I am unable to see that this should allow me to apply any other rule in the conduct of the proceedings, so far as I am able to control them, than I would apply to any and all similar cases. And this leads me to consider the reasons why I deem it important that creditors, when called to consider a proposition for a composition, shall have the alternative, if they choose to exercise it, of electing an assignee, either for the purpose of defeating the composition, or of obtaining the aid of an assignee appointed by themselves, by whose investigations they may be able to judge of the fairness of the offer. There are, however, two preliminary considerations to be noted.

1. It requires but small observation of the course of composition cases in bankruptcy, to be convinced that the positive provisions of the law for the protection of creditors against unfair or dishonest compositions are few and weak; and it therefore becomes the duty of the court to exercise not only its power but its ingenuity in conducting the proceedings, so as to afford ample opportunity for the creditor to be heard, and under circumstances which will secure to them the freest action. The court, therefore, ought not to permit a practice, if the law affords power to prevent it, which will put the creditors at a disadvantage, the key to which is held in the hands of the bankrupt.

2. It must be expected that attorneys for bankrupts will seek to gain for them all advantages possible under the law; and if they can so load the issue or present embarrassing alternatives to operate in favor of their clients, of course they will do it. That is what they are employed for; and in some cases all they are employed for. It is the business of the court, as I view it, and especially of the register, to see that no sinister advantage is allowed to either party.

With these preliminary considerations in view, I think the court never will construe the language of section 17, Act 1874 [18 Stat. 182], § 5103a, which authorizes composition proceedings in cases where an adjudication has not been had, to require the entry of an adjudication in a voluntary case to be suspended, and all the proceedings consequent upon an adjudication in such a case as directed by sections 5019, 5033, and 5034 to be stayed. The clause, "whether an adjudication in bankruptcy shall have been had or not," could only have been intended for involuntary cases, to authorize composition proceedings in the interval between the filings of a petition for compulsory bankruptcy, while its allegations were denied, and the time was running for a hearing upon them. I do not understand that even in such a case, it is a statutory right of an alleged bankrupt to have a composition meeting called. That must be in the discretion of the court. But it is going much further to affirm that, in a voluntary case, it is the right of the bankrupt to have the proceedings which the statute directs suspended--such, for instance, as the requirement to issue the warrant "forthwith"—while the composition proceedings go forward. But the claim on behalf of the bankrupts here goes beyond even this. Their solicitor claims the right to countermand the order contained in the warrant to send notice by mail to the creditors named in it. Such is the return of the marshal as it stands. Nor is it substantially changed if the return be amended to show the bankrupts only refused to furnish the marshal with necessary fees to perform the service he was required by his warrant to render. That would be

only an indirect mode of accomplishing the fact just as it now stands in the return. And if the court have no other power to prevent this unauthorized interruption of the service of its process, it can at least prevent the advantage sought to be gained by such interference. How much this advantage is worth to a body of creditors—of having an alternative before them of choosing an assignee or accepting an offered composition—it may not be easy to estimate. I have seen cases where I thought it was highly appreciated; cases, too, where, by the investigation of an assignee, the composition offered was in the end accepted; another, where a proposition for a composition was withdrawn on the exhibition of opposition to it by the creditors, who immediately proceeded to the choice of an assignee, under whose management the dividend paid was more than double the composition offered. That there is an advantage to bankrupts seeking a composition to have that proposition presented by itself I am assured by the efforts made so to direct the proceedings that the meetings shall be separate; and the advantage is greatest when a composition meeting is held before the meeting for the choice of an assignee is called. There is an element of uncertainty in point of time as to when an assignee can be obtained, which operates to influence creditors to accept the composition offered, even while expressing dissatisfaction with it. I have observed that sometimes the effort to separate the meetings is attempted in one way, and sometimes in another. The saving of expense, which is alleged as the reason in this, as it has been in other cases, for holding the composition meeting first and by itself, does not strike me as entitled to the force which is assumed for it. That expense in this case, in addition to that actually incurred by a partial service of the warrant, would have been from eight to ten dollars. I am persuaded that attorneys for bankrupts seeking composition see, as I do, the advantage of this method of procedure. It is an advantage properly, perhaps, within their professional duty to their clients to gain if they can; as it is, in view of what I think to be the evils of it, and, as I understand my duty, to prevent it if I can, I am not sorry that the question has been presented, that the practice may be settled in this district; and that all officers of the court may be informed whether or not it is competent for them to accept from the attorneys of a bankrupt directions as to the manner of performing duties specifically directed by the statute or by the general or special orders of the court.

BROWN, District Judge. I think the register presents strong reasons why the ordinary proceedings in bankruptcy should not be stayed on account of the pendency of a petition for a composition. The cases of In re Proby [Case No. 11,439], and In re Holmes [Id. 6,632], are authorities for holding that the register has power to adjourn a meeting, and, in view of the facilities for fraud afforded by composition proceedings, I am not disposed to deny the power or interfere with the discretion of the register in directing a meeting at which the creditors may exercise their option of accepting a composition or electing an assignee.

In issuing a warrant "forthwith," the register simply obeyed the mandate of the law (section 5019), and I am loth to say that the bankrupt may defeat the election of an assignee, and at the same time compel the creditors to pass upon the propriety of a composition, by neglecting to provide for the expense of serving the warrant.

There may be cases where the absence of all suspicious circumstances, and the probable rapid depreciation of property, may suggest to the register the propriety of overlooking the mistake of counsel, and of holding the composition meeting before the general meeting called for the election of an assignee, but I would not interfere with his discretion in that regard. The order and opinion of the register are affirmed.

CHENEY (KNIGHT v.). See Case No. 7,883.

CHENEY, The W. E. See Case No. 17,344.

CHENOWETH (UNITED STATES v.). See Case No. 14,792.

Case No. 2,638.

CHEONGWO v. JONES.

[3 Wash. C. C. 359.][1]

Circuit Court, E. D. Pennsylvania. April Term, 1818.

ATTACHMENT—PLEA IN ABATEMENT — ACTION ON PROMISSORY NOTE—DEFENSES — CONTRACT FOR SALE OF GOODS — PERFORMANCE—WARRANTY—REMEDIES FOR FRAUD.

1. The defendant cannot plead a foreign attachment, levied by him in his own hands, in bar to an action against him, by the defendant in the attachment, so as to set off damages against the plaintiff; he must plead the attachment in abatement. If judgment be obtained in the attachment levied in his hands, he may offset the amount.

2. In an action upon a promissory note, where the plea is non assumpsit, the defendant cannot give evidence of damages sustained by a breach of the contract upon which the note was given.

3. Upon a Canton contract to deliver teas, the quality of the sample chests to be selected by A; If A select and accept of chests of an inferior quality, in performance of the contract, there is an end to the warranty; and the Hong merchant could only be liable for a fraud, in imposing on the defendant teas apparently of a particular quality, but actually inferior. He could not be bound to deliver the selected teas, which might be very inferior, and bound also to deliver teas of a better quality.

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the supreme court of the United States, under the supervision of Richard Peters, Jr., Esq.]

4. If the teas selected by A, were afterwards changed, the buyer was at liberty to rescind the contract, and refuse to take the teas, as soon as the fraud was discovered—even at Amsterdam, the place of their sale; and to recover back what had been paid; and also to refuse payment of the note given on the contract, on the ground of a failure in the consideration of the note; or he might affirm the contract, and claim damages.

The declaration contained three counts: 1, On a promissory note, subscribed by the defendant [William Jones], dated 26th November, 1805, at Canton, by which he promised to pay the plaintiff, by the name of Mr. Cheongwo, 9,102 dollars, for value received, in teas, twenty months after date; and if not paid at maturity, to pay at the rate of one per cent. per month interest, until paid: 2, goods sold and delivered: 3, an account stated. The defendant pleaded non assumpsit and payment, with leave to give in evidence, the following special matters: 1st. Failure of consideration; the goods for which the note was given, not having been delivered in quality according to contract: 2. A foreign attachment issued by the defendant against the plaintiff, in this court, to October sessions, 1811.

The defendant offered evidence to prove that he had sustained damages, by a breach of the plaintiff's warranty, of the quality of the teas, which constituted the consideration of the note; as well as for 8,000 dollars, paid to him when the note was given; and also, that the teas sold to him by the plaintiff, had not been delivered to him; but the plaintiff had delivered another parcel of an inferior quality. This evidence was rejected by the court, as inadmissible upon the pleadings, as damages could not be proved to have been sustained by a breach of the plaintiff's warranty, in order that the same might be offset against the note. The court stated, that in the case of Graigle v. Notnagle [Case No. 5,679] the only question decided by the court was, that a creditor might lay a foreign attachment in his own hands, and might proceed to obtain a judgment. There is no doubt but that this judgment might be pleaded in bar, by way of offset, or might be given in evidence, on notice. But the attachment itself cannot be pleaded in bar. Where it is pleaded by a garnishee, in a suit depending against him, it must always be in abatement. As the defendant could not, upon the general issue, give evidence of damages sustained by the plaintiff's breach of contract, in diminution of the debt for which the suit is brought, so neither can he be allowed to give such evidence, under his plea of foreign attachment. The parties then filed an agreement, in writing, that the defendant should be at liberty to give the evidence offered; and that the jury might deduct the amount of damages to which they might think him entitled, from the debt, for which suit was brought.

It appeared in evidence, that some time in November, or. December, 1805, the plaintiff entered into a verbal agreement with the defendant, then at Canton, that he would furnish him with 800 quarter chests of tea, one-half to be hyson skin, and the other congo, at stipulated prices; the quality of which should correspond with the samples which should be selected by Edward Gray, the defendant's supracargo, who should be the judge thereof; and upon his selection of the samples, the contract was to be carried into effect. Muster chests were accordingly sent to Mr. Gray, who, after examination, made his selection; and he declares, that he considered the quality of the samples to have been excellent. He afterwards examined and marked the chests, in the plaintiff's packing-house; and he states, that the qualities of the teas so examined, were excellent. The plaintiff delivered on board of the Eugenia, the number of quarter chests of tea stipulated by the above agreement to be furnished, which were carried to Amsterdam, and placed, in the usual manner, in the warehouses of the Asiatic Company, for sale; and which were disposed of at the public sales of the company, which took place in 1807. Mr. Gray stated, that he saw the teas at Amsterdam, when they were inspected by the servants of the company, and that their quality was most infamous. The hyson teas, in particular, were black, and the quality so inferior, that he thought they would not have sold in the United States for the duties. He was clearly of opinion, that the teas delivered on board the Eugenia, were not the same with those which he had examined and marked in the packing-house of the plaintiff. The boxes he believed to have been the same; but from the difference in the quality and size of the leads, which at Amsterdam were too small for the boxes, he was satisfied that the teas had been changed. It appeared from the public sales, made by the Dutch Company, in 1807, of different cargoes of teas, that the defendant's teas sold at prices very far below those of other teas of similar denominations, and of the best qualities. In 1807, Mr. Gray returned to Canton, and stated to the plaintiff the bad quality of the defendant's teas. The plaintiff entered into a written agreement, reciting this representation by Mr. Gray, of the bad quality of the teas; and promising to settle with the defendant, upon the same terms that other respectable houses at Canton had done; and, in case of a difference of opinion between the parties, to submit the same to arbitration. Mr. Gray, who was personally a sufferer by the bad quality of teas he had purchased from the plaintiff, effected a settlement at the same time with the plaintiff, upon the principle, as was contended by the defendant's counsel, of being allowed the difference between the sales of his teas, and those of other teas, of the same denomination and quality of the teas stipulated to be delivered. This was denied by the plaintiff's counsel; and no settlement was effected by Mr. Gray, relative to the defendant's teas. It was proved,

on the part of the plaintiff, that the quality of the tea crop, of 1805, was generally indifferent; and that the contract between these parties, was made at a very late period of the season, when the market was much exhausted. A witness, examined on the part of the plaintiff, also stated, that he had lived at Canton for ten years, and that it was very difficult for a person who had not, for a length of time, resided in China, to judge of the qualities of teas. That instances had sometimes occurred, of a few chests of teas being changed on board the Hong boats, by the mariners; but that he had never heard of an instance of a cargo being changed by the merchant who had sold it. The witness who testified to these facts, had been extensively engaged in business at Canton.

Rawle and Gibson, for plaintiff.

Mr. Binney, C. J. Ingersoll, and Mr. Dallas, for defendant.

WASHINGTON, Circuit Justice (charging jury). This is an action on a note of hand given at Canton, the signature of which is acknowledged by the defendant. But his counsel place his defence upon the two following grounds: 1st. That the consideration for which the note was given, was 800 quarter chests of tea, designated and marked, lying in the plaintiff's warehouse, which the plaintiff undertook to deliver on board of the Eugenia. That these chests were not delivered; but a different parcel of teas, not purchased by the defendant, were substituted, and put on board of the vessel. 2d. That if the identical teas, purchased by the defendant, were delivered, still they did not correspond in quality, with the samples selected by Mr. Gray; and, therefore, the defendant claims damages, for the breach of the warranty, to be offset against this note.

(The judge here stated the evidence in relation to the contract at large.)

Upon this evidence, it may not be improper, at this time, to make two general observations: 1st. That a Canton contract, for the purchase and delivery of teas, is always understood to mean, a delivery on board of the vessel which is to transport them, at Wampoa, or wherever the vessel is lying in the river. This not only results from the peculiar situation of the contracting parties, but is known to be the common understanding; and was so proved by a witness, who was examined, and who was well qualified to testify on the subject. 2d. The other observation is, that Gray was appointed by the parties the judge of the samples, with which the cargo was to correspond; but having made the selection, his judgment as to the correspondence of the cargo with the samples, was not to bind either of the contracting parties. This observation is made, in answer to an argument urged by one of the defendant's counsel.

If the argument in support of the first point, made by the defendant's counsel, be well founded, then it is immaterial whether the teas delivered on board of the Eugenia, corresponded with the samples or not. The complaint is not that the quality of these teas was inferior to that of the sample; but that the identical teas, purchased by the defendant, and for which this note was given in part payment, never were delivered. But what part of the contract, bound the plaintiff to deliver any particular parcel of teas? The agreement was to deliver teas, which should correspond in quality and denomination with the selected samples; and if he did that, his warranty was fulfilled. If he did not, then he exposed himself to a claim for damages, for his failure. But he did not stipulate to deliver such teas as Mr. Gray might select; and there is no proof, that the teas selected and marked by Gray, in the packing-house, were the identical chops to which the selected samples belonged. All that is stated on this subject, is, that the teas so selected and marked, were of excellent quality. There is no doubt but that Mr. Gray might, as the agent of the defendant, if empowered to bind the defendant by the act, accept of the particular chests, which he marked, as a performance of the plaintiff's contract. But, in that case, there would be an end to the warranty; and the plaintiff could only be liable for a fraud, in imposing upon the defendant teas apparently of a particular quality, but really of a different and inferior quality. It would be monstrous to say, that he was bound to deliver the teas which Mr. Gray might select, and which might be very inferior to the samples; and that he was also bound to deliver teas of a better quality, or to answer for the consequences. If Gray's selection did not bind the plaintiff, the teas which he did select, were not the identical teas sold, and for which this note was given; and the plaintiff was therefore at liberty, notwithstanding the selection, to deliver other teas more correspondent, in his own opinion, with the quality of the samples. If the plaintiff was bound by Gray's selection, then he was unquestionably discharged from his warranty; because the teas were accepted in performance of the contract. The claim asserted, to the chests selected, and the claim for damages, for not delivering on board of the Eugenia teas of a particular quality, are totally inconsistent and inadmissible.

But, admit that the plaintiff was bound to deliver the teas which were selected and marked, is the evidence such as ought to satisfy the jury that these teas were afterwards withdrawn from the chests, and other teas substituted? This is a fact of which the jury must judge, upon the evidence given on each side. Mr. Gray does not state that he examined all the chests, either at Canton or Amsterdam; nor does it appear in what manner he examined them. Whether he could decide with accuracy as to the size of all the

leads, without having had the boxes emptied of their contents, is a question for the consideration of the jury. As a further evidence of the incorrectness of the memory, as well as of the judgment of this witness, in relation to the alleged change of the teas, the plaintiff's counsel rely upon the testimony of Mr. Bleight, who deposes, that, in the course of the ten years he resided at Canton, he never heard of an instance of such a fraud being committed, either by one of the Hong, or by any out-door merchant. Should the jury, however, be satisfied, that the teas were selected by the defendant's agent, and were afterwards changed, the next inquiry is, what were the defendant's rights, in consequence of these acts, and how did he exercise them?

There can be no question, but that it was competent to him to rescind the contract, and to refuse to take the teas, even at Amsterdam, as soon as the breach of contract was perceived. In that case, he might recover back the money paid to the plaintiff, and exonerate himself from the payment of this note; upon the ground taken by his counsel, that there was a failure of the consideration for which it was given. Or, if he did not choose to take this course, he might affirm the contract, and claim damages for a breach of it. Did he do any act to rescind the contract? If he meant to do so, the teas ought to have been sold at Amsterdam, as the property of the plaintiff; whereas, they were sold as the property of, and for the account of, the defendant. But this is not all. In 1807, when his agent, Mr. Gray, returned to Canton, he made no complaint to the plaintiff, that the teas were changed, nor did he ask for a return of the money which had been paid by the defendant to the plaintiff, and also, that this note might be given up; but his objections were confined to the bad quality of the teas, for which reason he demanded compensation; and the plaintiff agreed to settle with him upon the same terms that other merchants had settled similar claims. These facts are stated at large in the written agreement, signed by the plaintiff and accepted by Gray, and must, therefore, be considered as conclusive on the defendant. Thus, it appears, that the defendant never thought of rescinding the contract, nor ever charged the plaintiff with the fraud now alleged; but, on the contrary, acted throughout in a manner to affirm the contract, and to confine his claim to a compensation in damages for a breach of it. It would be too much for the court to permit him now to change his ground, and to treat the contract as one made without consideration, or of which the consideration had failed.

2. The next question is, whether the contract between the parties has been fulfilled? The contract was to deliver teas, which should correspond in quality with the samples selected by Mr. Gray. This gentleman has deposed, that the quality of the samples which he did select was excellent. This is his expression; and the jury must decide on its correct meaning, when used by merchants in describing the quality of an article, which they are about to buy or sell. In common parlance, it certainly imports a quality of a high grade, if not the highest.

The next inquiry is, what was the quality of the teas delivered? Mr. Gray has sworn, that at Amsterdam he examined them, and that the quality was most infamous. It also appears, from the sale made of these teas by the Dutch Asiatic Company, that they sold for prices very inferior to other teas of the same denomination, and of a high grade of quality. But, after all, the quality of the samples selected by Mr. Gray, and, consequently, of the 800 quarter chests, which the plaintiff warranted should correspond with the samples, must be decided by the confidence which the jury may place, not only upon the veracity of that gentleman, (which has not been questioned,) but upon the accuracy of his memory and judgment, both of which have been.

It is contended, by the plaintiff's counsel, that the teas at the Canton market, of the crop of 1805, were generally of bad quality, and that the defendant's teas were purchased when the market was nearly exhausted, which would render them still worse; consequently, that Mr. Gray must be mistaken, when he states, that the samples, and the teas which he examined in the plaintiff's warehouse, were of an excellent quality. How far these facts impeach the credit of Mr. Gray, the jury must decide. But, if they believe that the quality of the samples has been correctly stated by this witness, then the circumstances just mentioned, afford no excuse to the plaintiff for delivering teas inferior in quality to the samples. If the market would not enable him to deliver teas of that quality, he ought not to have sent these samples; and if Gray refused to select inferior samples, the contract was at an end; because it was not to be concluded until the samples were selected. But when samples of a superior quality were sent and accepted, the plaintiff agreed to deliver 800 quarter chests, to correspond with them; and he cannot excuse himself, by alleging that he was unable to comply with this contract.

If the contract has not been fulfilled, the last inquiry is, what is the compensation to which the defendant is entitled? The rule laid down by this court in former cases like the present, is, to take the differences between the prices given for the teas of the injured party, at the Dutch sales, and other teas, of the quality which, by the contract, he was entitled to have, and of the same denomination, and to make that difference the rate of the injury sustained, to be applied to the first cost of the article, at Canton; to which is to be added the premium of insurance, duties, and all other usual expenses

and charges.—Thus, if the defendant's teas sold for 50 or 25 per cent. less than other teas, which would be designated as excellent, or thereabouts; the defendant is entitled to claim of the plaintiff, the same rate of this sum, which he gave for the teas at Canton, with the charges as before mentioned. The reasons for this rule are explained at large, in Gilpins v. Consequa [Case No. 5,452]; Youqua v. Nixon [Id. 18,189]; and Consequa v. Willings [Id. 3,128]. But if the parties have agreed to settle by any other rule, they are bound by it, and it is for the jury to decide, upon the testimony of Mr. Gray, taken in connexion with the agreements of the 27th November, 1807, whether any other, and what rule, was established between these parties.

As to the interest, I have only to repeat what was laid down by the court, in all the cases before mentioned, that the law does not sanction the allowance of interest upon unliquidated damages. Verdict for plaintiff.

Case No. 2,639.

The CHEROKEE.

[12 N. Y. Leg. Obs. 33.]

District Court, S. D. New York. Dec., 1353.

REMOVING TIMBER FROM PUBLIC LANDS—FORFEITURE OF VESSEL—PLEADING AND PROOF.

1. Forfeiture cannot be enforced [against a vessel, the master of which has taken on board timber removed from public lands, in violation of act of March 2, 1831 (4 Stat. 472)], except upon averment in the libel, and proof that the acts charged as a public offense were done by the master of the vessel wilfully, or with knowledge of their culpability.

2. That the confessions of the consignee of the vessel of his knowledge in the premises are not admissible to charge the offense on the owner or mate of the vessel.

3. That if such proofs could be received, it was less doubtful upon the evidence whether the portions of land upon which the timber was cut, at the time belonged to the United States, and if they did do so, whether the consignee cut or removed the same thereupon, or acquired it knowing that fact.

Charles O'Conor, Dist. Atty., for the United States.

George F. Betts, for the schooner.

BETTS, District Judge. This is a libel of information, demanding the forfeiture of the schooner for removing timber from the public lands in Florida, contrary to the prohibitions of the act of congress of March 2, 1831 (4 Stat. 472, §§ 1, 2). The first section of the act imposes a fine and imprisonment on any persons committing the offenses therein declared "on any lands of the United States, which in pursuance of any law passed, or hereafter to be passed, shall have been reserved or purchased for the use of the United States, for supplying or furnishing therefrom timber for the navy of the United States or from any other lands from the United States acquired, or hereafter to be acquired," without being authorized by order in writing, by a competent officer and for the use of the United States. The second section supplies the immediate foundation of this prosecution. It enacts, "that if the master, owner, or consignee of any ship or vessel shall knowingly take on board any timber cut on lands which have been reserved or purchased as aforesaid, without proper authority, and for the use of the navy of the United States, or shall take on board any live oak or red cedar timber cut on any other lands of the United States, or to export the same to any foreign country, the ship or vessel on board which the same shall be taken, transported or seized, shall with her tackle, apparel and furniture be wholly forfeited to the United States, and the captain or master of such vessel, wherein the same shall have been exported to any foreign country against the provisions of this act, shall forfeit and pay to the United States a sum not exceeding $1,000."

The libel consists of six counts. In the first, the cause of forfeiture is, that the master of the Cherokee knowingly took on board her without proper authority, on St. John's river, East Florida, on the 20th of June, 1851, a quantity of red cedar timber which had been cut on public lands of the United States in East Florida, reserved for supplying timber for the use of the navy, which timber had not been cut for the use of the navy, and that the same was taken on board by him with intent to transport it to New York. The second count is the same as the first, except that it does not charge that the master did the act knowingly. The third count varies from the second in averring that the master took the timber on board "with intent to export, dispose of, use or employ the same in a manner other than for the use of the navy of the United States, and in omitting the allegation that the timber was cut or taken from the land reserved," etc. The fourth, fifth and sixth counts are substantially the same with the first; the sixth averring, in addition, that the schooner sailed from Florida with the timber, and arrived with it on the 1st of July, 1851, in this port. The answer is interposed by the owners, and denies the liability of the vessel to forfeiture for the cause alleged, being in effect tantamount to a demurrer. A commission was executed in Florida and the testimony of witnesses taken under it on the part of the United States. The claimant examined the master before a commissioner out of court.

The libel does not designate the locus in quo by any more specific description than that it was some point on the St. John's river in East Florida, to the plaintiffs unknown; and it is urged that they make sufficient title to the premises under the treaty of cession by Spain of February 22, 1819 (8 Stat. 254, art. 2). But the cession is qualified upon its face. It cedes "all public lots and squares, vacant lands, public edifices, fortifications, barracks and other buildings, which are not private prop-

erty." And affords full proof that the territories were occupied by a resident population, and also that grants of lands, of indefinite location and extent, had been previously made by Spain. Arts. 6 and 8. All rights of private property remained unaffected by the treaty.

The legislation of congress, and the adjudications of the United States courts from the period of cession to the present time, are judicial notice in this cause, that the United States did not become proprietors of the whole of Florida by the cession; on the contrary, that very large portions of both territories have been always claimed and occupied as private property, under title paramount to that of this government. It is, accordingly, necessary for the plaintiffs to prove that the premises from which the timber in question was cut or taken, were at the time public property.

The plaintiffs, on the hearing, and by their proofs, allege that the timber in question was taken from sections 31 and 32 of township 10 south, range 24 east. The only evidence offered to the fact is, that these lands were surveyed by the United States surveyor, and have been recently watched, occasionally, by their timber agents, to prevent trespasses, and that on the 11th of June, 1851, entries were made by an individual, of parts of two lots in each of these sections. The further proof that it is generally understood in that region of country that the United States own lands adjacent to the St. John's river or its tributaries, is too loose and indefinite to aid a claim to these particular lots.

No legal evidence, affecting the owners of the vessel is given, that the timber transported by her was taken from either of these lots. Indeed, there is no proof whatever to that fact, other than the declaration of one J. W. Pearson. It is unnecessary to criticise the version of these declarations given by different witnesses, because I hold them inadmissible to create a forfeiture of the vessel as against the interests of other parties. The vessel went out from a port in New Jersey, under a charter from the master to a Mr. Grier, and was by him consigned to Pearson to load her with a cargo of timber. The charterer accompanied the vessel. Pearson was no way the agent of the master or owners in loading the schooner. He, on his own account, supplied the timber to the charterer, without other interference by the master than his repeated warning not to put any United States timber on board. The charter contained the usual qualifications to the engagement to take a full lading, and that it should be lawful cargo. Pearson was not the agent of the owners, nor was he authorized to bind them or the vessel by his declarations or admissions. The general principle is, that the admissions of agents affect even their direct principal only when made during his continuance of the agency in regard to a transaction then depending, "et dum feret opus." 1 Greenl. Ev. (6th Ed.) § 113, and notes; Rouse, Cr. Ev. 54. Under this doctrine the declarations or admissions of the charterer himself that he received on board an unlawful cargo knowingly would not be permitted to implicate the vessel or her owners in an illicit transaction, because he had no direct or implied authority so to employ the vessel.

In this case the offense charged in the libel is, that the master committed the unlawful act, and the proof offered to support the charge is the admission of an agent of the charterer. The statute subjects a vessel to forfeiture by acts committed by her consignee; but it is doubtful if in such cases, the corpus delicti could be proved, by his declarations or confessions alone. Rouse, Cr. Ev. 37. The testimony is direct and positive that the master forbade any United States timber being laden on board, and was assured by the consignees that none of this cargo came from the public lands. I think, on these points, the defense to the libel is complete. But further, supposing the timber in question was taken from the public lands without proper authority, and that the consignee, knowing the fact, loaded it on board the vessel, and that such a transaction might subject the vessel to forfeiture, this libel is not so framed as to entitle the plaintiffs to that decree upon its allegation. The rules of pleading require libels for forfeitures to set forth distinctly the ground and causes upon which a forfeiture is demanded, and they must bring by plain averments the supposed offense within the provisions of the statute on which the action is founded. Sup. Ct. Rules Adm. 22; The Merino, 9 Wheat. [22 U. S.] 401; The Palmyra, 12 Wheat. [25 U. S.] 18.

The allegation is, that the offense was committed by the master, whilst the proof goes no further than to implicate the consignee in acts which would legally forfeit the vessel,—for, in my judgment the second and third counts or allegation of the libel are not within the provisions of the statute, and no decree of condemnation can be rendered on them if fully proved. These counts assume, that the offense is committed by the act of taking the timber on board and transporting it to New York, although the master was ignorant that it had been taken from public lands. I do not accede to this interpretation of the statute. The second section of the act creates two classes of offenses. The first is transporting any timber cut on the lands of the United States reserved for the use of the navy; and the other, transporting any live oak or red cedar timber, cut on any other lands of the United States. These two clauses of the sections are separated in punctuation by a semicolon: the term "knowingly" is prefixed to the first branch, and is not repeated in the second. The argument on the part of the United States is, that the offense under the second clause is consummated by the commission

of the prohibited act, without regard to the scienter of the accused party. It seems to me, this construction of the law is not sanctioned by the arrangement and connection of the two sentences, nor by their general design and purport. In the first instance, where it is admitted, a scienter must be charged in the libel and proved on trial, in order to establish an offense; the prohibited act embraces live oak and red cedar equally with the other clause, for it interdicts cutting and carrying away any timber; and as it relates to lands reserved by the United States for the use of the navy, would seem much more to justify an implied notice or knowledge, in the whole community of the United States title, from the fact of such reservation for public use, than in the second instance, where no specific act need be done by the United States, beyond accepting the cession of the lands, in order to bring the lands within the protection of this statute. It must, accordingly, be far less likely that the community, as matter of fact, is apprised that sections 31 and 32 in this case, not reserved, belonged to the United States, than if they had been surveyed, reserved and set apart for the use of the navy. On this state of the facts there is a strong improbability that congress would impose the penalty of forfeiture of vessels engaged in carrying away timber which had been cut on the lands generally and unreserved, without any knowledge of or notice to, the owner, master, or consignee of the vessel, and would forbear to inflict the same penalty for the offense on lands reserved for the use of the navy, unless it be averred and proved that the owner, master or consignee of the vessel knew that the timber came from those lands, and had been obtained without proper authority. The reason of the case stands strongly opposed to such an interpretation of the law. Besides, the arrangement of the two clauses and the rules of syntax would naturally carry the qualification of "knowingly," from the first paragraph to the second, particularly considering that a common penalty was imposed in both, and in the second instance for acts committed anywhere within the two territories and irrespective of any reservation or special appropriation of the lands.

It appears to me that the government in taking to itself a protection for its lands within these territories against trespasses, higher and different from what at that day it enjoyed elsewhere in the United States, intended to exact these extreme penalties only in case of wilful depredations upon the public property; and that the forfeiture of a vessel employed in transporting timber cut on lands of the United States, cannot be enforced without proof that the wrong was done knowingly.

The libel in this case must be dismissed. First. Because the action cannot be sustained except upon the averment and proof that the acts charged as a public offense, were done by the master wilfully or with knowledge of their culpability. Second. Because the confessions of the consignee of the vessel of his own knowledge in the premises, are not admissible to charge the offense on the owner or master of the vessel. Third. Because, if such proofs could be received, it is left doubtful upon the evidence whether the portions of lots No. 31 and 32, on which the timber in question was cut, at the time belonged to the United States, and if they did so, whether Pearson, the consignee, cut or removed the timber therefrom or acquired it knowing that fact.

Case No. 2,640.

The CHEROKEE.

[2 Spr. 235;[1] 3 Am. Law Reg. (N. S.) 289.]

District Court, D. Massachusetts. Dec., 1863.

JOINT CAPTURE OF PRIZE—CONSTRUCTIVE CAPTURE—PRIZE ACT OF 1862—CONSTRUCTION.

Joint capture of a prize. Who are entitled to share. Co-operation in a blockade does not constitute the blockading vessels joint captors. Discussion of the English doctrine of constructive captors. Construction of the prize act of 1862 [12 Stat. 606].

[Followed in The Atlanta, Case No. 619. Cited in The Aries, Id. 529; The St. John, Id. 12,225; The Selma, Id. 12,647.]

In admiralty.

R. H. Dana, Jr., U. S. Atty., for the actual captor.

No counsel appeared for any other party, but suggestions were made in communications from some of the vessels claiming as joint captors.

SPRAGUE, District Judge. The steamer Cherokee and cargo were captured on the 8th of May last by the United States ship-of-war Canandaigua, and sent into this port. They have both been condemned. The question now arises, how shall the proceeds be distributed?

It is the duty of this court to determine what ships shall participate in the proceeds of a prize; but it is the province of the secretary of the navy, under the statutes, to ascertain and decide, at least in the first instance, what persons constituted the officers and crews of such ships, and the flag officer of a squadron, and the share which each shall receive. I mention this because communications have been received, founded on the erroneous supposition that this court was to decide upon the claims of individuals as flag officers or otherwise, and it is desirable that it should be known that such claims must be presented to the navy department.

Applications to be allowed to share in this prize have been presented in behalf of the following vessels: New Ironsides, Stettin.

[1] [Reported by Hon. Richard H. Dana, Jr., and here reprinted by permission.]

Wamsutta, Flag, Paul Jones, Lodona, Marblehead, Huron, Powhatan, and Housatonic. Some of these applications are quite informal. But I shall treat them all as petitions duly presented. Since the decree of condemnation, the depositions of one or more of the officers of each of the above-mentioned ships have been taken. These have been examined with the other evidence in the case. It appears that the Canandaigua and the petitioning ships composed the blockading squadron off Charleston. All, excepting the Lodona, were stationed at different places immediately off the city, so as to guard the more direct approaches. The Lodona was stationed at Bull's bay, to guard that channel of communication to Charleston, and was about sixteen miles from the rest of the squadron.

On the evening of the 5th of May last, the Cherokee ran out of the port of Charleston. She was first discovered by the steamer Flag, who fired one or more guns at her, as she was passing by, and also threw up a rocket. She was then discovered by the Canandaigua, a steamer lying outside of the Flag, which immediately got under way in pursuit. This was about eleven o'clock at night. The pursuit was continued about three and a half hours, when the Canandaigua, having come within cannon range, fired a gun, and the Cherokee hove to and surrendered. The commencement of the chase was seen by several of the blockading vessels, but no one of them started in pursuit. All remained at their anchorage. Both pursuer and pursued were entirely lost sight of about one hour after the chase began; and the place where the capture was actually made was thirty-five miles from the blockading squadron. No vessel of the squadron was within signal distance of either the Canandaigua or Cherokee at the time of the capture.

All prizes made by our ships-of-war belong primarily to the United States, and any person who claims to participate therein must show a grant from the government. There have been three acts of congress making such grants: that of 1799, c. 24 (1 Stat. 715); that of 1800, c. 33 (2 Stat. 52); and that of 1862, c. 204 (12 Stat. 606). The first of these three acts remained in force about a year. Its provisions are so similar to those of subsequent acts that they need not be here recited. The fifth section of the act of 1800 says "that the proceeds of all ships and vessels, and the goods taken on board of them, which shall be adjudged good prize * * * when of inferior force, shall be divided equally between the United States and the officers and men making the capture." The sixth section provides that "whenever one or more public ships or vessels are in sight at the time any one or more ships are taking a prize or prizes, they shall all share equally in the prize or prizes." The statute of 1862 (section 2) copies the first of the foregoing provisions verbatim. But it does not preserve the phraseology of the second. In section 3 it says, "When one or more vessels of the navy shall be within signal distance of another making a prize, all shall share in the prize."

This appears to be a substitute for the corresponding provision in the act of 1800. But it is unnecessary to consider whether it be so or not, it being immaterial in the present case whether the former is superseded by the latter, or whether both may stand and be enforced together. These petitioning vessels do not come within either clause. No one of them was within either sight or signal distance of the Canandaigua when she was taking or making this prize. This is not contended for. They rest their claim wholly upon the fact that they, together with the Canandaigua, composed the blockading squadron. Does that fact bring them within the first provision of the statutes of 1800 and of 1862; which has already been quoted? The question, then, is reduced to this: Are the officers and men who were on board these vessels to be deemed "officers and men making the capture," within the meaning of the statute? That the capture was actually made by the Canandaigua when and where no other vessel was in sight or in a condition then to render any aid whatever, is certain.

Those on board the other vessels, therefore, were not actual captors. The question is, are they to be deemed captors by construction of law, by reason of their being a part of the blockading squadron? If we look only at our own statutes, the present question might be solved without much difficulty. They manifestly provide for two classes of ships:—First. Those making the capture. Second. Those within signal distance of a vessel making a capture. The second section of the act of 1862 gives one-half to the "officers and men making the capture." The third section gives a share to any vessel of the navy which "is within signal distance of another making a prize."

Thus the statute, in the first place, gives half of the prize to those making the capture, and then provides that another class shall share with them; viz., vessels not themselves making the prize, but within signal distance of those that do make it. From this it seems clear that the first class are those who actually make the capture, and that none others can participate except those provided for in the second class. This construction would be adopted without hesitation, were it not for certain English doctrines, which have been supposed by some to have a direct and even controlling application to our law. It becomes necessary to bestow some attention upon the decisions in which those doctrines are to be found.

It must be borne in mind that we are not discussing a question of general jurisprudence, or endeavoring to ascertain a rule of the unwritten law to be determined by judicial precedents or considerations of justice and policy. But we are endeavoring to as-

certain the true meaning and intent of a positive legislative enactment. Of course we do not look to British decisions for any direct exposition of our own statutes, to which they can, at most, have but an indirect application. Those decisions are under the English prize acts; that is, they give construction to their own positive enactments. Now, if the language which describes those who are to share in the prize be the same in our statutes as in the British, then English decisions may have some application.

If such language of the British statutes had received a judicial interpretation, and had thus acquired a settled and well-known meaning, and our legislature had then adopted the same language, it might well be supposed that they intended it should bear the same interpretation. We must, therefore, endeavor to ascertain what was the provision of the British statutes, and how far there had been any settled and well-known construction thereof at the times when our statutes were passed.

The prize acts of 6 Anne, c. 16, 43 Geo. III. c. 160, 45 Geo. III. c. 72, and of 55 Geo. III. c. 160, give the prize to the officers and crew by whom it "shall be taken." There was a prize act in 33 Geo. III., which is noticed as expired, but not printed in the British statutes at large. There can be no doubt, however, that it gave the prize to those who should take it; for, in the year 1799, Sir William Scott, in the case of The Vryheid, 2 C. Rob. Adm. 21, says, "The act of parliament and the proclamation give the benefit of prize to the takers." In the corresponding provision in our prize acts, instead of the word "take," the word "capture" is used. I do not think that there is any difference in the import of these two words, in the connection in which they are used; and I proceed to consider the effect of the British interpretation of their statutes in the same manner as if our own had, in this first provision, adopted their language without the change of a word.

In construing their prize acts, the English courts have divided the takers or captors into two classes,—the actual captors, and the constructive captors. As to who should be deemed actual captors, there seems to have been little question. But there has been much doubt and difficulty in determining who should be permitted to share as constructive captors. Judicial decisions have admitted two classes of king's ships. The first is those in sight at the time of the capture. This rule of construction, doubtless, grew out of the difficulty of defining the limits of actual assistance by joint action or cooperation. If two ships were engaged in the combat with the enemy, it is manifest that both actually contributed to the result. So where several vessels placed themselves in such positions and proximity to an enemy's ship that she could not escape, and she struck without resistance, because resistance to such numbers would be useless, it is manifest that all were at the time directly instrumental in effecting the result. Then come cases of ships being present, or within sight, at a greater or less distance from the actual captor, creating doubts whether they gave efficient aid, or contributed in any and what degree to the capture, which doubts it would be impossible satisfactorily to solve; and to avoid them, and the litigation and uncertainty which would attend each of the numerous cases that might arise, the courts adopted a general rule that a king's ship being in sight should constitute her a joint captor by construction of law, upon the ground, that it must be presumed that the actual captor was thereby encouraged, and that the enemy was intimidated. The rule required that she should be in sight not only of the capturing ship, but also of the enemy. There were some exceptions. The Robert, 3 C. Rob. Adm. 195.

The doctrine, that a king's ship being in sight entitled her to share in the prize, was firmly established. This rule had the advantage of being well defined, and of resting on an intelligible reason. A second class of constructive captors has been introduced by judicial decisions. They are those who, not being in sight at the time of the capture, are nevertheless permitted to share in the prize by reason of some association with the actual captor.

These petitioners claim to come within this class, by reason of their being associated with the Canandaigua in the same blockading squadron. It becomes necessary, therefore, to inquire how far, at the several times when our respective prize acts were passed, there was any settled and well-known construction by which such association conferred the rights of constructive joint captors, Our earliest prize act was in 1799. That, as already stated, has been repealed. The next was in 1800. What was the state of the British adjudications at that time? There is no doubt that they recognized two classes of captors, one the actual, and the other the constructive; and that they had determined, that a vessel in sight at the time of the capture should share in the prize as constructive captor. But the question is, how far had the doctrine of association been then established? There were doubtless many decisions before that time; but, for the want of trustworthy reports, our means of ascertaining what they were are very imperfect. We have to rely mainly upon such glimpses as we obtain from fragmentary statements made by the court or counsel in the trial of subsequent cases. Of the earlier cases thus referred to, the one most in point is The Mars, decided by the lords 1760, and cited in The Vryheid, 2 C. Rob. Adm. 22. It is thus stated in a note: "This was a case of a French ship taken by one of three king's ships, which, being apprised of the design of the enemy to escape from Port au Prince,

had taken their station at different outlets to intercept them. The capture was made by one ship. A claim was given on behalf of the other two, to share as joint captors, though not present at the capture; but it was rejected."

In 1800, the knowledge of previous decisions seems to have rested in a great degree, upon tradition, or upon the recollection of the judges and counsel who had been engaged in the trials. We learn something of the state of the law in 1799, by what is said by Sir William Scott in The Vryheid. After remarking that that was a case of joint capture, that is, a claim to participate as constructive captors, he says: "The court has to lament that cases of this nature are, in general, attended with much difficulty, as they depend frequently on very minute facts, on which the court has to decide between contradictory representations; and it is to be regretted that the decisions of the courts on this subject have not always been so uniform as it is highly desirable they should be." Again, on page 23, he says: "The being in sight, generally, and with some few exceptions, has been so often held to be sufficient to entitle parties to be admitted joint captors, that, where that fact is alleged, we do not call for particular cases to authorize the claim; but, where that circumstance is wanting, it is incumbent on the party to make out his claim by an appeal to decided cases, or at least to principles which are fairly to be extracted from those cases."

There does not appear to have been any decision inconsistent with that in The Mars, much less any one that could control it; and it cannot be said, that, in the year 1800, the English courts extended the doctrine of constructive capture by association to cases of blockade, much less that there was any such settled and well-known rule in that respect as to create a presumption that congress intended to adopt it, even if it had copied the provisions of the British statute. In such case, it might have been inferred that it was satisfied with the decisions that had been made in regard to ships in sight, and approved of the rule thus adopted. But its intention in this respect was not left to inference. It introduced a new provision, giving to ships in sight the rights of joint captors, thus expressly declaring how far it intended to adopt the doctrine of constructive capture, and repelling the presumption that it intended to sanction it in other cases.

But it has been said, that, previous to the passing of our prize act in 1862, the doctrine of constructive capture by association had been fully established by judicial decisions, and especially in case of blockade. There have been no such decisions in this country. No such construction, therefore, had been given to our own statutes. All the adjudications relied upon were made in England in giving a construction to their own prize acts. Those decisions require some attention.

The case of The Vryheid, which was decided in 1799, has already been referred to. The claim of a ship to share in a prize made by a fleet of which she had been a part was rejected, upon the ground that she had been temporarily detached upon a separate service before the chase began. There are subsequent decisions to the same effect. See The Island of Trinidad, 5 C. Rob. Adm. 92.

In The Fortsigheid, 3 C. Rob. Adm. 315, 316, the ship-of-war Director being one of a fleet which was blockading the Texel, was sent to look out, and, while out of sight of the rest of the fleet, made the capture. "The captured ships were not seen by the fleet till they were in the possession of the actual captor." Sir William Scott decided that the whole fleet was entitled to share in the prize. This decision was on the 17th of June, 1801.

On the same day, in another case, The Harmonie, 3 C. Rob. Adm. 318, it appeared "that the Scorpion and the Fox were sent by Captain M'Doual, commander of a squadron employed in the blockade of the Texel, as small vessels that drew less water, to cruise for the purpose of keeping up the blockade nearer in upon the coast, where large ships could not safely venture on account of the shoals. It was admitted that the capture was made ten leagues from the fleet, after a chase of three or four hours, and completely out of sight." Sir William Scott held that the fleet were constructive joint captors.

In the Genereux, decided by the lords in 1803, referred to by the court and counsel in The Guilliaume Tell, Edw. Adm. 9, 16, the capture was made by the Foudroyant and two other ships. The Lion claimed to be admitted as joint captor. It appears that they all belonged to a squadron under command of Lord Keith, who, having received information that a French squadron consisting of four ships was on the way for the relief of the French garrison at La Valette, immediately made such disposition of his ships as would be most likely to intercept them. "The Foudroyant and two other ships-of-the-line were ordered to look out for the enemy in the south-south-east, and the Lion was ordered to take a station off the passage between Gaza and Malta," and the rest of the vessels were stationed in another place or places to prevent the enemy from entering La Valette. The Foudroyant, and the two vessels with her, fell in with the enemy and captured the Genereux on that side of the island which is opposite to La Valette. At the time of the capture, the Lion was sufficiently near to hear the report of the guns during the engagement. The Lion and the other stationed ships formed a part of the same squadron with the Foudroyant and her two associates. All were under the same commander, and took their respective stations, by his order, to intercept the enemy. Such were the allegations in behalf of the Lion. The court held that the allegations were insufficient; that is, that, if all the facts thus alleged were true,

still the Lion was not entitled to share, because she was not in sight at the time of the capture.

In The Guilliaume Tell (decided in 1808) Edw. Adm. 6, the Northumberland and Culloden were part of a squadron blockading the port of La Valette, in which were known to be two French ships-of-war. The capture of these ships was a special object of the squadron, they having also the general purpose of preventing the escape of other vessels and of taking the place. One of them, which attempted to escape in the night, was pursued and captured by some of the fleet. The petitioning vessels had taken an active part in the preconcerted measures to prevent the escape, but did not join in the pursuit nor leave their anchorage. It does not clearly appear, from the statement of facts by the reporter, whether the capture was made within sight of the petitioning vessels or not.

Sir William Scott, at the close of his judgment, states the grounds upon which it rested, as follows: "Now, in this case, there was not only an actual sight, not only a perfect connusance of what was going forward, but as complete and uniform and persevering an association in this particular object, as well as in the general objects of the blockade, as can be imagined. I am therefore of opinion, that the Culloden and Northumberland are entitled to share." It is to be observed that the judge states, as a material circumstance, that these vessels were in sight. I do not think that it is to be inferred that they were in sight at the time of capture, but only at the beginning of the chase; and this, I suppose, was relied upon to distinguish it from The Genereux. There is another circumstance which is emphatically dwelt upon by the judge. It is that the vessels of the squadron were associated not only in the general object of a blockade, that is, to prevent the ingress or egress of any vessels, but in the special purpose of preventing this French ship-of-war from escaping. After having spoken of these ships as being part of a squadron associated for the express purpose of making the capture, he says: "The whole fleet were acting with one common consent, upon a preconcerted plan, for the capture of this prize;" and again, in the quotation before made from the concluding part of his opinion, we notice this explicit language: "There was * * * as complete and uniform and persevering an association in this particular object, as well as in the general objects of the blockade, as can be imagined."

From this judgment it would be inferred that merely being part of blockading squadron to prevent the egress of all vessels, without the special object of capturing that ship, or preconcerted measures for that particular purpose, would not have entitled the ships which remained at anchor to participate with those who pursued and captured, and that being associated both for that special purpose and the general object of the blockade would not have been sufficient without at some time being in sight. From this it would seem that, under the pressure of the authority of The Genereux, the learned judge no longer insisted upon the doctrine which he had laid down in The Forsigheid, in the year 1801. But in 1809, that case came again before him, after proof had been taken to support the allegations which he had admitted, and he then re-affirmed his former decision, using the following language: "Upon the principle which I laid down upon the admission of the allegation, I am bound to pronounce that the whole fleet must be entitled as joint captors." Edw. Adm. 127.

In Le Bon Aventure (decided in 1810 by the lords) 1 Act. 239, Sir William Grant, in delivering the opinion of the court, states the question to be "whether a vessel commencing a second chase, in sight of a fleet of which she had constituted a part before she had been detached, by signal, upon a former chase, and capturing the second chase at any distance from such a fleet, would necessarily, upon this principle, be compelled to let in the claim of the whole fleet to share in a prize so made, notwithstanding such fleet afforded no assistance or co-operation in the capture, but actually bore away from the captor on another tack." He declared that no such principle had ever been recognized, and the claim of the fleet was rejected. But in The Empress (decided by Sir William Scott in 1814) 1 Dods. 368, the ship-of-war Beagle, while pursuing an enemy's vessel, discovered another ship-of-war, the Rover, also in chase of her. Both continued the pursuit for some time, when a second enemy's vessel hove in sight. Thereupon the captain of the Beagle, being the superior officer, ordered the Rover to discontinue the pursuit of the first, and pursue the second enemy. She did so, and after continuing the chase for ten hours, and until out of sight of the Beagle, made the capture. The Beagle was admitted to share in the prize by reason of the alleged association, although her meeting the Rover on the ocean was accidental, and she had continued her course without pause or deviation in pursuit of the first enemy's ship, and had afforded no assistance or co-operation in the capture, but actually bore away from the captor. It is not easy to see how the officers and crew of the Beagle could be deemed to have taken the second enemy's ship, when they were, all the time, sailing for another object, in a different direction until out of sight, and did not even know of the capture until some time afterwards.

The L'Etoile, 2 Dods. 107, does not go so far as The Empress. In The Naples Grant, 2 Dods. 277, it is held as a general rule, that in order to confer a right to share in a prize upon a vessel which is engaged in the common service in a blockade, or in naval or military operations of that kind, it must be shown that such vessel was present at some period of the operation, either at the commencement, the

intermediate stage, or at the time of the surrender. It is added that this rule may not be without exceptions.

In The Nordstern (decided in 1809, by the lords) 1 Act. 140, the court say, "Upon this we are decidedly of opinion, that it is not sufficient a joint enterprise shall exist at the time, except it expressly refer to the capture in question; or, in other words, that the capture grew out of the purpose and object for which the parties have been united, and be the joint produce of an actual co-operation and the object of union." This language, especially the concluding sentence, and the decisions in The Mars and The Genereux indicate a disposition in the appellate tribunal not to go beyond the line of actual joint capture. The courts have undoubtedly in many cases gone beyond this line; but their decisions have not been uniform, and to what extent they mean to carry the doctrine of constructive capture by association is left in doubt.

Looking at the adjudications of both the superior and subordinate courts, it cannot be said that they present any settled and well-defined rule. Indeed, the whole course of the decisions in favor of constructive joint capture is most remarkable. Their only foundation is the express language of the statute. And their only legitimate authority is to give a just construction to that language. Yet, except in the case of The Vryheid (decided in 1799) we find no reference whatever to any statute. We look in vain, not only for the terms of any act of parliament, but for any remark which indicates that any such act existed. The claims of captors are discussed, not as resting upon express grant, but as if they were questions of common law, depending merely upon previous decisions and general considerations of justice and policy.

In The Vryheid, 2 C. Rob. Adm. 21, Sir William Scott says that by the word "takers," in the act of parliament, are naturally to be understood those who actually take possession, or those affording an actual contribution of endeavor to that event. Either of these persons are naturally included under the denomination of takers; but the courts have gone further, and have extended the term "taker" to another description of persons,—to those who, not having contributed actual service, are still supposed to have rendered a constructive assistance; thus distinctly admitting that the courts had gone beyond the natural import of the statute. In a subsequent case, The Financier, 1 Dods. 67, the same learned judge says, "The admission of a constructive captor to share with an actual captor is, in itself, an indulgent construction of the law, which must not be further extended." Thus it appears that the constructive captor comes in by the indulgence of the court, and not by the natural construction of the statute grant. In reading many of the decisions, it is evident that the courts, following their own views of policy or expediency, have indulged in a latitude of construction which has carried them out of sight of the test which they were supposed to be expounding. That the decisions had gone beyond the just interpretation of the terms of the grant is not unfrequently admitted by the courts themselves.

Besides the remarks already quoted, Sir William Scott, in The Vryheid, page 22, after having stated that the act of parliament gave the prize "to the takers," says, "For, as the word has already travelled a considerable way beyond the meaning of the act of parliament, the disposition of the court will lean, not to extend it still farther, but to narrow it, and bring it nearer to the terms of the act than has been done in some former cases." In The Odin, 4 C. Rob. Adm. 325, the court says, "The principle of constructive assistance has been altogether thought to have been carried somewhat far."

In La Furieuse, Stew. Vice Adm. 179, the court says "that, as a general principle, it has been the object and intention of the courts of vice admiralty, to narrow rather than to extend the interest of joint captures, and to confine as much as possible the benefit of prize to such vessels as are the real and actual captors."

In Le Niemen, 1 Dods. 16, it is said by the court, "It certainly is not, at this time of day, the disposition of the court to extend the limits of joint capture." In The Arthur, Id. 426, it is said, "The principle of association has not been of late favored either here or in the court of appeal." This was in the year 1814. In L'Etoile, 2 Dods. 107, the court says, "There was an actual engagement between the Sparrow and the enemy; and this circumstance does, I think, discharge the legal prejudice which prevails against a constructive joint captor." This was in the year 1816, after the termination of the wars which grew out of the French revolution and the reign of Napoleon the First. Thus it appears that a "legal prejudice," that is, a prejudice by the legal profession, then prevailed against constructive joint captors. Since that time there have been no decisions upon that subject, which have come to my knowledge.

At the commencement of the Russian war, in March, 1854, the queen, by proclamation, granted the proceeds of prizes to the takers, and prescribed the manner in which they should be divided. That proclamation contained the following clause: "Ships or vessels, being in sight of the prize, as also of the captor, under circumstances to cause intimidation to the enemy and encouragement to the captor, shall be alone entitled to share as joint captors."

In June following, a prize act was passed by parliament, as usual, in confirmation of the royal grant made by proclamation. It did not contain this clause respecting vessels being in sight, and it has been suggest-

ed that such omission is to be regarded as a disapproval of it. But it is to be observed that the preamble refers to the proclamation as a grant made by royal munificence to the captors, and the act repeats the grant, but makes no distribution of the proceeds of prizes, but expressly confirms the division which had been made by the proclamation. From this the fair inference is that parliament deemed the clause giving vessels in sight a right to share, and none others, to be a part of the rules of division, and that it was not the intention of the legislature in any degree to change what they have recognized as a rightful grant by royal munificence. If this be so, then the doctrine of constructive capture by association has been discarded both by the advisers of the crown and by the parliament.

If it should be thought by any one that the omission of that clause in the act of parliament is to be regarded as a disapproval of it, then it would exhibit the same want of accord between the executive and legislative departments, and the same unsettled and unsatisfied state of mind as previously existed in the courts and the legal profession. But the act of parliament is passed chiefly for the purpose of confirming the royal grant of the prizes which belong to the monarch, but are held jure coronae, and grants of which, the commons contend, require the sanction of parliament.

From the foregoing review, it appears that the judicial doctrine of constructive capture by association has not been uniform, and is not well defined and well settled. It has encountered the decided disapprobation of the profession; and the courts have not unfrequently indicated that it was not satisfactory even to themselves, and seems finally to have been discarded by royal proclamation. It is by no means commended to our understanding, as founded on sound principles of interpretation.

I do not think that it could be rationally presumed that congress intended to adopt it by their act of 1862 [supra], even if the provisions of that act were the same throughout as those of the British acts. But they are not the same. Our statute contains a new and highly important provision. The third section says, that "when one or more vessels of the navy shall be within signal distance of another making a prize, all shall share in the prize." It is contended, on the side of these petitioners, that congress did not intend merely to follow our prize act of 1800 [supra], but that they must have known and had in view the British doctrine and decisions. Assuming that to be so, then they knew that one part of the doctrine of constructive capture was well defined and well settled upon rational ground, while another part was not well defined, and was not sustained by uniformity of decision or just principles of construction, and had been discountenanced by the profession. Thereupon they expressly adopt the first part, but do not so adopt the second.

Does not this clearly show, that they did not intend to leave it to the courts to determine how far the doctrine of constructive capture should be deemed or made a part of our law, but chose to determine it themselves, and fix the limits by express enactment? And having so introduced the first part of such doctrine, and not the second, must we not infer that they did not intend to adopt both?

It is not a case for the application of the maxim "expressio unius est exclusio alterius," especially as we see good reason both for the adoption of the one and the exclusion of the other. There is another view. By our statutes, there are two classes of ships, and two classes only, which are to participate in the prize. The first are those who make the capture, or, in other words, those making the prize. The second class are those within signal distance of one of the first class. The language is, any ship within signal distance of another making a prize. If, then, each one of a blockading squadron comes within the first class, and is a vessel making a prize within the meaning of the statute, then any vessel that is within signal distance of her is one of the second class, and entitled to share by the express words of the statute; and the result would be, that a ship of a blockading squadron lying at anchor, and not herself being within signal distance of another making a prize, and having no knowledge of the capture until some time after it was effected, will not only share herself, but bring in another vessel not associated in the blockade, which merely happened to be within signal distance of her at the time when a capture was made, of which both were wholly ignorant. This is an absurdity which no one can believe the legislature intended. It may be asked, why did not the same result follow from the English decisions? The answer is, that the whole doctrine of constructive capture was the creature of the courts, and in their hands all its parts were flexible. They moulded it at pleasure by limitations or alterations according to their views of expediency. They did not build construction upon construction. Thus, where a ship became a constructive captor by being in sight, they did not permit one associated with her, but not in sight, to be a captor by construction, although it was by obeying an order to pick up the boats of the first that she was prevented from being also in sight. The Financier, 1 Dods. 67.

But our legislature having provided that one class of those who had been decreed constructive captors shall be entitled to share, and thus given them an express statute right, if the court shall introduce another class of constructive captors, and hold that they are "ships making the prize" within the meaning of the statute, then the result which has already been stated will follow. This,

as we have seen, congress could not have intended. The first class of grantees, therefore, can embrace only actual captors; and this conclusion is in accordance with the fair and natural import of the language of the statute.

The result is that no vessel is entitled to share with the Canandaigua.

See the Aries [Case No. 529]; The St. John [Id. 12,225]; The Ella & Anna [Id. 4,368].

NOTE [from original report]. We are indebted to the courtesy of the district attorney of the United States for the district of Massachusetts, the Hon. Richard H. Dana, Jr., for the foregoing opinion of the experienced and learned judge of that district, Mr. Justice Sprague; and we are assured by Mr. Dana, and fully concur in the assurance, "that this opinion of Judge Sprague is of the utmost interest to the navy; that it is the leading case, and is most thoroughly considered." Nothing which we could add would be esteemed of much value beyond such an indorsement, from such a source, Mr. Dana being not only a good lawyer, everywhere, but especially devoted to admiralty and prize law. But we desire to commend, in a special manner, this opinion of Judge Sprague to the bench and the bar throughout the land, as drawn up with that patient labor and research, which makes it a mine of wealth to all who may possess it. Such a thorough revision and careful analysis of the cases, presenting them in detail, and sufficiently at length to make them intelligible, even to unprofessional readers, renders the opinion, and any opinion drawn up in that authentic and reliable manner, almost invaluable as a matter of convenient reference ever after. There is no one thing wherein the public poorer proves economy, than in requiring so much labor of their judges, in courts of final adjudication, as to render it absolutely impracticable for them to wait long enough, to obtain a full survey of the field lying behind them, before they are compelled to take a leap into the future, which too often proves in the sequel, but a leap in the dark.—I. F. R.

Case No. 2,641.

CHERRY v. SWEENY.

[1 Cranch, C. C. 530.][1]

Circuit Court, District of Columbia. Dec. Term, 1808.

MISCONDUCT OF JURY.

1. Information given by one juror to his fellow jurors after they have retired, is not sufficient ground for a new trial, if the verdict has done substantial justice between the parties.

2. The court will not lend an easy ear to affidavits of jurors, as to their proceedings after they have retired to consider of their verdict.

Motion by defendant for a new trial, because one of the jurors gave information of his own knowledge, after they retired, viz.: that he had heard both from the defendant and plaintiff, that the defendant was not to be allowed anything for the services of her son; which was a claim in set-off which she had attempted to prove on the trial.

Mr. Law, for defendant.

1. It is a good ground for a new trial. 1 Bl. Comm. 374, 375; 3 Bl. Comm. 373.

2. The fact may be proved by the affidavits of the jurymen. 1 Sel. Pr. 508; Cogan v. Ebden, 1 Burrows, 383; Rex v. Simmons, 1 Wils. 329; Hale v. Cove, 1 Strange, 642; Vasie v. Delaval, 1 Term R. 11. The reason why the affidavit of a juror is rejected is, that he shall not charge himself with a misdemeanor. But where the fact does not charge misconduct, there such affidavits are admitted.

Mr. Porter, contra, contended that justice had been done, and that encouragement should not be given to information coming from a juror. 3 Wils. 273; 1 Term R. 11; 3 Burrows, 1696; 1 Sel. Pr. 507, 508, 510.

New trial refused (FITZHUGH, Circuit Judge, absent), THE COURT being of opinion, that substantial justice had been done, and doubting the policy of giving an easy ear to affidavits of this kind.

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

CHERUB, The (RICH v.). See Case No. 11,756.

Case No. 2,642.

The CHESAPEAKE.

[1 Ben. 23.][1]

District Court, E. D. New York. Feb., 1866.[2]

COLLISION IN THE EAST RIVER — VESSELS CROSSING—PLEADING—MOVEMENT IN IMMINENT DANGER.

1. Where a propeller coming down the East river had a ferry-boat, which was crossing from New York to Brooklyn, on her starboard hand, and the ferry-boat kept her course, as was admitted by the answer—*Held*, that under articles 14, 16 and 18 of the rules of navigation, the propeller would be liable for a collision under such circumstances.

2. That the effort on behalf of the propeller to make out a special case under article 19 was not only inconsistent with her answer, but was not sustained on the evidence.

3. That under the circumstances it would have been prudent for the propeller to have ported her helm and gone under the ferry-boat's stern, whereas she did attempt to cross her bows, and that having selected the most hazardous of two courses open to her, she must be held responsible for its failure of success.

4. That the excuse that the ferry-boat stopped her wheels and so led the propeller to starboard, is not made out.

5. That the fact that the propeller, as she neared the ferry-boat, blew two whistles and received two whistles in reply, does not alter the case. The two whistles in reply would amount to nothing more than an indication that the ferry-boat acquiesced in the right so claimed by the propeller to select her own method of avoiding the former. Moreover, the danger was then imminent.

B. D. Silliman, for libelants.

John E. Parsons, for claimants.

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

[2] [Affirmed in Case No. 2,643.]

BENEDICT, District Judge. This is a case of collision between the ferry-boat Manhasset, which was crossing the East river from New York to Brooklyn, and the propeller Chesapeake, which was passing through the East river, on her way to Fort Lafayette, on the 2d of December, 1864. The law applicable to the case, is to be found in the rules and regulations for preventing collisions, adopted by the act of congress of April 29, 1864 [13 Stat. 58]. By these regulations it is declared to be the duty of a steamer, which, when crossing so as to involve risk of collision, has the approaching vessel on her own starboard side, to keep out of the way of such approaching vessel, and the duty of the steamer so approaching, to keep her course. Articles 14, 18, Act April 29, 1864. Judged by this rule, the case as stated in the answer of the propeller would seem to be in favor of the ferry-boat; for the answer, while it admits that the ferry-boat was crossing, and the propeller coming down the river, the ferry-boat being on the starboard side of the propeller, also admits that the ferry-boat kept her course, and that the propeller, while attempting to cross her bows, struck her amidships on the port side. No fact is put forth in this answer as tending to take the case out of the general rule; and the fault it charges upon the ferry-boat is, in not changing her course and passing under the stern of the propeller. Upon such an answer, if it stood alone, the libellants would be entitled to a decree. As presented to the court upon the evidence, the case differs from that disclosed in the answer, in this, that special circumstances are claimed by the respondents to have been shown, which rendered a departure from the general rule, as laid down in articles 14, 16, and 18, necessary and justifiable under the proviso of article 19 of the same act.

This claim to have the case considered a special one rests upon evidence tending to show that a sloop and schooner were beating down the river on the New York side, between the propeller and the ferry-boat, rendering it impossible for the propeller to pass to the right and so allow the ferry-boat to keep her course, while the presence of another vessel coming down the river behind the propeller, is relied upon as showing that it was impossible for her to stop and back sooner than she did.

With regard to this evidence, introduced by the respondents without objection on the part of the libellants, for the purpose of making out a special case within the meaning of article 19, it is to be noticed that it is inconsistent with the answer. The theory of the answer is, that it was possible for the ferry-boat, and accordingly her duty, to have starboarded her helm, and so passed between the propeller and the New York shore; but if, as now contended, the presence of a sloop and schooner, beating down between the propeller and the ferry-boat, rendered it impossible for the propeller to port, it must have been, for the same reason, impossible for the ferry-boat to starboard; and as to the impossibility of stopping and backing, the answer nowhere avers such impossibility, but rather implies the intention on the part of the propeller to avoid the ferry-boat by keeping on.

The theory, then, advanced upon the trial, and based upon these special circumstances, might well be rejected as irreconcilable with the averments of the answer.

It is not, however, intended to rest the decision here upon a question of pleading, but to consider the whole case as disclosed in the evidence. With this view I have carefully examined the testimony relied upon as showing that the propeller was prevented from porting by the presence of other vessels, and while I find positive evidence that a sloop and schooner were beating down the river at the time in question, I also find evidence which satisfies me that these vessels were not in a position to interfere with the propeller in any attempt she might have made to pass under the stern of the ferry-boat. The controlling evidence upon this point is found in the testimony of the master of the propeller. This witness, who was at the wheel, directing the navigation of his vessel, states that when he saw the sloop and schooner he was just below Jackson street; that he starboarded his helm in order to clear them, and "held his sheer long enough to get by them;" that he "then ported the wheel, so as to steady the vessel," and "kept his course right down at full speed." He also says that he saw the ferry-boat when "in the act of passing the sloop and schooner," and not before. Now the fact stated by this witness that after he saw the ferry-boat, and when on a sheer towards the Brooklyn shore, he ported his wheel and steadied his vessel on a course right down the river, renders it highly improbable that the ferry-boat was then approaching on his starboard side, within any short distance. Had the ferry-boat, sloop, and schooner been so near each other as to render it necessary for him to pass across and near to the bows of the ferry-boat, as well as the bows of the sloop and schooner, he would not have ported his helm when he did. The manoeuvre, of itself, shows that the sloop and schooner, when passed by the propeller, were a sufficient distance above the ferry-boat, to have enabled the propeller to pass between them in safety and under the stern of the ferry-boat.

Other evidence in the case confirms this conclusion. Thus the master states that when he first saw the ferry-boat—which was when he was passing the sloop and schooner—he was probably three hundred yards from her, and that in going that distance in that tide he could sheer his vessel eight points. Of course, then, he had room to pass the stern of a vessel which, with helm hard a starboard, he only reached to strike amidships. The second mate of the steamer estimated this

distance at 800 yards, and put the sloop and schooner 1,000 yards distant, approaching at right angles; while another witness introduced by the respondents, and who was standing upon pier 39, stated that he saw no vessels near enough to interfere with the movements of the propeller and ferry-boat. The testimony, then, of the respondents' witness—confirmed, as it is, by several witnesses produced by the libellants—clearly disposes of the allegation that the propeller was prevented by other vessels from passing to the stern of the ferry-boat.

So also the evidence fails to support the allegation that the presence of other vessels under the stern of the propeller rendered necessary a departure from the general rule requiring every steamship, when approaching another so as to involve risk of collision, to slacken her speed, or, if necessary, to stop and reverse. It would appear that there were some vessels passing down the Brooklyn side; but the fact that the last sharp sheer of the propeller to the Brooklyn shore compelled these vessels to back hard to avoid her, shows that before that sheer the propeller could have stopped without interfering with them. And, besides, if any vessels were following the propeller, it is to be presumed that they were being managed in view of the rule (article 17, Regulations of 1864), which casts upon a vessel following, the responsibility of avoiding the vessel ahead, and were therefore prepared for any stoppage, or other necessary manoeuvre on the part of the propeller.

As I view the case, then, it cannot be considered as a special one within the meaning of the proviso of article 19, of the act of 1864, but must be treated as a case of two steam vessels meeting under ordinary circumstances, and governed by the general rule.

Accordingly, the burden is upon the propeller, to show that she adopted timely and prudent measures to avoid the ferry-boat, which failed of success by reason of some fault on the part of the ferry-boat. This the propeller has failed to do. The prudent measure under the circumstances, was to port her helm and go under the stern of the ferry-boat. She attempted to pass her bows; and having selected the most hazardous of two courses open to her, she must be held responsible for its failure of success. But it is said, "the ferry-boat stopped her wheels and so led the propeller to starboard her helm as the proper consequent manoeuvre, and after she had starboarded, it was too late to again change upon seeing the wheels of the ferry-boat start." This excuse, which is not to be found in the answer, is without foundation in the evidence. The testimony of the pilot and engineer of the ferry-boat, which agrees in this respect with the answer of the propeller, shows that the wheels of the ferry-boat were stopped, but instantly put in motion again without affecting in any considerable degree the headway of the vessel; while the testimony of the master and mate of the propeller is positive that no change was made in the course of the propeller by reason of this momentary stopping of the ferry-boat's wheels. These two witnesses agree in the statement that the propeller kept on her course down the river until the wheels of the ferry-boat started, and that it was after the wheels of the ferry-boat were seen to start that the helm of the propeller was put astarboard. Upon the evidence, then, the stopping of the wheels of the ferry-boat cannot avail to excuse the propeller for starboarding instead of porting her helm.

Considerable stress was laid by the respondents upon evidence tending to show that the propeller, "as she neared the ferry-boat, blew two whistles as a signal that she desired to continue her course," and received two whistles in reply from the ferry-boat; but I do not see how this fact, if it were clearly proved, would, in view of the other facts of this case, materially change the aspect of the defense. Two whistles in reply, from a vessel crossing as the ferry-boat was, would amount to nothing more than an indication that she acquiesced in the right so claimed by the propeller, and given her by the law, to select her own method of avoiding the ferry-boat; and it is not shown that at the time of the alleged reply of the ferry-boat, any change of course was made in either vessel.

Moreover, to these whistles, as also to the starting of the wheels of the ferry-boat, the remark applies that the danger was then imminent. The master of the propeller says he rang his four bells in as quick succession as possible, and as soon as he saw the wheels start, and yet he struck the ferry-boat just as his engine began to work back. No mistake committed by the ferry-boat at this late moment would excuse the propeller for placing the vessel in a position of such peril. The duty to avoid the ferry-boat was upon the propeller from the time the ferry-boat was seen to be crossing on her starboard side; and yet, according to the testimony of her own principal officers, the propeller steadied herself on a course right down the river and across the track of the ferry-boat, and held that course, without change and at full speed, until so near that a collision was imminent, when she for the first time changed her helm and then put it to starboard.

Upon her own showing, there appears to me to have been an absence of that care and skill in the management of the propeller, which the law requires of a steamship when crossing the track of another, and I cannot doubt but that she should be held responsible for the damages that ensued.

Let the decree be for the libellants, with an order of reference to ascertain the amount of damages.

This case was affirmed by the circuit court on appeal. [Case No. 2,643.]

Case No. 2,643.

The CHESAPEAKE.

[5 Blatchf. 411.] [1]

Circuit Court, E. D. New York. June 10, 1867.[2]

COLLISION BETWEEN STEAMERS—HOLDING COURSE—BURDEN OF PROOF.

1. Where a steam ferry-boat was about one-third of the way across the East river, on a trip from New York to Brooklyn, when a steam propeller was coming down the river, and the propeller undertook to pass across the bows of the ferry-boat, and a collision ensued: *Held*, that the propeller was in fault for violating article 14 of the act of April 29, 1864 (13 Stat. 60), as the propeller had the ferry-boat on her own starboard side, and was bound to keep out of her way, while the latter was bound to keep her course.

2. This rule will, on all proper occasions, be steadily enforced, and, in case of a departure from it, followed by a collision, the onus will be on the offending vessel to show a clear and undoubted special case of excuse.

[Cited in The Garden City, 19 Fed. 532.]

This was a libel in rem, filed in the district court, by the owners of the steam ferry-boat Manhasset, against the steam propeller Chesapeake, to recover damages for a collision, which occurred in the East river, at about nine o'clock a. m. on the 2d of December, 1864. The district court—The Chesapeake [Case No. 2,642]—decreed for the libellants, and the claimants appealed to this court.

Benjamin D. Silliman, for libellants.

John E. Parsons, for claimants.

NELSON, Circuit Justice. The Manhasset came out of her slip at the foot of Catharine street, on the New York side, on her way across the river to her slip at the foot of Main street, on the Brooklyn side. The Chesapeake was coming down the middle of the river, laden with a company of soldiers, going to Fort Lafayette. The propeller was some distance up the river, when she saw the ferry-boat about one-third of the way across from the New York shore, and, instead of adopting measures to pass her stern, and permit her to keep her course, as she was entitled to by the settled rule of navigation under such circumstances, undertook to dictate the course she must pursue, so as to enable the former to pass on her left or across her bows. By the fourteenth article of the act of April 29, 1864 (13 Stat. 60), "if two ships, under steam, are crossing, so as to involve risk of collision, the ship which has the other on her own starboard side, shall keep out of the way of the other." This is a simple and plain rule, and must be observed, except under very special and urgent circumstances, in order to avoid the result of fault in case of collision. The correlative duty is also imposed on the other ship to keep her course. Special circumstances have been set up, in this case, on the part of the propeller, to excuse a departure from the rule, namely, that two sailing vessels were in the way of a movement to pass the Manhasset under her stern. The weight of the proof is, that no such impediment existed; but, even if there had, it would have been easy for the propeller to slow and stop till the other vessel had passed, as the tide was hardly flood, which favored such a movement.

It is also insisted, on the part of the propeller, that, when she blew her two whistles, and the Manhasset slowed, if she had not again started on with speed, the collision would not have occurred, and that, in this movement, she was in fault. But the answer is, that this movement was in the moment of danger, and the pilot was influenced to make it, seeing the collision inevitable, in order to prevent a direct blow, and receive, as his vessel did, a glancing blow, so as to lessen the injury.

It is quite plain, on the proofs, that the collision, in the present case, occurred from ignorance, on the part of the master of the propeller, of the rule of navigation prescribed by the act of congress, or, if he was possessed of this knowledge, from a neglect to observe such rule, under circumstances to which it had a direct application; and, also, even in the absence of any such rule, in his mistaken movement, and persistence in it, to pass the Manhasset across her bows. The clear weight of the proofs is, that, if the propeller had kept her course down the river, no collision would have happened. I prefer, however, to place the decision upon her departure from the safe and fixed rule established by law, that, in the position the propeller held in relation to the other vessel, it was the duty of the latter to hold her course, and of the former to keep out of the way. It should be made known, that this rule will, on all proper occasions, be steadily enforced, and that, in case of a departure from it, followed by a collision, the onus will be on the offending vessel to show a clear and undoubted special case of excuse. No such excuse has been shown in the present instance, and, for this reason, the decree of the court below is affirmed.

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

[2] [Affirming Case No. 2,642.]

CHESAPEAKE INS. CO. (BUCK v.). See Case No. 2,078.

Case No. 2,644.

CHESAPEAKE & O. CANAL CO. v. BARCROFT et al.

[4 Cranch, C. C. 659.] [1]

Circuit Court, District of Columbia. Nov. Term, 1835.

CONFESSION OF SUPERSEDEAS JUDGMENT.

An execution upon a supersedeas judgment, confessed more than two months after the date of the original judgment, will be quashed.

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

THE COURT (nem. con.) quashed the execution in this case, because the supersedeas judgment, upon which it was issued, was not confessed until after the expiration of two months after the original judgment. See the following cases heretofore decided by this court, namely, Hodgson v. Mountz, at December term, 1806 [Case No. 6,569]; Smith v. Middleton, April term, 1821 [Id. 13,079]; Mandeville v. Love, October term, 1821 [Id. 9,012]; McSherry v. Queen, April term, 1823 [Id. 8,926]; Holmes v. Bussard, April term, 1823 [Id. 6,636]; and Thomas v. Elliot, October term, 1823 [Id. 13,896].

Case No. 2,645.

CHESAPEAKE & O. CANAL CO. v. BINNEY.

[4 Cranch, C. C. 68.] [1]

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

EMINENT DOMAIN—THE INQUISITION—CONTENTS—DESCRIPTION OF LAND — DISQUALIFICATION OF JUROR.

Quaere, whether a person who subscribed for stock in the Chesapeake and Ohio Canal Company, without paying a dollar a share at the time of subscribing, and who has never been required to pay any of the instalments called for by the company, can be considered as a stockholder, so as to disqualify him to serve upon an inquisition to condemn land for the canal? It is not necessary that an inquisition, taken under the charter of that company, should contain the names of such jurors as were summoned but not sworn. The land condemned is sufficiently described by reference, in the inquisition, to the description of it in the warrant.

CRANCH, Chief Judge (THRUSTON, Circuit Judge, not sitting). This was an inquisition condemning land for the canal, under the fifteenth section of the charter.

Mr. Key, for the defendant, moved to set aside the inquisition: 1. Because John G. Wilson, one of the jurors, was a stockholder in the company. 2. Because the whole number (18) of jurors summoned, were not named in the inquisition. 3. Because the land valued is not described in the inquisition, otherwise than by reference to the warrant.

1. It is alleged that he was a stockholder because he was an original subscriber. The facts, in regard to this question, are admitted to be, that Mr. Wilson subscribed for three shares of the stock, but has never paid the dollar per share required by the charter to be paid at the time of subscription. That, some time afterward, in speaking of the stock to several persons, among whom was Mr. A. Hunter, he remarked, that he wished he had not taken any of the stock. Mr. Hunter replied that if he was tired of it, he would take it off his hands. That Mr. Wilson told him he should have it, and he never gave himself any further trouble about it, as he did not consider himself a stockholder; and was not aware that his name was on the list of stockholders until he was informed of it since the taking of the inquisition. That Mr. Hunter was one of the commissioners for receiving subscriptions at Harper's Ferry, where Mr. Wilson subscribed, and put his initials opposite the name of Mr. Wilson as having received the subscription money. That Mr. Wilson never paid anything upon the stock, and has never been required to pay any of the instalments which have been called for by the company. That his name was returned, as a subscriber, by the commissioners, to the board of public works in Virginia, agreeably to the second section of the charter. By the fifth section, it is provided, that upon all subscriptions which shall not be paid in the certificates of the stock or debts of the old Potomac Company, there shall be paid, at the time of subscription, on each share, one dollar; and thereafter, when the company shall be formed, the whole stock subscribed shall be paid in such instalments, and at such times as the president and directors shall, from time to time, require; and when any subscriber shall fail to pay any instalment called for by the company, it shall be lawful for the company, upon motion and ten days' notice, to obtain judgment against the subscriber so failing to pay; or may sell the stock of such subscriber, and the purchaser shall become a stockholder, and entitled to the same privileges as an original subscriber. And, by the seventeenth section, the stockholders may transfer their shares by deed registered in the company's books, and not otherwise, except by devise.

It is clear by the state of the case, that Mr. Wilson was not interested in the stock of the company at the time of the taking of the inquisition, unless he could then have been compelled to pay either the original dollar per share required to be paid at the time of subscribing, or to pay the instalments, or had then a right to make such payment and become a stockholder. He certainly was not then a stockholder, having never paid for, nor purchased any part of the stock; nor do I think he could then be called a subscriber; for there could be no valid subscription which could bind the company to admit him as a partner unless the dollar per share were paid at the time of subscription. There was no means of compelling him to pay the dollar per share. The remedy, given by the fifth section, is only for instalments called for by the president and directors, after the company was formed. I do not think he was a subscriber within the meaning of the charter so as to be charged with instalments, and to participate in the profits of the company. But if I should be mistaken in this view of the subject, as my brother judge, for whose opinion I have the highest respect, thinks I am, I concur with him in opinion, that if Mr. Wilson had been legally bound to pay the

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

dollar per share which was to have been paid at the time of subscription, and might have been held bound at law to pay the instalments, yet, under the circumstances of this case he might be relieved in equity, and would, as a stockholder, be considered as a mere trustee for Mr. Hunter. I consider him, therefore, as having been quite free from any interest whatever in the stock of the company at the time of taking the inquisition.

2. The second cause alleged for setting aside the inquisition is, that the names of those jurors who were summoned but not sworn upon the inquest are not given in the inquisition. As I cannot perceive why they should have been named in it, I cannot see that the omission to name them is any cause for setting it aside.

3. The third cause alleged for setting it aside is, that the land condemned is not described in the inquisition otherwise than by reference to the warant, which the marshal in his inquisition, says he returns therewith. "Id certum est quod certum reddi potest." I do not see any use in burdening the records with a repetition, in the inquisition, of the description contained in the warrant.

These seem to me to be the only objections, applicable to this case, which were not considered and overruled in Mr. Key's Case [Case No. 2,649], at May term, 1829; and are also now overruled.

At December term, 1830, the inquisition was set aside because the jury by mistake had not given damages for a bridge which Mr. Binney was obliged to build to connect his land, which was intersected by the canal.

Case No. 2,646.

CHESAPEAKE & O. CANAL CO. v. BRADLEY et al.

[4 Cranch, C. C. 193.][1]

Circuit Court, District of Columbia. Dec. Term, 1831.

SERVICE ON SUNDAY.

A notice cannot lawfully be served on Sunday.

This was a motion for judgment for an installment on a joint subscription by the defendants, in the handwriting of Mr. Bradley, for one hundred shares. The ten days' notice, required by the fifth section of the charter, was served on Mr. Carroll on Sunday. Upon that ground the motion was overruled by the court, although the parties had appeared according to the notice. Roberts v. Monkhouse, 8 East, 547; Rex. v. Croke, Cowp. 26.

Mr. Wallach and Mr. Jones, for plaintiffs.
Mr. Tabbs and Mr. Coxe, for defendants.

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

CHESAPEAKE & O. CANAL CO. (CAMERON v.). See Case No. 2,341.

CHESAPEAKE & O. CANAL CO. (CAROTHERS v.). See Case No. 2,425.

Case No. 2,647.

CHESAPEAKE & O. CANAL. CO. v. DULANY.

[4 Cranch, C. C. 85.][1]

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

RIGHTS AND LIABILITIES OF STOCKHOLDERS.

1. A person who becomes a member of a corporation is bound to know the obligations which he thereby incurs. Those obligations are matters of law resulting from the construction of the charter.

2. If both parties were equally mistaken as to that construction, it is no ground, in equity or law, for setting aside the obligation of the contract.

Motion, by Mr. Wallach, for the plaintiffs [the Chesapeake & Ohio Canal Company] for judgment against the defendant, Patrick Dulany, for the amount of the instalment called for by the company, on his shares, upon ten days' notice, under the fifth section of the charter of 27th of January, 1824.

CRANCH, Chief Judge (nem. con.). The defence set up in this case is, that the defendant subscribed under a mistake as to the right of the plaintiffs to coerce payment of future instalments; and that he was led into that mistake by the opinion of Mr. McCleary, who took from him his power of attorney to Mr. Smith, to subscribe; and who, in answer to an inquiry by the defendant, said that he did not think that the future instalments would be enforced, but that the shares might be forfeited by their non-payment. The defendant, when he became a corporator in this company, was bound to know the obligations which he thereby incurred. Those obligations were matters of law resulting from the construction of the charter. Whether a subscriber was or was not liable to pay future instalments, was a question of law arising from that construction. If both the parties were mistaken as to that construction, it is no ground, in equity or law, for setting aside the obligation of the contract. 1 Fonbl. Eq. 106; Lord Irnham v. Child, 1 Brown, Ch. 93; Howard v. Hopkyns, 2 Atk. 371; Gwinne v. Poole, 2 Lutw. 387 (Powell's opinion); Dig. 22, tit. 6; Cod. 1, 18; "De juris et facti ignorantia;" Code Nap. 2052, 2053, 2058; Eden, Inj. p. 10, and the cases there cited.

Before the court delivered its opinion, Mr. Key, for the defendant, referred to the following authorities, as to mistake of fact or law: Gee v. Spencer, 1 Vern. 32; Graham v. Hendren, 5 Munf. 185; Armstrong v. Hickman, 6 Munf. 287; Pow. Cont. 196; Newl. Cont. 432; Poth. Cont. 14; Jollife v. Hite, 1 Call, 301; Lyon v. Richmond, 2 Johns.

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

Ch. 51; Blennerhassett v. Day, 2 Ball & B. 128; Gray v. Chiswell, 9 Ves. 125; Wiser v. Blachly, 1 Johns. Ch. 607–610.

CHESAPEAKE & O. CANAL CO. (HOLMEAD v.). See Case No. 6,626.

Case No. 2,648.

CHESAPEAKE & O. CANAL CO. v. JOHNSON.

[5 Cranch, C. C. 643.][1]

Circuit Court, District of Columbia. March Term, 1840.

ORPHANS' COURT—POWER TO ANNEX CONDITIONS TO PAYMENT OF DIVIDEND OUT OF INTESTATE'S ESTATE.

The orphans' court has no power to annex conditions to the payment of the dividend of a judgment at law recovered against the intestate for instalments due upon the stock of the Chesapeake and Ohio Canal Company.

The Chesapeake and Ohio Canal Company had recovered judgment against the intestate in his lifetime, upon motion and ten days' notice, for $2,500, for instalments upon 50 shares of the stock in that company, under the 5th section of the charter. After his death, the orphans' court for Washington county, on the 2d of August, 1839, ordered, "That [Lewis Johnson] the administrator of William Otis make a dividend among the judgment creditors of said Otis, of thirty-six and an half per cent., on their respective claims." And on the 21st of November, 1839, "at a special court held this day, at the request of Lewis Johnson, the administrator of William Otis, the court passed the following order: Ordered, that the administrator of William Otis pay to the Chesapeake and Ohio Canal Company, the amount of their dividend of said estate, provided he receive from them a certificate of the stock of said company, equal to the whole amount paid in." From this order the canal company appealed to this court.

Brent & Brent, for the appellants, contended that the effect of this order would be to compel them to issue full certificates of stock to the amount of the dividend, at $100 a share, which they were not bound to do. They had a right to apply the payment equally to all the shares subscribed for, or owned by the intestate.

Mr. Morfit, contra. There was not judgment at law. The court had no jurisdiction to render judgment on motion. The judgment was by default for breach of contract. There should have been a writ of inquiry of damages. The defendant had a right to apply the payment to particular shares, and thus obtain certificates in full.

THE COURT reversed the order of the orphans' court, with costs.

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

Case No. 2,649.

CHESAPEAKE & O. CANAL CO. v. KEY.

[3 Cranch, C. C. 599.][1]

Circuit Court, District of Columbia. July 20, 1829.

EMINENT DOMAIN—COMPENSATION—THE INQUISITION—CHESAPEAKE AND OHIO CANAL COMPANY—CONSTRUCTION OF CHARTER.

1. To condemn the land of an individual for the use of the Chesapeake and Ohio Canal Company, is to take private property for public use.

[Cited historically in Shoemaker v. U. S., 147 U. S. 282, 13 Sup. Ct. 370.]

2. The damages assessed by the jury must be considered as the just compensation required by the amendment of the constitution, which forbids the taking of private property for public use without just compensation. That compensation must be just towards the public, as well as just towards the individual whose property is taken.

3. The charter granted by Virginia having been ratified and confirmed by congress, became as much an act of congress, so far as it is applicable to the District of Columbia, as if it had been reënacted with such modifications as might be necessary to fit it for use in the District.

4. The power to take private property for public use, upon just compensation, is not a power in derogation of common right. All property is held subject to that power; and the right thus to take private property for public use, is as much common right as that of the individual. The canal is a great highway; and all lands are held subject to the right of the public to make a highway through them.

5. The charter should be so construed as to carry into effect the will of the legislature. The words "from" and "at" do not always exclude the place to which they refer.

6. The beginning of the eastern section of the canal is not precisely fixed by the charter, but is left to the discretion of the company, with this limitation only, that it should be in the District of Columbia, and upon tide water.

7. A certain day must be fixed, in the warrant, for the meeting of the jury on the land, and the want thereof is fatal to the inquisition.

This was a motion by F. S. Key, to set aside an inquisition which had been taken and returned to the court, condemning, for the use of the canal, a lot in Georgetown, owned by him.

The cause was argued by him and Mr. Jones, on the 23d and 25th of May, 1829. The statement of the case will appear in the opinion of the court.

CRANCH, Chief Judge. This cause comes before the court by a motion to set aside the inquisition which condemns Mr. Key's land in Georgetown, for the purposes of the canal, under the 15th section of the charter granted by Virginia, and confirmed by Maryland, Pennsylvania, and the United States. By that section it is enacted that the inquisition taken and returned in the manner therein set forth, shall be affirmed, unless good cause be shown against it. Mr. Key, in showing

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

cause, has taken the following objections to the inquisition, and to the proceedings upon which it was founded. 1. That the provisions of the charter for condemning land, are unconstitutional, because no provision is made for just compensation. 2. That the act of Virginia, granting the charter, is not in force in this district, because that act is only confirmed, not reënacted by congress. 3. That the company has no right to condemn land in Georgetown. 4. That the warrant is insufficient in form and substance. 5. That some of the jurors were interested. 6. That the marshal has only certified that the fourteen jurors who were sworn were not interested; and not that the whole eighteen who were summoned, were not interested. 7. That the oath was not properly administered; and was not administered upon the land. 8. That the inquisition does not cure the defect of the marshal's return, nor the faults of the warrant.

1. That the company has no right to condemn land, because that clause of the charter, so far as it attempts to authorize such condemnation is unconstitutional, inasmuch as it does not provide a just compensation to the party whose land is sought to be condemned. The words of the 5th amendment of the constitution of the United States, upon which this objection is founded, are these, "Nor shall private property be taken for public use without just compensation." This amendment admits the principle that private property may be taken for public use, if just compensation be made. It is not denied that to take land for the use of the canal, is to take it for public use. The question, then, is, whether the charter provides for making a just compensation. It is said that it does not, because it directs that, in every such valuation and assessment of damages, the jury shall be, and they are hereby instructed to consider, in determining and fixing the amount thereof, the actual benefit which will accrue to the owner from conducting the canal through, or erecting any of the said works upon his land, and to regulate their verdict thereby; except that no assessment shall require any such owner to pay or contribute any thing to the said company, where such benefit shall exceed, in the estimate of the jury, the value and damages ascertained as "aforesaid." It is contended, that the constitution provides a positive, not a conjectural compensation; that under the provisions of this charter, it may happen that no compensation at all may be made; that the expected benefits which the jury shall have estimated, may never arrive; and that, therefore, the jury should not have been required, by the charter, to consider them in their estimate of value and damages. But the constitution only provides for the general principle. The means of ascertaining the just compensation were left to be decided by the public authority, which should give the power to take the private property for public use. All the states, prior to the adoption of the constitution, exercised this right, and still continue to exercise it where it is necessary to condemn land for roads, and other public uses; and they have generally provided for compensation through the intervention of a jury. It is impossible for the legislature to fix the compensation in every individual case. It can only provide a tribunal to examine the circumstances of each case, and to estimate the just compensation. If the jury had not been required by the charter to consider the benefit as well as the damage, they would still have been at liberty to do so, for the constitution does not require that the value should be paid, but that just compensation should be given. Just compensation means a compensation which would be just in regard to the public, as well as in regard to the individual; and if the jury should be satisfied that the individual would, by the proposed public work, receive a benefit to the full value of the property taken, it could not be said to be a just compensation, to give him the full value. If the jury would have a right to consider the benefit as well as the damage, without the provision of the charter which requires them to do so, the same objection would still exist, namely, that under the provisions of the charter, it might happen that no compensation at all, or, at most, a nominal compensation, would be made. The insertion, therefore, of that provision in the charter which requires the jury to do what they would be competent to do without such a provision, and which, in order to ascertain a compensation which should be just towards the public, as well as just towards the individual, they ought to do, cannot be considered as repugnant to the constitution.

2. But it is objected, 2dly, that the canal company has no right to condemn land within the District of Columbia; because Virginia had no right to legislate for that district, or in regard to lands therein. It is said that the act of congress only ratifies and confirms, but does not reënact the act of the state of Virginia, and that even that ratification is limited; that the act of Virginia is only ratified and confirmed so far as it may be necessary to enable the company to carry into effect the provisions thereof in the District of Columbia; and that "the provisions thereof," are not applicable to the state of things in that district, where there is no sheriff, no county clerk, and no prothonotary. This is understood to be the substance of the objection. For the purpose of considering this objection, I shall take it for granted that, by the charter, it is contemplated that some part, at least, of the canal, or its works, will be in the District of Columbia. It is evident, from a perusal of the charter granted by Virginia, that the legislature intended that it should be coextensive with the whole object in view, and should confer all the powers necessary to accomplish it. It professes to legislate as well over the District

of Columbia and the state of Maryland, as over Virginia; but it restrains itself until the consent of congress and Maryland should be obtained. That consent only was wanting to give validity to its legislation; and it is expressly provided that the charter shall be so construed as to fit it for use in Maryland and in the District of Columbia. This charter, therefore, having been ratified and confirmed by Maryland and by congress, in the manner required by the legislature of Virginia, has become as much an act of congress, so far as respects this district, as if it had been expressly reënacted with such modifications as might be necessary to fit it for use in the district. In order to show that it was the intention of the legislature of Virginia, to legislate in regard to such part of the canal as should be within the District of Columbia, it is only necessary to read the provisions of the charter. In the first section, they expressly require the assent of the legislatures of Maryland, Pennsylvania, and the United States, before any of its provisions should take effect. By the 14th section they require the assent of the same States, and of the United States, to any alteration of the tolls for the use of the canal; that is, (according to the proposition before assumed,) a canal extending into the district. In the 15th section it is said to be necessary "for making the said canal," that provision should be made for condemning a quantity of land for that purpose; and it provides for the condemnation of any land "through which the said canal is intended to pass." These provisions show that the power to condemn land, was intended to be coextensive with the canal itself. And the 22d section provides that so much of the charter "as respects the canal and works designed to be constructed in the District of Columbia, and the states of Virginia and Maryland, shall take effect, with such necessary modification in the construction thereof, as shall fit it for such limited application and use upon the assent of the congress of the United States, and the legislature of Maryland being given thereto." All that is necessary to fit the provisions of the charter for use in the District of Columbia, so far as it regards the condemnation of land, is, so to modify it by construction, as to substitute the marshal of the district for the sheriff of the county; the clerk of the circuit court for this county, for the clerk of the county, and the circuit court, sitting in the county, for the county court, which seems to be alluded to in the charter. Such a modification in the construction of the charter is required by the charter itself; and, being confirmed by congress, is equivalent to an express provision by congress to that effect. The right, therefore, and the means, to condemn land in the District of Columbia, are given to the company, provided the charter intended to give, and purports to give the company a right to construct any part of the canal, or of its works in that district.

The third objection is, that the company has no authority to condemn land in Georgetown. Upon this point it has been contended, that the authority to condemn land for public use, without the consent of the owner, is in derogation of common right; and, therefore, the charter must be construed strictly. That none of the expressions in the charter indicate clearly a right in the company to extend the canal below the highest convenient and safe navigable tide-water of the Potomac. Thus the words in the preamble, "from the tide-water of the river Potomac, in the District of Columbia," are perfectly satisfied by commencing the canal at the highest part of the tide-water of the river Potomac, in the district; and the fourth section, which gives the company its authority to make the canal, only gives them power to make a canal from the tide-water of the Potomac, in the said district. The word "from," it is said, is exclusive of the point, or place, named; and, of course, the canal must strictly, according to the terms of the charter, begin at the highest point of tide-water in the district. But it is admitted that this strictness must have a reasonable construction; and that it must mean the highest point of safe and convenient navigable tide-water. So in the twentieth section of the charter, which describes and defines the eastern and western sections of the canal, the words are—"That the first, or eastern section of the canal, shall begin at the District of Columbia, on tide-water, and terminate at or near the bank of Savage river;" "that the second, or western section, shall commence at the said termination," &c., "to the highest steamboat navigation of the Ohio river." Here the word "at" is also supposed to be exclusive of the place named. A person, it is said, may be at a place and not in it; and the word is evidently used in that sense in the subsequent clause of the same sentence, where it is said that the second section shall commence at the termination of the first. Here it is impossible that "at" should mean "in." Then, in the strict construction which ought to be given to this charter, it is said that, if the tide-water of the Potomac extends as high as the upper line of the District of Columbia, the canal must stop at that line. But here, also, it is admitted, that this strict requisition of the charter must be relaxed, by the application of a reasonable construction; introducing a proviso that the tide-water, where the upper line of the district crosses the river, should be safely and conveniently navigable; and that, if it should not be so, the canal may be continued into the district until it shall meet such navigable water, but no further.

The only words in the charter which describe or define the lower terminus of the canal, are those which have been cited from

the preamble, and from the twentieth section. The strict construction of those words, thus contended for, it is said, is corroborated by the terms of the charter of the old Potomac Company, and its practice under that charter; by the memorials of the committee of the canal convention to the legislatures of Maryland and Virginia, in 1823; and of the central committee to congress, in April, 1826; by the report of General Bernard, the chief executive officer of the engineer department; and by the common council of the city of Washington, in their resolution of the 5th of July, 1827, for calling a meeting of the inhabitants to consider the subject of the canal. Whether it will be necessary or proper for the court to resort to such extraneous evidence of the meaning of the charter, will depend upon the question, whether, after applying the proper rule of construction to the words of the charter itself, they shall remain obscure or ambiguous, in relation to the point in dispute?

The first question, then, is, what is the proper rule of construction applicable to charters, and such legislative acts as are in the nature of charters? Is it that the words shall have the strongest possible construction against the grantee? Or is it that they shall have a reasonable construction, drawn from the whole context of the instrument, or act, to carry into effect the intention of the parties? Here it is said that the strictest construction ought to be adopted against the powers granted to the company, because those powers are in derogation of common right. But is that true? Is the right to take private property for public use, upon making just compensation, in derogation of common right? The right of the public has been recognized by the constitution of the United States, and has, from time immemorial, been exercised by the several states ever since the Revolution; and was, before that period, exercised by the colonies, and by the mother country. It is one of the conditions upon which all property is holden by individuals; and, as a member of the public, the individual himself is as much interested in maintaining it, as he is in maintaining his individual rights. The public right is as much common right as the individual right. This public right is not a power exercised merely because the sovereign power cannot be controlled, and therefore in derogation of common right; but it is a constitutional power, primarily assented to by the people themselves, in their original primitive sovereignty, not applicable to any particular individual, but extending equally to all, and creating a lien upon all property, into whose hands soever it may come. The contemplated canal is intended to be a great highway; and no man can be ignorant that he holds his land always subject to the right of the public to make a highway through it, whenever the great interests of the nation or of the state may require it. It does not seem to me, therefore, that the power given by this charter, to condemn land for this highway, is such a power in derogation of common right as will justify the court in confining the words "at" and "from" to their strictest and strongest sense, against the company. Nor would I, on the other hand, entirely adopt the rule applicable to grants,—that the words shall be taken most strongly against the grantor; but the rule most properly applicable seems to be that which is applied to wills, and to ordinary legislative acts; to wit, to give that construction, which will best carry into effect the will of the testator or of the legislature.

The question then occurs, what was the will of the legislature of Virginia, in regard to the lower terminus of the canal? Did they mean to fix the precise spot at which the water of the canal should be mingled with the tide-water of the Potomac? Or did they mean to leave it to the discretion of the company, under any and what limits? The word "from" is not always, and, indeed, in common conversation is seldom exclusive of the place named. Thus, if I should say I had just come from Philadelphia, no one would suppose that I spoke the truth if I had never been in Philadelphia; and, if I had sworn to the fact, I could hardly be saved from the penalty of perjury, by proving that I came from the utmost boundary of the city, without having been either within or upon the boundary. "From" a town, or district, generally means from some indefinite place within that town, or district; and the expression is justified, if the person came from any part of the town or district. So the word "at," in ordinary speech, more generally means within than without. Thus, at a town, or at a county, means at some place within the town, or within the county, rather than a place without, or even at the utmost verge of, but not in the town or county. So in indictments, where the utmost legal precision is necessary, the fact is generally stated to have been done at the place; and, if it were not done in the place, the venue would be wrong. And in indictments in this district, where we have no hamlets or parishes, the act is generally averred to have been committed at the county; and if that did not mean within the county, the court would have no jurisdiction of the cause. The words "from" and "at," therefore, have not, in general, an exclusive signification; nor are they, in the charter, connected with any other words which render it necessary that they should be so construed. The words in the preamble are—"A navigable canal from the tide-water of the river Potomac, in the District of Columbia." This description would be fully justified by a canal from any part of the tide-water of the river Potomac, in that district. In the twentieth section, the words are—"The first, or eastern section, shall begin at

the District of Columbia, on tide-water." This description, also, would be justified by a canal beginning in any part of the district, upon tide-water. There is no expression in the charter inconsistent with such a construction. On the contrary, there are several provisions which strongly corroborate it.

The first enacting clause of the charter, by Virginia, of the 27th of January, 1824, requires the assent of the congress of the United States to the provisions of that act; and, by the twenty-third section it is declared, that such assent is understood and taken to relate only to their authority as the legislature of the District of Columbia. But if the words "from" and "at" are to have this exclusive signification, no part of the canal could be within the district, and the assent of congress, as the local legislature of the district, would be wholly unnecessary. So in that case, the assent of congress, which is required by the fourteenth section to an alteration of the rates of toll, would be entirely useless. So in the twenty-first section, a right is given to the United States to retain the power to extend the canal in (not into) the District of Columbia, on either side, or both sides, of the river Potomac; and the same section provides, that "the United States shall authorize the states of Virginia and Maryland, or either of them, to take and continue a canal from any point of the above-named canal, or the termination thereof, through the territory of the District of Columbia." And by the twenty-second section it is enacted, "that this act, or so much thereof as respects the canal and works designed to be constructed in the District of Columbia, and states of Virginia and Maryland, shall take effect, with such necessary modification in the construction thereof, as shall fit it for such limited application or use, upon the assent of the congress of the United States and the legislature of Maryland being given thereto; and, upon its receiving the further assent of the legislature of Pennsylvania, the whole, and every section and part thereof shall be valid, and in full force and operation." So, also, the confirming act of Maryland, of the 31st of January, 1825, says —— "And for the purpose of removing all doubts as to the right of the state of Maryland to intersect the said Chesapeake and Ohio Canal, for the purpose of constructing a lateral canal, or canals, to Baltimore, or elsewhere, in the state of Maryland, from that part of the said Chesapeake and Ohio Canal which shall be within the District of Columbia, be it further enacted," &c.; thereby clearly showing the understanding of the legislature of Maryland, in the very act of confirming the charter, that a part of the Chesapeake and Ohio Canal would be constructed within this district. So also the act of congress of the 3d of March, 1825 (4 Stat. 101), confirming the charter, enacts, "that the act of the legislature of Virginia, entitled an act incorporating the Chesapeake and Ohio Canal Company, be and the same is hereby ratified and confirmed, so far as may be necessary for the purpose of enabling any company that may hereafter be formed by authority of said act of incorporation, to carry into effect the provisions thereof, in the District of Columbia, within the exclusive jurisdiction of the United States, and no further." So also the second section of the same act speaks of the right of Virginia and Maryland, "to take and continue a canal from any point of the Chesapeake and Ohio Canal, to any other point within the territory of the District of Columbia," showing clearly the understanding of congress that a part of the canal would be made in the district. Again, by the fourteenth section of the charter, the old Potomac Company is authorized to transfer, and the new company to accept, all the property, rights, and privileges of the Potomac Company, which has been done, and among that property are locks below the little falls, which are within the district, and which are to be kept in repair by the new company until the new works shall be substituted for them. So, also, it is enacted by the second section of the act of congress of the 23d of May, 1828 (4 Stat. 293), that the authority designed by the former act of congress, confirming the charter to be given to the states of Virginia and Maryland, "to extend a branch from the said canal, or to prolong the same from the termination thereof, by a continuous canal within or through the District of Columbia towards the territories of either of those states, shall be taken to be as full and complete in all respects as the authority granted by that act to the Chesapeake and Ohio Canal Company to extend the main stem of the said canal within the said district." So, also, by the act of congress of the 24th of May, 1828 (4 Stat. 293), it is enacted, "that, for the supply of water to such other canals as the state of Maryland, or Virginia, or the congress of the United States may authorize to be constructed in connection with the Chesapeake and Ohio Canal, the section of the said canal leading from the head of the little falls of the Potomac river, to the proposed basin next above Georgetown, in the District of Columbia, shall have the elevation above the tide of the river at the head of the said falls, and shall preserve throughout the whole section aforesaid a breadth at a surface of the water of not less than sixty feet, and of depth, below the same, of not less than five feet, with a suitable breadth at bottom."

Nothing can be more clear than that the legislatures of Virginia, Maryland, and the United States, expected that some part of the canal and works would be constructed within the District of Columbia; and, consequently, that they did not mean to use the words "from" and "at" in their exclusive sense. If those words are not to be confined to their exclusive sense, they must be taken in their ordinary sense; and, taken in their ordinary

sense, they authorize the company to commence the canal on any part of the tide water in the District of Columbia. Who, then, is to determine the precise spot where it shall commence? Surely it must be the company, for they only have a right to make the canal; and they are bound to make it in a certain time, under the penalty of a forfeiture of their charter. They must, therefore, act upon the subject; and who shall control their discretion, if they exercise it honestly? It is said, that the object of the charter was to make the river navigable where it was not navigable before; and as it was before navigable a mile or two above Georgetown, the meaning of the legislature was, that they should commence the canal a mile or two above that town. But the legislature has not said so. The only limit they have imposed to the discretion of the company is, that they should begin their canal on the tide water in the District of Columbia. Besides, if that idea were to limit their powers, they would have to let their canal down into the Potomac at every point where it is already navigable. And again, it is not probable, that when the legislature was contemplating the great object of a national highway from the eastern to the western part of this continent, they would have occupied themselves with an examination of all the minute and local circumstances which must be taken into view to determine the precise spot where it would be best for all concerned that the canal should commence. But it is sufficient to say that they have not determined it, and we can easily imagine many good reasons why they have not. It has also been suggested that this company is only a substitute for the old Potomac Company; that the object is the same, and that all the property, rights, privileges, and powers of the old company are transferred to the new; and, therefore, that the new company cannot extend the canal further down into the district than the works of the old company extended. But the old company was obliged, by its charter, "to make at or near the little falls, such canal and locks, if necessary, as will be sufficient and proper to let vessels and rafts aforesaid into tide water." But no such limitation is contained in the new charter, nor are the powers of the new charter at all limited by reference to those of the old. Whatever analogy there may be between the object and powers of the old company and those of the new, it does not affect the plain and clear provisions of the latter.

Not perceiving any ambiguity or uncertainty in the provisions of the present charter, in regard to the place of commencement of the canal; and being of opinion, that the fixing the precise point of commencement is left to the discretion of the company, within the limits fixed by the charter, it is unnecessary to examine the extraneous matter which has been offered in evidence, such as the memorials of the committee of the canal convention, &c., for whatever looseness or uncertainty there might be in papers of that kind, where the precise point of beginning was not the object of those memorials, the terms seem to be sufficiently settled by the charter itself. The company, therefore, having the right to determine the precise place of commencing the eastern section of the canal, within the limits prescribed to them by their charter, and having so determined it, have a right to obtain, by agreement or condemnation, all the land that may be "necessary for the making of the said canal, dams, locks," &c.; and the only remaining question is, whether the proceedings, in obtaining the condemnation of the land mentioned in this inquisition, are correct, and can be sustained.

The first objection taken to them is, that the warrant is insufficient: 1. Because it is general, embracing land belonging to divers persons having no connection with each other; whereas there ought to have been a separate warrant for each person's land. 2. Because the warrant does not state a disagreement between the company and the defendant (Mr. Key), before the issuing the warrant, so as to justify the company in requiring a warrant against his land, or to authorize the justice of the peace to grant it; nor does it state that Mr. Key was under age, or non compos, or out of the state or county. 3. Because the warrant does not, with sufficient certainty, describe the land to be condemned. 4. Because it does not name the owners. 5. Because no definite certain day was expressed in the warrant for the jury to meet on the land. Being of opinion that the fifth objection to this warrant, namely, that it does not express a certain day for the jury to meet on the land, is fatal to this inquisition; and it being very important to all the parties concerned that the opinion of the court should be known upon the other important points in the cause which it has considered; and as the other objections taken to the proceedings involve many new and nice questions, which it will take more time to decide correctly than the court can, during the short intervals between their daily sessions, bestow upon them, the court deems it to be its duty to deliver its opinion now, upon the points which it can decide; and to decline giving any opinion upon the other points at present. The fifteenth section of the charter requires that a day should be expressed in the warrant, for the meeting of the jury upon the land. This warrant commanded the marshal to summon a jury "to meet on the said quantity of land, and lands adjacent thereto respectively, on Thursday, Friday, and Saturday, Monday, Tuesday, Wednesday, Thursday, and Friday, the ninth, tenth, and eleventh, thirteenth, fourteenth, fifteenth, sixteenth, and seventeenth days of April next, or so many days thereof as may be necessary to complete the said inquisition. Who was to say which of those days would be necessary? It is evident that no certain day is

fixed by the warrant, and for that reason it is the opinion of the court that this inquisition must, in the language of the charter, be "set aside," with costs.

The other two judges [THRUSTON and MORSELL, Circuit Judges] feeling interested in the questions involved in this cause, sat only to make a court, and declined giving any opinion; so that the foregoing opinion is, in truth, that of the CHIEF JUSTICE only.

Case No. 2,650.

CHESAPEAKE & O. CANAL CO. v. MASON.

[4 Cranch, C. C. 123.][1]

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

EMINENT DOMAIN—SETTING ASIDE INQUISITION.

An inquisition, condemning more land than can be reasonably required for the use of the Chesapeake & Ohio Canal Company, or if the boundaries are not ascertained with certainty, will be set aside by the court.

C. Cox and Mr. Swann, for plaintiff.

Mr. Key, for defendant.

This was a motion to set aside an inquisition condemning land of [John] Mason, in Georgetown, District of Columbia, for the use of the Chesapeake & Ohio Canal.

THE COURT (THRUSTON, Circuit Judge, absent), upon hearing the testimony of witnesses, and the arguments of counsel, set aside the inquisition, because they were of opinion that the company had unreasonably required the condemnation of the whole lot, when they might have left valuable property to Mr. Mason, which seems to be of no use to the company, and because the jury had not ascertained, with sufficient certainty, the bounds of the land condemned.

Case No. 2,651.

CHESAPEAKE & O. CANAL CO. v. POOR.

[3 Cranch, C. C. 598.][1]

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

CHESAPEAKE & OHIO CANAL COMPANY—JUDGMENT FOR NONPAYMENT OF INSTALMENTS.

The instalments due by the subscribers to the Chesapeake & Ohio Canal Company, may be recovered on motion, with costs.

This was a motion for judgment against [Nathaniel P. Poor], a stockholder, for instalments due upon the shares subscribed for by him in the stock of the Chesapeake and Ohio Canal Company; ten days' notice of the motion having been given, according to the fifth section of the charter granted by Virginia, and confirmed by the states of Maryland and Pennsylvania, and by the United States; by which it is enacted that "whenever any subscriber shall fail to pay any instalment called for by the company, it shall and may be lawful for the company, upon motion to be made in any court of record, after ten days notice, to obtain judgment against the subscriber so failing to pay." The charter says nothing respecting the costs of the motion.

Mr. Wallach, for plaintiff, observed that the statute of Glocester gives costs wherever damages could be recovered at common law, although a summary remedy may be given by statute. Hull. Costs, 5. If these subscriptions had been sued for at common law, upon the contract, damages would have been given.

THE COURT (nem. con.) ordered the judgment to be entered for the several subscriptions, with costs; and observed, that the charter was granted by Virginia, and confirmed and adopted by Maryland, Pennsylvania, and the United States; and that there was in Virginia, at that time, a statute authorizing the court in all cases of judgment on motion to give costs at its discretion. If such a motion as the present were made in Virginia against a subscriber under this charter, the judgment would be with costs, and the same construction should be given everywhere to this clause of the charter.

Judgment for $75, with costs.

Case No. 2,652.

CHESAPEAKE & O. CANAL CO. v. ROBERTSON.

[4 Cranch, C. C. 291.][1]

Circuit Court, District of Columbia. March Term, 1833.

CHESAPEAKE & OHIO CANAL COMPANY—RIGHTS OF SUBSCRIBER.

The original subscribers to the Chesapeake and Ohio Canal Company are bound by the alterations of the charter made by subsequent acts of legislation with the consent of the corporation.

This was a motion by C. Cox, for the Chesapeake and Ohio Canal Company, for judgment for an unpaid instalment under the fifth section of the original charter granted by Virginia on the 27th of January, 1824.

Mr. Key, for defendant [Henry B. Robertson].

The original subscribers are not bound by the alterations made by subsequent acts of legislation; although made with the consent of the corporation. The company cannot consent to any alterations that can bind the original subscribers. The subscriptions were made under the act of Virginia of the 27th of January, 1824; the act of Maryland was passed at the December session of 1824, and the act of congress on the 3d of

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

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

March, 1825. Material alterations have been made by the act of Maryland of the 10th of March, 1827; the Maryland act of December, 1826, and by the act of Virginia of the 25th of January, 1828. (Quaere, February 26, 1828?) These amendments make a new charter. The company afterwards assented to these alterations, but the old subscribers were not members of the company which so assented.

Mr. Key cited the following authorities: The case of Dartmouth College, 4 Wheat. [17 U. S.] 590; Head v. Providence Ins. Co., 2 Cranch [6 U. S.] 127; Gozler v. Georgetown, 6 Wheat. [19 U. S.] 593; Terrett v. Taylor, 9 Cranch [13 U. S.] 43; Rex v. Pasmore, 3 Term R. 240; Wales v. Stetson, 2 Mass. 143; Ellis v. Marshall, Id. 269; Baggs' Case, 1 Rolle, 224; Dom. Civ. Law, 153; Poth. Obl. 565; Korn v. Mut. Assur. Soc., 6 Cranch [10 U. S.] 192; 3 Bac. Abr. 16; Kyd, Corp. 401; Currie v. Mutual Assur. Soc. 4 Hen. & M. 315.

Mr. Cox referred to Angell & Ames on Corporations. The company was first organized on the 20th of June, 1828. All those alterations had then been made. Mr. Robertson has paid all but the twelfth and following instalments. At a general meeting of the company on the 3rd of July, 1828, Mr. Key moved that the company assent to the alterations, and the motion was carried unanimously, the defendant being present, or represented, at the meeting.

THE COURT (nem. con.) overruled the objections, and ordered the judgment to be entered up, with costs.

CHESAPEAKE & O. CANAL CO. (SMITH v.). See Case No. 13,024.

Case No. 2,653.

CHESAPEAKE & O. CANAL CO. v. UNION BANK.

[4 Cranch, C. C. 75.][1]

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

EMINENT DOMAIN—THE INQUISITION.

1. Where several warrants have been issued and returned, with inquisitions for condemning land for the use of the company, and each inquisition refers to the warrant returned therewith, it is competent to prove by parol which warrant is applicable to each inquisition.

2. The jury ought to ascertain and describe the bounds of the land by them valued, and the quality and duration of the interest and estate in the same.

3. The canal company is the sole judge, what interest in the land will be necessary for their operations, and the jury are to value such interest as the company shall require.

4. The charter does not require notice to be given to the party whose lands are sought to be condemned; and, therefore, the inquisition need not state that such notice has been given; but it ought, in fact, to be given, if the party be, at the time, within the county.

5. It is not necessary that the inquisition should state the value of the land separately from the damages.

6. The benefit to the owner may be as well set off against the value of the land as against the damages.

7. Quaere, whether it be necessary that the jury should ascertain the bounds of the land, upon the land itself, by metes and bounds?

8. In authorizing the condemnation of lands for a highway, the United States only claim to exercise the power, which belongs to every sovereign, to appropriate private property to public use.

[Approved in Shoemaker v. U. S., 147 U. S. 282, 13 Sup. Ct. 362.]

This was a motion, by Mr. J. Dunlop, to set aside an inquisition condemning land in Washington for the use of the Chesapeake and Ohio Canal Company, under the fifteenth section of its charter of January, 1824, granted by Virginia, and confirmed by Pennsylvania, Maryland, and the United States.

Key & Dunlop, for Union Bank.

Swann & Jones, for canal company.

[Before CRANCH, Chief Judge, and MORSELL, Circuit Judge.]

CRANCH, Chief Judge. 1. The first objection to the inquisition is, that the name of the owner of land does not appear in the inquisition; and although the inquisition refers to a warrant supposed to be returned therewith, yet that warrant is not annexed to the inquisition, nor referred to by any mark or other description by which it can be ascertained to which of the various warrants returned, it refers. In answer to this objection, we think it is competent for the clerk to whom, by law, it was returned; or for the marshal who took and returned the inquisition and warrant, to prove, by parol, the fact of the return, and to designate which warrant was returned with the inquisition. It is admitted in argument that a warrant was returned and filed with this inquisition; in which warrant the property proposed to be valued is stated to be the property of the Union Bank of Georgetown; and the inquisition with which it was returned and filed, is marked on the margin with these letters: "Pt. & Drs. U. B." We thing it is competent for the canal company to prove those facts by parol.

2, 3. The second and third objections are, that the property is not sufficiently described either in the warrant or inquisition. The description is in these words: "All those parts of a lot of land, lying in the county aforesaid, and known and recorded as lots eight (8), nine (9), and ten (10), in the square one (1), in the city of Washington, which lie west of the west side of Twenty-Eighth (28) street west; and all those other pieces of land belonging to said lots, or any of them, and being due west of the said lots, or any

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

of them, and extending thence to, and binding with, the channel of Rock creek,—the property of the president and directors of the Union Bank of Georgetown." It is evident, that neither the bounds of those parts of lots 8, 9, and 10, which lie west of Twenty-Eighth street west, if any such there be; nor of the pieces of land belonging or appertaining to said lots, are ascertained and described by the jury. The square 1 is bounded on the west by Twenty-Seventh street west; therefore no lot, in square 1, can extend west of that street. If any of the lots, in square 1, have privileges extending west of that street, such privileges are not parts of such lots, but appurtenances thereto. The pieces of land which are supposed to be "belonging or appertaining to said lots," are described as lying due west of the said lots; but whether contiguous thereto, or at what distance therefrom, does not appear. They are said to be extending thence. Whence? Not from the place where they were lying, for that would make them extend beyond themselves; not from the lots 8, 9, and 10, for Twenty-Eighth street intervenes; not due west of the same lots, for that designates no place at all. It is impossible to locate these appurtenances from the description. Nor does the plat of square 1, as recorded on the surveyor's books, or the engraved plan of the city, cure the defect. It does not appear that any water privilege is, by law, or by any authoritative regulation, in regard to the plan of the city, annexed to those lots; or, if there is, the extent of it does not appear to have been defined; the jury, therefore, ought to have ascertained and described the bounds of the land by them valued; and not having done so, the inquisition must be set aside. It is much better for all parties, that the error should be now corrected by a new inquisition, than that it should be left for future litigation.

4. The fourth objection is, that the jury ave not "described and ascertained the quality and duration of the interest and estate in the same required by the company for its use." The only reason for introducing this provision into the fifteenth section of the charter, seems to have been to show what quantity of interest in the land was in the contemplation of the jury at the time of the valuation; for that quantity of interest, only, would pass by the valuation. The jury were to value such interest only as the company should require; it was, therefore, necessary that it should appear, in the inquisition, what that interest was. It has been supposed, in argument, that the jury was to ascertain whether that interest was or was not needed by the company. The word, however, is not "needed," but "required," by the company, who are the sole judges what interest in the land will be necessary for their operations; and the jury are to value such interest as the company shall require. The fifteenth section of the charter authorizes the condemnation of land for the temporary use of the company in the construction of their works, as well as a more permanent interest for the actual bed of the canal, and the site of their locks, dams, ponds, and feeders; and the jury is to value the land itself, "as of an absolute estate in perpetuity," "or the partial or temporary appropriation, use, or occupation of such land," according as the same shall be required by the company; and upon such valuation, "and on payment thereof, the said company shall be seized of such land as of an absolute estate in perpetuity, or with such less quantity and duration of interest or estate in the same; or subject to such partial or temporary appropriation, use, or occupation, as shall be required and described as aforesaid, as if conveyed by the owner to them."

From a consideration of these and other provisions of this section, it seems to us very clear, that the canal company, so far as relates to the duty of the jurors, was to be the sole judge what interest in the land was required by the company; and that the only reason why the jury is to describe and ascertain the quality and duration of the interest required by the company is, that it may be known what sort of interest is valued by the jury, so as to know what interest passes to the company by the valuation and payment. The warrant states that the canal is intended to pass through certain land, and that the said land, (therein described,) "is needed as of an absolute estate in perpetuity, for the making of the said canal and its appurtenant works." The jury in the inquisition "say, that all the said land described in the said warrant as of an absolute estate in perpetuity and all damages," &c., "are of the value of one thousand dollars." They have, therefore, clearly expressed, in their inquisition, "the quality and duration of the interest and estate," in the land which they have valued. Its quality is "absolute," and its duration is "in perpetuity." They have not, indeed, stated that the company required an interest and estate of such quality and duration; but this they were not bound to do. They have stated what sort of interest and estate they valued; and the warrant which is returned with, and, by reference, made part of the inquisition, shows that the company required such an interest and estate as they have valued. They have, therefore, "described and ascertained the quality and duration of the interest and estate," "required by the company for its use," which is all they were, in this respect, bound to do.

Much stress, in the argument, was laid upon the word "as," in the finding of the jury in these words: "The jury say that all the said land described in said warrants as of an absolute estate in perpetuity," "and the damages," &c., "are of the value of one

thousand dollars;" whereas, in the warrant, the words, "as of an absolute estate in perpetuity," do not constitute any part of the description of the land; so that it is uncertain what interest or estate in the land the jury valued. But this uncertainty is removed entirely by noticing the comma, placed after the word "warrant," in that sentence, which disconnects the word "as" from the word "described," and throws it into the latter clause of the sentence, so as to connect it with the valuation. It is evident, therefore, that the whole sentence ought to be read thus: The jury "say, that the said land described in the said warrant, as an absolute estate in perpetuity and the damages are of the value of one thousand dollars;" showing that they valued the land as of an absolute estate in perpetuity.

5. The fifth objection is, that the inquisition does not show that notice was given to the Union Bank of the time and place of taking the inquisition. The charter does not require notice to be given to any of the parties interested. But as the marshal is to summon jurors not related to the parties, it seems to be necessary that the parties should be named in the warrant; and, perhaps, it may be good cause to set aside an inquisition taken under this charter, that the real owner had no knowledge of the time and place of taking it, if he was, at the time, within the county. But the warrant and inquisition are in the nature of a writ of ad quod damnum, which was a writ to inquire whether a grant, intended to be made by the king, would be to the damage of him and others. The making of a new highway, or the change of an old one, is an act of sovereign power; and the writ is issued at the mere motion of the sovereign himself, to inform his conscience. It is, therefore, an ex parte proceeding; as will be seen in the forms of the writ in Reg. Brev. 247–255. The king commands the sheriff that by the oath of good and lawful men, "you inquire whether it will be to the damage or prejudice of us or of others if we grant to I., that he may give and assign one messuage, &c., in W. to a certain chaplain, &c., to perform divine services for the good of his soul," &c., "and if it should be to the damage and prejudice of us or others, then to what damage and prejudice of us, or of others, and of whom," &c. "And an injunction thereof distinctly and openly made to us in our chancery, under your seal, and the seals of those by whom it shall have been made, without delay you send, and this writ." Test, &c. In folio 255, is a like form for granting a mill-race; and in none of the forms is the sheriff required to give notice to any of the parties; nor does the oath in the present case require the jurors themselves to say whether notice was given or not. It seemed to be admitted in the argument that notice had been actually given to Mr. Beverly, the president of the Union Bank, and that he attended. If such was the fact, I do not think the inquisition should be set aside merely because it does not in itself contain the evidence of notice.

6. The sixth objection is, that the jury have not distinguished between the value of the land and the damages, but have found the value and damages all in one sum. The oath is to "value the land and all damages," &c., "and in every such valuation and assessment of damages," the jury are "instructed to consider, in determining and fixing the amount thereof, the actual benefit," &c., "and to regulate their verdict thereby;" except, that "where such benefit shall exceed, in the estimate of the jury," "the value and damages ascertained as aforesaid," the owner shall not be required "to pay or contribute anything to the said company." The benefits to be derived, therefore, may be as well set off against the value of the land as against the damages, and we see no reason why the jury may not find the result in one entire sum.

7. The seventh objection is, that the jury have not stated that they described and ascertained the bounds of the land upon the land itself by metes and bounds. The charter directs the jury "to describe and ascertain the bounds of the land by them valued." I think this requires them to describe the lands which they value, and to state the bounds thereof with certainty, so that it may be known what they valued, and what would pass to the company upon payment of the valuation. It does not necessarily imply that they themselves were to run and measure the lines, or to see it done by a surveyor.

8. The eighth objection is, that by the Maryland act of cession to the United States, of this part of the District of Columbia, 1791, c. 45, § 2, congress are restrained from affecting the rights of individuals to the soil, otherwise than as the same should be transferred to the United States by such individuals; and it is contended that this prohibits the United States from taking private property in this district, for public use; and that the right of sovereignty, which Maryland exercised, was not transferred. We think it is a sufficient answer to this objection, to say that the United States do not, by this inquisition, or by the charter to the Chesapeake and Ohio Canal Company, claim any right of property in the soil. They only claim to exercise the power which belongs to every sovereign to appropriate, upon just compensation, private property, to the making of a highway, wherever the public good requires it.

MORSELL, Circuit Judge, concurred in the judgment to set aside the inquisition, and in the opinion, except as to the fifth and seventh objections. In regard to the fifth, he was of opinion that notice ought to appear somewhere in the record; and as to the sev-

enth, that it should also appear that the jury saw the lines run upon the land.

The inquisition set aside, and a new one ordered.

[NOTE. For subsequent proceedings herein, see Case No. 2,654.]

Case No. 2,654.

CHESAPEAKE & O. CANAL CO. v. UNION BANK.

[5 Cranch, C. C. 509.][1]

Circuit Court, District of Columbia. Nov. Term, 1838.

RIPARIAN RIGHTS.

The lots in the city of Washington lying on Rock creek, are entitled to the water privilege in front of them, although separated from them by a public street, unless the bank of the creek lies between the street and the creek; and the owner of the lots is entitled to the condemnation money awarded for the water privilege in front of them, condemned for the use of the Chesapeake and Ohio Canal Company.

[Disapproved in Potomac Steam-Boat Co. v. Upper Potomac Steam-Boat Co., 109 U. S. 693, 3 Sup. Ct. 458. See the dissenting opinion in same case, 109 U. S. 701, 4 Sup. Ct. 17.]

So much of the water privilege of Rock creek as lay west of lots Nos. 8, 9, and 10, in square No. 1, in the city of Washington, had been condemned for the use of the Chesapeake and Ohio Canal Company; and the question arose whether the Union Bank of Georgetown, to whom those lots had been conveyed by Leonard Harbaugh, who had purchased them, thirty years ago, from the United States, to whom they had been allotted upon the division of the square, between the public and Robert Peter, the original proprietor of the land, had a right to the condemnation money. This question was submitted to the court.

[For prior proceedings, see Case No. 2,653.]

C. Cox, for the canal company, contended that Mr. Harbaugh never had any water privilege as appurtenant to those lots because they were cut off from the creek by 28th street west; and as the streets belonged to the United States, the water privilege belonged to them also; although Mr. Harbaugh built a wharf into the creek, thirty years ago, and he and those claiming under him have occupied the same ever since without interruption, or adverse claim, by any one; no part of the bank of the creek, and no dry land west of the street, one half of which was in the creek.

Mr. Dunlop, for the Union Bank, contended that the streets were conveyed to the United States only as highways, and did not deprive the riparian proprietors of their water rights, and referred to Nicholas King's letter in Burch's Dig. 329, 353, 359, and the wharf regulations by the city commissioners in 1795, and the Maryland act of 1791 (chapter 45, § 12).

THE COURT (THRUSTON, Circuit Judge, not sitting) decided that the title of Harbaugh to his wharf was good against the United States, claiming under a private citizen (R. Peter), and that the Union Bank is entitled to the condemnation money.

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

CHESAPEAKE & O. R. CO. (RICHARDS v.). See Case No. 11,771.

Case No. 2,655.

The CHESHIRE.

[Blatchf. Pr. Cas. 151.][1]

District Court, S. D. New York. May 6, 1862.[2]

PRIZE—THE CLAIM—PROOF—TRANSFER OF ENEMY VESSEL—RUNNING BLOCKADE—EVIDENCE.

1. A claim in a prize suit should be one of property merely, and should only put in issue, by a simple denial, the validity of the capture.

2. The papers found on board the captured vessel, and the testimony of the witnesses in preparatorio, can alone be considered on the hearing, in the first instance, in the determination of the issue.

3. A transfer of an enemy vessel by an enemy to a neutral, in an enemy port, during the war, is void.

4. In this case the vessel and cargo were falsely represented to be bona fide neutral property, when they were, in fact, enemy property, and as such liable to capture.

5. A contingent destination to a blockaded port must appear on the ship's papers; otherwise it will be presumed that there was a dishonest purpose in approaching such port.

6. In this case there was positive evidence of such dishonest purpose. The alleged purpose of making inquiry as to the raising of the blockade was a mere pretence.

7. A neutral vessel, with knowledge of the existence of a blockade, has no right to proceed to a blockaded port with the purpose of inquiring there as to the continuance of the blockade.

[Cited in The Empress, Case No. 4,477; Stokely v. Smith, Id. 13,473.]

8. The inquiry must be made elsewhere than at the mouth of the port itself.

9. Vessel and cargo condemned.

BETTS, District Judge. On the 6th of December, 1861, the United States ship-of-war Augusta captured the merchant ship Cheshire, with her cargo, at sea, off the harbor of Savannah, Georgia. The captors sent her to the port of New York for adjudication in this court, as prize of war. A libel was filed on the 23d of December, and, on the 17th of January thereafter, claims were interposed on behalf of Joseph Battersby and William

[1] [Reported by Samuel Blatchford, Esq.]

[2] [Affirmed by circuit court in Case No. 2,657; and by supreme court in The Cheshire v. U. S., 3 Wall. (70 U. S.) 231.]

Battersby by Thomas Stone, who represents himself to have been a passenger on board the ship, and her supercargo for the voyage. In these claims it is averred that the Battersbys are British subjects, and partners under the firm of J. & W. Battersby, and the entire cargo was the property of the firm. The test oath to these claims is made by Stone. Various allegations, under the oath of Stone, are annexed to the claims, but they are wholly irrelevant to the issue, except as they may bear upon the question of the credibility of Stone, who was examined as a witness upon the standing interrogatories.

On the 8th of February, following, a further claim was filed, on the part of the Battersbys conjointly, by James Craig, the master of the ship, represented by the same proctor as before, in which it is averred that Joseph Battersby was the sole owner of the vessel, and that Joseph and William, as a mercantile firm, were sole owners of the cargo. To this claim also averments and charges are appended, of tortious and culpable acts on the part of the captors towards the vessel and cargo, and her officers and crew; and to this is added an elaborate instrument, in the form of a protest, reiterating and amplifying the said charges, made in the name of the master, the mate, and three of the crew of the vessel, before the proctor for the claimants, as a notary public.

In the case of The Empress [Case No. 4,476] it has been adjudged in this court that such a mode of pleading in prize causes is irregular and improper; that the claim should be one of property merely, and by a simple denial putting in issue the validity of the capture; and that the papers found on board the captured vessel, and the testimony of the witnesses in preparatorio, can alone be read or considered on the hearing, in the first instance, in the determination of the issue. Such is the well-established rule. The reasons upon which it rests, and the authorities by which it is sustained, are set forth in the case alluded to, and need not be reiterated here. All these collateral statements and protests are, therefore, excluded from the case.

The grounds upon which the validity of the capture is maintained by the libellants are that the alleged neutral ownership of the captured property was simulated, and that the vessel was fitted out at Liverpool, England, and despatched thence on a voyage to Savannah, Georgia, with knowledge, on the part of the owners of vessel and cargo, that the port of Savannah was under blockade at the time, and with the purpose and intent of violating the blockade, which was only prevented by the capture.

On the part of the claimants it is insisted that the vessel and cargo are bona fide neutral property; that the voyage in question was honestly set on foot by them, without the purpose of violating the blockade, and, indeed, without knowledge that it was still in force; and that to avoid misapprehension, the voyage was planned and prosecuted under the precaution and direction that the vessel should sail from Liverpool first to the vicinity of Savannah, there to inquire and ascertain if the port was still under blockade, and if not, to make that her port of destination, and there deliver her cargo; but if the blockade was found to be in force, to go to the British port of Nassau, New Providence. And it is further insisted that these directions were carefully and truly followed and adhered to by the claimants and their agents, and that the vessel was captured by the libellants on their arrival off the port of Savannah, without any warning being indorsed on the ship's register, or any direct previous notice having been given that the port was under blockade.

It will be seen that there are three questions involved in the issue between the parties: 1. Were the vessel and cargo bona fide neutral property, or was the nationality merely simulated as a cover or protection from consequences of capture? 2. Was it truly the purpose of the vessel, on approaching the port of Savannah, to make an honest inquiry into the continuance of a known prior blockade before attempting to enter the port, or was it, on the contrary, designed to attempt to enter without speaking or being bespoken off the harbor, or making any previous effort to ascertain if the blockade were still maintained? 3. With the knowledge of the blockade possessed by the master and the owners of the vessel and cargo, in view of the character of her lading, and on the facts in proof, could she lawfully go to the port of Savannah, to inquire there as to the continued existence of the blockade?

First. As to the neutral ownership of the captured property. The prima facie evidence of this neutrality, as derived either from the ship's papers or from the testimony of the master and the supercargo, on their examination in preparatorio, is open to serious distrust. The vessel was of American build, and had been in the trade between Savannah and Liverpool, conducted, from the time of the breaking out of the rebellion, substantially, if not entirely, by the present claimants, J. & W. Battersby. It is proved that instead of both claimants being residents of Manchester, England, as is averred, one of them was at the commencement of the war, and ever since has been, domiciled in Savannah, and engaged there in conducting the trade of that vessel between that port and Liverpool; and that he being thus domiciliated, and therefore having full knowledge of the state of war between the so-called Confederate States and the United States, of the imposition of the blockade on the port of Savannah, and of its efficiency, the vessel was laden in that port with a cargo, the produce of that country, and actually evaded the blockade of that port and transported her

cargo to Liverpool; that voyage being the one next preceding the voyage upon which she was captured. The American name of the vessel was the Monterey, of Savannah. She was furnished with a British register, under the name of the Cheshire, at Liverpool, on the 30th of August, 1861, about ninety days before her capture; and this constitutes the sole documentary evidence of a change of ownership. No bill of sale is produced, nor is there any evidence of the payment of a consideration for her alleged transfer. Stone, the supercargo, testifies (in answer to the 14th interrogatory) that the vessel was owned by Joseph Battersby. He thinks the bill of sale was given in Savannah by Brigham & Baldwin, or by their agents; and he thinks "it was some time last winter, on the passage from Liverpool to Savannah; they bought her to arrive." "I think this was the way the ship was bought." And, in answer to the 14th interrogatory, he says: "I know Mr. Battersby is the owner by the register, and I have heard him say he was." Brigham & Baldwin, the former registered owners of the ship, were citizens of Savannah, and, as such, were, in law, public enemies at the time of the alleged transfer to Battersby as a British subject. Such a transfer, being in fraud of belligerent rights, could have no validity. Battersby, the alleged transferee, was a partner in the house of trade domiciliated in Savannah, the residence of the other partner. A transfer to him, therefore, of property thus employed in the trade of the enemy would wholly fail in divesting it of its hostile character under the law of nations.

But supposing, for the moment, that such a transfer might have been lawfully made, and that the property might by such transfer have become neutral, yet the reality and integrity of the transfer itself so essentially rest upon the testimony of the witness Stone that his evidence requires special attention. He says that he is an Englishman by birth, but is an American citizen, and has for the last thirteen years resided with his family at Williamsburgh, New York; that he was on board at the time of the capture, which took place nine or ten miles from Tybee, but does not know why the vessel was captured; that she belongs to Joseph Battersby, of Manchester, England; that the master, he thinks, was appointed by Mr. Battersby, in Liverpool, where he took possession of her in October or September last; that the vessel's company when captured consisted of seventeen persons, but he did not belong to the vessel's company, and "had no part, share of, or interest in the vessel or cargo;" and that the vessel sailed from Liverpool to Savannah some time the previous winter with a cargo of salt, and some time in May last back from Savannah to Liverpool with a cargo of cotton, and returned from Liverpool in October, on the voyage upon which she was captured. In answer to the 14th interrogatory, he says that he knew Battersby was the owner of the vessel from his own declaration and the register, but "does not know who owned the cargo; it was shipped by Charles Hill, of Liverpool;" and he adds, in answer to the 28th interrogatory, that "he supposed the shipper," Charles Hill, "would have owned the cargo when it arrived;" that the Battersbys reside with their families in England, and have always resided there; and that he resides with their family when in England. To the 39th interrogatory, he says that he has "stated all that he knew or believes relative to the true property or destination of vessel and cargo." These formal interrogatories were replied to by the witness, under the solemnity of an oath, on the 17th day of January, 1862. On the same day the claim of the Battersbys is filed, accompanied by the test oath of this witness, who therein swears that "he had been in the employ of the claimants, Joseph Battersby and William Battersby, for upwards of four years, and that he was a passenger on board the ship Cheshire, and supercargo on the voyage on which she was seized, and makes this test oath, and deposes to the verity of the above claim." Thus, by averments of long acquaintance, residence in their families, employment for years, and being supercargo upon this voyage, the witness displays his abundant means of knowledge as to the ownership of the cargo, and states, in the claim, to which he swears, that "all the cargo was owned by the claimants," the Battersbys; while on his examination as a witness by the commissioner, he swears that he "has no knowledge as to the ownership of the cargo," but supposes "that it would, on its arrival, belong to the shipper," Hill.

When it is considered that the good faith of the alleged transfer of the vessel from Brigham & Baldwin rests entirely upon the testimony of this witness, it may well be asked, whether such an irreconcilable incongruity as this in his own sworn statements does not sufficiently impair his credit as a witness, to raise a very serious doubt of the good faith of the alleged transfer?

But the testimony of this witness, Stone, is not only thus impaired by the inconsistencies and contradictions of his own sworn statements upon material points, but upon other points equally material and relating to the questions of the honesty or culpability of the voyage, of the purpose to inquire at the mouth of the port before attempting to enter, and of the design and attempt to enter without inquiry, he is directly contradicted by another witness, examined in preparatorio, who is unimpeached, and who could have no motive or inducement to falsify from position or relationship to the parties, and whose evidence, entirely consistent in itself, and with all the known and conceded facts, is, moreover, confirmed by the vessel's journal or log. This testimony, in connexion with that of Stone, I shall advert to

in considering the next proposition involved in the contestation. I here speak of it as evidence inherently reliable, which directly contradicts that of Stone. When added to this contradiction of himself, it casts such discredit upon his testimony (on which alone rests, the averment of the neutral ownership of the captured property) as, in my judgment, to raise an impressive presumption that the vessel and cargo were falsely represented to be bona fide neutral property, while they, in truth, belonged, wholly or in part, to persons domiciled in the so-called Confederate States, and, therefore, to public enemies of the United States under the law of nations, and were, as such, liable to capture and confiscation. Halleck, Int. Law, c. 21, §§ 1–3; Duer, Ins. lect. 6, §§ 1–3.

Second. Was the voyage of the ship Cheshire from Liverpool to the port of Savannah, and her approach to that port, undertaken and prosecuted with the honest intent to inquire there if the blockade was still in force, and by no means to enter the port without making inquiry; or, on the contrary, was the voyage set on foot and prosecuted, and was the port of Savannah approached, with the purpose and intent to enter without inquiry if a favorable opportunity should occur or could be made?

In entering upon this inquiry, the fact first presenting itself is not without its influence. The business of carrying cotton out of the port of Savannah, and, in return, taking needed supplies to the enemy within that port, in spite of the blockade, seems to have been the business to which the ship was devoted by her owners, and in which she was successfully employed until her capture. But the averment of the purpose, in good faith, to go to the mouth of the port, and there make honest inquiry as to the blockade, and to deliver her cargo there, as her destined port, only in the contingency of finding, on inquiry, that the blockade was raised, is met by an objection which Sir William Scott, in a like case, regards as the most pregnant evidence of the falsity of such representations. The ship's papers disclose no such contingent destination. She was documented simply for a voyage to Nassau or Halifax, and back to a port in Europe. If the averments on which the defence rests be true, then the ship's papers are false, in fraudulently concealing the fact of the contingent destination to Savannah, and representing the destination to be absolute to Nassau or Halifax. The dishonesty of the purpose of the approach to the blockaded port of Savannah is clearly evinced by the studied concealment in the papers of the intent to approach it at all.

In the case to which I have alluded (The Carolina, 3 C. Rob. Adm. 75) Sir William Scott says: "Had there been any fair, contingent, deliberative intention of going to Ostend, that ought to have appeared on the bill of lading, for it ought not to be an absolute destination to Hamburg, if it was at all a question whether the ship might not go to Ostend, a port of the enemy. There is, then, an undue and fraudulent concealment of an important circumstance which ought to have been disclosed." See, also, The Margaretha Charlotte, 3 C. Rob. Adm. 78, note. In a recent case (The Union, 1 Spinks, Prize Cas. 164) Dr. Lushington says that a ship's papers should show her destination to a blockaded port, in the contingency of a blockade being found raised upon her arrival, and otherwise should show her ulterior destination. This offence of clothing a vessel with false documents, which conceal her real destination, and set forth that as her absolute destination which is, in truth, but contingent, is justly regarded as sufficient cause for capture and confiscation.

This vessel, with papers on board which declare that her voyage is from the port of Liverpool to Nassau, New Providence, or to Halifax, Nova Scotia, and which do not disclose any destination as intended in any contingency, is found off the blockaded port of Savannah, in Georgia. Upon authority, the presumption of the dishonest purpose of the voyage, and of the dishonest approach to the blockaded port, arising from the papers, and in the absence of any explanatory proof, is conclusive. And here I might rest the second proposition. But there is positive evidence, in the testimony before me, of the dishonest purpose of the voyage, of such a character that I cannot pass it in silence.

The averred purpose of the approach to Savannah, for inquiry simply, and without design to enter without inquiry, is maintained by the positive testimony of the witness Stone. In reviewing the evidence of this witness upon another point, I have had occasion to show its unworthiness, resulting from its contradictions and inconsistencies, and have alluded to the fact that, upon the point I am now considering, it is in direct conflict with the testimony of a witness whose evidence is consistent in itself, and not only unimpeached, but confirmed by the conceded facts of the case. That witness is John Thornton, one of the crew of the ship, shipped at Liverpool as cook, but who afterwards served as cabin boy. He testifies substantially as follows: that Craig was only the nominal master; that Stone had the actual control on board; that Stone had been long a resident of Savannah, although his family was at Williamsburgh, New York; that Stone informed the witness that he was engaged by Battersby at Savannah, where Battersby lived and carried on business, to take command of the vessel, in Liverpool, for this voyage back to Savannah, with the intention of running the blockade; that the crew were all hired by Stone, who received the vessel from Captain Norton, in September, 1861; that he, Stone, had informed witness that he owned the vessel, and had an interest in the cargo; that this was in New York, and

since the capture; that he heard Stone inform Craig that the vessel ran the blockade on the preceding voyage, when commanded by Captain Norton, under the name of the Monterey, of Savannah; that the cargo, upon this voyage, was to have been delivered in Savannah to Mr. Battersby, who resided there, as did Stone also; that the existence of the blockade was well known to all on board; that on the night before she was captured, the lights of the vessel were all extinguished, and an attempt was made to run the blockade, but that, having failed upon that occasion to find the water sufficiently deep the ship was put about and stood out to sea, till the following morning, when she again stood in for the port, and was captured about seven miles from Tybee; and that Captain Stone said, that if he could have got under the guns of Fort Pulaski he would have been safe; that the cargo cost $30,000, and that, if he had been able to get into the blockaded port, he would have realized $250,000.

No part of the testimony of this witness is inconsistent with the general evidence in the case, other than the conflict between his statements and those of Stone; and as to those differences there would seem to be no doubt, if he is entitled to full credit as to all the declarations and admissions imputed by him to Stone, that his contradictions are so direct and positive to important statements made in Stone's testimony, that the court is bound to withhold belief from the latter.

Thornton is also corroborated, and the averments of Stone are discredited by the ship's log. Stone says that the vessel lay off the port of Savannah two days, and tried to speak three or four vessels, but could not. The log discloses the fact that vessels were present "all around," and states no attempt to speak any of them; nor does it make any allusion to the least difficulty in communicating with either or all of them, had it been desired. The log shows that the Cheshire had been tacking off and on, from early dawn of Thursday, the 5th of December, until the afternoon of Saturday, the 7th, and was actually in a position, at the time testified to by Thornton, to make the attempt to enter the port at night; which attempt Thornton swears was made, and failed for want of sufficient depth of water.

Upon the testimony, and upon all the facts in the case, the conclusion is unavoidable that the ship, with full knowledge of the establishment and efficiency of the blockade of Savannah, was despatched upon a voyage to that port, with a fixed design to violate the blockade and there deliver her cargo, if practicable; and that the alleged purpose of making previous inquiry was a mere pretence, having no real existence. This result is conclusive as to all the alleged rights of the respective claimants, and involves the necessity of condemning both vessel and cargo.

Third. With the knowledge of the blockade possessed by the master and owners of the vessel and cargo, and on the facts in proof could the ship lawfully go to the mouth of the port of Savannah, for the purpose of inquiring there as to the continued existence of the blockade? Although the conclusion to which the evidence has directed me upon the preceding proposition renders it unnecessary to decide this point in the case, yet it is proper to say, whenever the question arises, that it is res adjudicata in this court. In the case of The Delta [Case No. 3,777], not long since argued and determined, the point arose and was decided.

The authorities are clear and conclusive that a neutral vessel, with knowledge of the existence of a blockade, had no right to proceed to the very port blockaded, with the pretended or actual purpose of inquiring there as to its continuance. It is the policy of the law to inhibit neutral vessels from assuming such positions with reference to the blockaded port, as must, of necessity, greatly increase the watchfulness and activity of the naval force, and at the same time afford to the neutral vessel extraordinary facilities for a fraudulent evasion of the rights of a belligerent. It is well settled, that where the destination of a neutral vessel to a blockaded port is contingent upon inquiry, that inquiry must be made elsewhere than at the mouth of the port itself. In the case which I have cited in another connexion (The Union, 1 Spinks, Prize Cas. 164,) Dr. Lushington says, that "where an excuse is set up that the vessel approached the blockaded port to make inquiry, it must be clearly proved by evidence perfectly satisfactory to the judgment of the court that she was ignorant of the fact of the blockade." Here no pretence of ignorance is set up; and, indeed, such pretence, in view of all the facts in proof, and especially of the violation of the blockade on the previous voyage, would be quite preposterous.

In the case of The Delta [supra], I considered, at length, the reasons upon which the rule is placed which prohibits neutral vessels from approaching the blockaded port to make inquiry, and reviewed the authorities which establish the doctrine. As the conclusion in this case is not exclusively or necessarily based upon this doctrine, I need only refer to what was there said, without reiteration. The vessel and cargo, in this case, were, for the several reasons stated, lawfully captured, and a decree of condemnation must be entered accordingly.

This decree was affirmed by the circuit court, on appeal July 17, 1863. [Case No. 2,657.] From the decree of the circuit court the claimants appealed to the supreme court, where the decree was affirmed March 5, 1866. [The Cheshire v. U. S., 3 Wall. (70 U. S.) 231.]

Case No. 2,656.

The CHESHIRE.

[Blatchf. Pr. Cas. 165.][1]

District Court, S. D. New York. May 17, 1862.

PRIZE—SALE OF PERISHABLE PROPERTY.

After a decision condemning the vessel and cargo, but before the entry of the decree, the libellants moved for an immediate sale of vessel and cargo, as being in a perishing condition. The court *held*, on the facts, that no necessity was shown for such sale.

[Cited in The Empress, Case No. 4,477.]

BETTS, District Judge. This suit was brought to hearing on the preliminary evidence of the ship's papers and the proofs, in preparatorio, on the 10th of March last, and was, after two days' discussion, submitted to the court for decision, with the reservation of a privilege to the counsel to file additional briefs during that week. Although the briefs were frequently asked for by the court, circumstances delayed their being furnished until about the 1st of May. In the meantime, the case had been so far considered by the court that it was enabled, immediately after reviewing the written briefs, (about the 5th or 6th of May,) to conclude the examination of the papers, and an interlocutory decision was rendered, condemning the vessel and cargo to forfeiture as lawful prize. [Case No. 2,655.] The papers were, with the decision, immediately placed in the hands of the clerk, with a view to the preparation of the formal decree to be entered on the minutes of the court, but such registry, it appears, has not been made, nor has the decree been notified to the claimants.

The district attorney, in behalf of the libellants, on the official report of the prize commissioners, accompanied by the sworn appraisements and statements of Cyrus Curtiss and E. B. Seaman, and the deposition of Walter S. Gove, who has had the custody of the vessel and the storage of the cargo a principal part of the time since their arrival as prize in this port, moves the court for an order for the immediate sale of the vessel and cargo as being both of them in a perishable and perishing condition. Mr. Edwards, on the part of the claimants in the suit, opposes the application, and reads the affidavits of Robert Mackie, Charles H. Marshall and Washington Durbrow, to prove that the vessel is not perishing, or in a perishable condition, and that the cargo is not perishing, or in a suffering condition, or liable to deterioration, in the situation in which it is now placed.

The testimony of the claimants' witnesses rests upon a more specific and distinct notice of the facts relating to the state and exposure of the property than is furnished by the affidavits filed on the part of the United States, and relieves the case from all apparent necessity for an immediate sale of the property, by an extraordinary interposition of the court, and without waiting the ordinary course of procedure in the cause. The libellants, holding a decree in the suit, in effect final, since its rendition, possessed the power to compel a sale of the prize at once, upon execution, and do not require the protection of any further order to guard their interests in the recovery. No legal reason is shown for seeking an additional interlocutory order, in place of using the final decree of the court for effectuating the same end within the same period of time. It is suggested by the district attorney, and in effect admitted by the counsel for the claimants, that an appeal will be taken in the suit, immediately on the entry of the final decree, which may lead to delaying final execution on the decree of this court. But the court will not intercept the free use to either party of all appropriate remedies provided by law, where no evidence is given that such election must be attended with palpable loss or damage to the other party, and that a restraint in that respect is necessary to the prosecution of rights involved in the subject of litigation. If property is shown to be in a state of absolute wastage, or in such predicament that the shortest delay in disposing of it would reasonably lead to imminent peril of its loss or large deterioration, the court will undoubtedly interpose the aid of a summary sale, to avoid the destruction of the property condemned; but, without the pressure of such urgency, the regular course of proceedings will be left to govern the remedy in prize suits, the same as in other civil causes in admiralty.

As I do not regard the preponderance of evidence filed in the cause as showing a reasonable necessity for an instant sale of the property, the application for a summary order to that end is denied, and the libellants are left to enforce the decree by regular writ of execution.

[NOTE. The claimants appealed to the circuit court, where the decree referred to herein was affirmed. See Case No. 2,657. The claimants then appealed to the supreme court, where the circuit court decree was affirmed. See The Cheshire v. U. S., 3 Wall. (70 U. S.) 231.]

[1] [Reported by Samuel Blatchford, Esq.]

Case No. 2,657.

The CHESHIRE.

[Blatchf. Pr. Cas. 643.][1]

Circuit Court, S. D. New York. July 17, 1863.[2]

PRIZE—ATTEMPT TO VIOLATE BLOCKADE.

1. Decree of the district court, condemning vessel and cargo for an attempt to violate the blockade, affirmed..

[1] [Reported by Samuel Blatchford, Esq.]

[2] [Affirming decree of the district court in Case No. 2,655. Decree of the circuit court affirmed by supreme court in The Cheshire v. U. S., 3 Wall. (70 U. S.) 231.]

2. Where the owner of a vessel and her master are aware of the existence of a blockade at the time the vessel sails on her voyage, and have no reason to believe that it has subsequently ceased, the vessel has no right to approach the blockaded port for the purpose of ascertaining whether the blockade is still in force.

[Cited in Stokeley v. Smith, Case No. 13,473.]
[See note at end of case.]

[Proceedings to condemn the ship Cheshire and cargo for an attempted violation of the blockade. The claimants appeal from a sentence of condemnation rendered in the district court. Case No. 2,655.]

NELSON, Circuit Justice. This vessel was captured off the port of Savannah, Georgia, on the 6th of December, 1861, by the steamer Augusta, one of the blockading vessels. She was on a voyage from Liverpool to Nassau, N. P., with directions, from the shipper of the cargo and agent of the owner of the vessel and cargo, to call at the port of Savannah and inquire if the blockade had been removed. The vessel sailed from Liverpool on the 10th of October, 1861, with a cargo of coffee, salt, tin, blankets, &c. She was owned by Joseph Battersby, and the cargo was owned by him and his brother William, both of them merchants of Manchester, England, and British subjects. The firm had an agency at Savannah, Georgia, where they had carried on business several years. The vessel had been purchased from a house at Savannah, the previous winter, by J. Battersby, and carried a cargo from Liverpool to Savannah and back, leaving the port of Savannah in May, 1861. It is quite apparent, from the testimony in the case, that all parties concerned in the present shipment were aware of the blockade of the port of Savannah at the time the vessel left Liverpool, October 10, 1861; and, unless the right existed to call at the blockaded port, and inquire there for the purpose of ascertaining if the blockade was still in force, the condemnation of the vessel and cargo is unavoidable.

I agree that, as no official notice of the blockade was given to England, the condemnation in this case must be upheld, if at all, on the footing of the violation of a blockade de facto, in which case the master may have been justified in making the inquiry at the port if the owners and master were ignorant of its existence at the time the vessel sailed from Liverpool. This principle is, I think, well settled. But the difficulty lies in the fact that all the parties concerned were fully advised of the existence of the blockade, and no ground or reason is furnished for a belief that it had ceased. If the master, under the facts and circumstances of this case, could be justified in making the inquiry, he would be in any imaginable case. I lay aside the testimony of the boy, Thornton, as unworthy of credit, and see no ground for the condemnation of the vessel or cargo as enemy's property. But, within the case of the Hiawatha, in the supreme court, the decree below is correct, on the ground of an attempt to violate the blockade of the port of Savannah. Decree below affirmed.

[NOTE. For denial of a motion for the sale of the vessel and cargo, see Case No. 2,656.

[From this decree the claimants appealed to the supreme court, where the decree of the circuit court was affirmed. Mr. Justice Field, who delivered the opinion, assigned as grounds for affirmance that the intention to break the blockade would be presumed from the position of the vessel when captured; that she knew of the blockade when she sailed from Liverpool, had no just reason to suppose it discontinued; and that consequently her approach to the mouth of the port for inquiry was itself a violation of the blockade, which subjected the vessel and cargo to seizure and condemnation. The Cheshire v. U. S., 3 Wall. (70 U. S.) 231.]

Case No. 2,658.

The CHESHIRE.

[2 Spr. 28.] [1]

District Court, D. Massachusetts. Jan., 1861.

LIABILITY OF VESSEL TO SHIPPER—STOWAGE.

A vessel is liable in rem for damage caused to goods of one shipper by those of another, although the goods are stowed in the usual way, if the injury is caused by the goods of the third party being in bad condition when put on board.

In admiralty. This was a suit to recover for leakage of about one thousand two hundred and ninety-six gallons of sperm-oil, out of three thousand three hundred and five gallons, contained in twenty casks of various sizes, and shipped by said bark from Boston to London, in July, 1858. The libel alleged, that, by the bill of lading, the casks were received in good order, &c., but, when delivered, were shrunk by heat, and the one thousand two hundred and ninety-six gallons had leaked out between the staves and at the chines of the casks, and, running down among the ballast, were in part pumped overboard, and the rest not worth the trouble of recovering. The answer left the libellants to prove the loss, but said that it was customary and proper stowage to put oil in casks with the other articles of the cargo in this manner; and that the agent of libellants saw the ship when partly loaded, knew the character of her cargo, and requested that the oil be sent, though a part of the oil-cake already stowed would have to be broken out, to let the oil go to the bottom of the ship. The following facts were proved:—The casks were properly placed over the ballast, directly under the main hatch. Cattle hoofs were filled in among, and spread upon, them to make an even surface; and there was unusual dunnage of staves, pine fire-wood, and Calcutta mats upon and around them. The rest of the low-

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

er hold was filled with oil-cake. The cargo between decks was oil-cake, pails, shoe-pegs, &c., and in the fore-hold a large quantity of cattle-hoofs. The cake was from all of the three linseed-oil mills in Boston and Chelsea. The master kept the fore and aft hatches open during the voyage, but made no effort to save the oil pumped up. The capacity of the ship was five hundred and forty-seven tons. The quantity of oil cake on board was nine thousand five hundred bags. The quantity of hoofs was twenty-four tons. The length of the passage, forty-seven days of pleasant weather.

Benjamin Dean, for libellants.
John C. Dodge, for claimants.

SPRAGUE, District Judge. There is no evidence that this loss was owing to any peril of the seas or any defect of the ship, and I do not think it is to be accounted for by the season of the year in which the passage was made. The warmth of the captain's cabin floor and the blistering of paint on the pails, with other testimony, point to heat as the cause of the loss, and this heat must have been from the cake or the hoofs. That such a loss cannot be said to be a common occurrence, is admitted by the defence made by claimant. There never could be a custom of stowing in any manner which would ordinarily result like this. There must have been some extraordinary cause of this phenomenon, and we have to rely on circumstantial evidence to ascertain what it was. The custom of stowing oil-cake near other cargo liable to be injured by heat shows that there is no principle of deterioration necessarily inherent in the cake. In its ordinary condition, the New York witnesses say it heats no more than grain. There must have been something unusual in the condition of this cake on the voyage. The only cause of the heat that any witness assigns is dampness; and this is strong circumstantial evidence that some of the cake was green when put on board, or that it was moistened afterwards. And a former agent of one of the mills has shown that a change has been made in the manufacture of the cake in that mill, by using less water than formerly. If a usage to store cargo in this way is to be made out, it is a Boston usage, and must depend upon the quality of the cake from all the mills that ship from Boston; and the fact that since 1858, changes have been made in the management of one of them, on account of actual damage to their cake on various voyages, is a presumption that the two other mills sent out a different article, for there is no proof that they experienced such losses. I cannot help thinking that the oil-cake from this mill may have been not in good condition when put on board.

There is some testimony that the hoofs stowed in the forepeak were wetted by showers before putting on board, and that steam issued from the fore hatch just over them, while the vessel was at the wharf loading. This is strengthened by the fact, that there was dampness in the cake from some source; and it may be, that the hoofs moistened the cake, and the cake then heated the hold and shrunk the casks. This seems to me to be the more probable solution of the cause of the loss. That position of the evidence seems to me to throw the burden of the loss on the carrier. If the shipper had assented to the mode of stowing his oil, it might preclude him from now objecting; but that assumes that the other articles of the cargo were in good condition, or at least that he assented to the stowing with those particular articles.

The shipper in this case only knew that the cargo was to be made up mostly of "oil-cake." He cannot be held to have assented to the stowing with this cake, or such as this, if this was unseasoned. It is not necessary to come to a conclusion whether this was customary stowage. If it were proved that it was customary, and that this cake was put on board no more than ordinarily wet, I am not sure how this case would be decided. The case of Baxter v. Leland [Case No. 1,124] is the strongest for the claimant; but the custom in that case is spoken of as one long established and well known. And a circumstance relied upon by both Betts, J., and Nelson, J., in that case, is the fact that the shipper knew of the usage, and made provision for it. And the loss was not as large in proportion as this. In Lamb v. Parkman [Id. 8,020] there was not such unusual damage as this. I should be surprised to find an established usage going the length of this case. Decree for the libellants.

See Gillespie v. Thompson, cited 6 El. & Bl. 477, note, 36 Eng. Law & Eq. 227; The Col. Ledyard. [Case No. 3,027]; Bearse v. Ropes [Id. 1,192].

Case No. 2,659.

CHESHIRE PROVIDENT INST. v. JOHNSTON.

Circuit Court, D. Minnesota. April 15, 1876.

ATTACHMENT BY ASSIGNEE OF DEBT FRAUDULENTLY CONTRACTED.

[1. A positive averment, in the words of the statute, that "the plaintiff's debt was fraudulently contracted," is sufficient, under Laws Minn. 1867, c. 66, § 1, authorizing an attachment in such a case.]

[2. The assignee of a debt fraudulently contracted is not entitled, under the act, to an attachment against the debtor, as fraud in the inception of a debt is personal to the contracting parties, and does not follow the assignment.]

[At law. Action by the Cheshire Provident Institution against George H. Johnston upon a promissory note, secured by mortgage, payable to George B. Sargent as agent of Austin Corbin, and assigned by him to Corbin, and by Corbin to plaintiff. The plaintiff procured an attachment upon the ground that the "plaintiff's debt was fraud-

ulently contracted." The fraud charged consisted of alleged false answers to written questions submitted to defendant pending the negotiations for the loan. Defendant moved to vacate the attachment.]

Morris Lamprey, for plaintiff.
Charles D. Kerr, for defendant.

NELSON, District Judge. The agent of the plaintiff made affidavit that "the plaintiff's debt was fraudulently contracted," an attachment was properly granted upon the positive averment of the existence of this fact. Laws [Minn.] 1867 [p. 110], c. 66, § 1. The motion to dissolve is made upon counter affidavits, which tend to disprove the statements made in the affidavit upon which the writ was allowed, and is met by further affidavits on the part of the plaintiff. The issue presented is the truth or falsity of the statement, that "the plaintiff's debt was fraudulently contracted." In my opinion the plaintiff cannot invoke this clause of the statute to aid him in collecting his indebtedness, unless he shows that the fraud was perpetrated by the defendant immediately upon him.

Although, as between the original parties to the contract, the defendant may have been guilty of a fraud towards the person with whom he contracted, this plaintiff cannot by reason of such fraud sustain this proceeding. He became owner of the debt by purchase, and it is only when fraud is perpetrated upon an assignee of the debt by his immediate assignor, and suit is brought against him, that the right to the writ as a provisional remedy is given. Any fraud in the inception of the debt does not follow the assignment, but is personal to the contracting parties. The present plaintiff could not in a suit instituted against the defendant, succeed in setting aside the original contract between Sargent as the agent of Corbin, the immediate assignor of the plaintiff, and the defendant, for fraud in its inception. This right of action could not be assigned by Corbin, as the fraud upon him was a personal wrong. If the plaintiff could have no such remedy, his debt is not tainted with the fraud contemplated by the clause in the statute under consideration. It was urged that the representations to Corbin of the condition of the property upon which the money was loaned influenced the plaintiff in his purchase, and as the defendant made these representations to be used by Corbin as his agent to negotiate the loan, the plaintiff was privy to any action resulting from their falsity. If the facts divulged showed that the plaintiff advanced the money directly to the defendant in a negotiation with Corbin as his agent, then the fraud, if it existed, would have been perpetrated immediately upon the plaintiff, but such is not the case as presented. Motion granted.

CHESNEY (WALLIS v.). See Case No. 17,110.

CHESNUT (VANHORN v.). See Case No. 16,856.

Case No. 2,660.

CHESTER et al. v. BENNER.

[2 Lowell, 76.] [1]

District Court, D. Massachusetts. Nov. 1871.

SEAMEN — LIABILITY FOR CHARGES FOR IMPRISONMENT IN FOREIGN JAIL — CONSTRUCTION OF SHIPPING ARTICLES.

1. Where seamen were imprisoned in a foreign jail by order of the American consul at that port, and there was no evidence of bad faith on the part of the master,—*Held*, this court, in a case not large enough to be appealed, is bound to follow the decision in Jordan v. Williams [Case No. 7,528], though doubting its correctness; and that the doctrine of that case, fairly carried out, requires the men to pay the necessary charges of the imprisonment, and the expense of hiring substitutes.

[Cited in Coffin v. Weld, Case No. 2,953.]

2. But the consul's own charges, as judge, are to be paid by the ship. Reasons for this rule.

3. A clause in the shipping articles by which the crew agree to pay charges of imprisonment does not bind them to pay the fees of the consul acting as judge.

In admiralty. This libel was for wages of six seamen, earned on a voyage of two months and twenty days, from Boston to Paramaribo, in Surinam, and back to Boston, in the bark Tidal Wave. The only dispute was, whether seventeen dollars and sixty-seven cents which had been retained from the pay of each man was rightly deducted. The answer alleged that, at Paramaribo, the libelants [Charles Chester and others] "became intoxicated and drunk, incapable of doing duty, and disobedient, insubordinate, and mutinous," &c.; that the master called in the consul, who ordered and caused the libelants to be detained in custody upon due legal proceedings, and that they were so detained for four days; that the master hired other persons to do the libelants' duty, at a cost in all of eighteen dollars in gold; three dollars for each man; and that the costs and expenses of the arrest, custody, board, and release of the libelants were ten dollars and sixty cents in gold for each of them; all which was paid. The certificates of the consul were received as evidence, by consent, and the only witness examined to the occurrences abroad was the master, who swore that the men, or some of them, were intoxicated one morning while in port, and all refused duty under pretense that the food was bad; that the consul came on board and examined the food, and pronounced it good, and gave the men five minutes to

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

return to duty, which they refused to do; and they were sent to jail until the ship was ready to sail, when they were returned on board, and performed the rest of the voyage; that before and after this time their conduct was irreproachable.

C. G. Thomas, for libelants.
J. B. Richardson, for respondent.

LOWELL, District Judge. This case, though small in the amount of money involved, is important to masters and crews generally. The imprisonment of our seamen in foreign jails has always been looked upon by courts of admiralty with disfavor, from the suffering and hardship which often accompany it; and there are many decisions which require the master to make use of this mode of restraint or punishment only in cases of necessity, where the great powers which the law gives him on board his own ship are inadequate to the emergency. It was also uniformly held that the consul had only an advisory power, and the master was responsible if the imprisonment was unjustifiable. Thus Hopkinson, J., in Johnson v. The Coriolanus [Case No. 7,380]: "I have repeatedly expressed my disapprobation of putting our seamen into foreign jails and dungeons, at the mercy of the local police-officers, for offenses by no means requiring such severity. For ordinary misconduct or insubordination, the power of the master on board his vessel is amply sufficient for all the purposes of discipline and subordination, and it is only in cases of extraordinary violence, where the safety of the vessel or of those on board requires that the offender should not be suffered to remain there, that he should be taken and imprisoned on shore. . . . And here I would again correct an error into which captains are continually falling. They seem to believe that, if they can get the consent or co-operation of the consul to their proceedings, it will be a full justification for them when they come home. . . . In all my experience I have never known a consul refuse the application of a captain to imprison a seaman," &c. In that case, on appeal, Mr. Justice Baldwin not only affirmed the decision, but said that if the case had come before him in the first instance he should have given damages for the imprisonment, as well as full wages. See note at the end of the report. The decisions, which, up to the year 1840, are entirely uniform, are collected in 2 Pars. Shipp. & Adm. 91, note 5. In 1840, congress passed an important act regulating the shipment and discharge of seamen, and the duties of consuls, of which the eleventh section requires those officers "to reclaim deserters and discountenance insubordination by every means within their power; and where the local authorities can be usefully employed for that purpose, to lend their aid and use their exertions to that end in the most effectual manner." 5 Stat. 395. This statute has been construed in the circuit court for this circuit to give consuls jurisdiction over the imprisonment of our seamen in foreign jails, and, in such case, to relieve the master from responsibility in the matter, if he has acted in good faith. Jordan v. Williams [supra]. That case virtually decides, that, in suits between the crew and the master or owners, such an imprisonment by order of a consul must be presumed to have been necessary; and, it seems to follow and is intimated by the court, that the necessary charges resulting from that course must fall upon the seamen, as between them and the owners, though they have a right of redress against the consul. In a case like this, in which no single sum in dispute is large enough to admit of an appeal, I must follow that decision of the circuit court, though I venture to think its reasoning unsound. Still, it remains my duty to inquire carefully into the nature and propriety of the charges, and whether they all fall strictly within the rule.

The sum deducted from each man's pay was seventeen dollars and sixty-seven cents in currency, equal to three weeks' pay of each able seaman, and more than six weeks' pay of the boy. At the rate at which the settlement was made, this sum is the equivalent of fifteen dollars and a half in gold; and, as I read the evidence, eighty cents of this, and no more, is the cost of subsistence for each man on shore, three dollars the cost of a substitute, and the rest is made up of fees of one kind and another, and largely those of the consul, who was the judge in the case. The evidence does not account for quite all the charges; but it is admitted that seven dollars in gold was charged against each man by the consul, and I think it may be not unfairly inferred that some of the items not accounted for were for his various certificates. At any rate, he charged in gold against each man two dollars for ordering the arrest, two dollars for ordering the imprisonment, two dollars for ordering the release, and one dollar for certifying. To the other reasons which admiralty courts have given for discountenancing this method of dealing with seamen, this case requires me to add the great and disproportionate expense which it entails. I am of opinion that it will be neither just nor prudent to oblige the crew to pay for a decision against them. If the ship pays the judge, the master will be interested to see to the charges; while, if the crew pay him, both the master and the consul will be interested in favor of a decision to imprison, because both will then recover costs. It is impossible that the crew should scrutinize the consular accounts, or even know of them until they are paid; and their right of action against the consul is, of course, of no value. In this instance, I doubt if any of these expenses would have been incurred if the ship had been known to be responsible for them.

While, therefore, I agree that in theory the owners should lose nothing, so long as the construction of the law remains as it is, yet practical justice requires, as a guarantee of good faith and a check on hasty action, and as the only possible means of keeping the fees within due bounds, that the consul's fees should be paid by the ship. There will be a trifling compensation in the subsistence which the ship will escape during the absence of the men.

The shipping articles contain this clause: "And whereas it frequently happens that the owner or captain incurs expenses while in a foreign port, relative to the imprisonment of one or more of his officers or crew, or in the attendance of nurses, or in the payment of the board on shore, for the benefit of such person or persons: now it is understood and agreed by the parties hereunto, that all such expenditures as may be incurred by reason of the foregoing premises shall be charged to and deducted out of the wages of any officer, or such one of the crew, by whose means or for whose benefit the same shall have been paid." Assuming, for the purposes of this case, that the stipulation is valid, it means only that the lawful and reasonable expenses of a necessary imprisonment shall be paid by the crew; and, if the action of the consul is to be conclusive of the necessity for imprisonment, his own fees do not appear to me to be a part of those reasonable expenses, for the reasons I have already given. The men, too, have all signed receipts in full; but it is testified by the respondent's witness that some of them protested against the amount of deductions: and courts of admiralty, when the facts are clear, and show that a smaller sum has been paid instead of a greater one due, never regard a receipt in full; though it is often of much significance in contradicting a case made up by an afterthought, or in cases of doubt or compromise.

Upon the whole, I think I ought to allow the respondents to deduct all excepting the consul's fees. I shall so examine the other charges with care, and require them to be well substantiated; but there seems nothing to impeach them here. It is admitted that the consul's charge against each man was seven dollars, and there is one dollar and ninety cents against each not accounted for. The burden of proof on the owners to establish their deductions may, perhaps, be fairly met by the receipts of the men; so that I ought not to charge this unexplained balance against the owners, unless it was probably a part of the official charges. There is some reason to believe that the consul did make further charges for his various certificates; and this may be inferred to be the origin of a part of the balance. I shall divide this between the parties. The crew, then, are to recover seven dollars and ninety cents each in gold, which is nine dollars in currency. Decree accordingly.

Case No. 2,661.

CHESTER et al. v. CURTIS.

[1 Blatchf. 499.][1]

Circuit Court, S. D. New York. Oct. Term, 1849.

CUSTOMS DUTIES—"CARPET BINDINGS."

1. Under subdivision 2 of section 2 of the tariff act of July 14, 1832 (4 Stat. 584), worsted carpet bindings are not chargeable with a duty of 25 per cent. The clause in that subdivision, relating to bindings, refers exclusively to articles of that description when composed wholly or in part of wool.

2. Whether an action to recover back duties paid under protest after the act of March 3, 1839 (5 Stat. 348), and before the act of February 26, 1845 (5 Stat. 727), can be maintained against a collector, is not decided in this case. An objection on that ground was raised on a motion for a new trial, but was not taken at the trial; if it had been taken, evidence might have been given to obviate it.

At law. This was an action commenced in 1847, to recover back duties paid under protest, in 1841, to the defendant [Edward Curtis], as collector of the port of New York, on worsted carpet bindings. A duty of twenty-five per cent. was charged on them, as falling under subdivision 2 of section 2 of the act of July 14, 1832 (4 Stat. 584), which imposed a duty of twenty-five per cent. on "mits, gloves, bindings, blankets, hosiery, and carpets and carpeting." It was admitted that, unless the articles were properly chargeable with the duty imposed, they were entitled to come in free of duty, under the third section of the act. At the trial, before Mr. Justice Nelson, in November, 1848, he charged the jury that the articles were entitled to entry free of duty, and a verdict was found for the plaintiffs. The defendant now moved for a new trial, on a case.

Benjamin F. Butler, for defendant, besides arguing the question of the construction of the statute, contended that the action could in no event be maintained, the defendant having been required, by section 2 of the act of March 3, 1839 (5 Stat. 348), to pay the duties into the treasury, although they were paid under protest; and that the act of February 26, 1845 (5 Stat. 727), repealing the act of 1839, could not operate retrospectively to subject the defendant to an action to which he was not liable when the duties were received.

Daniel Lord, for plaintiffs [William W. Chester and others]. 1. The objection to the recovery, founded on the act of 1839, was not raised at the trial. 2. The act of 1845 restores the action of assumpsit, if it was taken away by the act of 1839. 3. The act of 1845 restores merely a remedy, not a right of action.

NELSON, Circuit Justice. It is insisted on the part of the plaintiffs, that the term

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

"bindings," in the connection in which it is used in the clause of the act of 1832 which is in question is to be limited to the article when composed wholly or in part of wool, and does not include it when composed wholly of worsted; and the case of Bend v. Hoyt, 13 Pet. [38 U. S.] 263, is referred to as a decision to that effect. The article in question there was silk hose, and the duty was imposed upon it, under the impression that the articles enumerated in the clause embraced all articles of the kind, of whatever materials composed, and that silk hose, therefore, fell within the term "hosiery" there enumerated. But it was held, that the clause applied to articles of the description enumerated, composed wholly or in part of wool, and, therefore, did not embrace the articles of hosiery if composed of silk. The argument is somewhat stronger in favor of such a construction in respect to the article of silk hose, on account of other provisions in the act, than it is in regard to the article in question here. But, as I understand the decision, the court intended to hold and did hold, that the clause related exclusively to articles of the description specified, composed wholly or in part of wool. That decision covers and disposes of the question in this case.

The objection that the suit cannot be maintained against the defendant since the act of 1839, and the decision under it in Cary v. Curtis, 3 How. [44 U. S.] 236, notwithstanding the repeal of that act by the act of 1845, does not arise, as the point was not taken at the trial. If it had been, evidence might have been given to obviate it.

New trial denied.

CHESTER (RIGGS v.). See Case No. 11,823.

Case No. 2,662.

CHESTER et al. v. WELLFORD et al.

[2 Flip. 347.][1]

Circuit Court, W. D. Tennessee. Feb. 22, 1879.

REMOVAL—PRO CONFESSO NO BAR — INDISPENSABLE PARTY —TRUSTEE NOT SUCH — REMOVAL OF CAUSES—CASE IN JUDGMENT.

1. A pro confesso, taken by complainant at return term, does not operate to prevent the removal of a cause, under the act of 1875 [18 Stat. 470], into the federal court.

2. The jurisdiction of the court cannot be defeated because the plaintiff cannot obtain full relief by the suit brought as to all parties against whom relief may be needed, but only when it cannot be had against a non-resident defendant without the presence of some resident defendant, whose presence is indispensable.

3. Where a citizen of Tennessee filed a bill in equity against an insurance company chartered by Missouri to cancel certain policies of insurance, loan and interest notes for an account of premiums and dividends and to enjoin a sale of his land under a deed of trust given to secure the loans, and the trustee was a citizen of the same state with the complainant: *held*, that the cause was removable as a controversy wholly between citizens of different states, and that the trustee was not an indispensable party.

[Distinguished in Chester v. Chester, 7 Fed. 3.]

Motion to remand.

J. B. & F. H. Heiskell, for plaintiff.

Wright & Folkes, for defendants.

HAMMOND, District Judge. This bill in equity was filed in the chancery court of Madison county, November 29, 1877, process and publication being returnable to January 7, 1878, the first day of the next succeeding term. On the fourth day of the term, no answer being filed, a pro confesso was taken by the plaintiff before the clerk and master, and the cause set for hearing by him, ex parte under the provisions of the Code of Tennessee (section 4370), which enacts that in such a case "the cause may be set for hearing at the return term of the process."

Subsequently, and on January 14, 1878, at the same term, the court by consent of parties set the pro confesso aside, and the defendants answered separately. The Life Association of America, the non-resident defendant, filed its petition and bond for the removal of the cause into this court, on June 28, 1878, prior to the next succeeding or July term of the court. The first ground of the motion to remand is that the petition to remove was filed too late. The act of congress of March 3, 1875 (18 Stat. 470), requires that the petition for removal shall be filed "before or at the term at which said cause could be first tried and before the trial thereof." It is argued that this was the January term, 1878, because the cause having stood for hearing on the pro confesso at that term it was the one at which it could have been first tried, and that the subsequent action of the court setting aside the pro confesso has not changed this attitude of the case.

It will be observed that this order pro confesso was taken on the very first day on which the defendants were in default for want of an appearance, namely, the fourth day of the term at which the process was returnable. Code, § 4350. If by taking this advantage the plaintiffs be allowed to defeat a removal of the cause into this court, it comes to this, that the defendant must file his petition for removal, or otherwise make his appearance, on or before the first moment of the first day on which he would be in default for want of such appearance, or it is within the power of the plaintiff to altogether defeat the right secured to him by this act of congress, and this although the court may subsequently, on good cause shown, set aside the pro confesso and permit him to make his defense. Id. § 4375. And so the right of the plain-

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

tiff to a removal may be defeated by the defendants taking some such advantage of his first default. In practice this would furnish a very effectual means of circumventing the act of congress solely by the prompt action of the adverse party in taking advantage of defaults; and that too for no other purpose than that of defeating this right of removal; because, for all other purposes the default could be avoided, while for this only it would become irrevocable, as the jurisdiction of this court is entirely gone if once defeated by such means. And thus, no matter how good may be the excuse for suffering a default, while sufficient to justify the court in requiring that no advantage shall be taken of it for any other purpose, it becomes ineffectual to avoid the absolute forfeiture of the right of removal. It seems to me that it was not intended, by the phraseology used in the act, and relied upon here, to place the right of removal so completely at the mercy of the adverse party. The right would be of little value if it could be so readily defeated by an adversary on the alert to prevent its exercise. See Hunter v. Royal Canadian Ins. Co. [Case No. 6,909].

I think the right of either party to remove a cause into this court under the act of 1875, is not within the control of the other party by any proceeding he can take prior to a final disposition of the cause. If a party seeking a removal has been guilty of such laches as entitles his adversary to a final judgment in the state court before the petition for removal has been filed, it may be that he cannot file the petition till after he has by proper proceedings reinstated his right to appear and defend, but whenever he has that right and issues are made up for adjudication by the court, he may remove those issues into the federal court, by filing a petition and bond for that purpose at the first term of the state court at which the suit is triable by the practice of the court, and before the trial thereof. Taking a decree pro confesso is in no sense a trial of the cause, as the taking of a judgment by default was held to be in construing this act of congress in the case of McCallon v. Waterman [Id. 8,675]; for, by the very sections of the Code relied on here, notwithstanding the case was set for hearing at the return term it remained to be tried, and until final decree the court had full power to reinstate the defendant to all his rights of defense. Code, §§ 4370–4375. And, after the pro confesso was set aside, the cause stood as if it had never been taken, and the first trial term was that which first came after answer filed and the expiration of the six months allowed the parties to take their proof; certainly not earlier in any event than the next succeeding term after the filing of the answer. Id. §§ 4375, 4401, 4432; Chancery Rules, No. 2, § 4. I think after a very careful consideration of the cases cited by the learned counsel for the plaintiffs, there is no conflict between those rulings and that I make here; but it would extend this judgment beyond proper limits to enter into any elaborate analysis of the facts upon which those adjudications rest. See Ames v. Colorado, C. R. R. [Case No. 325]; Scott v. Clinton S. R. Co. [Id. 12,527]; McCallon v. Waterman [supra].

The second ground for the motion depends upon the allegations of the bill and the nature of the controversy. The bill sets out that the plaintiffs insured their lives in the defendants' company by paid up policies for ten thousand dollars each. That in payment of the premiums, which amounted to $10,582.60, and for the further consideration of a loan by the company to them of $7,500, they executed their note for $18,082.30, due in five years, and likewise semi-annual notes for the interest at 10 per cent. To secure these notes they executed a deed of trust to the resident defendant, Wellford, as trustee, authorizing him in default of payment and at the request of the company to sell the lands conveyed and pay the notes. And because of the allegations of fraud contained in the bill the plaintiffs seek a rescission of the contract and to recover back the money paid to the company; or else for an account with the company to adjust an alleged equity to have certain credits which are claimed applied to the full satisfaction of the notes which are alleged to have been fully paid.

The bill asks no relief against Wellford, who resides in this state, except to enjoin him along with the defendant company from selling the land under the trust deed. The plaintiffs insist that they cannot get along against the insurance company without the presence in the suit of Wellford, the trustee; that this is, therefore, not a controversy which is wholly between citizens of different states that can be fully determined between them in this court; and that for that reason it is not within the acts of congress either of 1866 [14 Stat. 306] or 1875 [18 Stat. 470]. While the trustee is no doubt a proper party to the bill, I think he is not an indispensable party to the relief here prayed against the non-resident defendant. His presence is not in any way essential to a decree cancelling the notes, nor to a decree for an account with the insurance company, and all these matters can be adjudicated without him. Nor is it necessary to have him here in order that the insurance company may be perpetually enjoined from ever settling up or claiming any benefits under the trust deed and from seeking in any way to enforce it by a request for a sale or otherwise: and by such a decree, it seems to me very clear, that the controversy between the plaintiffs and the insurance company can be fully determined as between them, without having the trustee here. It is said he has

the legal title to the land and that it is necessary to have him here to divest himself of it in order that the plaintiffs may have full relief. I do not understand that the jurisdiction of this court can be defeated because the plaintiffs cannot get full relief by the suit here as to all parties against whom they may need relief; but only when they cannot get full relief as against the nonresident defendant without the presence in court of some resident defendant whose presence is indispensable. If the contract of the plaintiffs with the insurance company is rescinded and the notes secured are cancelled, or if on a proper accounting they are decreed to have been satisfied, there is but little if any need of having Wellford here to divest title. After such a decree if his title were not divested ipso facto, it would be the most naked and harmless of titles. It would probably under our law divest ipso facto by such a decree, or rather to be entirely accurate, the existence of the facts which entitle the plaintiffs to a decree cancelling the notes have already divested the trustee of his title. Technically it could only revert by a reconveyance of the trustee or by a decree upon foreclosure. But it has been held, and is well settled, that it cannot be set up against the mortgagor after the debts secured by it are paid by him, even at law. Carter v. Taylor, 3 Head. 30; Peltz v. Clarke, 5 Pet. [30 U. S.] 481; Breckinridge v. Ormsby, 1 J. J. Marsh. 237, 257; Williams v. Neil, 4 Heisk. 279, 283.

The draughtsman of this bill did not, it seems, think the divestiture of the trustees title necessary, for it contains no prayer to that effect. The injunction sought against him is only incidental, the injunction against the beneficiaries being equally effective. But I do not put my judgment on this ground alone. Even if the injunction against the trustee is necessary—and to divest him of title is necessary to complete plaintiffs' relief; and moreover if plaintiffs have to bring another suit to accomplish it I hold that the jurisdiction of this court will not be refused to avoid a multiplicity of suits. The only inquiry here is not, whether Wellford is a proper party, or one necessary to plaintiffs' full relief, but whether he is an indispensable party to the bill in order to afford the plaintiffs the relief they ask as against the nonresident defendant. The case of Gardiner v. Brown, 21 Wall. [88 U. S.] 36, is not in point. There the relief sought was a foreclosure of the mortgage and the presence of the trustee was indispensable to afford that relief. Not so when the case is reversed and the object is to rescind the contract or cancel the notes because they have been paid. In such a case the trustee is at most only a proper party. Such nominal parties cannot oust the federal courts of jurisdiction. Wood v. Davis, 18 How. [59 U. S.] 468.

It is not necessary for me to determine now whether the trustee has been brought here by this removal. He has not joined in the petition, and is not here asking to have that question determined. It will be time enough at the final hearing, if any relief is asked as to him, to determine whether it can be granted. As to the controversy between him and the plaintiffs he is either enjoined in the state court or here, and that is all the plaintiffs have asked as to him. If he should appear here and move to dissolve the injunction, the plaintiffs can then take the objection that the court has no jurisdiction as to him. If he should move a dissolution in the state court, that court will determine whether it has jurisdiction as to him. Not having joined in the petition and bond for removal, the question whether he has been brought along by the removal made by his codefendants cannot arise on the motion to remand made upon the filing of their petition. Not until he takes some step assuming a jurisdiction over him, or the plaintiffs some step, asserting it, will the question properly arise. Until then, at least, I shall not be tempted to "assume the truth of the maxim that it is the duty of a good judge to enlarge his jurisdiction," as it has been said the federal judges generally do, by a learned state judge, who, somewhat loath, perhaps, to part with his own, has in a very able opinion, cited in argument here, denied, in such a case, any jurisdiction in this court over a controversy between residents of the same state. See Smith v. St. Louis Mut. Life Ins. Co., 2 Tenn. Ch. 656, 665. Mr. Justice Miller, in Taylor v. Rockefeller [Case No. 13,802], has intimated a contrary opinion, but I need not now decide the point.

I cordially assent to what has recently been said by the supreme court of Alabama as to the considerations which should actuate the courts in the determination of these questions: Per Manning, J.—"The acts of congress for the removal of causes from the courts of the states to those of the United States, require on the part of the judges of either government, who may have to consider and act under them, candor and good temper. Jealousy of jurisdiction, when too susceptible of alarm and resentment, is apt to hurry those under its influence into error. The institutions of both governments are established for the good of all; and it is the right of all to have them preserved and upheld in the performance of their respective proper functions. When, therefore, cases arise in which the question to be decided is, whether the cognizance of them belongs to the state courts or the federal courts, it is the dictate of patriotism, as well as of law, that jurisdiction shall be cheerfully declined by those to which it does not pertain, and exercised without offensive arbitrariness by those entitled to exercise it. According to the supreme court of the United States, through the late Chief Justice Chase: 'It may be not unreasonably said, that the preservation of the states and the maintenance of their governments are as much within

the design and care of the constitution, as the preservation of the Union and the maintenance of the national government.' Texas v. White, 7 Wall. [74 U. S.] 700." Ex parte Grimball [61 Ala. 587]. The motion to remand is denied.

On the point that after order pro confesso it is not too late for petition for removal, read Hunter v. Royal Canadian Ins. Co. [Case No. 6,909.]

CHESTS OF.

[Note. Cases cited under this title will be found arranged in alphabetical order under the quantity or number of chests; e. g. "Chests of Tea. See Six Hundred and Fifty-One Chests of Tea."]

CHETWOOD (FRANK v.). See Case No. 5,051.

CHEVALLIE (GALLEGO v.). See Case No. 5,200.

CHEVES, The LANGDON. See Cases Nos. 8,063 and 8,064.

Case No. 2,663.

CHEW v. BAKER.

[4 Cranch, C. C. 696.][1]

Circuit Court, District of Columbia. March Term, 1836.

PLEADING—LIMITATION OF ACTIONS—ACCRUAL OF CAUSE OF ACTION.

1. If there be two counts in a declaration, and the statute of limitations be pleaded to both, it is not necessary that it should be supported as to both; but it may be supported as to both or either.

2. An account in bar, which consists of debits only, against the plaintiff, does not take the plaintiff's cause of action out of the statute of limitations, although the last item of debit be within the three years.

3. If a sub-contractor agreed with the original contractor to do a certain part of the work, and to receive his pay at the time the contractor receives his pay, and in like proportions, and the contractor is to receive four-fifths of every monthly estimate at the end of each month, and the remaining one-fifth when the work shall be completed and the final estimate made, the sub-contractor's cause of action against the contractor does not accrue until the plaintiff has notice that the money has been received by the defendant, or has demanded it of the defendant.

4. The moneys thus received monthly by the contractor are to be considered as received by him on account; and, if the final settlement of the account is made within the three years, the statute of limitations is no bar to the sub-contractor's action against the contractor, although the moneys so received by him on account should have been received by him more than three years before action brought.

At law. Assumpsit [by Samuel Chew against the administrators of J. W. Baker]. First count for work and labor. Second count for money had and received. Pleas, non assumpsit, and the statute of limitations. The defendant also filed an account in bar, consisting of sundry items of payments made to the plaintiff by the defendant. This suit was commenced on the 13th of November, 1834.

R. S. Coxe, for the plaintiff, contended that, as the statute of limitations was pleaded generally, it must be good as to both counts, or it was not good as to either. Webb v. Martin, 1 Lev. 48.

But THE COURT (nem. con.) was of opinion that it is not necessary that the plea of limitations should be supported as to both counts, but that it might be supported as to both or either.

Mr. Marbury, for the plaintiff, then contended that, as the last item of the count in bar was a payment made by the defendant to the plaintiff within the three years, it is an acknowledgment of a subsisting debt, and a promise to pay the balance. Catling v. Skoulding, 6 Term R. 189; 2 Saund. 127, note; Whetmore v. Smith, 6 Wheeler, Abr. Am. Com. Law, 472.

THE COURT (nem. con.) said that the account in bar, as it is called, (being only a statement of debits against the plaintiff,) did not take the case out of the statute, although the last item was within the three years.

Mr. Key, for the defendant, then contended that the plaintiff's cause of action accrued monthly, as the payments were to be made monthly; as the defendant received money from the Chesapeake and Ohio Canal Company, upon the monthly estimates of his work by the engineer; and three years had expired after the monthly estimates, and after the defendant had received the money, before the suit was brought. And he prayed the court to instruct the jury that if they believe from the evidence that prior to the 10th of August, 1831, all the money due for the work on section B, (which was the work for which this action was brought,) had been received by the defendant's intestate, except the balance appearing on the final estimate, then the plaintiff is barred of all his claim, except such proportion of the said balance as the work done by the plaintiff bears to the whole amount of work stated in the said estimate.

Which instruction THE COURT (nem. con.) refused to give; CRANCH, Chief Judge, and MORSELL, Circuit Judge, being of opinion, that as, by the agreement, Baker was to receive the money for the plaintiff, the statute of limitations did not begin to run against him until he had notice of the receipt of the money, or had demanded it.

THE COURT, at the prayer of the plaintiff's counsel, instructed the jury, in effect, that if the final settlement between the defendant's intestate and the canal company was not made before the 28th of January, 1832, the plaintiff's cause of action for his share of the one-fifth retained did not accrue before that day; and that the payments made from time to time by the company to

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

the defendant's intestate were to be considered as payments made on account; and that if the final settlement was made on the 28th of January, 1832, and not before, and that the amount was paid on that day, the plea of limitations is no bar to the plaintiff's action, which was commenced on the 13th of November, 1834.

Verdict for plaintiff, $2,404.81, with interest from the 28th of January, 1832.

CHEW (DECATUR v.). See Case No. 3,721.

CHEW (GEORGETOWN v.). See Case No. 5,345.

C. H. FROST, The (ROOSEVELT v.). See Case No. 12,033.

CHICAGO (BRADY v.). See Case No. 1,796.

CHICAGO (CLARK v.). See Case No. 2,817.

CHICAGO (COLLINS v.). See Case No. 3,011.

Case No. 2,664.

CHICAGO v. GAGE.

[6 Biss. 467; 1 N. Y. Wkly. Dig. 331; 9 West. Jur. 721; 8 Chi. Leg. News, 49; 21 Int. Rev. Rec. 374.] [1]

Circuit Court, N. D. Illinois. Oct., 1875.[2]

REMOVAL FROM STATE COURTS.

Where the real controversy is between a city and one of its citizens, a citizen of another state, claiming to be interested in the subject matter of the litigation, has not the right to remove the suit from the state into the federal court.

[Cited in Carraher v. Brennan, Case No. 2,441; Donohoe v. Mariposa L. & M. Co., Id. 3,989; First Presbyterian Soc., etc., v. Goodrich Trans. Co., 7 Fed. 261.]

In equity.

T. Lyle Dickey and Chas. H. Morse, Corp. Counsel, for complainant.

M. W. Fuller, for Wm. T. Ayres, intervening claimant.

BLODGETT, District Judge. This case was originally commenced in the superior court of Cook county, and removed to this court on the application of the defendant, Ayres. A motion is now made on behalf of the complainant to remand the case to the superior court, because of facts appearing upon the face of the record.

The record shows that, on the 27th day of December, 1873, David A. Gage and his wife, of the city of Chicago, executed and delivered to George Taylor, also of said city, a deed conveying to said Taylor, in trust, certain property for the purpose of securing the city against loss of any indebtedness which might exist from Gage to the city, as late treasurer thereof, and for other purposes therein expressed. Said deed did not state what the amount of said indebtedness was, but declared that said conveyance was not to be, in any sense, a satisfaction of any part of said indebtedness. It included and conveyed to Taylor a large amount of real property situated in Chicago, and its suburbs, some portions of which were improved and yielding income. It empowered the trustee, during the period of eight months from the date of the deed, to enter immediately into the possession of said property, control and manage the same, receive and collect the rents, income and profits thereof, and out of the same pay the taxes, assessments and insurance; to sell and convey, under the direction and with the concurrence of the comptroller of the city, all or any part of said property, and out of the net proceeds of the said sales, rents, income and profits, to pay over to the city, from time to time, to apply on the indebtedness of Gage to the city, such sums as might be available for that purpose. At the expiration of eight months the comptroller was authorized to require the peremptory sale of so much of said property as should then remain unsold, for cash, and the said Taylor, as trustee, was required to comply with said request and apply the net proceeds of the sales so made to the satisfaction of the unpaid remainder of said indebtedness. Taylor accepted the trust, entered upon the possession, control and management of the property, and made some sales thereof, and partial payments to the city within the eight months allowed for that purpose.

After the expiration of said eight months, a large portion of the indebtedness, claimed by the city, against Gage, as its late treasurer, still remaining unpaid, the comptroller ordered the trustee to sell the rest of the property on hand, for cash. Said trustee refused to comply with the order of the comptroller, alleging as the ground of said refusal, that said deed did not state the amount of said indebtedness; that he did not know the amount of it himself, and that he was unwilling to sell and pay over the proceeds of such sale to the city until a competent court had first found and decreed the balance due from Gage to the city. Thereupon the city filed the bill in this case, in the superior court of Cook county, setting out the said trust deed, and alleging that at the time of the making thereof Gage was indebted to the city, as treasurer, for a balance of five hundred and seven thousand, seven hundred and three dollars and fifty-eight cents, for the security of which it was claimed that Taylor held the property so conveyed to him by said trust deed; and prayed that the court would take an account and ascertain the amount due, and give a decree in favor of the city for the same, and order the said trustee to proceed and sell the trust property remaining unsold, and apply the proceeds of

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 1 N. Y. Wkly. Dig. 331, contains only a partial report.]

[2] [Affirmed in Ayers v. Chicago, 101 U. S. 184.]

such sale to the satisfaction of the amount so found due. Gage and wife, and Taylor, were the only defendants to this bill.

Gage answered the bill, denying that he owed the city anything. Taylor also answered, stating his belief that the amount due from Gage to the city was that stated in the bill, but alleging that he did not know what was the real amount of said indebtedness, and prayed that the court would find and decree the amount of said indebtedness, and order the sale, and declare the amount to be paid by him out of the proceeds.

In February last, William T. Ayres, a citizen of Alabama, acting as executor for Charles P. Gage, deceased, late of said state of Alabama, recovered a judgment in this court against said David A. Gage for three thousand and six dollars and ninety-two cents. Execution was issued on said judgment, and returned "no property." Thereupon Ayres applied to the superior court to be made a party-defendant to the bill in this case, which application having been granted, he answered the bill, and also, by leave of court, filed a cross-bill, in both of which he alleged in substance the recovery in this court of said judgment against Gage, the issue of his execution and return, and charged that said judgment was an equitable and prior lien upon the property so held in trust by said Taylor; alleging that no indebtedness, in fact, existed from Gage to the city; that by the action of the common council of the city, Gage had been permitted to loan the funds of the city, and to pay certain interest arising therefrom to the city; that by reason of certain advances which had been made from certain of the general funds to certain specific funds by Gage while acting as city treasurer, certain equitable considerations had arisen which ought to defeat and did defeat any claim at law or in equity in favor of the city against Gage, praying it might be found and decreed that no indebtedness existed from Gage to the city, and that the property conveyed by Gage to Taylor, the trustee, be legally and equitably subjected to the lien of his judgment, as against the city, and asking the court to decree a satisfaction thereof out of the same.

After having filed his said answer and cross-bill, Ayres filed his petition in the superior court, setting up that he was a citizen of the state of Alabama; that there was a controversy in said suit between himself and said Gage and the city, who were citizens of the state of Illinois and of this district, and asking that said cause be removed from said superior court to this court for trial. The superior court entertained said petition and ordered the removal of said cause to this court; and the question is: Does there enough appear on the face of the record to justify this court in holding jurisdiction of the case?

The fifth section of the act of March 3, 1875 (18 Stat. 470, 472), provides, "that if, in any suit commenced in a circuit court, or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no farther therein, but shall dismiss the suit, or remand it to the court from which it was removed, as justice may require."

The first question which suggests itself to my mind in discussing this motion, is, between whom is the controversy in this case? The original suit was brought by the city of Chicago to determine the amount of indebtedness due to it from Gage, and to require the payment of that indebtedness out of the property held in trust by Taylor, for that purpose. In his answer, in that case, Gage denied any indebtedness between himself and the city. I think it unnecessary for the purposes of this inquiry to investigate the grounds upon which Gage based that denial; it is sufficient for this motion, to say that by the bill, answer and replication in the case, as it stood at the time Ayres made himself a voluntary party thereto, the controversy in the case was between the city and Gage as to whether there was, in fact, an indebtedness, and the amount thereof, if any, from Gage to the city. The defendant, Ayres, does not raise any new controversy by his answer and cross-bill, but simply makes himself a party to that which already existed, alleging, perhaps, more in detail the grounds for denying any indebtedness from Gage to the city, but at the same time not changing in any degree the issue in the case or the character of the controversy. The main question still is, as the pleadings now stand, and as they stood before Ayres came into the case, does Gage owe the city anything which ought to be satisfied out of the proceeds of the property held in trust by Taylor, under the trust deed described in the complainant's bill? This being so, the controversy inaugurated in the suit is simply one between citizens of this state. True, Ayres, as a creditor of Gage, may be interested in the result of that controversy, because, if it terminates in favor of Gage, it leaves the property now held by Taylor subject, equitably if not legally, to Ayres' debt, but that does not in any degree, in my estimation, involve a controversy between the city and Ayres in the original suit.

As was intimated by the learned circuit judge of this circuit in the case of Osgood v. Chicago, D. & V. R. Co. [Case No. 10,604], the statute of March 3, 1875, clearly contemplates the removal of the whole suit from the state to the federal court, and not of

such fragment or part thereof as may involve a controversy or question between two or more of the defendants. And we must look into the nature of the original controversy, which was the subject matter of the suit, to settle this question of right of removal.

A complicated chancery suit may, almost necessarily, involve in some of its collateral issues, the rights and interests of citizens of different states; but, unless the original controversy which the suit is brought to determine be between citizens of different states, or between such parties as give the federal courts jurisdiction, it would hardly seem that congress intended to provide for the removal thereof, inasmuch as the whole case must be removed instead of that collateral branch or part involving a controversy between citizens of different states.

Applying these suggestions to the case under consideration, it would seem that the controversy as presented by the issues and pleadings, is as to whether or not Gage owes the city anything which should be paid out of this trust fund. That being determined, if determined against the city, the defendant, Ayres, may have a standing in court to claim his pay out of the trust property, but not until then. Notwithstanding Ayres' interpolation into the suit, the real questio is still stand at issue between the city and Gage, and Ayres only has rights as he may be subrogated to those of Gage. It is nowhere intimated in this case that there is any collusion between Gage and the city, or that the city suit is not prosecuted in entire good faith. If it had been made to appear that Gage had given the trust deed to Taylor for the purpose of defrauding Ayres, or that the conveyance was not bona fide, the parties to the controversy might be changed, and Ayres, or any creditor of Gage, might be the real party to the controversy with the city and trustee; but there is nothing of the kind in this case. It therefore seems clear to me that, upon the facts shown in the record, this suit is not such an one as was intended to be removed from the state to the federal court.

The cause will therefore be remanded to the superior court of Cook county.

[NOTE. Ayres, the intervener, appealed to the supreme court, which affirmed the order of the circuit court. After the docket of the appeal, the complainant moved to dismiss, for the reason that the cause was not one from which an appeal would lie. This motion was overruled, the court holding that there was no doubt of its jurisdiction, as by the act of 1875, § 5 (18 Stat. 472), jurisdiction to review such an order was expressly conferred.

[The court then decided the case upon the merits, upon the following grounds, Mr. Chief Justice Waite delivering the opinion: That the original bill and cross bill constituted but one suit; that appellant had no separate dispute with either Gage or the city; that, at most, he and Gage had a controversy with the city as to its lien, and, Gage, who was on the same side of that controversy with him, being a citizen of the same state as the city, the suit was not removable, under the rule settled in the Removal Cases, 100 U. S. 457; Ayers v. Chicago, 101 U. S. 184.]

CHICAGO (GARRISON v.). See Case No. 5,255.

CHICAGO (GOODRICH v.). See Case No. 5,542.

CHICAGO (LOMBARD v.). See Case No. 8,470.

CHICAGO (NICHOLSON v.). See Case No. 10,248.

CHICAGO (NORTHERN TRANSP. CO. v.). See Case No. 10,324.

CHICAGO (SCOTT v.). See Case No. 12,526.

CHICAGO (STOW v.). See Case No. 13,512.

CHICAGO (UNION NAT. BANK v.). See Case No. 14,374.

CHICAGO, A. & St. L. R. CO. (DENNISTON v.). See Case No. 3,800.

CHICAGO & A. R. CO. (BARLEY v.). See Case No. 997.

CHICAGO & A. R. CO. (ILLINOIS v.). See Case No. 7,006.

CHICAGO & A. R. Co. (JESSUP v.). See Case No. 7,300.

Case No. 2,665.

CHICAGO & N. W. R. CO. v. CHICAGO & P. R. CO.

[6 Biss. 219; 7 Chi. Leg. News, 57; 9 Am. Law Rev. 362; 22 Pittsb. Leg. J. 74; 6 Leg. Gaz. 386.] [1]

Circuit Court, N. D. Illinois. Oct., 1874.

RAILROAD CROSSING AT GRADE—JURISDICTION.

1. Where the state legislature has not prescribed in what manner one railroad shall cross another, a court of equity has jurisdiction in a proper case, to control the matter.

2. In Illinois the policy of state legislation is to allow a new railroad, in most instances, to cross another road at grade; but if a new road can at small expense, cross the old one at a different level, a court of equity should require it to do so, especially if a grade crossing is dangerous to life and property.

3. The additional expense may, however, be apportioned between the roads, as in such case the old road has no vested absolute rights to control the new.

4. A corporation created by the laws of another state, although associated with one of this state, and having common interest with it, is entitled to file a bill in this court and claim its protection.

[Distinguished in Chicago & W. I. R. Co. v. Lake Shore & M. S. Ry. Co., 5 Fed. 22; Horne v. Boston & M. R. R., 18 Fed. 51. Cited in Burger v. Grand Rapids & I. R. Co., 22 Fed. 562.]

[2] [A bill in chancery was filed in the United States circuit court, alleging that the complainant was a corporation organized and

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. The statement is taken from 7 Chi. Leg. News, 57. 22 Pittsb. Leg. J. 74, and 9 Am. Law Rev. 362, contain only partial reports.]

[2] [From 7 Chi. Leg. News, 57.]

existing under the laws of the state of Wisconsin, and a citizen of that state, and that there was also a corporation of the same name organized and existing as a corporation under the laws of the state of Illinois; that by a certain agreement heretofore entered into between said respective corporations, commonly called articles of consolidation, the said two corporations became and still are the joint owners of all of the lines of railroad in the states of Illinois and Wisconsin, formerly owned by the companies separately, including a certain line of railroad from Chicago to Freeport; that the Chicago & Pacific Railroad Company were engaged in constructing a line of railroad from Chicago to the Mississippi river, which had been so located as to cross the complainant's road a few miles west of Elgin, and was now being constructed on that route; that at the proposed crossing point the grade of the Northwestern Railway was 24 feet to the mile, and on a curve, and from thence north the line passed through a deep cut 1,000 feet long, so that a train approaching the crossing from the west would be entirely out of sight of trains approaching on the Pacific Railroad; that it would at all times be difficult, and with a slippery track impossible, to stop a heavy freight train approaching the crossing on the down grade; that, as all trains were required by law to stop before crossing, the capacity of the entire Freeport line would be lessened to the extent of at least five loaded freight cars to each train, as this was the heaviest grade upon the whole road, and a locomotive could not haul as heavy a train, by five cars, if it was obliged to stop at the crossing and start again on the up grade.

[It was further alleged that under an agreement between the two companies a route for an elevated crossing, where the Pacific Railroad could pass over the Northwestern by bridge, had been surveyed by the engineers of both roads and was only some 500 feet distant from the proposed point of crossing, and would cost only about $13,000 more to construct than the proposed route; that this route was perfectly safe and feasible, and is the one that ought to be adopted; that the proposed route would make a crossing that would always be exceedingly dangerous and difficult, and materially lessen the capacity of the whole line from Chicago to Freeport, and materially impair its usefulness. The bill then prayed that the Chicago & Pacific Railroad Company be enjoined from making the proposed crossing. A large number of affidavits were filed with the bill, accompanied by plats and profiles showing the proposed crossing at grade, and also the surveyed route for the over crossing, and the gradients of the respective routes.

[The Chicago & Pacific Railroad Company filed several affidavits, in which they alleged that proceedings had been instituted in Kane county under the eminent domain act, to condemn a right of way on the proposed route, and those proceedings were now pending. They also denied that any agreement had ever been made as to the over crossing. They also alleged that the Pacific road was now being operated from Chicago to Elgin, and that the grading and bridging was finished from Elgin to a point 40 miles west; that the ties and iron were all on hand and ready to be laid on this 40 miles, and if it was prevented from making the crossing the line could not be built this year; also, alleging that the bill was filed simply to delay the building of the Pacific Railroad, which was alleged to be a competing line.

[The case was opened on the part of the Northwestern Company by B. C. Cook, general solicitor of the company, who made a full statement of the case, and claimed that under the facts, as shown by the bill and affidavits, the law would not allow the Chicago & Pacific Company to cross the Northwestern Railroad at grade, but would compel it to make an over crossing. The over crossing could be made in the immediate vicinity by a safe and feasible route, and at an expense of only $13,000 in excess of the proposed route. This expense was inconsiderable, in view of the danger of the crossing at grade, and the material injury which such crossing would inflict upon the Northwestern, by diminishing the capacity of the entire line to the extent of five loaded cars to each freight train.

[The defendant was represented by its attorney, John S. Wilcox, of Elgin, and B. F. Ayer, of Chicago.

[Mr. Ayer relied mainly upon objections to the jurisdiction of the court: First, that the United States court had no jurisdiction of the parties; second, that chancery had no jurisdiction of the subject matter.

[In support of the first proposition, he contended that the bill showed that the C. & N. W. Railway was a consolidated corporation of the states of Illinois and Wisconsin, and therefore a citizen of each of those states; that the corporation, as a citizen of Wisconsin and Illinois, could not bring a suit against a citizen of Illinois in the United States court; citing Bank v. Deveaux, 5 Cranch [9 U. S.] 61; Louisville R. R. v. Letsan, 2 How. [43 U. S.] 497; Marshall v. Baltimore & O. R. R., 16 How. [57 U. S.] 314; Ohio & M. R. R. v. Wheeler, 1 Black [66 U. S.] 286; Baltimore & O. R. R. v. Harris, 12 Wall. [79 U. S.] 65; Chicago & N. W. R. R. v. Whiton, 13 Wall. [80 U. S.] 270.

[Second, that a court of chancery had no jurisdiction of the subject matter. Mr. Ayer cited section 10 of the charter of the Chicago & Pacific Company, which authorized that company to cross any railroad, highway or water-course on its line, provided it should restore the same so as not to materially impair the usefulness of the railroad, highway or water-course so crossed.

He also cited the eminent domain act as providing the method by which right of way should be obtained in case the parties could not agree. He then contended that as proceedings had been commenced under the eminent domain act, in the circuit court of Kane county, that court had by law exclusive jurisdiction of the controversy.

[Mr. Wilcox also insisted that the circuit court of Kane county had sole jurisdiction, because the charter of the Pacific road authorized it to cross the Northwestern; and the eminent domain law provided a method for the assessment of damages, if the Northwestern should be damaged by the crossing. He also insisted that the bill and affidavits did not make out a case for the interposition of a court of equity; that the bill was filed to delay the construction of the Chicago & Pacific, and not because the crossing was a dangerous one; also that, if the Pacific road was prevented from crossing at grade, the over crossing was so expensive as to seriously delay its construction, and that the over crossing would be difficult to maintain and operate.

[Geo. C. Campbell concluded the argument on the part of the Northwestern Railway Company. The points made were as follows: First. The United States court had jurisdiction of the parties. Second. A court of chancery has jurisdiction of the subject matter. Third. The facts of this case call for the interposition of the court to prevent defendant from making the crossing at a point where there will be continual danger to life and property.

[In support of the first point, Mr. Campbell relied upon the cases cited by Mr. Ayer. In the Case of Wheeler, in 1 Black, 286, the supreme court of the United States had held that a corporation could not be formed under concurrent laws of two different states, but would exist as a separate legal entity in each state. In the Harris Case, 12 Wall. [79 U. S.] 65, this opinion was modified so far as to admit that an amalgamated corporation could exist under the laws of several states, but in such case the separate legal existence of the different corporations was not terminated. They existed, rather, as joint owners of the property, and, as the supreme court said in the case cited, "The jurisdictional effect of the existence of such a corporation, as regards the federal courts, is the same as that of a co-partnership of individual citizens residing in different states." This was conclusive upon the question of jurisdiction of the federal courts. The Case of Whiton, cited from 13 Wall. [80 U. S.] 270, was further confirmation of the rule, for there the supreme court of the United States held that this very corporation, the C. & N. W. R., was, notwithstanding the acts of consolidation, still two distinct legal entities,—one by the laws of Wisconsin, and one by the laws of Illinois. The question here was simply whether one joint owner, being a citizen of Wisconsin, had the right to invoke the aid of the federal court to protect the common property.

[Second. As to the jurisdiction of a court of chancery. Mr. Campbell contended that this court had exclusive jurisdiction of a controversy like the one at bar, and cited the railway act of 1871–72, § 15 (Myers' Laws, p. 70), which provides that one railroad shall have the right to cross any other railroad, and enacts that "if the corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of crossing, the same shall be ascertained and determined in manner prescribed by law." The controversy in this case was as to the point and manner of crossing. There was no statutory proceeding under which such a dispute could be settled, and no common law action in which it could be settled. Hence, there was absolutely no remedy at law, and that would give a court of chancery jurisdiction. Defendants claimed that the eminent domain act afforded a remedy, but it did not. The act provided a method of taking private property only. But the right of way of a railroad was not private property; it was acquired under the eminent domain act for public use, and was held for public use. That property held for one public use could not, under a general law providing for the condemnation of private property, be taken from the first use, and subjected to another public use. This rule had been laid down in Massachusetts, California, and New York. Boston & A. R. Case, 53 N. Y. 578. If conceded that the aid of the eminent domain act could be invoked at all, it did not meet this case, as it would only provide a method of determining the compensation to be paid by one road to the other. There was no dispute here as to compensation. The dispute was "as to the point and manner of crossing." Eminent domain law provided no method of settling that dispute. The bill alleges and the affidavits prove that the proposed crossing would be continually dangerous to life and property. Can it be supposed that the legislature intended that the Pacific road should institute proceedings under the eminent domain law, and have a jury determine what sum should be paid to the C. & N. W. Railway in order that it should be entitled to construct and maintain a crossing which should be forever fraught with danger to life and property? Yet the whole act will be searched in vain for authority to settle any dispute except as to compensation. It is equally plain that no common law action will afford a remedy, but the statute contemplates a dispute "as to point and manner of crossing," and enacts that it shall be settled as provided by law. It does not grant to the new railroad the right to choose for itself the point and manner of crossing, and merely have the compensation fixed by law. The

conclusion is irresistible that chancery alone has jurisdiction to settle all disputes as to "point and manner of crossing."

[Third. Upon the facts in this case, defendant has no right by law to cross at grades, but must make an over crossing. Section 10 of the charter of the Pacific Railroad gives it the right to cross any railroad on the line of its route, provided "the said railroad shall restore the railroad thus intersected or crossed to its former state, or in a sufficient manner, not materially to impair its usefulness." The bill alleges and the affidavits show that the proposed crossing will materially impair the usefulness of the Northwestern road, as it will diminish the capacity of the entire road to the extent of five loaded cars per train, and also make it dangerous to life and property. This being the fact, it is not a question as to how much it will cost to make an over crossing, but such a crossing must be made if the evil cannot be avoided in any other way. This is precisely the rule in Chicago, B. & Q. R. Co. v. Payne, 59 Ill. 540. This was a case arising under section 24 of the railway act of 1849, which is, word for word, the same as section 10 of the charter of the Chicago & Pacific R. R. Mr. Justice McAllister, in delivering the opinion of the court, says: "The company was under the statutory duty to restore the highway to its former state, or in a sufficient manner not to impair its usefulness. The peril of crossing could have been avoided by the railway going under the highway, or, in other words, constructing the highway over the railway. If the highway could be restored in a manner not to impair its usefulness only in that way, it was the duty of the company so to restore it."] [2]

DRUMMOND, Circuit Judge. The question involved in this case is one of great importance, both as to the rights of railroads and those of the public. I am inclined to think that, under certain circumstances, an application may be made to a court of equity for the purpose of controlling, to some extent, the right of one railroad to cross another. If the legislature of the state has prescribed in what manner one railroad shall cross another, it may be that it would control all parties and the courts; but where the legislature has not declared in what particular way one railroad shall cross or intersect another, but has only referred to it in general terms, then, I think, within the true meaning of the act of the legislature, it may be competent for a court of equity to control the railroads as to the crossings. In this state, it may be said, in one sense, to be the policy of the state to allow a new railroad to cross the track of an old railroad, and at grade, in most instances. At the same time, the legislature has shown clearly enough that it does not intend that a railroad shall cross at grade in all instances; otherwise it would have been so stated. For the reason that I mentioned before, it is not likely the legislature ever will say so, because the topography of the particular locality where the crossing is to be made—indeed, various circumstances—control and determine how the crossing shall be made. For example, where two railroads are approaching each other, through a comparatively level country, and one is to cross the other, it may be said that, in such a case as that, ordinarily, the new railroad would have the right to cross the other at grade; not that it is universally true, but generally so. There might be, and often are, circumstances where it would not be consistent with the interests of the railroads themselves or of the public that they should cross at grade.

Now in this case, assuming that the facts are as stated, and that the new railroad (the Chicago & Pacific Railroad) can cross over the old railroad at so little expense as is stated, I should consider it the duty of a court of equity to require it to be done. If the old road comes into a court of equity and asks that the crossing should be so made, and there is an additional expense incurred in consequence, it may be competent for a court to say the expense shall not be wholly incurred by the new railroad company, because I adhere to the doctrine I laid down the other day in the Michigan Central and Baltimore & Ohio Case, that the fact that one railroad has been constructed does not give it any absolute rights, except so far as the question of mere property is concerned, over a new railroad. It takes its rights always subject to the power of the state to authorize any other railroad to cross or intersect it, as the case may be. Where there is a considerable expense growing out of the crossing, it may be a question for a court of equity to determine how that expense shall be apportioned.

In this particular case, assuming that the allegations of the bill are sustained by the affidavits, then it seems clear that it is for the interests of both roads that one should cross over the other. It is not a question for a day, a month, or a year; but it is a question for all time, so to speak, at any rate, for an indefinite time. The crossing of a road at grade involves a continual, never-ending expense and damage to both roads. It can be avoided by one crossing over the other, and the only expense then is the interest on the additional cost.

Now, in this case it is said that there is quite a steep grade; that one of the circumstances connected with the crossing at grade, namely, the stoppage of the trains, involves a peculiar loss and danger. In such a case as that, it certainly may be competent for a court of equity to interfere, under the provisions of law as they now exist. The

[2] [From 7 Chi. Leg. News, 57.]

mere question of damages to be ascertained by the exercise of the right of eminent domain does not reach the difficulty; therefore it may be a proper case for the interposition of a court of equity, even though the court under other circumstances, would not interfere, as in the case supposed, of two railroads in a level country, where they approach under such circumstances that the natural crossing may be at grade. Here it is not so.

If there is any additional expense involved in this to the new road, I do not say that expenditure would have to be incurred exclusively by that road. I should be very much inclined to apportion the expense under the circumstances of the case, because the old railroad comes in and asks for the interposition of a court of equity, and under the equity rule, might be required to bear its proper share of the expense, because the crossing at the elevation is for the common advantage of both roads.

I think this a proper case for the interposition of a court of equity. I am more and more inclined to hold that it is the duty of a court of equity to interfere in cases of this kind unless the legislature has unmistakably declared what the rule is. If the legislature comes in and says all crossings shall be located in a particular way, as a police matter, we will submit. But so long as they have left it open, I am inclined to hold that a court of equity can protect and assert the rights of railroads—the old and the new—and those of the public.

As to the question of jurisdiction, it is perhaps not entirely free from doubt. But I think that for the purpose of a standing in the federal court, within the language of the constitution and the judiciary act, we must hold that a corporation created by the laws of another state, although it may be associated with a corporation in our own state, and their interests may be common, will be recognized as being within the jurisdiction of this court; that a court of equity can protect the interests of a joint proprietor in property that is being injuriously affected. That is my present impression. Let the injunction issue pursuant to the prayer of the bill.

CHICAGO & N. W. RY. CO. (MENZELL v.). See Case No. 9,429.

CHICAGO & N. W. RY. CO. (PIEK v.). See Case No. 11,138.

CHICAGO & N. W. R. CO. (SAYLES v.). See Cases Nos. 12,414 and 12,415.

CHICAGO & N. W. R. CO. (WHITON v.). See Case No. 17,597.

CHICAGO & P. R. CO. (CHICAGO & N. W. R. CO. v.). See Case No. 2,665.

CHICAGO & S. R. CO. (SMYTHE v.). See Case No. 13,135.

CHICAGO & S. W. RY. CO. (DOWS v.). See Case No. 4,048.

Case No. 2,666.

CHICAGO, B. & Q. R. CO. v. ATTORNEY GENERAL et al.

[2 Cent. Law J. 335;[1] 9 West. Jur. 347.]

Circuit Court, D. Iowa. May 12, 1875.[2]

LEGISLATIVE POWER TO REGULATE RAILWAY TARIFFS—STATE REGULATION OF RAILWAYS—LEGISLATIVE RESERVATION OF RIGHT TO MAKE RULES AND REGULATIONS — VALIDITY OF ACT WHICH PRESCRIBES DIFFERENT RATES FOR DIFFERENT ROADS.

1. Where a railway company has been organized under a general law of a state, which confers upon such companies "the power to make contracts," but does not in express terms confer on them the exclusive power to fix their own tolls and compensation, the state may afterwards pass laws regulating such tolls and compensation.

[See note at end of case.]

2. The United States granted to the state of Iowa certain lands for the purpose of constructing a described railway within the state. The legislature of Iowa accepted the trust, and conferred the donation upon a particular company, with the reservation that such company should at all times be subject to such rules and regulations as might from time to time be enacted and provided by the general assembly, "not inconsistent with the provisions of this act, and the act of congress making the grant" [11 Stat. 9]. *Held*, that this was an express reservation, on the part of the state, of the power to regulate the compensation which should be received for the carriage of freight and passengers over such road.

3. A state law which divides the railroads in such state into different classes, based upon the amount of the earnings per mile, and which prescribes a rate of charges for the roads of each class different from the rates prescribed for each of the other classes, is not obnoxious to a constitutional inhibition against the passage of laws not uniform in their operation.

[See note at end of case.]

Bill [against M. E. Cutts, attorney general, and William Christy, treasurer, of the state of Iowa, and Daniel Campbell] for an injunction.

On the 23d day of March, 1874, the legislature of the state of Iowa passed an act entitled, "An act to establish reasonable maximum rates of charges for the transportation of freights and passengers on the different railroads of this state." Acts 1874, p. 61. This act classifies all of the railroads within the state, according to their gross annual earnings per mile, and provides in substance that railroads earning $4,000 per mile and over (Class A.) shall not charge more than 90 per cent. of the fixed rate; that roads earning $3,000 per mile (Class B.) shall not charge over 5 per cent. above the fixed rate; and roads earning $2,000 per mile (Class C.) shall not charge over 20 per cent. in addition to the fixed rate; and that they shall not charge respectively for passengers more than: Class A., three cents, Class B., three and one-

[1] [Reprinted by permission.]

[2] [Affirmed in Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155.]

half cents, and Class C., four cents per mile. The present suit is brought by the Chicago, Burlington and Quincy Railroad Company, of Illinois, as the lessee in perpetuity, under legislative authority, of the Burlington and Missouri River Railroad Company of Iowa, to enjoin suits by the attorney general of the state, for the enforcement of the above mentioned railway tariff act of March 23, 1874. The bill rests upon the ground that the act last named is in conflict with the constitution of the United States, in that it impairs the obligation of a contract, and is also a regulation of inter-state commerce; that it is also repugnant to the constitution of the state, for the reason that it does not affect all railroads alike, and is therefore not of uniform operation; and for the further reason that it conflicts with section 1 of the bill of rights. The answer admits most of the allegations of the bill, but denies that the B. and M. R. R. Co., either by the charter or the laws of Iowa, had the exclusive right and power to fix its rates of fare, and denies that any attempt is to be made to enforce the law, so far as regards inter-state commerce. It is averred in the answer that, if the B. and M. R. R. Co., ever did have such exclusive right, it yielded such right by its acceptance of the land grant in A. D. 1856, under the conditions stated in the act granting said lands. That since the original charter was granted, and after the adoption of the new constitution of Iowa in A. D. 1857, said charter has been amended in many material respects; and that by the acceptance of such amendments the charter became subject to amendment or repeal by the general assembly, under the provisions of said constitution conferring that power and right upon the general assembly; and that it especially applies to the Red Oak Branch, which was constructed by virtue of an amendment to the charter made in A. D. 1869; that as to the other branch roads, they were constructed by the aid of taxes levied and collected in various townships under the act of 1870, which provided that all roads constructed by such aid "shall be subject to the control of the general assembly, in regard to management of the same, and the charges for transportation of freight and passengers." On the bill, answer and certain exhibits and affidavits, the complainant moves for the allowance of a temporary injunction to restrain the enforcement of the act of March 23, 1874.

O. H. Browning, D. Rorer, and James Grant, for complainant.

M. E. Cutts, Atty. Gen. of Iowa, and W. H. Seevers, for respondents.

DILLON, Circuit Judge. Whatever rights the complainant corporation has are derived from the Burlington and Missouri River Railroad Company. It will be conceded for the purposes of the present application that the complainant possesses all the franchises, rights and powers of the Burlington Company, and is entitled to the relief here sought if the last named company would have been entitled thereto, if it were itself using and operating its road. An enquiry into the rights of the Burlington Company as respects compensation for services rendered by it, becomes necessary. This company was incorporated in 1852. The constitution of the state then in force provided that "corporations, except for political or municipal purposes, shall not be created by special laws, but the general assembly shall provide, by general laws for the organization of all other corporations." Under this provision of the constitution the legislature, in 1851, passed a general act for the creation of corporations for pecuniary profit, including railway corporations. No express power to alter or annul the articles of association of companies organized under the act, was reserved. Code 1851, art. 43, pp. 108, 109. It was under this general incorporation act that the Burlington Company was organized in 1852. By this act it was provided (Code 1851, § 673), that "any number of persons may associate themselves and become incorporated for the transaction of any lawful business, including the establishment of ferries, the construction of canals, railways, bridges, or other works of internal improvement; but such incorporation confers no power or privilege not possessed by natural persons, except as hereinafter provided." The next section (674) enumerates the powers of corporations organized under this act as follows: "(1) To have perpetual succession. (2) To sue and be sued by its corporate name. (3) To have a common seal which it may alter at pleasure. (4) To render the interests of the stockholders transferable. (5) To exempt the private property of its members from liability for corporate debts except as herein otherwise declared. (6) To make contracts, acquire and transfer property, possessing the same powers in such respects as private individuals now enjoy. (7) To establish by-laws and make all rules and regulations deemed expedient for the management of their affairs, in accordance with law, and not incompatible with an honest purpose." This, then, is the extent of the corporate powers and franchises of the company; and they are but little greater than those which the law "tacitly, and without any express provision, considers inseparable from every corporation," created for a like purpose. Ang. & A. Corp. § 110; 2 Kent, Comm. 224. The complainant seeks an injunction in this case, not on the ground that the maximum rates of charges allowed by the act of 1874 are unreasonable, but on the ground distinctly asserted in the argument, that the company has the exclusive power to fix the measure of its own compensation, and con-

sequently that such an enactment as that of 1874 is a violation of its chartered rights.

In considering this claim of the company, it cannot fail to arrest attention that the statute nowhere in terms confers upon railway corporations organized under it, the power to fix or regulate their charges. We have, then, to deal with a case where the legislature has not expressly delegated to the company the power to fix its own tolls or compensation. When we consider the rule of construction, as it is definitely settled in Great Britain and by the courts of this country, that any ambiguity or fair doubt in the charters of corporations, operates in favor of the public, and that a corporate body can claim nothing not clearly granted, it is quite plain that the general power "to make contracts, the same as individuals," cannot be held to amount to a contract between the state and the company, that the latter should exclusively and permanently prescribe and regulate its own charges. The surrender of legislative power beyond recall, in so important a matter, can not, in my judgment, be implied from any such general language. Undoubtedly the railroad company may demand compensation for its services. It can not be imagined that the legislature supposed the capital necessary to construct and operate railroads would be invested therein except for the hope of profit to be thereby realized, and there is no source of profit to a railway company except its earnings for the transportation of persons and property. I have no difficulty, therefore, in holding that the legislature, either by the express power "to make contracts," or, what seems the more satisfactory ground, by just and necessary implication, did authorize railway corporations to demand and receive compensation for their services; but this is far short of conferring upon them an exclusive power in this respect, and one beyond future legislative control.

In all civilized countries the duty of providing and preserving safe and convenient highways to facilitate trade and communication between different parts of the state or community, is considered a governmental duty. This may be done by the government directly, or through the agency of corporations created for that purpose. The right of public supervision and control over highways results from the power and duty of providing and preserving them. As to ordinary highways these propositions are unquestioned. But it is denied that they apply to railways built by private capital and owned by private corporations, created for the purpose of building them. Whoever studies the nature and purposes of railways constructed under the authority of the state by means of private capital, will see that such railways possess a two-fold character. Such a railway is in part public, and in part private. Because of its public character, relations and uses, the judicial tribunals of this country, state and national, have at length settled the law to be that the state, to secure their construction, may exert in favor of the corporation authorized by it to build the road, both its power of eminent domain and of taxation. This the state cannot do in respect of occupations or purposes private in their nature. A way thus authorized and established is intended for the public use and benefit, although the capital is furnished by the corporators or shareholders, and the tolls belong to them. In its public character a railroad is an improved highway or means of more rapid and commodious communication, and its public character is not divested by the fact that its ownership is private. These general views have been asserted by many state courts, but in this court it is sufficient to refer to the judgments of the supreme court of the United States, in the cases of Olcott v. Supervisors, 16 Wall. [83 U. S.] 678; Council Bluffs & St. J. R. Co. v. County of Otoe, 16 Wall. [83 U. S.] 673; and the very recent cases known as the Topeka and Iola Tax Cases [Citizens' Sav. & Loan Ass'n v. Topeka, 20 Wall. (87 U. S.) 655; Commercial Nat. Bank v. Iola City, 22 U. S. (Lawy. Ed.) 463], the opinions in which were given by the presiding justice of this court. In its relations to its stockholders, a railroad or the property in the road and its income is private property, and subject to the lawful or reserved rights of the public, is invested with the sanctity of other private property. The distinction here indicated marks with general accuracy, the extent of legislative control, except where this has been surrendered or abridged by a valid legislative contract. Over the railroad as a highway and in all its public relations, the state, by virtue of its general legislative power, has supervision and control; but over the rights of the shareholders, so far as these are private property, the state has the same power, and no greater than over other private property. The power which the state may legitimately exercise over railways within it is subject to such further restrictions as it may have consented to by express grants in charters in respect of which no power of repeal or alteration is reserved, and by the commerce clause of the federal constitution, which withdraws interstate commerce from state control, and confines the state to the regulation of its internal traffic. As our railroad system is made up of links supplied under the authority of the several states, it may admit of doubt in our present knowledge, whether a power in a state thus limited can be beneficially exercised; but this is a legislative problem and not a judicial question.

Without further enlarging upon the public nature and uses of railways, or undertaking to review the authorities cited, or examine the positions assumed by counsel, which would necessarily lead through a broad field of discussion, I content myself, on this branch

of the subject, with stating as my conclusion, that the legislature has not expressly conferred upon railway corporations in this state the exclusive power to fix their own charges; that such a power cannot be deduced by implication from the constituent act of the corporations, and that whatever powers are conferred in this respect, are subject to an implied condition that they shall not be oppressively or unreasonably exercised, and also subject to the future exercise of the police regulations of the state, or any other power possessed by the state, properly legislative in its nature, which includes the power to regulate, consistently with the charter, all of the franchises granted, and to prescribe and limit the amount of toll or charges which it shall be lawful to take.

This view, if sound, is decisive of the case against the railroad company. But if we should concede it to be erroneous, and that the company originally possessed chartered rights which the act of 1874 would violate, still it has surrendered any such right by its acceptance of the act of July 14, 1856. On the 15th day of May of that year, congress made a grant of lands to the state of Iowa, "for the purpose of aiding in the construction of a railroad from Burlington, on the Mississippi river, to a point on the Missouri river, near the mouth of the Platte river." The state could dispose of the lands for the sole purpose of building the line of railway, but it had the absolute power to select the company which should receive the benefit of the grant. The legislature accepted the trust by the act of July 14, 1856, and by that act gave the benefit of the grant to the Burlington Company upon condition that it should assent to the provisions of that act, which it did. Among the provisions of the act thus assented to by the company was the following: "That the company accepting the provisions of the act, shall at all times be subject to such rules and regulations as may from time to time be enacted and provided by the general assembly of Iowa, not inconsistent with the provisions of this act, and the act of congress making the grant." Rev. St. 1860, § 1311. The state of Iowa sustained towards these lands the relation of trustee of the general government, and in that capacity could not divert or change the trust, but it also sustained towards any company on which it should confer the benefits of the grant the relation of a sovereign, and as such was capable of enacting any valid law whatever, not in conflict with the act of congress making the grant. The state had the power, therefore, to say to the donee of its bounty, we will give you the benefit of this grant of lands provided you will agree to be at all times subject to such rules and regulations as the general assembly may enact. The company accepted the grant, and thereby agreed to be subject to this condition. The only question, then, is as to the extent of the power recognized or given by the words "rules and regulations." The interpretation of these words must depend upon their occasion and purpose. The occasion was an important one, both for the company and the state. The company was made the beneficiary of a large and valuable grant of lands. The state was endeavoring to secure for the benefit of the public the building of an important highway or line of communication from the Mississippi to the Missouri river.

Doubts as to the extent of the power of the state over the corporation, under the then existing legislation, suggested the provision in question, and it was undoubtedly the design of the legislature to secure a substantial right to the state, or a recognition by the company of such a right in the state. It is to be regretted that words were not used which would admit of no dispute, but as it is we must interpret those employed so as to effectuate the intention of the parties. Some aid to interpretation is afforded by the decisions of the supreme court of the United States, in respect to the word "regulate" as it occurs in the federal constitution. These are referred to in the recent case of Hamilton v. Dillin [Case No. 5,979]. In this case it was held under the act of July 13, 1861 [12 Stat. 257], that power to authorize commercial intercourse, during the rebellion, "to be conducted and carried on only in pursuance of rules and regulations prescribed by the secretary of the treasury," authorized the secretary to impose, as a condition of cotton permits, a tax of four cents a pound on cotton purchased. The following observations of Mr. Justice Bradley, in the case last cited, are pertinent to the case in hand. The learned judge says: "It is contended that the imposition of the bonus of four cents per pound was not a 'rule' or a 'regulation' within the fair meaning of the act; and it is conceded that in many cases the power to make rules and regulations on a particular subject is a limited power, having respect to mode and form, and time and circumstance, and not to substance. But it also must be conceded that in other cases the power is much more extensive and substantial. Thus in the constitution, the several powers 'to regulate commerce,' 'to establish a uniform rule of naturalization,' 'to make all needful rules and regulations respecting the territory or other property belonging to the United States,' are understood to give plenary control over those subjects. The power to regulate commerce has been held to include the power to suspend it (1 Kent, Comm. 432); and the power to make rules and regulations respecting the territory of the United States, has been held to include the power to legislate for and govern such territory and establish governments therein. [M'Culloch v. Maryland] 4 Wheat. [17 U. S.] 422; Story, Cont. § 1328. The extensive effect given to these clauses is undoubtedly largely due to

the character of the instrument and that of the donee of the powers, to wit, the legislature of the United States, to whom the grant of a power means the grant of a branch of sovereignty. It shows, however, that the rule of construction depends, at least, in some sort, upon the nature of the subject-matter. In the case before us, the power of the government to open and regulate trade with the enemy was intended to be conferred upon the president and secretary of the treasury. The power of regulation in such a case is to be taken in the broadest sense, and, in our judgment, included the power to impose such conditions as the president and secretary should see fit."

So, in the case before us, the legislature of the state is the donee or possessor of the power to make the rules and regulations in question, and the power is to be construed accordingly, and not in a narrow and technical sense. Any construction that deprives words of a substantial purpose or meaning, would plainly thwart the purpose intended to be effected. The words, when carefully considered, satisfactorily evince a purpose of subjecting the companies to the control of the legislature. The language is that "the company accepting the grant shall, at all times, be subject to such rules and regulations as may, from time to time (that is, as occasion arises), be enacted and provided by the general assembly of Iowa," and the only limitation named is, that they shall not be inconsistent with the act of July 14, 1856, or the land grant act of congress. Such rules and regulations are, necessarily, laws. Referring to this subject, counsel say that these words "can justly be construed only to refer to what is called the public and general management of the road as a highway, and not to change the vital, life-giving principle of the charter to the corporation, to regulate its own tariffs." But the power to regulate the public and general management of the road as a highway existed before, and the interpretation suggested is open to the objection of making an important provision to which the company was expressly required solemnly to assent, useless and unavailing. The legislature, by this provision, meant, in my judgment, to put at rest any question that might then exist as to the subordination of the corporations accepting the grant to the legislative power of the state, so far as, consistently with the preservation of their franchises, the public good might from time to time require.

The act of 1874 is not void for want of uniformity, or because it does not prescribe a uniform rate for all railroads in the state. There may be good reasons connected with the cost of construction and expense of operating, and the amount of earnings, why railroads of one class should be allowed to charge more than roads of another class. The law is uniform in its operation upon all roads in each class; and similar acts, as for example dividing cities into classes, with different powers, are not uncommon in our legislation, and their validity has been sustained by the courts. The cases cited in the brief of the attorney general fully establish this proposition.

I need not discuss the objection made by the bill to the act of 1874, as interfering with inter-state commerce, since the answer expressly disclaims any intention to enforce, or attempt to enforce, the act in this respect. Injunction denied.

[NOTE. Plaintiff appealed to the supreme court, which affirmed the decree herein, holding, per Waite, C. J., that complainant was subject to legislative control as to its rates, there being nothing in its charter to prevent legislative interference; that the right to regulate such rates was not lost by failure to exercise it; and that the statute of March 23, 1874, was not repugnant to the constitution of the state, or that of the United States. Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155, 163.]

CHICAGO, B. & Q. R. CO. (EMIGH v.). See Case No. 4,448.

CHICAGO, B. & Q. R. CO. (FINLAYSON v.). See Case No. 4,793.

CHICAGO, B. & Q. R. CO. (HAZARD v.). See Cases Nos. 6,275 and 6,276.

Case No. 2,667.

CHICAGO, B. & Q. R. CO. v. OTOE COUNTY.

[1 Dill. 338.][1]

Circuit Court, D. Nebraska. 1871.

COUNTY BONDS—HOW DECLARED ON.

Where a county by public statute has the power to issue negotiable bonds on certain conditions, and its bonds are issued and in the hands of bona fide holders, such a holder is not bound to allege in his declarations the election or other facts showing a compliance with the conditions on which the issue of the bonds is authorized.

[Cited in Kennard v. Cass Co., Case No. 7,697.]

[See note at end of case.]

The questions to be determined arise on a demurrer to the petition, which consists of one hundred and thirty-five counts, each of which is as follows: "That on the 1st day of January, 1870, at Nebraska City, in said county, the said defendant made and issued its certain bond, dated on said day at said place, whereby, for value received, it promised twenty years from date to pay the bearer one thousand dollars at the Broadway Bank in the city of New York, with interest payable semi-annually at said bank, at the rate of eight per cent per annum, according to divers coupons thereto attached, which bond, in order to distinguish it from others of like character, was marked No. ——; that attached thereto was, among others, a certain coupon, bearing date on the day and at the place

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

aforementioned, made by said county, whereby it promised to pay to the bearer thereof forty dollars at said bank, on the 1st day of July, 1870, for the interest then and there to be due on said bond, which coupon is in words and figures as follows: '$40. Nebraska City, January 1, 1870. The county of Otoe, in the state of Nebraska, promises to pay to the bearer forty dollars, at Broadway Bank, New York, on the 1st day of July, 1870, being for six months' interest on bond No. ——. A. Stout, President Board County Commissioners. George R. McCallum, Clerk.' That before said coupon by its terms became due and payable, the said bond, together with said coupon, came to and for value became the property of this plaintiff, who thereupon became, and has ever since been and still is the true and lawful holder thereof; that when said coupon by its terms became due and payable, the same was duly presented at the place of payment therein mentioned, and payment demanded, but refused because said defendant had not nor did it ever have funds at said place; that the said plaintiff has often and in a friendly manner, applied to said defendant, at its treasury, in Nebraska City, in said county, to pay said coupon, but it has refused to do so, notwithstanding it is justly indebted thereon to this plaintiff in the full sum of forty dollars, with interest from the first day of July, 1870."

The defendant assigns its causes of demurrer as follows: "1. The petition does not state any facts which would authorize the said defendant, by its county commissioners, to issue or deliver to any person or corporation, the bond referred to in said petition, or the coupons mentioned and set forth therein, upon which this action is brought; nor does said petition show any authority or power in the county commissioners of Otoe county to make, issue, or deliver bonds and coupons of the defendant in any manner whatever. 2. It does not appear from the petition that the bonds therein referred to, or the coupons upon which this action is founded, were ever issued or delivered to the Burlington and Missouri Railroad Company, or to any railroad or corporation, to secure to Nebraska City and Otoe county, in the state of Nebraska, a direct eastern railroad connection, or otherwise, in conformity to an act of the legislature of the state of Nebraska, approved February 15, 1869, entitled 'An act to authorize the county commissioners of Otoe county to issue the bonds of said county to the amount of one hundred and fifty thousand dollars to the Burlington & Missouri Railroad Company, or any other railroad running east from Nebraska City,' as in conformity to or with any law whatever of the state of Nebraska, and that said pretended act of the legislature of the state of Nebraska, above mentioned, is repugnant to the constitution of the United States of America, and to the constitution of the state of Nebraska, and therefore null and void. 3. And for a further cause of demurrer to the petition, the defendant says that the bonds referred to in the said petition claimed to have been issued by the defendant, are not set forth in the petition, but only so much of said pretended bonds as is contained in the coupons thereto attached, and also that such petition and declaration is in other respects uncertain, informal, and insufficient."

J. M. Woolworth, for plaintiff.

Sweet & Schofield and H. M. & A. H. Vories, for defendant.

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

DILLON, Circuit Judge. There are three causes of demurrer set down against the sufficiency of the petition. The second ground of demurrer cannot be considered, since it refers to and rests upon matters de hors the petition. By the petition it does not appear that the bonds mentioned in the coupons were issued to the Burlington and Missouri Railroad Company or to any railroad company, or to aid in the building of, or to pay for stock in, any railroad company whatever. It is alleged in the petition that the defendant made and issued its negotiable bonds, with interest coupons attached; that before the coupons now in suit became due, the bonds together with the coupons, for value became the property of the plaintiff, the Chicago, Burlington & Quincy Railroad Company.

The first ground of demurrer raises the question whether the petition must set forth the facts showing that the county commissioners were authorized to issue the bonds. There are two acts of the state of Nebraska, under either of which (assuming their constitutional validity) bonds to aid in the construction of a railroad (assuming also, the bonds now in controversy to be of this character) might have been properly made and issued by the defendant. Laws Neb. 1869, pp. 92, 260. One of these is a general act to enable public and municipal corporations to borrow money on their bonds, or to issue bonds to aid in the construction of railroads or other works of internal improvement, after the proposition shall have been submitted to and approved by a vote of the people. The other is a special act "authorizing the county commissioners of Otoe county (the defendant) to issue $150,000 of its bonds to the Burlington & Missouri River Railroad Company, or any other company that will secure to Nebraska City a direct eastern railroad connection, as a donation to said railroad company, or on such terms and conditions as may be imposed by said county commissioners." Under which of these acts, if either, the bonds were issued, is not alleged. It appears, however, from an act of the legislature which this court will notice, that on certain terms the defendant was authorized to issue its bonds; and bonds having been issued, and being, as

alleged in the petition, in the hands of holders for value, before maturity, the presumption is that the election was held and the other necessary terms complied with, which would authorize the commissioners to issue the bonds.

The question on this record is one of pleading; and a holder, under such circumstances, of bonds negotiable in their character, is not bound, when suing in the federal courts to allege in his petition, the election or other facts showing a compliance with the preliminary steps required of the officers before they are authorized to issue and deliver the bonds.

Such is the doctrine of the supreme court, which it is obligatory on this court implicitly to follow. If in the given case, the authority to issue bonds did not arise or exist, and the corporation is not liable thereon, the facts may be pleaded in defence. Knox Co. v. Aspinwall, 21 How. [62 U. S.] 539; Moran v. Commissioners, 2 Black [67 U. S.] 722; Rogers v. Burlington, 3 Wall. [70 U. S.] 364; Cincinnati v. Morgan, Id. 275; Mercer Co. v. Hackett, 1 Wall. [68 U. S.] 83; Gelpcke v. Dubuque, Id. 220; Curtis v. Butler Co., 24 How. [65 U. S.] 435; Bissell v. Jeffersonville, Id. 287; Meyer v. Muscatine, 1 Wall. [68 U. S.] 385; City of Kenosha v. Lamson, 9 Wall. [76 U. S.] 477; Supervisors v. Schenck, 5 Wall. [72 U. S.] 772; De Voss v. Richmond [18 Grat. (Va.) 338]. The averments in the petition show prima facie liability; and this view is entirely consistent with the case of Marsh v. Fulton Co., 10 Wall. [77 U. S.] 679, recently decided by the supreme court. The result, as well as the reasoning, of Mr. Justice Field in that case, is entirely satisfactory to my mind.

It only remains to add that it is not necessary to set out in the petition the bonds to which the coupons are attached. Knox Co. v. Aspinwall, 22 How. [63 U. S.] 539; Thompson v. Lee Co., 3 Wall. [70 U. S.] 377; City of Kenosha v. Lamson, 9 Wall. [76 U. S.] 477; Ring v. Johnson Co., 6 Iowa, 265; McCoy v. Washington Co. [Case No. 8,731]; Johnson v. Stark Co., 24 Ill. 75.

The constitutional question argued by the counsel for the defendant is not legitimately presented by the demurrer, and is not examined nor decided. The demurrer is overruled, and the defendant has leave to answer. Demurrer overruled.

NOTE. Constitutional question: See Gilchrist v. Little Rock [Case No. 5,421]; King v. Wilson [Id. 7,810]. Remedy of creditor: Welch v. Ste. Genevieve [Id. 17,372]; Muscatine v. Mississippi & M. R. Co. [Id. 9,971]; Lansing v. Treasurer [Id. 16,538].

[NOTE. On the trial upon the merits, the judges of the court were divided in opinion, and certified the case to the supreme court. The questions upon which the circuit court judges divided were as follows:

[1. Whether the act of the Nebraska legislature (Feb. 15, 1869) authorizing the issue of bonds by the county of Otoe in aid of the construction of a railroad outside the state conflicted with the state constitution.

[2. "Whether the county commissioners of Otoe county could, under the act of February 15, 1869, lawfully issue the bonds from which the coupons in suit were detached, without the proposition to vote the bonds for the purpose indicated, and also a tax to pay the same being or having been submitted to a vote of the people of the county, as provided by the act of the territorial legislature of Nebraska passed January 1, 1861."

[The certificate of the supreme court is as follows: First, that the act of February 15, 1869, is not unconstitutional; and, second, that the county commissioners of Otoe county could lawfully issue the bonds from which the coupons in suit were detached, without any submission to a vote of the people of the county of the proposition to approve the bonds, or a tax for the payment thereof. Chicago, B. & Q. R. Co. v. County of Otoe, 16 Wall. (83 U. S.) 667.]

Case No. 2,668.

CHICAGO, B. & Q. R. CO. v. PAGE.

[1 Biss. 461.] [1]

Circuit Court, N. D. Illinois. Aug. 1864.

NEW CERTIFICATES OF STOCK—WHEN NOT DIVIDENDS.

1. Where a railroad company, from time to time, made advances from their surplus earnings to another railroad company, taking leases and morgages therefor, and such second company finally became insolvent, and the loaning company, to secure their debt, foreclosed their mortgages and purchased the insolvent road for the amount of their advances, and issued stock certificates to each of their stockholders, representing their pro rata interest in this property thus acquired,—all the said advances having been made prior to the passage of the act of July 1, 1862 [12 Stat. 469],—such certificates are not dividends within the meaning of section 81 of that act, and are not subject to the three per cent. tax.

2. The advances having all been made prior to the passage of the act, and no money having been received at the sale, but the company having simply perfected their title and enforced a pre-existing lien, and having always treated this acquired property as added capital stock, such certificates are not properly dividends in money or scrip paid to the stockholders.

In equity. This was a bill to prevent the collection, by seizure, distress, or otherwise, by Mr. Schneider, the United States collector for this district, of a tax for $29,285, claimed to be due to the United States from the complainant, under the 81st section of the internal revenue law of July 1, 1862 (12 Stat. 469). A controversy having arisen between the government and the railway company as to the right of the former to assess and levy the tax, and the collector being ordered to enforce its collection, this bill was filed. By various acts of the legislature of Illinois, the complainant, prior to 1860, had the right to construct a railway from Junction, in the county of DuPage, to Galesburg, in the county of Knox. The road was in operation between those points in 1855. For the purpose of aiding the Peoria and Oquawka Railway

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

Company, and to obtain for itself a connection with the Mississippi river at Burlington, the complainant, in 1854, advanced to the Peoria and Oquawka Railroad a sum exceeding three hundred thousand dollars, which was secured by a lease in the nature of a mortgage on that part of the Peoria and Oquawka Railroad west of Galesburg. This sum was not sufficient for the purpose contemplated, and, prior to the first day of January, 1862, the complainant, with the same object, had advanced other large sums of money to that company, amounting, in the aggregate, even as early as the first of January, 1860, to more than fifteen hundred thousand dollars. This whole indebtedness was secured by mortgages, leases, and contracts in the nature of mortgages on that part of the Peoria and Oquawka Railroad extending from Peoria to Burlington. The plaintiff was also obliged to purchase, in order to secure these advances, certain first and second mortgage bonds of the Peoria and Oquawka Railroad, amounting to twelve hundred and fifty thousand dollars, given and secured in 1852 and 1853, on the same part of the road. Prior to the first day of January, 1862, the complainant had become the owner of nearly all of these mortgage bonds. In February, 1860, the Peoria and Oquawka Railroad Company had become insolvent, and the complainant caused suit to be instituted to foreclose these mortgages in this court, and a decree of foreclosure was entered, and at the sale under the decree, which took place in October, 1862, the complainant became the purchaser of that part of the road between Peoria and Burlington, as the only means of saving any portion of the moneys previously advanced. From July, 1857, to November, 1862, but one dividend was distributed to the stockholders by the complainant. The earnings of the complainant's road were appropriated to aid in making the advances and purchases already referred to, and which have never been reimbursed, except by the sale of the part of the Peoria and Oquawka Railroad above mentioned, and of which the complainant is now the owner. In November, 1862, the complainant had on hand of the earnings of its road, $210,207.29, which had not been appropriated in the manner stated above, and which sum it divided among its stockholders, reserving three per cent. therefrom, which was paid to Mr. Schneider, the collector for the United States, as required by the 81st section of the internal revenue law. The complainant, with a view of ascertaining the amount of the earnings of the road, which had thus been advanced to the Peoria and Oquawka Railroad Company, on the 16th of November, 1862, caused an account to be taken, and the sum was found to be in the aggregate $946,900, and thereupon a stock certificate was issued to each of the stockholders of the complainant's road, showing the pro rata amount of earnings which had been advanced, the same amounting to about twenty per cent. to each stockholder on the original amount of stock held by each. The certificate which was issued under this arrangement was to the effect that the holder was entitled to so many shares of the full paid stock of the company —thus turning the property which had been acquired for the advances made, into capital stock of the company. It was three per cent. of the sum thus advanced and for which certificates were given in November, 1862, that the government claimed should be paid by the railway company.

Walker & Dexter, for complainant.

Perkins Bass, U. S. Dist. Atty., for defendant.

DRUMMOND, District Judge. The 81st section of the act of July 1, 1862, provides that on and after that day "all dividends in scrip, or money, or sums of money thereafter declared due or payable to stockholders of any railroad company, as part of the earnings, profits or gains of said companies, shall be subject to and pay a duty of three per centum on the amount of all such * * * dividends whenever the same shall be paid; and said railroad companies or railroad corporations, or any person, or persons owning, possessing or having the care or management of any railroad company, or railroad corporation, are hereby authorized and required to deduct and withhold from all payments made to any person, persons or party, after the first day of July, as aforesaid, on account of any * * * dividends due and payable as aforesaid, the said duty or sum of three per centum." 12 Stat. 469, 470. In conformity with the joint resolution of July 17, 1862 [12 Stat. 627], the secretary of the treasury gave notice that the time mentioned in the foregoing section should be construed as referring to the first day of September, 1862.

It is insisted on the part of the government that the issuing of the certificates of stock in November, 1862, was a division among its stockholders of the profits and earnings of the road, or a dividend in scrip within the meaning of the law. There can be no doubt the assets, securities and mortgages held and owned by the plaintiff at the time of the passage of the law, and which were then in course of foreclosure and sale in this court, were partly acquired with the earnings and profits of the road; but they were laid out and invested in them—a large share prior to 1860, and all prior to July 1, 1862. These profits and earnings had then actually been disbursed for them and they were held as a part of the general property or assets of the company. When the company enforced its lien by a sale, the property and assets, in part purchased with the earnings of the road, did not produce the money which had been paid for them, but the company took in their place that part of the Peoria and Oquawka Railroad extending

from Peoria to Burlington, and became the legal and equitable owner of the same. Its value as an acquisition to the property of the plaintiff was estimated at its cost, and a stock certificate was issued, showing the amount which each stockholder had contributed towards the purchase.

We think in no just sense can this be considered as a dividend. It was not intended or treated as such by the company. It is true that it is not necessary the division should be of money, but the act clearly contemplates that when it is in scrip, it shall be of a character to be paid,—and the payment of which can be deducted and withheld from the stockholders by the managers of the railroad,—and that it shall be due and payable. Apply these tests to this property and it will be seen the facts will not warrant the right claimed. Before the sale, it could be regarded only as a loan or purchase made; after, as a bona fide title acquired in the property by the company,—consequently by all the stockholders,—and not as something due and payable to them. If heretofore it had been converted into money, or hereafter it ever shall be, and the amount divided among the stockholders, there might be now, or then, some apparent reason for the position taken. And if the company had had on hand at the time of the passage of the law a portion of its earnings, and afterwards purchased with them property which it converted into stock, there would be some force in urging that the company could not in that way avoid the payment of the tax to the government. But the argument here is, that it is of no consequence what the actual value of the property was in November, 1862, or at the time of the advances,—though not one quarter of the money paid,—yet it must be regarded as a dividend for the whole, and it goes even further, and seeks to establish either that the property must be sold in whole or part to pay the tax, or that earnings on hand and not divided, or subsequently acquired, and for which, therefore, there might be a tax due, shall have an additional burden to the three per centum already imposed. It is plain that such a principle would reach every purchase made with its profits by a railway company in past years, either of real or personal property, added to the general stock, and any apportionment of stock so acquired, for which a certificate might be given after September 1, 1862, showing the amount of such purchase or apportionment, and the share of the stockholder in the same. A construction which leads to such consequences ought not to be given to this statute unless the language imperatively demands it. There is nothing in the scope or spirit of the law, or in its terms, to require such a construction. The true question must always be in these cases: Has there been a bona fide dividend in money or scrip paid to the stockholders, or has there been an attempt to cover up or conceal the payment of a dividend by some device or mere form? If there has been, it may be conceded that the tax should be paid.

If in 1860 a man had bought an estate, or a mortgage on one, with a portion of his income for that year, he thereby added to his estate the value of the purchase. If he in that way increased his income for 1862, that would be taken into account in assessing it, but if he were then to foreclose the mortgage or perfect his title, that would only be consummating a right of property by enforcing an absolute lien. If he made sale of the property, would the proceeds become part of his income for that year, even though reinvested in another estate?

It is contended on the part of the plaintiff that the law only refers to the earnings received after its passage, July 1, 1862. There is much force in the argument, particularly upon comparing the eightieth with the eighty-first section, the former of which declares that, on and after a certain day, railroad managers shall be subject to, and pay a duty of three per centum on the gross amount of all receipts for the transportation of passengers; but it is not necessary for us to decide that question. We think, however, that there must be, in substance or in fact, after the 1st of September, 1862, a distribution of a dividend in money or scrip, made to the stockholders, and not the mere evidence given of a title in property, the right to which already existed. But it may be said that when there are earnings to be divided, the right to them exists before the division. That is true, but it is also true that until actually divided, the managers of the railroad have control of them, and may appropriate them to the improvement or repairs of the road. It is the setting them apart as a dividend in money or scrip that makes the law operate upon them so as to authorize the tax of three per cent.

We think, therefore, under the circumstances of this case, these certificates of stock cannot be regarded as a dividend declared due and payable to the stockholders in November, 1862. The company and the stockholders treated that part of the property acquired with these earnings as capital stock, and it cannot be at the same time stock added to the capital and a dividend.

At the argument, objection was made by the counsel of the government, though not pressed, that the court ought not to interfere in this summary manner to prevent the collection of the revenue, and various authorities were cited upon that point. We have not fully considered that question, and any temporary order that may be made will be regarded as leaving that open for future consideration. This, we understand, is the wish of the counsel, while at the same time desiring the opinion of the court on the merits of the case. The plaintiff insists that a suit at law would be unavailing in consequence of the pecuniary irresponsibility of the collector,

and because his sureties would not be liable, and therefore if this bill is not maintainable the plaintiff is without remedy.

We are informed that the judges of the circuit court of the United States for the eastern district of Michigan, at the June term of the present year, have decided that the sureties of the collector were not liable for illegal collections. If this be so, and the collector himself is not able to respond in damages in an action at law, there would seem to be some ground for the application in this case. However this may be, or whether the distinction taken in some of the cases is sound, that courts of equity will interfere when the tax is illegal or the property not subject to the tax (Chicago, B. & Q. R. Co. v. Frary, 22 Ill. 34), and not in other cases, we need not now inquire. The question in this case has been examined because of the desire expressed by the counsel to that effect, on both sides. If necessary, the right of the court permanently to interfere and arrest the collection of this tax may be hereafter considered. It is proper to add that Judge Davis, to whom it has been submitted, entirely concurs in this opinion.

CHICAGO, B. & Q. R. CO. (SAYLES v.). See Case No. 12,416.

CHICAGO, B. & Q. RY. CO. (SEYMOUR v.). See Case No. 12,685.

CHICAGO, D. & M. R. CO. (BURNHAM v.). See Case No. 2,174.

CHICAGO, D. & V. R. CO. (OSGOOD v.). See Case No. 10,604.

Case No. 2,669.

CHICAGO FRUIT-HOUSE CO. v. BUSCH.

[2 Biss. 472; 4 Fish. Pat. Cas. 395; 3 Chi. Leg. News, 201; 3 Leg. Gaz. 107.][1]

Circuit Court, N. D. Illinois. March Term, 1871.

VALIDITY OF RE-ISSUED PATENT—ACTION OF COMMISSIONER — PATENTEE MAY OMIT PART OF HIS CLAIM — "AIR-TIGHT" — IMPERFECT CONSTRUCTION—ADDING TO PATENTED ARTICLE.

1. In considering the validity of a re-issued patent the only question is as to whether the invention described in the re-issued letters is to be found in the original model, specifications or drawings of the invention.

2. In the re-issued patent the patentee need not claim all that was claimed in the original patent, but may retain what he deems proper.

[Cited in McWilliams Manuf'g Co. v. Blundell, 11 Fed. 420.]

3. The courts must accept the action of the commissioner of patents, as the lawful exercise of his authority, unless it is apparent upon the face of the patent that he has exceeded his authority, and there is a clear repugnancy between the old and the new patent.

4. A patentee, the main and controlling element of whose invention was a metallic ice floor, may in a re-issued patent omit the specifications of the method and form of the supports which had formed a part of his original letters patent, without impairing his claim to the subject matter retained.

5. The term, "air-tight" as applied to the floor of an ice reservoir, means substantially "water tight," or such a construction of the floor that the water will not run down upon the articles stored below, nor the air escape to melt the ice above. A patent for such a floor cannot be evaded by constructing a leaky floor. A person cannot use a patented device by constructing it in an imperfect manner.

6. The fact that in combination with the floor patented, the defendants use another floor, cannot be allowed as a defense. If the floor patented is any part of the defendants' combination, any additions or improvements made thereto do not entitle them to use the part patented.

This was a bill in equity to recover damages for past and to restrain the future use by defendants, of a patent [No. 3,252] re-issued by the United States to Benjamin M Nyce, bearing date the 5th day of January 1869, for "an improvement in buildings for preserving fruit and other substances." The substantial allegations in the bill were, that on the 19th day of March, A. D., 1861, a patent [No. 31,734] was duly issued by the United States to said Benjamin M. Nyce for a new and useful invention before then duly made by said Nyce, for an "improvement in buildings for preserving fruit and other substances;" that afterwards said Nyce, in pursuance of the acts of congress in that behalf made and provided, duly surrendered his said patent, and on the 5th day of January, A. D. 1869, he received new and re-issued letters patent for said invention with amended specifications for the residue of said term of seventeen years from the 19th of March 1861; that on the 17th day of February, 1869, by his assignment in writing of that date duly executed, delivered and recorded, said Nyce assigned, sold and transferred to said complainant, who, it is averred, is a body corporate duly created and existing under the laws of the state of Illinois, all his right and title to make, use and vend the improvements specified in and by said re-issued letters patent, in and throughout the county of Cook, in said state of Illinois, and that ever since said assignment said complainant has been and is the sole owner of said patent, and has the sole right to make, use and vend said invention in said county of Cook; that said invention is of great value to complainants, and yet defendants although knowing complainant's right to said invention, did and have unlawfully and without right, used said invention and improvement, and are still using the same, to the great damage of complainant. The answer did not deny the issue of said letters patent nor the making of said invention by said Nyce, nor deny or put in issue the novelty of said alleged invention nor the validity of the patent. It also admitted that defendants were using buildings for the preservation of lager beer, but denied that said buildings were constructed substantially in the manner described in said patent.

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

King, Scott & Payson, for complainant.
Nisser & Barnum, for defendants.

BLODGETT, District Judge. The issue in this case under the pleadings is simply upon the question of the identity of the three devices used by the defendants with that invented and patented by Nyce. It appears from the evidence that the specifications in the original letters patent, described a building constructed with two or more outer walls with the space filled with chaff, tan-bark, charcoal or other non-conducting substances, after the manner usually adopted for the construction of ice-houses. This building was to be divided into upper and lower rooms or chambers by a floor to be made of metal, recommending galvanized iron as the best material for the purpose. The upper room or chamber was to be filled with ice, packed upon said metallic floor, and the articles to be preserved were to be placed in the lower room or chamber. The patentee then describes the method in which said floor is to be supported, providing for transverse joists, the upper edges of which should be beveled so as to cover as little as possible of the under surface of the floor, and the beveled edges should be tipped or covered with metal, thereby securing the contact of the atmosphere of the preserving chamber with the greatest possible amount of the surface of the ice floor. Provision was also made for the drainage of the water from the melting ice by means of pipes at the sides of the building, passing through the walls. To secure the necessary degree of dryness in the air of the preserving chamber, certain chemical absorbents were prescribed to be used. The specifications also described a vestibule or entry, to be so constructed as to enable persons to enter the preserving chamber without the admission of external air.

The claims of the patentee under this original patent were: "1st. The construction of a preserving house, whose lower chamber, to contain provisions, is separated from its upper or ice chamber by an air-tight metallic floor, 'M,' supported on metallic joists, 'L,' whose upper surfaces consist of a series of thin edges or points, substantially as set forth." (2d claim, not important in this case.) "3d. The combination of the vestibule and the preserving chamber, constructed as set forth. 4th. The combination of the preserving chamber with the use of the chemicals used for desiccating the atmosphere, and the hygrometric apparatus." In the re-issued letters the patentee only claims on: "1st. An insulated house * * * having an ice reservoir above, and separated from it by an air-tight metallic floor. 2d. The combination of such a house with a vestibule, as described. 3d. The use in such a house of a hygrometer, constructed substantially as explained."

It will thus be seen that while in his original patent the inventor claims the various parts of his house and apparatus in combination, in his re-issued patent his first and chief claim is for an air-tight metallic floor, separating the preserving chamber from the ice reservoir. He does not as in the first patent, claim for a metallic floor, resting on metallic joists with thin edges, although he states that method of construction as the best, when the lowest degree of temperature is desirable. But he says: "It is obvious that there are purposes to which these improvements are applicable, that do not require cold so excessive or an atmosphere so dry as to preserve fruit through successive seasons. For example, to preserve lager beer a temperature of forty-six degrees will answer, forty-three degrees being the best temperature to insure the slow and even chemical changes necessary during its two weeks of fomentation, a necessity which has heretofore closed almost all the breweries of the world from June to September. For all such purposes the strict conditions may be modified, as greater or less cold or dryness is desired. If moisture is not detrimental, leave out the absorbents. If a uniform temperature of forty degrees will suffice, the walls may be less perfect, and the instructions for insulating the metal ice floor less rigidly adhered to."

The defendants are brewers, and the alleged infringements are in certain buildings constructed by them in this city, for storing lager beer during the hot weather. The proof shows that all said buildings contain an ice reservoir, separated from the store or beer room by a galvanized iron floor, resting on wooden joists with flat edges or bearings, or on wooden knobs; that said floors pitch or descend from the center towards the outer wall, and next the wall have a trough or gutter to catch the drippings from the melting ice—the floor not fitting tightly to the wall. Defendants do not use the chemical absorbents described in the patent, but to protect the contents of the store room from the drippings from the ice floor, caused either by leakages or condensation, they construct another floor of zinc, or zinc and wood, under the metallic ice floor, which is made tight and sloping, or pitching from the center to the walls of the room. In fact, they construct a zinc roof beneath the ice floor and over the contents of the store room, to catch and carry off the water which would otherwise drip from the ice floor upon the beer casks. And defendants claim that the floor thus used by them does not infringe on complainant's patent, because: First. Complainant's patent calls for an iron floor, resting on iron supports—iron on iron. Second. The water runs off from their floor differently from what it does from floors described in the patent. Third. Their floor is not air-tight. It has a space next the wall, and also leaks some. Fourth. They use the metallic ice floor in combination with the

zinc floor or roof beneath it, and without this zinc floor or roof the ice floor would be valueless to them.

By their first point the defendants insist that the patentee is bound by the specifications in his original patent, and can only hold under his patent an iron floor on iron supports or bearings. This involves the question as to the validity of the re-issued patent.

The 13th section of the act of July 4, 1836 (5 Stat. 122), provides that: "Whenever any patent * * * shall be inoperative or invalid by reason of a defective or insufficient description or specification, or by reason of the patentee claiming in his specification, as his own invention more than he had or shall have a right to claim as new, if the error has or shall have arisen by inadvertency, accident or mistake, and without any fraudulent or deceptive intention, it shall be lawful for the commissioner * * * to cause a new patent to be issued to the said inventor * * * in accordance with the patentee's corrected description and specifications."

In considering the validity of a re-issued patent, then, the only question is as to whether the invention described in the re-issued letters is to be found in the original model, specifications or drawings of the inventor. In other words, is it his invention? If it can so be found, although defectively described, or if claimed with other matters not new or not the invention of the patentee, the re-issue is granted; and the action of the commissioner in granting the re-issue cannot be impeached or inquired into, except for alleged fraud or collusion. Blake v. Stafford [Case No. 1,504].

In the re-issued patent the patentee need not claim all that was claimed in the original patent. He may retain what he deems proper. Crompton v. Belknap Mills [Id. 3,406]. In this case the original specifications described a metallic ice floor, but claimed it in combination with the beveled and metal-tipped joists or supports. And the courts must accept the action of the commissioner as the lawful exercise of his authority, unless it is apparent upon the face of the patent that he has exceeded his authority, and there is a clear repugnancy between the old and the new patent. Woodworth v. Stone [Id. 18,021].

"An inventor is always at liberty in a renewed patent to omit a part of his original invention, if he deems it expedient, and to retain that part only of his original invention which he deems it fit to retain. No harm is done to the public by giving up a part of what he has actually invented; for the public may then use it, and there is nothing in the terms or policy of the patent act which prohibits such a restriction." Carver v. Braintree Manuf'g Co. [Id. 2,485].

"When the commissioner accepts a surrender of an original patent and grants a new patent, his decision in the premises in a suit for infringement is final and conclusive, and is not re-examinable in a suit in the circuit court, unless it is apparent upon the face of the patent that he has exceeded his authority, that there is such a repugnancy between the old and the new patent that it must be held as a matter of legal construction, that the new patent is not for the same invention as that embraced and secured in the original patent." Per Clifford, J., in Seymour v. Osborne, 11 Wall. [78 U. S.] 516, citing Battin v. Taggert, 17 How. [58 U. S.] 83; O'Reilly v. Morse, 15 How. [56 U. S.] 111; Sickles v. Evans [Case No. 12,839]; Allen v. Blunt [Id. 216.]

"Corrections may be made in the description, specification or claim when the patentee has claimed as new more than he had a right to claim, or when the description, specification or claim is defective or insufficient, but he cannot under such an application make material additions to the invention which were not described, suggested, nor substantially indicated, in the original specifications, drawings or patent office model." Seymour v. Osborne, 11 Wall. [78 U. S.] 516.

In the re-issue he claims simply the metallic ice floor. This is certainly within the rule. This floor was described in the original specifications, although combined with something else the inventor does not now desire to insist upon. There is no dispute but the patentee was the first inventor of the metallic ice floor, and he had a right to claim it as the sole subject matter of his invention, if he chose to do so. There is no departure from the original subject of his invention. He has merely simplified his claim, and confines it now to a single element, instead of a combination of elements, as at first. He is not confined to iron resting on iron; but may rest his floor on any support which enables it to subserve the object for which it is used.

The metallic ice floor was the main and controlling element of the invention. The method of supporting it, of drying the air, of securing ingress and egress, were mere incidents, whose use secured the more perfect working of the invention. This also disposes of the second objection, that the water runs off differently from defendants' floor than it does from complainant's.

It is obvious that some provision must be made for taking off from the floor the water formed by the melting of the ice, but the patentee is not confined to any special method of taking it off. He can carry it off by a gutter or through holes in the walls, or otherwise, as is most convenient. But it is urged, thirdly, that the patentee's floor must be "air-tight," and it is said defendants' is not air-tight, because it does not close up and make a tight joint with the wall, but admits a gutter along its edge between the floor and walls. I think it evident the

term "air-tight" used in the claim of the re-issued patent, is to be understood the same as "water-tight;" or, substantially, a tight floor through which the water would not run into the lower room to injure the articles stored there, nor the air escape into the upper room to melt the ice. This, of course, is a desirable condition, and the nearer air and water tight the floor is, the nearer the floor will be perfect. But I do not think the patent can be evaded by constructing and using a leaky floor.

Suppose a machine is patented in which a wheel is described as a material part—a wheel should be a perfect circle—could an infringer defend by showing that he used a wheel which was not a perfect circle? In other words, can any person use a patented device by constructing it in a slovenly or imperfect manner, so that it will accomplish the same kind of result as that intended by the inventor, but not so perfectly? But, as a matter of fact, the proof shows that all defendants' floors were made tight, and some have since become leaky by defective construction. Thus showing that in this regard the defendants attempted to make a tight floor, or an air-tight one.

But the defendants say they use the metallic ice floor in combination with the zinc floor underneath, and hence they do not infringe. This fact cannot be allowed as a defense, if in point of fact the complainant's floor is part of the defendants' combination, because the Nyce patent is for the metallic ice floor, and any additions or improvements added thereto do not entitle defendants to use what belongs to the owners of this patent. For the purposes to which this device is applied by defendants, I presume the zinc floor, to take the place of chemical absorbents, and to prevent drip, is a useful improvement, but that does not entitle defendants to use it without the consent of the patentee.

So, too, with regard to the vestibule. Defendants claim they do not use the vestibule described by the patentee, but they do use a room which performs the substantial functions of the vestibule in the patent. That is to say, the store room is entered through an adjoining room or entry, thereby preventing the external air from rushing into the preserving chamber or store room; so that this entry, as used by defendants in combination with the store room, is in all essential respects the equivalent of the patentee's vestibule. As this case stands, then, upon the pleadings and proofs, Nyce must be deemed the original and first inventor of a metallic ice floor for preserving houses, and of the vestibule in combination therewith. This fact, not being denied by the pleadings, must be held to be admitted, or, if not admitted, defendants only ask for proof, and that is furnished by the production of the letters patent. The right to use and vend this patent has been duly assigned to and is held by complainant. The floors used by defendants are, in their construction and functions, substantially like that described in the patent, and complainant, as assignee of the patent for the county of Cook, is entitled to recover its damages for the infringement.

The matter will, therefore, be referred to H. W. Bishop, Esq., one of the masters of this court, to take testimony, and report as to the amount of said damages, and the injunction will be granted, according to the prayer of the bill.

CHICAGO, I. & N. R. Co. (GRAY v.). See Case No. 5,713.

CHICAGO, M. & ST. P. R. CO. (BARNES v.). See Case No. 1,016.

CHICAGO MANUF'G CO. (DANE v.). See Case No. 3,557.

CHICAGO, P. ETC., R. CO. (FARMERS' LOAN & TRUST CO. v.). See Case No. 4,665.

CHICAGO, R. I. & P. R. CO. (ATLANTIC & P. TEL. CO. v.). See Case No. 632.

CHICAGO, R. I. & P. R. CO. (HATCH v.). See Case No. 6,204.

Case No. 2,670.

CHICAGO, ST. L. & N. O. R. CO. v. McCOMB et al.

[17 Blatchf. 371; 9 Reporter, 569.][1]

Circuit Court, S. D. New York. Dec. 31, 1879.

REMOVAL—DIVERSE CITIZENSHIP—CORPORATIONS.

1. In determining, under the first clause of § 2 of the act of March 3, 1875 (18 Stat. 470), whether a suit is one in which there is a controversy between citizens of different states, the condition of the controversy when the petition for removal is filed is what is to be considered, and not its condition at a subsequent time. There must be a controversy between citizens of different states when the petition is filed, and all the parties on one side of such controversy must unite in the petition for removal, and they must all then be of different state citizenship from any of the parties on the other side of such controversy.

[Cited in Smith v. McKay, 4 Fed. 354; Curtin v. Decker, 5 Fed. 387, 388.]

2. A corporation defendant, which is not a real or actual or necessary party, but is a merely formal party, to the controversy in the suit, as such controversy stands when the petition for removal is filed, is to be considered as not a party.

3. The controversy is to be judged of, in part, by the pleadings, if any, which had been put in, in the state court, before the filing of the petition for removal.

4. In a suit by a corporation of one state against a citizen of another state, it is sufficient, in a petition for removal by the defendant, under the first clause of said § 2, to state, that the defendant is a citizen of such other state, and it is not necessary to state that he was such citizen when the suit was commenced.

[Cited in Curtin v. Decker, 5 Fed. 387, 388.]

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 9 Reporter, 569, contains only a partial report.]

5. Nothing had transpired, in pleading or evidence, since the case came into this court, to show that said formal defendant ought now to be held to be an actual, real and necessary defendant; and a motion to remand the cause was denied.

In equity.

John F. Dillon, for the motion.
Francis N. Bangs, opposed.

BLATCHFORD, Circuit Judge. The defendants in this suit filed in the state court in which the suit was brought a petition for its removal into this court. The petition was that of both of the defendants. It set forth, "that the plaintiff is, as alleged in the complaint, a corporation, existing under the laws of the states of Louisiana, Mississippi, Tennessee and Kentucky; that the said Henry S. McComb is a citizen of the state of Delaware, and that the defendant, the Southern Railroad Association, is a corporation existing under the laws of the states of Mississippi and Tennessee; that the said action was commenced against the defendant Henry S. McComb alone, by the service of a copy of the summons and complaint therein upon the said Henry S. McComb on the 28th day of May, 1878, and that said defendant has not yet appeared in said action; that no service of process in said action has yet been made upon the defendant, the Southern Railroad Association; that the matter in dispute in this action exceeds, exclusive of costs, five hundred dollars; that it relates to certain railroad bonds amounting to over $475,000 in par value; and that a controversy has arisen in this action between citizens of different states, and the defendants desire to remove the said action from this court to the circuit court of the United States for the southern district of New York, in which district the said suit is pending; wherefore, the petitioners pray that the said suit may be removed from this court to the said circuit court of the United States for the southern district of New York, and that this court will proceed no further in this action." The petition is dated and verified June 1st, 1878. A proper bond accompanied it. On the 6th of June, 1878, the state court made an order in the cause, reading as follows: "The defendants in this action having, pursuant to the third section of the act of congress of the United States, approved March 3d, 1875, made and filed in this suit, in this court, their petition for the removal of this suit into the circuit court of the United States for the southern district of New York, and having made and filed therewith a bond, with good and sufficient surety, for the defendants' entering in such circuit court, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by the said court if said court shall hold that this suit was wrongfully or improperly removed thereto, and also for there appearing and entering special bail in such suit, if special bail was originally requisite therein, now, on motion of C. W. Bangs, attorney for the said defendants, for this purpose, it is ordered that the said petition and bond be accepted, and it is hereby declared that this court will proceed no further in this suit, and this cause is hereby declared to be removed to said circuit court of the United States for the southern district of New York."

This suit, if removed, is removed under the first clause of the 2d section of the act of March 3, 1875 (18 Stat. 470). The petition for removal is framed under that clause. That clause, so far as it applies to this suit, provides, "that any suit of a civil nature, at law or in equity, * * * hereafter brought in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, * * * in which there shall be a controversy between citizens of different states, * * * either party may remove said suit into the circuit court of the United States for the proper district."

A motion is now made by the plaintiff to remand this cause to the state court, on the following grounds, stated in the notice of motion: "First, that the said cause is not properly removable into this court under any of the laws of the United States providing for and regulating the removal of causes from the state courts into the courts of the United States; second, that it does not appear, from the petition for the removal of the cause, or otherwise, that the said defendant McComb was, at the time of the commencement of said suit in the said superior court of the city of New York, a citizen of the state of Delaware, or a citizen of a state other than the states of which the plaintiff is a citizen; third, that it does appear, from the papers and pleadings heretofore filed in this suit, that the said defendant, the Southern Railroad Association, is a necessary adverse party defendant to the case made and stated in the plaintiff's bill, and it also appears that said defendant is a citizen of the same state or states with the complainant."

On the 4th of November, 1878, the plaintiff filed a bill of complaint in this court, which avers the bringing of this action in the state court, and "that, thereafter, the said Henry S. McComb, according to the provisions of the statutes of the United States in such case made and provided, removed the said action into this court." McComb put in an answer, in this court, to said bill, in which those averments are admitted. The Southern Railroad Association and McComb, "as the alleged president, or as otherwise an officer of the Southern Railroad Association" put in an answer and disclaimer, in this court, to said bill, in which it is averred, "that neither the said the Southern Railroad Association, nor the said Henry S. McComb, as the president, or as otherwise an officer, of the said the Southern Railroad Associa-

tion, had, at the time of the commencement of this suit, or at any time since, or now has, in its or his possession, or under his or its control, nor has he or it, at any time since the commencement of this suit, claimed, nor does he or it claim, any right, or title to, or interest in, any of the first or second mortgage bonds of the Mississippi Central Railroad Company, touching which any discovery or relief is sought by the said bill, and they, as such officer and corporation as aforesaid, severally disclaim having any right, title or interest, in, to or upon any of the first or second mortgage bonds or things in action in respect to which this suit appears by the said bill to be brought."

In determining, under section 2 of the act of 1875, whether a suit is within the description of one "in which there shall be a controversy between citizens of different states," so that "either party may remove said suit" into a federal court, it is plain, that the condition of the controversy at the time the petition for removal is filed in the state court is the condition of the controversy which must be taken into consideration, and not the condition of the controversy at a time subsequent to the filing of such petition, if there be a difference between the condition of the controversy at the one time and its condition at the other time. There must be, in the suit, a controversy between citizens of different states, at the time the petition for removal is filed, and all the parties on one side of such controversy must unite in the petition for removal, and, when they so unite, they must all of them be, at that time, of different state citizenship from any of the parties on the other side of such controversy. This is understood to be the view of the supreme court, so far as it is expressed in the recent decision of that court in Meyer v. Construction Co., 100 U. S. 457.

In the present case, the petition for removal states, that the plaintiff is a corporation of Mississippi and Tennessee, and that the defendant, the Southern Railroad Association, is a corporation of Mississippi and Tennessee. Therefore, if the Southern Railroad Association was, when the petition for removal was filed, a real and actual and necessary, and not a merely formal, party to the controversy in the suit, as such controversy stood at that time, this suit could not be removed into this court by virtue of the petition which was filed under the first clause of said 2d section, because there was not, at that time, the necessary diversity of citizenship between the plaintiff and the Southern Railroad Association.

That controversy must be judged of, in part, by the pleadings, if any, which had been put in in the state court, prior to the filing of the petition of removal. In this case, the only pleading in the state court, when the petition for removal was filed, was a complaint. That complaint relates, in the first place, to $106,000 of first mortgage bonds, alleged to have been illegally re-issued. Of those, it is alleged that $79,500 "are now held and claimed by the defendant, Henry S. McComb, as hereinafter stated." It then alleges, that certain second mortgage bonds, which it claims are invalid, are "in the hands of the said McComb," and that "said McComb claims to hold and own the same in his own right or for the Southern Railroad Association, and has demanded of this plaintiff that it should recognize the said bonds as outstanding and valid obligations." Again, in regard to such second mortgage bonds, it alleges, "that the greater portion thereof are now in the possession or under the control of the said Henry S. McComb, and that he claims to hold and own the same either individually or as an officer of, or for the benefit of, the said Southern Railroad Association, or of said associates or corporators therein;" and that "the said Henry S. McComb does not distinctly designate the particular right or title by which he claims the same, but he claims and demands that plaintiff should recognize these bonds and the coupons thereof, as valid and existing bonds and obligations secured under the said second mortgage." It then alleges, that "the said second mortgage bonds held by said McComb, or in his possession and control, as aforesaid, and which * * * he now claims and demands, without right, to hold and enforce against plaintiff and its property," are numbered so and so, "amounting, in all, to $398 300." It then avers, "that the said Henry S. McComb claims to hold as his own, or in behalf of parties he does not disclose, $79,500 of the said amount of $106,000" first mortgage bonds, "and threatens to enforce the same, as he does the said $308,300 of second mortgage bonds, against this plaintiff." There are no averments in the complaint which vary or control the foregoing. It is plain, from them, that McComb is the real defendant, holding, possessing and controlling the bonds which are attacked. The averments of the complaint are not sufficiently specific as to the Southern Railroad Association, to make it a necessary party, or any other than a formal or nominal party. Then the answer and disclaimer of the Southern Railroad Association, sworn to by McComb, in this court, January 31st, 1879, may be used, on this motion, as an affidavit, to the effect, that the Southern Railroad Association did not have, at the time this suit was commenced or at the time the petition for removal was filed, any of said bonds in its possession or under its control, and that it did not, when the petition for removal was filed, claim any right or title to or interest in any of said bonds. On this state of facts, it must be held, that the association was a merely formal party to the suit, at the time the petition for removal was filed, and that the suit and the whole suit was removed into this court by the proceedings which were had. These views dispose of

the first and third grounds specified in the notice of motion.

As to the second ground, the petition for removal states that McComb is a citizen of the state of Delaware, but does not state that he was such citizen when the suit was commenced. This question has been decided by this court in McLean v. St. Paul & C. Ry. Co. [Case No. 8,892], in which the same point was taken as to a petition for removal under the act of 1875, and was overruled.

I do not understand that there is anything which has transpired, in pleading or evidence, since this case came into this court, which goes to show that the Southern Railroad Association occupies such a different position in regard to the controversy, that it must now be held to be, in this court, an actual, real and necessary defendant, although it may appear to have been only a nominal or formal defendant when the petition for removal was filed. The motion to remand the cause is denied.

Case No. 2,671.

CHICKERING v. HATCH et al.

[1 Story, 516.][1]

Circuit Court, D. Maine. May Term, 1841.

MASTER IN CHANCERY—POWERS ON REFERENCE—CERTIFICATE OF ENROLLMENT—CONCLUSIVENESS.

1. Where an interlocutory decree was made, referring it to a master, to ascertain and report to the court the amount of a claim, which the defendant had against certain real estate, which was conveyed to him, as a security for such claim; it was *held*, that the master was not bound by the statement of that claim in the defendant's answer, but was at liberty to inquire by all the evidence in the cause, and other evidence brought before him, what was the true extent and just amount of the claim, whether that evidence was in support of, or was contradictory to, the answer.

2. The statement of the title or ownership of a vessel in the custom house documents, whatever may be its effect between the parties to those documents, is not conclusive upon third persons, who have an adverse interest; but they are at liberty to show the real title to be different from what is stated therein.

This cause was formerly before this court, and the decision then made will be found reported in 3 Sumn. 474 [Case No. 2,672]. By the interlocutory decree then passed, it was referred to a master to ascertain and report to the court the amount of the claim of Gideon Hatch, which was declared to be a charge on the land stated in the bill. The master now made his report as follows:

The undersigned, a master in this court, to whom it was referred by order of the court to ascertain the sums of money due to the said Gideon B. Hatch from the said William B. Hatch, for the services mentioned in the said Gideon's answer, his first report having been recommitted to him, having heard the parties, and the evidence introduced by them, reports as follows: Gideon Hatch claims to be allowed wages as mate on board the schooner Infant, in the year 1825, for about nine months, at the rate of $16 a month. And wages on board the Tantamount from March 10th, 1826, to December 25th, 1826, nine and a half months, at about $15½ per month; on board the Tantamount from March to December, 1827, about nine months, at $20 per month; on board of the Tantamount in 1828, he claims in his answer nearly ten months, at $20 per month. On his examination he admitted, that his wages on board the Infant were $15 per month; and that he was entitled to wages for but three months and a half, in 1828, the vessel having then been sold.

The counsel for the defendant contends, that the court have decided, that the fund in question is chargeable with the amount of wages due to the said Gideon, for his said services; and that the only inquiry for the master is, as to the amount of wages so due; and that his answer is sufficient proof of his claims. But he introduces the deposition of Jeremiah Hatch to confirm the answer. This deposition is objected to on the ground of interest, and a certificate from the collector of the Passamaquoddy district is offered to prove, that on May 1st, 1826, the said Jeremiah Hatch was an owner of the said schooner with William B. Hatch, Seth Hatch, and Gideon Hatch; and that the said Jeremiah was master, and so liable to the said Gideon for his wages, and interested, that he should hold them out of his fund. This certificate is admitted, by agreement, as evidence in the same manner, as if it were a deposition from the collector, containing a copy of the record. The deposition is admitted by agreement, subject to the objection. This deposition confirms the answer of Gideon in some particulars, and contradicts it in some. It confirms it: 1. As to the Infant. Deponent knows, that Gideon was employed on board of her, because he was in company with and on board of her a great many times. 2d. As to the Tantamount. He knows that Gideon was employed as mate, because he was himself master of her for the year 1826, and part of 1827; and was on board of her the biggest part of the time in 1827 and 1828, and acted as master. Ans. 17, 18, 19, 20. He states, that he kept the account of Gideon's wages. That they were due to him from William B. Hatch, and that he never himself owned any part of that schooner. That Gideon purchased one quarter of William B. Hatch, but took his bill of sale from the Glovers. That he paid the money, that belonged to Gideon for wages, to the said Glovers, towards paying them what was due to them from William B. Hatch for his three quarters. That something over $300 of Gideon's wages was so paid to the Glovers. That there was due from William B. Hatch to Gideon, when the Tantamount was sold, from $500 to $600. On the other hand, he says, that Gideon received of

[1] [Reported by William W. Story, Esq.]

his wages, from time to time, about $100, and that he paid him a balance of his wages of about $100. It does not appear very clearly, whether he means two different amounts, each of $100, or only $100 in all. He says, too, that he and Gideon did, on or about May, 1827, take the usual oath, that they were the owners of the vessel. He states, that Gideon was employed on board the Tantamount from about the first of March to the first of October, 1828, as near as he can tell; and adds, that it was to the time, that she was attached. It is admitted, that she was sold June 11th, 1828. As to the amount of wages due to Gideon, which he speaks of in round terms as being $500 or $600, it is more than could have been due on the largest calculation, without deducting the payment he testifies to. See Statement No. 1. Richard Warren was introduced by the defendants, to confirm the claims stated in the answer. But I do not perceive, that his testimony was material. Gideon Hatch, the respondent, was introduced by the defendants' counsel, and offered to the complainant for examination. The complainant's counsel declining to examine him, and objecting to his examination, he was examined by the defendants' counsel, generally, as to his employment in the service of William B. Hatch. But his testimony was not considered by me as proper evidence, and was allowed no other weight, than as far as it contained admissions against himself. If his statements should have been admitted as evidence, the master does not find in them any thing to vary the conclusions, at which he arrived.

The complainant [John Chickering] introduced, as evidence to contradict the statements of the respondent and of Jeremiah Hatch, 1st. The certificate of Samuel Philips, collector of the port of Newburyport, certifying, "that the schooner Infant, William B. Hatch, master, was enrolled at this port, April 11th, 1825, and that her enrollment was surrendered at Passamaquoddy, July 6th, 1826. On the 22d of March, 1826, Benjamin Small became master." Which certificate was admitted by agreement to be used as evidence of the same effect, as a deposition from the collector, containing a copy of the record. The only effect of this certificate, as contradicting the respondent's answer or evidence, seems to be in fixing the time of the commencement of William B. Hatch's liability for wages to be April 11th, 1825, instead of March, 1825, as stated in the answer. The complainant likewise introduced the certificate of S. S. Rawson, collector of Passamaquoddy, which is admitted in the same manner, as the one above mentioned. This collector certifies, that it appears on record as follows, viz.: "Nov. 10th, 1824. Oliver Glover and James Glover, of Lubec, in the state of Maine, and George Savory, of Bradford, in the state of Massachusetts, are owners of the schooner Tantamount, and John Allen was master of her." "May 1st, 1826. Jeremiah Hatch, William B. Hatch, Seth Hatch, Jr., and Gideon Hatch, all of Dennysville, in the state of Maine, were owners of the said schooner, and Jeremiah Hatch was master." "June 20th, 1827. Jeremiah Hatch and Gideon Hatch, of Dennysville, in the state of Maine, were owners, and the said Jeremiah Hatch was master." "Nov. 19th, 1827. Owners the same as June 20th, 1827, and Gideon Hatch, master." And the enrollment was surrendered in Boston, June 12th, 1828. Likewise a bill of sale from Henry H. Huggeford, deputy sheriff of the county of Suffolk, Massachusetts, dated June 11th, 1828, of the said schooner Tantamount, to Joseph Patch and others, for $800; "he having (as stated in the said bill of sale) attached the same, on a writ in favor of Oliver Glover and James Glover, against Jeremiah Hatch, and one other writ in favor of Oliver Glover, against William B. Hatch, Jeremiah Hatch, Seth Hatch, Jr., and the said Gideon Hatch," which bill of sale was admitted as evidence. The said certificate of the collector of Passamaquoddy contradicts the answer of the said Gideon, and the evidence of Jeremiah Hatch, as to the ownership of the Tantamount by William B. Hatch.

But it is contended by the respondent, that it has already been settled by the court, that Gideon is entitled to his wages for all the time he served on board the said schooners, and that it is only for the master to ascertain the amount. If this be the correct principle for the master to act upon, he is of opinion, that the said Gideon is entitled to claim for his wages, while on board the Infant, ninety-seven dollars and thirty-seven cents; viz. wages for nine months, at $15, which amounts to $135.63, from which is to be deducted $37.63, which has been paid; leaving a balance of $97.37, as above. And for wages while on board the Tantamount, one hundred and ninety dollars and forty-four cents, viz.:

From March 10, 1826, to Dec. 25, 1826, 9½ months, at $15½	$147 25
From March, 1827, to December, 9 months, at $20	180 00
From March, 1828, to June 11, 3 months, at $20	60 00
William B. Hatch owned but three fourths of the vessel, and	
Three fourths of the above sum is	$290 44
From which deduct $100 paid	100 00
Leaving a balance of	$190 44

This, added to the balance due to him on board the Infant, makes the whole amount two hundred and eighty-seven dollars and eighty-one cents. See statement No. 1. But if the liability of William B. Hatch is not to be considered as already definitely settled by the court, but liable to be controlled by the evidence produced before the master, then the effect of that evidence is to be considered. If the custom house records were to be held as conclusive evidence of ownership, in determining a claim for wages, then

it appears, that Glover and others were owners up to May 1st, 1826, when Jeremiah Hatch, William B. Hatch, Seth Hatch, Jr., and Gideon Hatch became owners, and so remained to June 20th, 1827. It is not stated in what proportion each owned; and the master infers, that each owned one quarter, and that Gideon would therefore be entitled to claim of William B. Hatch one quarter part of his wages for that time; viz. from May 1st, 1826, to December 25th, 1826, seven months and twenty-four days, at $15½, and from March 10th, 1827, to June 20th, 1827, three and a third months, at $20 per month, amounting to $46.91. As it appears, that on June 20th, 1827, Gideon Hatch, and the witness Jeremiah Hatch, became sole owners, Gideon could claim nothing of William B. after that time. Gideon would be entitled to his wages on board the Infant, commencing, as by collector Philips' certificate, April 11th, 1825, for seven and a half months, at $15, amounting to $112.50; from which is to be deducted the $37.63 paid, leaving $74.87, which, added to the balance due on board the Tantamount, $46.91, makes $121.78; from which is to be deducted the $100 paid as per Jeremiah Hatch's deposition, and there remains twenty-one dollars and seventy-eight cents, which the master finds to be the amount due on this view of the case. See statement No. 2.

If the master is authorized to weigh and compare the evidence of the records with Gideon's answer and evidence, his conclusion would be different. Jeremiah Hatch swears, that he himself never owned any part of the Tantamount, but that William B. Hatch owned three quarters and Gideon Hatch one quarter; but that the schooner "was papered three quarters in his name," "for security." He does not state, what he means by "security." He does not state, that any conveyance or pledge of her was made to him. The master infers, that the vessel was registered in his name, as a cover to keep it from the creditors of William B. Hatch. And that William B. may have been an equitable owner of three quarters of her, while so registered. This, however, does not account for the registry of William B. Hatch, Seth Hatch, Jr., Gideon Hatch, and Jeremiah Hatch, as owners, May 1st, 1826. The master is induced, therefore, to believe, that from May 1st, 1826, to June 20th, 1827. William B. Hatch owned one quarter, and Gideon Hatch one quarter, and that Gideon may claim of William B. one quarter of his wages for that period; and that after that time William B. was equitable owner of three quarters, while the record ownership was in Jeremiah and Gideon. If this equitable ownership, under a fraudulent cover, entitles Gideon to claim wages of William B., then he will be entitled in addition to his wages for one quarter, as above mentioned, to hold his wages against William B. for three quarters of the vessel, from June 20th, 1827, to June 11th, 1828, viz:

From May 1st, 1826, to Dec. 25th, 1826, 7 5/6 months, at 15½, is	$121 00	
From March 10th, 1827, to June 20th, 1827, 3⅓ months, at $20, is	66 67	
One quarter of which two sums is		$ 46 91
From June 20th to December 20th, 1827, 6 months, at $20, is	120 00	
In 1828, three months, at $20, is	60 00	
Three quarters of which two sums is		135 06
To which add the balance due on board the Infant, as by the first statement		97 27
		$279 28
And deduct the $100 paid		100 00

And the balance is one hundred and seventy-nine dollars and twenty-eight cents, which sum the master finds to be due upon this view. See statement No. 3.

The counsel for the complainant having suggested, that the answer being contradicted by the testimony of the plaintiff, and by the further answers of Gideon Hatch, and the testimony introduced by him, before the master, it becomes the duty of the master to reject the whole, and report in favor of the plaintiff. And if the master should not consider it his duty so to report, requesting him so to present the case, that he may have the benefit of exceptions to the report, the master states, that if the whole question of the credibility of the evidence were open to him, he should, from the contradictions, exhibited between the answer of the said Gideon and the evidence of his witness, Jeremiah, and the proof from the records, find great difficulty in believing the answer of the said Gideon, and the evidence of the said Jeremiah, entitled to sufficient credit to establish any claim in the said Gideon, and should be inclined to reject the whole claim as unsupported by evidence. For the oath of the said Gideon in his answer, and of the said Jeremiah in his deposition, are decidedly contradicted by their oaths made at the custom house. And it is admitted by Jeremiah, that he and Gideon did take the usual oaths at the custom house, at the time of the charges exhibited by the collector's certificate. There are contradictions likewise between Gideon and Jeremiah. Thus, Gideon states in his answer positively, that he was entitled to wages for ten months in 1828. But it is found and admitted, that he is entitled to wages for but three months of that year. He states, that he received of his wages but $37.63. Jeremiah says, that he paid him about $100. And it is doubtful, whether he is not to be understood to say $200. And this was from his wages on board the Tantamount, and the $37.63 appears from the answer to have been in part of his wages on board of the Infant. He states, that all his earnings

were received and retained by William B. Hatch. But Jeremiah says, that a part of them we repaid to the Glovers to pay for Gideon's quarter of the Tantamount. And this sum must have been somewhere from $100 to $300. For the Glovers received for the vessel $1200; for Gideon's quarter $300. Of this a part came from the sale of the schooner in Boston. She was sold for $800; out of which was to be paid the debt and costs, for which she was sold, the amount of which is not stated, and Gideon's share of the balance was paid to the Glovers, and the remainder of the $300 was paid out of his earnings, or the earnings of his share of the vessel. Gideon says, that he bought one quarter of the vessel from William B. Hatch. Jeremiah says, he bought it from William B., but took his bill of sale from the Glovers. From the collector's certificate, that on June 20th, 1827, Jeremiah Hatch and Gideon Hatch were owners, it would seem, that they were then equal owners, and that Gideon's share was one half. But the master has not considered himself at liberty to take into consideration these circumstances, as impeaching the credibility of Gideon's answer. If the court should think, that the $100 balance spoken of by Jeremiah in his 85th answer was a different sum from that spoken of in his answers 71, 72, 73, then this $100 additional is to be deducted from Gideon's claim in all the statements. But the master, though doubtingly, thinks that one sum only of $100 was intended.

Signed, Henry Warren.

The statements Nos. 1, 2, and 3, referred to in the report, are omitted, as they are sufficiently explained in the report itself for the purposes of the decision made by the court.

To this report the following exceptions were filed by the plaintiff: Exceptions taken by the plaintiff to the report of Henry Warren, one of the masters of the said court to whom the said cause was referred, made in pursuance of an interlocutory decree of the said court: First exception. The said Chickering reserving to himself all exceptions taken at the hearing before the master, and which appear in his report, excepts to so much of the said report as allows the defendant, Gideon Hatch, any sum of money whatever; and insists upon the ground taken before the master, as set forth in the report, that the answer being contradicted by the testimony of the plaintiff, and by the further answers of the said Gideon, and the testimony introduced by him before the master, it becomes the duty of the master to reject the whole, and report in favor of the plaintiff. Second exception. But if, in the opinion of the court the first exception is not well taken, the plaintiff excepts to so much of the report, as allows the said Gideon, in the alternative, the sum of $287.81, or $179.28. Third exception. And the plaintiff excepts to so much of the said report as allows the said Gideon in the alternative the sum of $21.78 or $14.28, because the master in his statements Nos. 2 and 4, in which those two sums are reported, credits the sum of $100 only, instead of $200, the sum testified to by Jeremiah Hatch, as paid by him to Gideon Hatch.

Mr. Hobbs, for plaintiff.

C. S. Daveis, for defendant.

STORY, Circuit Justice. We think the true view of the case is that, which is presented in No. 3, annexed to the report of the master, by which $179.28 is allowed to the defendant, Gideon Hatch, under the order of the court. And we confirm the report accordingly; and overrule the exceptions filed in the case, so far as they touch this part of the report.

The short ground, upon which we have come to this conclusion is, that the statement No. 1, proceeds upon the supposition, that the answer of Gideon Hatch is conclusive as to his title to wages, and the extent of his claim, leaving to the master only to ascertain the amount. This is a mistake. The decretal order of the court left the whole matter open for inquiry before the master upon the answer and all the evidence in the case, which might be adduced in support of, or to control or contradict the answer or the claim. The statement No. 3 proceeds, therefore, upon the true ground, as the result, to which the master has arrived, upon a review of all the evidence, as well as the answer. Then, as to statement No. 2, it is founded upon the supposition, that the title or ownership of the vessel, as stated in the custom house documents, is conclusive of the title of the respective owners in a suit for wages. That is not a correct view of the law. On the contrary, whatever might be the case in a controversy between the respective parties to those documents, the true title or ownership may be shown to be different from that stated in those documents by a third person, whenever his interest is concerned therein. Now, this is precisely the predicament of the plaintiff; and hence the statement No. 2, cannot be supported. The result is, that the claim of Gideon Hatch for wages must stand upon the statement No. 3; and we are of opinion, that, under all the circumstances of the case, the allowance of $179.28 is the true balance due to him. The exceptions filed by the plaintiff are, therefore, overruled, and the report must stand confirmed for that sum; and a final decree for a sale of the property is to be entered, according to the opinion expressed at the original hearing of this cause, when the interlocutory decree was passed.

Case No. 2,672.

CHICKERING v. HATCH et al.

[3 Sumn. 474.][1]

Circuit Court, D. Maine. May Term, 1839.

MORTGAGE—CONVEYANCE ABSOLUTE IN FORM—VALIDITY.

A conveyance of certain premises, absolute in its form, but admitted, by the answer in chancery, to be a mortgage security merely for certain debts, was treated as a valid security to the extent of these debts, and the premises, subject to this charge, were held to be liable to judgment creditor of the original grantor.

Bill in equity, by an execution creditor under a levy, for discovery.

Hobbs, for plaintiff.

Daveis, for defendant Gideon Hatch.

No appearance was entered for William B. Hatch, the execution debtor, and the bill was taken against him, pro confesso.

STORY, Circuit Justice. The plaintiff is a judgment creditor, who has levied upon a part of the land conveyed to the defendant, Gideon Hatch, by the other defendant, William B. Hatch, his brother, by a deed absolute in its purport and form. The bill asserts the conveyance to be fraudulent. The answer denies the fraud; but admits that the conveyance, though absolute in its form, was designed by the parties to be a mortgage security merely for the debts then due for services by William B. Hatch to the defendant, Gideon Hatch. Subject to this claim, it admits the right of the plaintiff, and seeks satisfaction only for the amount of the claim under the conveyance. It appears to me, that the transaction, though very irregular, and loose, and inartificial, was founded in good faith, and not designed to defraud creditors, at least not to the knowledge, or with the assent, of the defendant, Gideon Hatch. He has made a full and fair disclosure of all the circumstances, and is therefore entitled to the protection and aid of the court to the extent of his just and equitable claim for services upon the property. Subject to that claim, he ought to be decreed to release all his right and title to the premises included in the levy. But the claim ought to be made primarily a charge upon that portion of the land, which is not included in the levy; and if, upon a sale thereof, to be directed by the court, there shall not be sufficient to satisfy the claim of the defendant, Gideon Hatch, when the same is ascertained by a master, then the residuum ought to be decreed to be a charge on the premises included in the levy; and when the plaintiff discharges the same, the release ought to be enforced by a decree against the defendant, Gideon Hatch.

The district judge concurs in this view of the case. And a decree will accordingly be entered, declaring the rights of the parties, and referring it to a master to ascertain the amount of the claim of Gideon Hatch; and further orders will be reserved until the coming in of the master's report.

[NOTE. For decision on the coming in of the master's report, see Case No. 2,671.]

[1] [Reported by Charles Sumner, Esq.]

Case No. 2,673.

CHILD v. ADAMS et al.

[1 Fish. Pat. Cas. 189;[1] 3 Wall. Jr. 20; 12 Leg. Int. 4.]

Circuit Court, E. D. Pennsylvania. Nov., 1854.

PATENTS — CONSTRUCTION OF STATUTE OF 1836 — POWER OF COMMISSIONER—FRAUD IN PROCURING ORIGINAL PATENT—REISSUE.

1. Section 13 of the act of July 4, 1836 [5 Stat. 122], by defining the conditions under which the powers it confers shall be exercised, necessarily excludes it in all other, except, perhaps, the correction of clerical errors.

[Cited in De La Vergne Refrigerating Mach. Co. v. Featherstone, 49 Fed. 917.]

2. Where a statute defines the extent of power given to one who acts ministerially, the courts can not extend it, or validate acts done without or beyond its authority.

3. The commissioner has no power to confirm a patent obtained by false suggestion, either by pardoning the offense or excusing it on the plea of innocent ignorance.

4. If an alien, either through ignorance or intention, falsely represents himself as a citizen in order to obtain a patent, the patent so procured is "inoperative and invalid" to vest a title in the alleged invention.

[Distinguished in Tonduer v. Chambers, 37 Fed. 337.]

5. The oath of citizenship, and other duties required by section 6 of the act of July 4, 1836, are conditions precedent without which the commissioner has no authority to grant a patent, and a defendant may allege the neglect or fraudulent omission to fulfill these conditions, or any of them, as a sufficient defense.

6. M., an alien, made oath that he was a citizen of the United States, and obtained a patent. Eight years afterwards he surrendered his patent, made oath that he was a citizen of France, paid the balance of the fee due the patent office and obtained a reissue, which recited (among other things) that said original letters were "granted to him upon his belief that he was a citizen of the United States, which belief arose from ignorance of the laws of the United States." *Held*: that the original and reissued patents were both invalid, first, because of false suggestion, the second from want of power in the commissioner to grant it.

[Cited in Hancock Inspirator Co. v. Jenks, 21 Fed. 914.]

7. *Held*, also, that the commissioner could not grant a new original patent eight years after the invention had been in public use.

In equity.

This was a bill in equity, filed to restrain defendants [Thomas Adams, William G. W. Jaeger, and Luther Martin] from infringing letters patent [No. 3,824] granted John Gilbert Mini, November 13, 1844, for an "improvement in making lampblack," and as-

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

signed to plaintiff [Richard S. Child]. The facts upon which the decision turned are fully stated in the opinion.

George Harding and John Cadwallader, for complainant.

John Fallon and R. P. Kane, for defendants.

GRIER, Circuit Justice. The first question in order, in the consideration of this case, will be, whether John Gilbert Mini, the patentee under whom the complainant claims, has obtained a legal grant or patent for the invention claimed. If this be answered in the negative, it will be unnecessary to notice the other questions, which have been so fully and so well argued by counsel.

The facts connected with this point are undisputed, and appear in the pleadings and exhibits annexed. The original letters patent to J. G. Mini for his "improvement in making lampblack," were issued on the 13th of November, 1844, and recited that Mini "has made oath that he is a citizen of the United States, etc.," "paid the sum of thirty dollars, etc." On this patent, the complainant, as assignee of Mini, filed his bill to April term, 1850, against the respondents, alleging an infringement and praying for an injunction. Among other matters of defense pleaded in the respondent's answer, it was averred that "J. G. Mini was not entitled to said patent at the time it was granted to him, because he was an alien, being a native of France and not a naturalized citizen of the United States; and that he had applied for, and obtained said letters patent, as a citizen of the United States, for the purpose of defrauding the revenue of the additional fees and charges, which, as an alien, he should have paid in order to obtain a patent."

Admitting the fact as alleged in this plea, but denying the fraudulent intent, the patentee surrendered his patent on the 24th of August, 1852, and received another called a "reissue," which is attempted to be connected with the original application by the following recital: "Whereas, John G. Mini, of Philadelphia, Pennsylvania, has alleged that he has invented a new and useful improvement in making lampblack (for which letters patent were issued to him, dated 13th November, 1844, which letters having been surrendered by him, the same have been canceled, and new letters ordered to issue to him on the same specification, said original letters having been granted to him, upon his belief that he was a citizen of the United States, which belief arose from ignorance of the laws of the United States; he also having since paid into the treasury of the United States the sum of two hundred and seventy dollars, the balance due from the original granting of said letters patent), which he states has not been known or used before his application, has made oath that, at the time of his original application, he was a citizen of France; that he does verily believe that he is the original and first inventor or discoverer of the said improvement, and that the same hath not to the best of his knowledge and belief been previously known or used; has paid into the treasury of the United States the sum of fifteen dollars, and presented a petition to the commissioner of patents, signifying a desire of obtaining an exclusive property in the said improvement, and praying that a patent may be granted for that purpose, etc."

On this reissue patent the complainant filed, to October term, 1852, the bill in the present case, praying it to be taken as "a supplemental and original bill or original in the nature of a supplemental" to that filed on the original patent.

The question now to be considered, is, therefore, whether an alien, who has obtained a patent by a false oath, suggesting that he is a citizen, can, after a lapse of seven years, and a surrender and cancelling of the patent thus obtained, lawfully obtain what is called a reissued patent connected with his original application—and whether the commissioner of patents has any authority to grant such a "reissued" patent. The right of Mini, with the consent of his assignees to surrender his original patent, and to have it cancelled, can not be doubted, whether it had been obtained by false suggestion or not; and when the invention or discovery had not been in public use more than two years the commissioner might probably grant him a new original patent or an original application, alleging, inter alia, "that he does not know or believe that his invention was before known or used." But a new patent seven or eight years after the application, and after the patentee and others had publicly used the discovery or invention, would be of little use—unless it can be construed to retroact by way of confirmation of the first.

The patent act of 1793 did not provide for a reissue of a patent, after a surrender or cancellation of it, by the patentee on account of a defective or insufficient description or specification. The great difficulty of making a correct specification which will stand the test of judicial scrutiny, and the very frequent instances in which the most valuable inventions and discoveries have been lost to meritorious patentees through inadvertency, accident, or mistake, originated the practice of granting reissues, in such cases of hardship, without any statute directly authorizing or regulating them. This practice was confirmed by the decision of the supreme court in Grant v. Raymond, 6 Pet. [31 U. S.] 218, in January, 1832. This was a case of a defective specification, and refers only to the practice of reissuing patents to cure such defects. It had never been suggested to the patent office or the court, from anything that appears, that a false or mistaken assertion, in regard to a matter of fact of which the applicant is presumed to be peculiarly cog-

nizant, and by which his patent was obtained for one-tenth of its cost, was ever considered as an inadvertence, accident, or mistake which could be thus remedied. But in order to confirm the decision of the court and to define the power of the patent office on this subject—the act of July 3, 1832 [4 Stat. 559], was immediately passed. This act gave to the secretary of state a much more extensive power than previous practice had assumed, or the judgment of the supreme court had confirmed. But though it might have included a case like the present within its terms, it left the question of the connection of the new patent with the old in such a case, wholly unsettled.

This act was repealed by the act of July 4, 1836, which established a new system, entirely abolishing all that preceded it. The power of the commissioner of patents to issue patents, and the effect of them, are carefully defined by this statute. By defining the conditions under which the power it confers shall be exercised, it necessarily excludes it in all others, except perhaps the correction of their own clerical errors. The thirteenth section of this act declares that: "Whenever any patent, etc., shall be inoperative or invalid by reason of a defective or insufficient description or specification, or by reason of the patentee claiming in his specification, as his own invention, more than he had or shall have a right to claim as new, if the error shall have arisen from inadvertence, accident, or mistake, or without any fraudulent or deceptive intention, it shall be lawful for the commissioner, upon the surrender, etc., to cause a new patent to be issued for the same invention, etc., and the patent so reissued, etc., shall have the same effect and operation in law on the trial, etc., as though the same had been originally filed in such corrected form before the issuing of the original patent."

It needs no argument to show that this case comes neither within the letter or the spirit of this section of the act—nor can the case of Grant v. Raymond [supra] be cited as authorizing any such general power in the commissioner to grant a new patent to one who has obtained it by false suggestion, which shall retroact by way of confirmation of the original, or stand in its place. Where a statute defines the extent of power given to one who acts ministerially, the courts can not extend it, or validate acts done without or beyond its authority.

I would not be considered as imputing any moral guilt to Mr. Mini, or intent to commit perjury, in this particular case. It is possible that men may live thirty years in this country, and not know that in order to become a citizen, an alien must be naturalized. It is possible, too, that an alien dragged to the polls "by respectable gentlemen," and permitted to vote by a complaisant inspector without question, may fancy himself to have been thus transmuted into a citizen. But instances of such amiable ignorance are so rare, that it could hardly be expected that legislatures should anticipate it, by providing a remedy for those whose mistakes are the consequence of it. Nor will the hardship of this particular case justify the commissioner of patents in assuming a power not granted to him by the statute. He has no power to confirm a patent obtained by false suggestion, either by pardoning the offense or excusing it on the plea of innocent ignorance. A mistake or inadvertence on the specification of a patent, can be proved by the face of the paper, and the reasons alleged for it. But where a person makes a mistake in his oath of citizenship, and enjoys the benefit of it for more than half his term, his innocence can be proved by his own oath alone; and he ought not to be allowed to obtain a new patent for the other half by stultifying himself. This would be holding out a premium for profitable mistakes, and an encouragement to double perjury.

But, it is contended, that if the reissued patent is void because issued without authority, the original may be set up as a good title. That it is not void, but voidable, and that the payment of the additional fee is a matter which concerns the government only, and can not be alleged as a defense by third persons. This might be true if the applicant had truly disclosed his citizenship, and had given his note for the three hundred dollars which he had afterward neglected or refused to pay.

The act of 1836 permits aliens as well as citizens to receive patents for inventions, but under very different conditions. A citizen, or one who has declared his intention of becoming such, pays a patent fee of thirty dollars only. An alien, if he be a subject of the king of Great Britain, must pay five hundred dollars, and all other persons three hundred dollars. An alien patentee is also compelled to "put, and continue on sale to the public, on reasonable terms, the invention or discovery for which the patent is issued." If it were not so, it would be in the power of an alien inventor, by means of his patent, to completely prohibit the use of his invention for fourteen years in the United States.

The sixth section of the patent law, accordingly, provides that, "before any inventor shall receive a patent," among other things, he shall make oath "of what country he is a citizen." This, as well as the other duties required by this section, is a condition precedent, without which the commissioner has no authority to grant a patent, and a defendant may allege in his defense the neglect, or fraudulent omission to fulfill these conditions, or any of them, as a sufficient defense; and, although the court has no power to avoid or annul a patent, by its decree or judgment, the patent, so far as respects that suit, is "inoperative and invalid" to vest a title in the alleged invention.

Many of these defects or omissions may, by

the act, be given in evidence, under the general issue, in an action at law; other defenses, such as "a license," or "alienage," must be specially pleaded. If, therefore, an alien, either through ignorance, or intention, falsely represents himself as a citizen, in order to obtain a patent, he not only fails in performing one of the conditions which the statute imposes in order to entitle him to a patent, but he commits also a fraud upon the government. And as this fact appears in the complainant's bill, the respondent may avail himself of it, as a defense to the title set up under the patent, and allege that the patent thus obtained is "inoperative and invalid."

We are of opinion, therefore, that the original patent of 1844, which issued to John Gilbert Mini, was invalid, because the applicant did not comply with the conditions of the patent act, in stating truly "of what country he is a citizen," and that the reissued patent of 1852 is equally invalid, the commissioner of patents having no power to grant such a patent, to act by way of confirmation of the original, nor to grant a new original, eight years after the invention has been in public use, which will give a valid title to such a patentee. The complainant's bill is therefore dismissed with costs.

Case No. 2,674.

CHILD v. BOSTON & F. IRON WORKS.

Circuit Court, D. Massachusetts. 1877.

PATENTS FOR INVENTIONS—INFRINGEMENT—ACCOUNTING—PROFITS.

[On accounting for infringement of a patented invention used in connection with printing presses, it appeared that defendant credited other parts of his manufactory with materials supplied from them, so as to allow them profits as independent establishments. *Held*, that such credit was erroneous, and that defendant should account for the entire profits realized.]

[Cited in Star Salt Caster Co. v. Crossman, Case No. 13,320.]

[In equity. Bill by Cyril C. Child against the Boston & Fairhaven Iron Works for infringement of letters patent No. 98,087, granted to C. Montague, December 21, 1869. There was a decree for libelant, and an accounting ordered to John G. Stetson, as master. See Case No. 2,675.]

Benjamin F. Thurston and Edward P. Brown, for complainant.

Thomas M. Stetson, for defendant.

BY THE MASTER. I now come to a consideration of the account filed by defendants in connection with the complainant's charge and defendants' discharge. The privilege is always accorded a defendant, in an accounting before me, to file an account of his profits; and, unless the complainant shows some error in the principles upon which this account is constructed, or in its details, I adopt it in my report. The defendants in this case filed an account, and, although they accompanied it with a statement that it was not an account of their profits from their infringement of complainant's patented improvement,—the extensible lever,—but an account of their entire profits from their printing press business, when I decided that they should account for such entire profits, this account became the basis for all subsequent proceedings before me. The first, second, third, fourth, fifth, and sixth specifications of the complainant's amended charge attack this account by alleging that certain classes of items are entered in the account at a higher price than the actual cost of these items to the defendants. The corresponding specifications of the defendants' amended discharge admit the correctness of the classification of the items referred to in the charge, and that the amounts thereof are correctly stated in pounds and hours, but deny that the prices charged are greater or other than the actual cost. This issue brings me to a consideration of the principle upon which this account is constructed. It appeared in evidence that the defendants carried on, during the period covered by the accounting, three distinct branches of business,—one, a foundry; another, a machine shop; and the third, the manufacture and sale of printing presses and paper cutters. In making up the press and cutter accounts, the foundry and machine shop were credited with whatever they furnished, at prices to allow them the profits to which it was considered they were entitled as independent establishments. In the printing press account, therefore, the castings which came from the foundry were entered at their estimated cost, but it is a cost based upon a credited purchase from the foundry upon such terms as to give the latter the profit which it would reasonably be presumed to have made; and labor and refined iron, which were furnished by the machine shop, are entered upon the same principle, so as to give the machine shop its reasonable profit. The machine shop and foundry, however, are but other names for the defendants, and the profits which they have made from the press business are profits which the defendants have made, and must be accounted for as other profits from the same business.

[NOTE. For decision of an action at law for the same infringement, in favor of defendant, see Child v. Boston & F. Iron Works, 19 Fed. 258; and, for a decision disallowing proof of the judgment herein as a claim against the defendant in bankruptcy, see In re Boston & F. Iron Works, 23 Fed. 880.]

Case No. 2,675.

CHILD v. BOSTON & F. IRON WORKS.

[Holmes, 303;[1] 6 Fish. Pat. Cas. 606; 5 O. G. 61.]

Circuit Court, D. Massachusetts. Jan. 1, 1874.

PATENTS — "PRINTING-PRESSES"— NEW COMBINATION OF OLD DEVICES.

1. A new combination of old mechanical devices, producing new results, or old results by a new method of operation, is patentable.

2. The patent granted Charles Montague, assignor to Cyril C. Child, Dec. 21, 1869, for an improvement in printing-presses, held valid.

Bill in equity to restrain alleged infringement of letters-patent [No. 98,087] for improvement in printing-presses, granted Charles Montague, assignor to the complainant [Cyril C. Child], Dec. 21, 1869. The defendant [The Boston and Fairhaven Iron Works] admitted the manufacture and sale of presses containing the patented improvement, but denied that Montague was the original and first inventor, and denied that it was new. The patented improvement consisted in a combination of mechanical devices, all of which were old; and the principal question in the case was whether the combination claimed was new.

B. F. Thruston and E. P. Brown, for complainant.

T. M. Stetson, for defendant.

SHEPLEY, Circuit Judge. Letters-patent numbered 98,087 were granted Dec. 21, 1869, to Charles Montague, assignor to Cyril C. Child, for improvement in printing-presses. This invention consisted: "First, in the use of a vibrating lever for moving the type-bed, constructed in two parts, one of which is made to slide out and into the other, somewhat like the joints of a telescope, so that the upper end of the lever may be attached directly to the under side of the bed (dispensing with the use of a link), and move in a direct line with the bed, the upper portion of said lever moving out of or into the lower portion, as the distance of the fulcrum of said lever to the point of attachment to the bed is greater or lesser in the different parts of the movement of the bed." The complainant's claim is for the extensible vibrating lever in combination with a reciprocating type-bed, substantially as described. Defendant admits the manufacture and sale of printing-presses containing the extensible vibrating lever in combination with a reciprocating type-bed, as described in complainant's patent.

The answer sets up in defence that Montague was not the original and first inventor, and also that the invention set forth in the complainant's patent had been in public use for more than two years before the application of Montague. To sustain the defence of prior knowledge and use, defendant undertakes to prove that one B. F. Leonard was the inventor. Leonard was in the employ of the defendant as its superintendent at the time that the defendant constructed for Montague the first printing-press known by the name of the "extension press," which embodied the invention of the extending vibrating lever in combination with the reciprocating type-bed. This press was made for Byington & Co., and was used in printing the "Norwalk Gazette," in the summer of 1867; and it is clear from the evidence in the record, that Montague had conceived the idea of substituting the extensible vibrating lever for the lever-and-link connection previously used, as early as 1865, and had made drawings in that year clearly describing the invention, although, from the opposition he encountered from defendant, which was then building his presses under contract with him, he did not embody his invention in a practical working machine until the press was made for Byington & Co., in 1867. Leonard never seems to have claimed to have been the inventor of this improvement until January, 1869, when he represented in his caveat that he had made certain improvements in mechanism for operating the platen of a printing press, and that he was then engaged in making experiments for the purpose of perfecting the same. This caveat he prepared and made oath to, but never filed in the patent office. This was more than three years after Montague had exhibited to two or three persons his drawings representing his improvements, and a year and a half after the defendant had made for Montague the Byington press. The testimony is conclusive that this is only one more of the too frequent instances in which a person engaged as a mechanic or constructor in embodying the inventor's idea in a material form, attempts to prove that he was the first inventor, because he made or aided in making the first machine.

On the issue of novelty, a much more difficult question is presented on a comparison of the patented combination in complainant's printing-press with the mechanism in the machine of Mr. Hervey Waters for rolling bayonets, and a similar machine for rolling file-blanks. This is the machine referred to in the answer, for which letters-patent in Great Britain were sealed June 14, 1864, dated Dec. 23, 1863, No. 3,251, to George Tomlinson Bonsfield, for an invention consisting of an improvement in apparatus for forging and tempering bayonet-blades, files, and other articles, on a communication from abroad of Hervey Waters, of Massachusetts. This contrivance of Mr. Waters had two extensible vibrating levers in combination with a reciprocating sliding-gauge. The reciprocating sliding-gauge moved backwards and forward in right lines upon ways. The swinging levers worked upon a rock-shaft so that the ends of the levers described a curved line; pieces were pivoted to the slid-

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

ing-gauge so as to turn on that pivot, their opposite ends fitting upon the ends of the swinging levers after the manner of a sleeve sliding away from and toward the axis of the levers upon the levers proper, and all so connected together as to allow the sliding-gauge to move in right lines, while the levers proper move in curved lines. This form of the file-machine with the extensible levers was used by Mr. Waters, at Ballardvale, as early as January, 1866, and was described in the English patent. Mr. Waters says he does not know who invented the extensible lever; that he put it into his machine, and knows that it was useful, but does not know that it was new with him. He says, "I am inclined to think that it was not, because I have no recollection of any particular effort about it." This combination certainly comes very near anticipating the complainant's invention. The three elements, considered separately and apart from the organization in which they are incorporated, the results of the organization, and the mode of operation in the combination, would seem to be the equivalents for the vibrating levers, the extensible sleeves, and the reciprocating platen or type-bed in complainant's combination. Nevertheless, old elements placed in new and different organizations, producing in such new organizations different results, or the same result by a new and different mode of operation, do not prevent such newly organized mechanism from being patentable. It becomes necessary, therefore, to compare the respective organizations into which these elements were incorporated, and the respective modes of operation, and the results of the operation, in the two machines.

Exhibit I is a model of the machine for rolling file-blanks. In this machine the forward movement of the gauge-bar is effected by means of a spring, and the backward movement by means of a projection on the lower roller, called by the witnesses a segmental die. Waters himself describes how this is effected: "The gauge is carried backward by the die on the bottom roll in its revolution, or by some part of the roll which is connected with the die, and the gauge swings backward the lever, at the same time raising the weight or cramping the spring according as the machine is organized. The gauge is carried forward by the spring which was cramped in the backward movement of the gauge, the spring actuating the lever, and the lever the gauge, or when the machine is organized with a weight in place of a spring, the lever is carried forward by the weight, and the gauge by the lever. But it should be understood that the motion of the lever forward, and consequently the motion of the gauge forward, is controlled by a can upon the lower roller, and altogether in the operation of the machine, the motion of the gauge backward and forward is controlled by the motion of the lower roll, and works in accordance with it."

It is noticeable here that, in the operation of the file-machine, the gauge-bar is not moved forward or retracted by the extensive vibrating levers in the same manner as the type-bed is in the comp'ainant's press. In the file-machine the gauge is carried back by the die on the bottom roll, and the gauge, instead of being moved back by the lever, swings the lever backward, and thereby cramps a spring which, when the gauge-bar is released by the revolution of the segmental die, actuates the lever, and, through the lever, the gauge in its forward movement. This organization—perfectly adapted to its purpose and object of presenting the blanks of metal in a proper position and at a suitable time to the rolls, without reference to regularity or uniformity of movement during its travel, provided the gauge presented the blank at the proper time to the rolls—would be unsuited to the operation of a printing-press, where a regular movement of the type-bed during its progress is indispensable. Practically, a type-bed during the period of taking the impression, could not be operated by a spring or any equivalent device. In the operation of the file-machine "the motion of the gauge backward and forward is controlled by the motion of the lower roll, and works in accordance with it."

The evidence in the record proves clearly the impracticability of operating a printing-press of the class to which this belongs, by using a device like this, as the diameter of the circle described by its revolution, in order to give sufficient impression movement to the type-bed, would be so great as to involve such an elevation of the type-bed above the floor as would place it beyond the reach of the printer. A crank or its equivalent is a part of the organization of complainant's combination, as will be seen on examination of the specifications; the crank acts upon the levers, and they in turn on the type-bed, and, as the rectilinear motion of the reciprocating type-bed is communicated from the levers which move in curved lines, the capacity of becoming longer or shorter (that is, the extensibility of the levers) becomes operative, while, if the type-bed could be practically moved in one direction by a revolving tappet, like that in the file-machine, and then in the contrary direction by a spring, this feature of the extensible levers would be dormant or useless in the operation.

Considering, therefore, the differences in the mode of operation and the differences in the results, and the fact that in the complainant's press the combination described is one in which the crank communicates the motion to the vibrating extensible levers, and they in their turn to the type-bed, and that the resultant motion given to the type-bed is one adapted by reason of its regularity and uniformity to the requirements of a printing-press of this class, I am inclined to think that there is sufficient invention to make the complainant's combination patent-

able, notwithstanding the use of these elements of it with a different operation and different results in an earlier, though different, organization.

It is also contended, in behalf of defendant, that the substitution of the extensible sleeve to the lever, in place of the link used in complainant's former patent, was a mere equivalent, and therefore that the invention embraced in the first claim had been in public use and on sale more than two years prior to his application for a patent. In many organizations of machinery it would be true that the one might be a mere mechanical equivalent of the other, where the same result would be produced by substantially the same operation. But in the application of the extensible lever to the printing-press, a different operation produces a different result from that in case of the link motion. The type-bed driven by the extensible lever has a uniformly accelerated movement during one-half of its travel, and a uniformly retarded movement during the other half of its travel, while the type-bed driven by the lever and link has an unequally accelerated movement during one-half of its travel, and an unequally retarded movement during the other half; other advantages, not necessary to be enumerated, result from the substitution of the one for the other, which, like the one above mentioned, are, in reference to the object and purpose of the organization, differences of operation, not of a degree, but of kind.

The patent is adjudged to be good and valid, and the decree is for complainant for injunction and account, as prayed for in the bill. Decree accordingly.

[NOTE. For master's report upon accounting, see Case No. 2,674.

[For decision of an action at law for the same infringement, in favor of defendant, see Child v. Boston & F. Iron Works, 19 Fed. 258, and, for a decision disallowing proof of the judgment herein as a claim against the defendant in bankruptcy, see In re Boston & F. Iron Works, 23 Fed. 880.]

CHILD (DAVIS v.). See Case No. 3,628.

CHILD (FILLEY v.). See Case No. 4,787.

Case No. 2,676.

The CHILDE HAROLD.

[Olc. 275.] [1]

District Court, S. D. New York. Feb., 1846.

EXTRA SEAMEN'S WAGES FOR SHORT ALLOWANCE —BURDEN OF PROOF.

1. Extra or double wages are given seamen when put on short allowances of provisions or water on a voyage, only in case the quantity required by law is not supplied the ship by her master or owner.

2. If the ship has a proper supply laden on board, and the crew is insufficiently furnished on the voyage, their remedy is by action for the particular wrong, and not for double wages.

3. All the crew may unite in a suit for double wages because of a short allowance of bread, and each is a competent witness for his fellows.

4. It devolves upon the libellants, in such action, to prove both that a short allowance was served them, and that the vessel had an insufficient supply laden on board.

[Cited in The John L. Dimmick, Case No. 7,355.

5. If they fail in maintaining their action, and it appears there was no colorable cause for bringing it, they will be charged with full costs of suit.

6. When one of the libellants unites a demand for contract wages unpaid him with his claim for short allowance, and obtains a decree for those wages, the court will only allow him proportionate costs against the vessel on that demand, not including witnesses fees to his co-libellants, and will order full costs against him in connection with his co-libellants upon the other branch of the litigation.

The libellant, Duffie, sues to recover wages on a voyage from New-York to Callao and back, and he, with his five associates, also claim the equivalent of their contract—wages for a period of six months and a half, because, as they charge, they "were on a short allowance of good and wholesome ship-bread," the "master having neglected to put on board the requisite quantity of provisions for the said voyage, according to the act of congress," &c. The answer denies these allegations, and asserts that the vessel was supplied with a sufficient quantity of good and wholesome bread for the voyage. It avers, also, that all the libellants, except Duffie, were paid the wages claimed by them, in full, on the arrival of the vessel at this port, and that at the same time Duffie's wages were offered to him, which he refused to accept. The answer denies that he is entitled to enforce the payment of wages, because of his mutinous and insubordinate conduct on the homeward voyage, having refused to obey the orders of the master to assist at sea in repairing damages the vessel had received in a gale, which had placed her in a crippled and unseaworthy state, and that on the voyage homeward he accosted the master in rude and insulting language, seized hold of him, and threw him down, and held him confined on the deck, until he was relieved by his officers, &c.

E. Burr, for libellants.

F. B. Cutting, for claimant.

BETTS, District Judge. The provision in the act of congress of July 20, 1790, section 9 [1 Stat. 135], upon which the contestation for short allowance is founded, is this: "Every vessel bound across the Atlantic ocean shall, at the time of leaving the last port from which she sails, have on board, well secured under deck, at least one hundred pounds of wholesome ship-bread for every person on board, and in like proportions for longer or shorter voyages; and in case the crew of any vessel, not so provided, shall be

[1] [Reported by Edward R. Olcott, Esq.]

put upon short allowance of bread during the voyage, the master or owner shall pay to each of the crew one day's wages beyond the wages agreed on for every day he shall be so put on short allowance, to be recovered in the same manner as his stipulated wages." The crew claim double wages in this action, because a sufficient allowance of good and wholesome bread was not served out to them during the voyage, and each of the libellants made a witness for his co-libellant, testified to the bad and unwholesome quality of the bread, and all concurred in saying, that after six weeks out to the completion of the outward and return voyage, the bread served the men was mouldy, rotten, filled with maggots and vermin, and when put in tea, the worms were skimmed off in spoonsful, and that it also stunk. Kelly, one of the men, and not a libellant, gave in substance the same representation. On his cross-examination, every witness stated that there was no short allowance of quantity, and most of them also said, the vessel sold from her stores of bread on the coast of South America, and brought back several barrels and three hogsheads of bread laden on board before the voyage began, and which had not been opened.

The question is raised by the claimants upon this state of facts, whether the libellants bring their case within the provisions of the act of congress. The statute is plainly intended to compel owners and masters to fit out vessels with a sufficiency of wholesome provisions for the voyage, and its direct language does not extend beyond that requirement. Mariners v. The Washington [Case No. 9,086]. No regulation is made respecting the distribution of bad provisions or short allowances, whilst the ship is supplied with good, or enough in quantity. Parties wronged, by being furnished at sea insufficient or improper provisions or water, are left to their legal remedies, as in other cases of maltreatment, not provided for by statute. Feeding a crew on unwholesome or spoiled provisions would justify their leaving the ship, and such neglect or malfeasance of the owner would subject him, at the least, to pay full wages for the voyage. 1 Hagg. Adm. 59; Id. 186; 1 Pet. Adm. 255, and note [Swift v. The Happy Return, Case No. 13,697]; 2 Pet. Adm. 411 [Dixon v. The Cyrus, Case No. 3,930]. The construction of the clause in this court has been, that the seamen must resort to their special action for damages against the master for giving them insufficient or improper food, whilst the ship had on board enough of good quality; and if the master proved his original supply had been sufficient, but it spoiled or was destroyed on the voyage, that he was still liable to the action, if he neglected to procure, when within his power, an adequate supply. This interpretation of the statute, and the rights of seamen in respect to their supplies of food on shipboard, I am inclined to maintain. I am persuaded seamen will be more thoroughly protected by such exposure of owners and masters to special damages, than if they may be exonerated by payment of this specific penalty for wrongs which must often demand a recompense more punitive and compensatory than a duplication of wages. The statute gives the right to double wages in case the crew of a vessel, not provided with the quantity of provisions specified, shall be put on short allowance; and manifestly the statutory right and cause of action does not arise when in fact the vessel commenced her voyage with the quantity of provisions on board demanded by the statute. The Mary [Id. 9,191]. Congress did not assume to regulate the provisioning of a crew further than regards the amount to be supplied on board for their support. The pleadings in suits for short allowances are framed in consonance with this understanding of the act. So, in this case, the libellants allege the master neglected to put on board the requisite quantity of provisions for the voyage, according to the act of congress. This allegation is the gravamen of the complaint, and the proofs and the recovery must be governed by it. The action is not to be maintained, then, upon the fact alone, that a crew is put on short allowance; the additional particular is equally an essential ingredient, that the ship had not on board the stores required by law when she sailed on the voyage.

It is contended by the libellants, that as they prove bread of a bad and unwholesome quality was served out, and they were not allowed a just ratio of that which was good and wholesome, that the burthen of proof is cast on the claimants to show the vessel properly stored on her departure. In ordinary acceptation, a party prosecuting is bound to prove on his part every fact necessary to the support of his action; so that when his right of action rests upon several facts and averments, it is indispensable that he furnish evidence of the existence of each. 1 Chit. 216–256. Moreover, it is a rule of evidence, when an issue involves a charge of culpable omission, it is incumbent on the party making the charge to prove it, although the proposition be a negative one, for the other party shall be presumed to be innocent of the imputation until he is proved to be faulty. Hartwell v. Root, 19 Johns. 345; 3 East, 192; Rosc. N. P. Ev. 52. The proofs, perhaps, need not be equally direct and cogent in respect to each particular, when two or more are the basis of the action, for the existence of one may be in some degree implied from that of another; as if the proof be satisfactory, that immediately on the commencement of a voyage the crew are put upon a close short allowance, and so kept habitually during the continuance of the voyage, very slight evidence of the insufficiency of the supply of provisions on board will cast on the owner the burthen of proving he had fully complied with the law.

I do not say the same implication might not arise respecting the fitness of the provisions, where those served were uniformly bad, although the evidence on the part of the libellants was limited to proving the quality of the rations, if there was any reliable evidence showing carelessness or fault in the selection and lading of the provisions put in the ship. But the rule ought not to extend to requiring the owner to give evidence of the quantity and quality of provisions stored on board, when the testimony of the libellants show, there was an abundant supply in the ship, and only accuses it inferentially of being unwholesome in quality when shipped.

Upon all the testimony submitted by the libellants in this case, I do not think even a presumption is raised that the provisions on board were deficient in quantity, which the claimants can be called upon to repel, by proving they furnished the vessel in the outset sufficiently. The whole contestation has proceeded upon the question of the wholesomeness of the bread served the men. If this point should be decided in their favor, there would be no semblance of right in them to recover the double wages demanded under the statute, without the further fact is found by the court, that the bread was not wholesome when put on board. These positions of law must control the case, and be fatal to the suit of the libellants upon their own evidence. But the testimony of Captain Dean and the mate Forsyth, respecting the quality of the bread remaining over from the previous voyage, and of the large excess brought back on this, and of Mr. Taylor, who furnished the supply for the voyage in question, proves, beyond any fair ground for doubt, that the bread was abundant in quantity and wholesome, and of a good quality when put on board and the ship went to sea. These facts would be decisive of the present action. But I feel constrained to say, that I am satisfied upon the whole proofs that the representation of the men as to the condition of the bread during the voyage is a sheer fabrication; that it is all grounded upon their receiving occasionally biscuits taken from some barrels which had been wet on the outside, and were approaching to mould, whilst the main body of the bread in the same barrels was sound and wholesome, and is found so now after the completion of the voyage, and the return of the bread to this port. It seems to me evident that this claim for short allowance was fabricated in aid of Duffie's suit for wages, and was not thought of by any of the crew when the vessel came in and had completed her voyage. All, except Duffie, received their wages when discharged, and intimated no claim of this character, or even complaint as to their fare on the voyage, and Duffie declined taking his wages with the others, threatening to sue the master for an assault and battery, without suggesting any demand against the ship or owners for short allowance. Afterwards he changed his mind, and wished to receive his wages. His counsel wrote the master they held his account for wages, and asked payment of the amount, without the coupling any demand for short allowance with it; and the owners not being willing to satisfy his demand, because of insubordination on the voyage and maltreatment of the master with which he was charged, this action was brought to recover his contract wages, and in the same suit his shipmates became joint parties with him, in a claim of extra wages for six and a half months' short allowance. A demand put in prosecution under such circumstances would, at all times, be looked at with great distrust. I do not say acceptance of the stipulated wages, and giving receipts therefor, would legally bar the crew from setting up afterwards a claim for short allowance; but such claim interposed subsequently must necessarily be subject to severe and jealous scrutiny, and when supported almost entirely by the oaths of the prosecuting parties, each swearing for his companions, and all expecting to recover upon facts mutually proved for each other, a court would exact a strong and most satisfactory case before making a decree in its favor.

The case, so obnoxious to suspicion and doubt on its face, is further met by evidence on the part of the owners, satisfactorily showing that the main representations on the part of the libellants in their testimony are unfounded in fact, or gross and wilful exaggerations as to the state and quality of the bread; and accordingly, on this branch of the case, I unhesitatingly decree against the libellants, with costs.

The remaining question respects the right of Duffie to wages. The pleadings and proofs in objection to this demand exhibit a case of gross insubordination and misconduct and violence on his part, which would justify a punishment equivalent to a forfeiture of wages, if the master or owners stood in a situation allowing them to make this defence. Considering the allegations of the answer fully proved, still it appears to me the master has remitted or pardoned the offence, if not entirely, certainly to that degree that he would not be allowed to plead the transaction as a bar to wages. Duffie was the best and most efficient hand on board. His conduct had been unexceptionable to the time of the disorderly and mutinous affray complained of. The master did not arrest and confine the offender, or subject him to the discipline of the ship for insubordination or misconduct, nor did he give Duffie to understand his offence would not be overlooked, or that he would be called to answer for it on the arival of the ship at a home port; neither did he make it the subject of complaint to the civil authorities, or even to his owners when the voyage was ended. On the contrary, the

very day, and within a few hours after his misconduct, Duffie resumed his work as usual, doing his duty faithfully and quietly, and so continued at his place during the voyage, without reprimand or question on the part of the master. When the crew were discharged, the master procured the money for Duffie and offered him his wages in full, but Duffie refused to accept them, saying, he intended to sue the master for an assault and battery in the affray complained of. The master testified, in explanation of his proceedings, that he had intended accompanying the payment of wages with a suitable reproof, but he did not administer it, because Duffie declined taking his pay. On the same day, Duffie relented and called on the master, and asked to be paid his wages. The master then refused to pay them, and charged that they had been forfeited. The same afternoon, as the master was about leaving the city, he received a note from Duffie's proctors, requesting payment of the wages. He made no objection to the demand, and handed the note to the owners, who agreed to see to the matter for him. They subsequently refused to make the payment, but it is not proved that this was done at the request or with the approval of the master. I think, under these circumstances, it was too late for the master or owners to revert to the offence committed a month before, as working a forfeiture of wages for the voyage, or urge it to the court as a ground of punishment by way of mulct or abatement of wages. I shall accordingly decree wages to Duffie. If the amount demanded by him is not agreed to by the claimants, a reference must be had to a commissioner to ascertain the sum due.

There is a difficulty in disposing of the question of costs on this branch of the case. The court has arrived at the conclusion that the claimants could not properly contest the payment of wages with Duffie, after the open and continued acts of the master, by implication, at least, condoning his offence on the voyage. They ought not to be allowed, in gratification of their own resentments, to create a litigation on that point, with impunity from costs, knowing that the master had overlooked or condoned the misconduct of the seaman. On the other hand, it is manifestly inequitable that this libellant, who, in conjunction with his associates, has forced the owners to an expensive litigation upon the groundless claim for short allowance, should have the advantage of throwing on them the costs of the whole controversy, by now recovering against them full costs, with his wages. All the taxable costs, or nearly so, must necessarily have been incurred in the suit for short allowance, without the adjunct of this demand. The owners, finding this tacked to those unfounded claims, might have been induced to make defence to the demand of wages by Duffie, when if the action rested on that alone, they would have satisfied it without contestation. The costs decreed against the joint libellants on the claim for short allowance would not be an adequate redress to the claimants, because, if Duffie is allowed to tax full costs on this branch of the case, he imposes on them a large portion of the very costs they are exempted from by the decree in their favor. For instance, they should be discharged of the marshal's fees on arrest, and keeping of the vessel, all disbursements made in bonding her, and various other particulars entering into the charges of the proctors, clerk and marshal, as well as all expenses for the attendance of witnesses, no witness being called to Duffie's demand for wages, who was not also used to prove the short allowance sued for.

I shall, in view of the whole case, and in the exercise of the discretion the court possesses in the allotment of costs, order that a separate bill of costs be made up in favor of Duffie, and that the claimants be chargeable only with those services specially and necessarily applicable to his demand for wages; and that he be entitled to recover only one-sixth of the charges of the marshal and clerk on the arrest, bonding and discharge of the vessel, and only for the attendance of Kelly as a witness, the other witnesses being all parties to the suit, and not entitled to fees as against him. A decree will be entered conformably to these directions.

Case No. 2,677.

CHILDS v. CORP.

[1 Paine, 285.] [1]

Circuit Court, D. Vermont. Oct. Term, 1810.

BILL OF EXCHANGE—LOSS BY REASON OF BAILEE'S NEGLIGENCE.

The defendant had sold the complainant a bill of exchange on a house in London, and received the complainant's note for the price, but kept the bill by agreement, as security for its payment. The bill was protested, the drawers became bankrupt, and dividends were declared upon their estates. The defendant refused to return the bill to the complainant, but made no effort to recover the amount or to obtain the dividends. He was held liable for any loss that might have happened by such negligence.

[In equity. Cross bill by Francis Childs against Samuel Corp.]

D. Farrand and E. Keyes, for complainant.
S. Hitchcock and A. Foote, for defendant.

LIVINGSTON, Circuit Justice. The object of this cross bill is to have a credit on the mortgage mentioned in the pleadings in this cause, for the amount of a certain bill of exchange for one thousand pounds sterling, which it is alleged, has been lost to the complainant by the negligence of the defendant.

It appears, that on the 29th November,

[1] [Reported by Elijah Paine, Jr., Esq.]

1803, the defendant sold to the complainant a bill of exchange for one thousand pounds sterling, which had been drawn by Robert Bird & Co. of New York, on Bird, Savage & Bird, of London, (both houses composed of the same persons,) and which had been protested for non-acceptance and non-payment. For this bill the complainant gave the defendant his promissory note for three thousand four hundred and eighteen dollars and seventy-nine cents, payable in the July following. The bill remained in the hands of the defendant, who gave his receipt for it, promising to return it to the complainant on due payment of his note. The note not being paid, the complainant was sued, and judgment obtained against him; after which, to secure the amount of the judgment, and some other demands, he gave the defendant three other promissory notes, dated the 8th of October, 1805, for one thousand seven hundred and forty-nine dollars and ninety-eight cents, each payable the 1st of April, 1806, 7, and 8, with interest, and executed a mortgage on certain real estate in Vermont. On the execution of this mortgage the receipt above-mentioned was given up, but the bill remained in the defendant's hands, without any written agreement respecting it.

Thus far there is no dispute about facts between the parties. The complainant asserts, that he expected the defendant would have delivered him the bill on receiving the new securities, but that he refused to do so, agreeing, however, that he would hold it for his benefit, and endeavour to collect the money due thereon for his use; which he neglected to do, to the great loss of the complainant. The defendant admits, that the bill remained with him as "a further security for the monies due from the complainant, until the same were paid by the complainant, or by the receipt of monies on the bill, which he was authorized to receive and apply toward his demands against the complainant," but denies, that "he was obliged to use any endeavours or be at any trouble or expense in endeavouring to collect the bill." Without stating that he had taken any measures to obtain payment, he alleges, that he was unable to do so by reason of the insolvency of the parties to it. It becomes necessary, then, to recur to the testimony, to ascertain the understanding of the parties at the time of leaving this bill with the defendant, which must determine the obligation and duty thereby imposed on him. In settling this question, the defendant's letter of the 9th of April, 1805, to his attorney, Mr. Foote, has been thought material. In this he desires Mr. Foote to take up the receipt he had given to the complainant, adding, "that it was understood, and he meant thereby to have it understood by his attorney and Mr. Childs, that whatever he might recover on said bill should be for his benefit."

Without going further, it would be very difficult to say that the defendant was at liberty to be entirely passive about the recovery of the monies due on this bill of exchange. He resided in the city of New-York, and the complainant at Colchester, in Vermont, at the distance of more than three hundred miles from each other. By consenting to retain the bill, and apply what was received on it to the complainant's credit, he put it out of the power of the latter to use any diligence for its recovery. The complainant, without the bill or protest, which was also in the defendant's hands, could not prove any debt, either under the commission against the house in England, or under the separate commission against Robert Bird in this country. He could not but believe that the defendant would do thus much, at least, or return him the bill, to enable him to do it himself. He could not suppose,—nor could it have been the intention or understanding of those gentlemen,—that the bill was to remain among the papers of the defendant, without a single effort on his part to secure to himself the dividends which might be declared on it—which must have been the sole object of his retaining it. If he found the trouble or expense too great, he should have relinquished his agency, and apprized the complainant of his unwillingness to incur either; and means might then have been taken by the complainant to prevent the loss which it is alleged has happened. But if, from the very nature of the transaction, some diligence was not imposed on the defendant, the testimony of Peaslee and Henry seems to remove every doubt. The first, who was employed by the complainant to come to some arrangement with the defendant, and who is mentioned in his letter to Mr. Foote as the person with whom he had a good deal of conversation on Mr. Childs' concerns, says, that the defendant "retained the bill in his own hands, and that it was an understanding between Mr. Corp and himself, that he was to act upon the bill, and to account to Childs for whatever the bill might nett." In another place he says, "he was directed by Mr. Childs to make a regular demand of the bill, but he did not, because Mr. Corp inclined to hold the bill; from whom he understood, that he would act for Mr. Childs, and collect what he could of the bill, and account with him for whatever he should collect." The other witness is not less explicit. Mr. Henry says, "that in 1807, two years after the interview between Mr. Corp and Mr. Peaslee, he called on him, at the request of Mr. Childs, and informed him, that it was his wish to have the bill, in order to obtain a dividend, which the witness had learned was declared on all the debts of the company; but the defendant declined giving it to him, alleging, that he would endeavour to obtain the dividend himself, and would

not give out of his hands any security he had."

The court is bound to conclude from this testimony, as well as from the internal evidence of the transaction, that the defendant was considered by the complainant, and was regarded by himself, as his agent to act for him, as the witness expresses it, and to collect what might become due on this bill. Whether he were obliged to sue, or to attach property of the drawers, or not, it is unnecessary to say, because that is not the negligence imputed to him; but the court is of opinion, that with the full knowledge which he had of their bankruptcy, it was at least his duty to have used that ordinary diligence and care which no man, however negligent, would have omitted in his own concerns, that of proving the debt, and thus taking a chance of dividends which might be made. This was the only way left to collect any thing, and certainly when he promised to act for the complainant, and to endeavour to obtain the dividends, nothing short of this could be a compliance with his engagement. The trouble of such a step would be trifling, and the expense very inconsiderable. The court, however, does not think with the defendant's counsel, that Mr. Corp has made himself liable for the whole bill, but only for so much of it as shall appear to have been lost by his negligence. Such an indemnity is all the complainant can ask, and beyond this a court of equity will not readily go. It is impossible, however, from any evidence before us to say what credit the complainant is entitled to on his mortgage. The depositions of Mr. McCall and Mr. Henry, leave it too uncertain what might have been received, without some further inquiry. The court, therefore, before a final decree, thinks it proper to refer it to the master to report what dividends have been declared and paid to persons holding bills of exchange drawn by Robert Bird & Co. in this country on Bird, Savage & Bird in England, and not accepted by them, either by the assignees of the latter, or by those of Robert Bird, and to reserve all further directions until the coming in of his report.

Case No. 2,678.

CHILDS et al. v. GLADDING et al.

[11 Am. Law Reg. (N. S.) 386; 14 Int. Rev. Rec. 173.]

District Court, D. Rhode Island. June, 1872.

VESSEL OWNERS—RIGHTS OF MAJORITY IN INTEREST.

[A majority in interest of shipowners may dismiss the master, although a co-owner, at any time without cause.]

KNOWLES, District Judge. This is a cause of possession, civil and maritime, promoted by C. T. Childs and others, against Samuel Gladding and others, the libellants, as owners of twenty-three thirty-second parts of the schooner Allen Middleton, Jr., claiming possession and control of her, as against the respondents, the owners of the remaining nine thirty-second parts.

The libel, as filed on the 12th of April, 1871, alleged as grounds of judicial action, first, the ownership of the schooner, as above stated, and, secondly, "that the libellants are desirous of employing her in the coasting trade, and for this purpose, of placing in her a master satisfactory to themselves, and in whom they have confidence, but that the said Samuel Gladding, having heretofore been master of the said schooner, refuses, though requested to deliver up possession of her to the libellants, and persists in his claim to continue in her as master, notwithstanding the demand made upon him by the libellants for possession and control of her, and he, and some of the other part-owners refuse to unite with the libellants in the employment of said vessel, though, as the libellants believe, a part of the owners, now absent, would join with them in the employment of said vessel, if here present. On the 20th of April, without objection, the libel was amended by inserting three additional articles to the effect following: 1st, that said Gladding was appointed master of the schooner, about the 3d of March, 1871, under a special agreement that he should remain master only so long as he gave satisfaction to the owners, and that before the filing of the libel, "he was informed by the libellants, who constituted a large majority in interest of such owners, that he did not give satisfaction to the owners, and that they had removed him as such master, and demanded of him the possession of said vessel, and to surrender up to them the papers thereof: 2d, that said Gladding, while he was master of said vessel, misused and abused her by greatly overburdening her, whereby she was strained and caused to leak badly and otherwise damaged; and 3d, that said Gladding is incompetent to act as master of said vessel." To the libel, as thus amended, the said Gladding intervening for his interest in the schooner, filed his answer, embodying six defensive allegations, of the first and sixth of which, however, it is not necessary here to speak.

The second was, in substance, that during the months of December, 1870, and January and February, 1871, he acted as agent of all the owners concerned in the purchase of said schooner, who unanimously appointed him master thereof, without any stipulation or condition, and, in consideration thereof, he became part owner; that in a subsequent agreement, on the 3d of March, 1871, a contract concerning the employment of the schooner and the division of her earnings was embodied, and it was expressly stipulated that he, said Gladding, was to act as master of the schooner, as long as he gave satisfaction to the owners—that the meaning of the stipulation was, "that until he, said Gladding, did some act as master that gave the own-

ers just cause of complaint or reasonable ground for dissatisfaction," he was to command and have possession of the schooner; that in pursuance of said agreement he gave up other employments, and on the —— of March, 1871, entered upon his duties as captain and manager of the schooner, having made in her since that date a successful trip to Baltimore, and having settled the accounts of the vessel for that trip with the several shareholders—they "all expressing themselves satisfied;" that he was arranging for and about sailing on a second trip, when the libellants, by instituting these proceedings and arresting the schooner, obstructed the sailing, use and employment of her, to his great damage as one of the owners and master of the same, and in unjust violation and breach of the said contract—he denying that the libellants or owners had any just cause of complaint against, or reasonable ground of dissatisfaction with him for any act done or suffered to be done by him in the command of said schooner, or the management of her affairs or settlement of her accounts.

The third allegation was, in substance, a denial or traverse of the charge of misusing, overloading or straining the vessel: the fourth, in substance, a denial of the charge of incompetency as master of said vessel, coupled with an averment that for over thirty years he had been a mariner by profession,—had served in all capacities (save that of cook) on board of vessels, and had been master of other schooners before, to wit, of the Mary H. Mifflin; Thomas Hallet; Flight; Gov. James Y. Smith; Science, of Bristol; Phoenix, of Stonington; and others, and that no vessel under his command ever had any injury done to her, or any accident happen to her that might have been avoided by the master. The fifth was, substantially, an allegation that he was the legal, bona fide owner of two thirty-second parts of the schooner, and that another thirty-second part is held for him by one William Butler, under an agreement to convey to him on payment of an agreed price.

The cause came to hearing upon libel, answer and documentary and oral proofs, several of the owners, the captain included, appearing as witnesses, and the several points set forth in, or suggested by the libel and answer, were distinctly presented and made the subjects of inquiry and argument. To such only of these as upon full consideration of the whole cause I deem of controlling importance shall I refer, as matters of comment on this occasion. In regard to certain principles or maxims of the law maritime, no question is raised at the bar. The learned counsel of the parties agree that in general the majority in interest of the owners of a vessel are entitled to the control, use and possession of her, and that this right of the majority the admiralty will protect,—of course,—duly regarding the rights of the minority, to demand security for the restoration of their property in specie or otherwise. Also, they agree that in general the owners of a vessel (that is the majority in interest of them), have the power of appointment and removal of the master at will, for any or no cause, as they may see fit, and that of course no objection of complaint, on the part of a captain, to an exercise of this power by the owners, is of any avail, unless grounded on the terms of some special contract between himself and those owners. But, at this point arises a question upon which the learned counsel are widely at variance, and upon which, it cannot be denied, text writers and jurists seem to be not fully in accord. Thus, on the part of the claimant, it is contended that when it happens that a part-owner, co-operating with the minority, occupies the position of captain, the general principles above stated lose their value for all practical purposes, unless the majority can show some adequate, just or reasonable cause for removing or dispossessing such captain. On the part of the libellants, on the other hand, it is maintained that the right of the majority in interest is as perfect and its power as irresistible, against the captain, though a part-owner, as against any other shareholder, whatever his occupation or his residence—landsman or seaman. And accordingly, as their first position, they claim that upon their petition or libel, as originally filed, in which the only ground for action set forth, is the majority's right of possession, without even an illusion to any cause of dissatisfaction, they are entitled to the relief prayed. On principle, they say, this claim can be sustained, and, while they acknowledge their inability to produce, in support of it, any adjudicated case from the English or American reports, they challenge a production of an adjudicated case militating with their position. In reply to this, and in support of his own position, the learned counsel of the claimant, with apt and cogent remarks and arguments, cites several authorities deservedly of high repute, viz.: 3 Kent, Comm. 162, and notes; Story, Partn. §§ 432, 445, and notes; Fland. Ins. § 65, and notes; 1 Pars. Shipp. & Adm. 95, and notes; Abb. Ins. 104, and notes. On referring to these, we learn that whatever is found in these works sustaining the claimant's views, is assumed and represented to be dictated or warranted by certain three cases in the English Admiralty, in tempore Sir William Scott (1802–10–11). The first of these is The New Draper, 4 C. Rob. Adm. 287. The owners of 9-16ths of a vessel sued for possession the owner of 7-16ths (who also was captain). The suit was contested, on the ground that the captain was in fact the owner of 14-16ths, having paid for seven of the nine shares holden at the commencement of the suit by certain of the libellants. The bills of sale, which he had taken, were, however, deemed by the court defective, and a judgment for possession was entered for the libellants, as being the majority in interest. So far as appears, the only point raised or

discussed was the validity and effect of the alleged purchase of seven shares by the defendant, after suit brought. In pronouncing judgment, the court said: "The dispossession of a master is, in its nature, not an uncommon proceeding. All that the court requires in cases where the master is not an owner, is that the majority of the proprietors should declare their disinclination to continue him in possession. In the case of a master and part-owner, something more is required before the court will proceed to dispossess a person who is also a proprietor in the vessel, and whose possession, therefore, the common law is, upon general principles, inclined to maintain. It is not, however, by any means unprecedented for this court to proceed even to that extent; but then some special reason is commonly stated to induce the court to interpose. I observe there is a reason given in this case, and the same that most frequently occurs, 'that the master is irregular in his accounts with his owners.'" The conclusion of the court's opinion is as follows: "The case becomes, therefore, a common case of the majority of owners proceeding against one in which the common rule of the court must be pursued. Possession decreed." The head note of the case, it may be well to state, is simply "Case of possession. Master dispossessed at the application of a majority of interests." The second of these cases is The Johan & Siegmund, Edw. Adm. 242, decided in 1810, eight years after the decision in The New Draper. The head-note is, "Cause of possession. Suit not entertained by the court in the case of a foreign ship." The only allusion in the report of the case to the point in question, is this single sentence: "If this were a British ship, there can be no doubt that, by the practice of this court, it would, upon the application of a majority of the parties interested, proceed to dispossess the master, though a part-owner, without minutely considering the merits or demerits of his conduct." The third of the three cases is The See Reuter, 1 Dod. 22, decided in 1811. The majority of the owners sought to dispossess the captain, who was also an owner of 5-16ths of the vessel. The decree was against the captain. The only portion of the report of this case, of any pertinence in this connection, is the first sentence of the court's opinion, in these words: "In cases of ships belonging to British subjects (the See Reuter was owned exclusively by aliens), the court has no hesitation in ordering possession to be delivered up on the application of a majority of the owners, without entering very minutely into the causes of dissatisfaction existing between them and the master." That there is found no adjudication in support of the claimant's position is apparent. Nor less apparent is it, that, in the view of the judge, an assignment of a reason for the dispossession of a master part-owner was rather matter of form than substance. In The New Draper, he says merely that some special reason is "commonly stated"—not that this is necessary, or even important—and his after utterances, in 2 Edwards and 1 Dodson, negative the inference that even he would have sustained a demurrer to a petition in which the majority of part-owners claimed possession, without assigning other cause than the majority's will and order. Assuming, as I am warranted in doing, that no adjudication upon this point adverse to the libellant's position can be produced, and failing to find in the argument of the learned counsel of the claimant, or in the text-books to which reference is made, any sufficient answer to the argument in support of that position, I am constrained to concur in the views of the libellants. No satisfactory reason is assigned or suggested by Sir William Scott, or any commentator, or by the learned counsel of the claimant, for holding that a part-owner of a ship who secures for himself an appointment as master of the craft, is entitled to retain his office and keep possession of the vessel until he shall see fit to resign or surrender, against the expressed will of the majority of the owners,—unless that majority can show reasonable and sufficient cause,—some misfeasance or nonfeasance for his removal and deposition. Of special contracts between a ship's master and a ship's owners I am not now treating, but of the relations between a master who is also a part-owner and his co-owners after his appointment. Is the part-owner who is appointed master of a ship endowed with any new or additional right as a part-owner? When, on his election he steps upon deck, are his relation to the ship and his rights in and over it the same as those of a part-owner of a horse, in his exclusive custody in and over that horse, as settled at common law? To these inquiries it is believed a negative answer must be given. The individual remains a part-owner, with all his rights as such, as before his appointment to the mastership, and no more. As master he is to be regarded simply as the agent of the owners as a body, with no other rights qua master than he would have were he not a shareholder. This, as it seems to me, is, or of right ought to be, regarded as the better law upon the point in question It is, as is believed, consistent with well-settled and familiar rules and principles, while its opposite leads logically and necessarily to results and conclusions which the profession would be slow to adopt, and the business community quick to condemn. Refraining from further remark upon this point, as supererogatory labor, I sustain the point raised in limine by the libellants as above presented. It is obvious, moreover, that by the amendment of their libel above mentioned it is made to conform to the views of the English jurist. A "special reason" and "causes of dissatisfaction" are set forth; but how "minutely" these causes should be considered—whether as matters of contestation upon proofs and argu-

ment or not—is left by him to the conjectures of his readers.

Of the evidence submitted by the libellants in the case in support of their charges or allegations of incompetency, and of misusing and overstraining the Middleton, it is sufficient here to say that it failed to substantiate those charges when weighed in the balance with the claimant's proofs in rebuttal. Assuming it is proven or admitted that the libellants are owners of 23-32 of the schooner, and the claimant owner of 2-32 only (the owners of the remaining 7-32 not entering appearance), and that the claimant, though requested, has refused to surrender possession, I must pronounce for the libellants, unless ground for a contrary judgment is found in the second defensive allegation of the claimant's answer, already stated in substance. On recurring to this it is seen that he claims to have been unanimously appointed captain of the Middleton in the winter of 1871, and in proof of this he exhibits the subscription list upon which the owners contracted for their several shares—reading thus: "We, the subscribers, agree to take or hold the respective shares set against our names of schooner Allen Middleton, Jr., said vessel to be commanded by Captain Samuel Gladding. Providence, November 30, 1870." Of this portion of the allegation and its proof I deem it sufficient to say that its relevancy and importance I have failed to perceive, inasmuch as the claimant proceeds to aver that subsequently, viz., on the 3d of March, 1871, a more formal agreement or contract between himself and his co-owners was made, in view of which, as he strenuously contends, the court should refrain from interfering "to aid either party in attempting to violate it." In the construction of this writing referred to, contended for by the claimant, I am unable to concur, and this whether it be considered separately from or in connection with "surrounding circumstances" concerning which testimony was received under objection. The co-owners of the vessel (the claimant among them), on the 3d of March, 1871, convened to ascertain the then will of the then majority in regard to the use of their joint property, and the action and will of the majority, so far as need here be inquired, was embodied in the following paper, to which the signatures of owners of 16-32, and no more, of the vessel (including the claimant owning 2-32) were attached:—

"It is agreed between the owners of schooner Allen Middleton, Jr., and Captain Samuel Gladding, as follows: Captain Gladding is to command the schooner so long as he gives satisfaction to the owners, and she is to be employed in the freighting business between ports not south of Cape Henry, and all northern and eastern ports. The division of gross earning is to be as follows:—Captain Gladding is to receive 3-5, and the owners 2-5 of the same. Captain Gladding to victual and man the vessel and to sail her, paying all port charges and all other charges appertaining to the running of said vessel, the owners only to pay such bills as are necessarily incurred in keeping the schooner in good running order. Captain Gladding is to make up his account after every trip, and after making deductions named above, he is to divide the balance among the owners. It is agreed that all bills made up for expenditure on the vessel shall, before being charged in Captain Gladding's account, be submitted to Mr. James M. Cross, of Providence, for his approval. Before the vessel leaves Providence all bills against the schooner are to be collected, and accounts made up by Captain Gladding and presented to owners for payment."

It is noticeable that of the seven signatures to this instrument (including Captain Gladding's) four are included among the libellants, and two have disposed of their shares.

For dissenting from the construction given by the claimant to this contract, it seems not necessary to state in full my reasons. It must suffice to say, that even did it bear the signature of each and every owner (instead of only half of them), and were they now, all of them, still owners (which is not the fact), and were there not now (which is the fact) owners who had no interest in the vessel in March last, I should nevertheless hold that the majority in interest is entitled to the possession of the vessel, either as against the claimant alone, captain and part-owner though he be, or against him and his co-owners of the minority. That the co-owners of a ship may not, by contracts and covenants or otherwise, estop themselves from exercising their rights in regard to the appointment or removal of a master, or the control and management of the ship, is not affirmed. It suffices to say that, under the facts in the case, the contract of March 3d, exhibited in proof, lacks more than one of the essentials of a contract of that species. Against any injury or wrong from mere wilfulness, caprice, or favoritism on the part of the majority owners of a ship, the master contracting can protect himself by bond, covenant, or otherwise; and if he neglect thus to guard his interests, himself, not the law, should he blame, if his employers dismiss him at a moment's notice, and without (so far as he may know or is entitled to know) any cause, reasonable or unreasonable.

Case No. 2,679.

CHILDS et al. v. GLADDING et al.

[See Case No. 2,678.]

Case No. 2,680.

CHILDS v. LENIG.

[1 Wall. Jr. 305.][1]

Circuit Court, E. D. Pennsylvania. April 12, 1849.

PRACTICE—AMENDMENT OF PLEADINGS.

A defendant will not be allowed, as a matter of course, to put in new pleas in this court as in state courts, on the trial of a case. The court speaks of the practice of so doing as vexatious, and one which will be allowed only where a good reason is shewn for it, and then, generally speaking, only upon terms.

The "patent act," as it is called, of July 4th, 1836, § 15 (5 Stat. 123), "permits" a defendant, in suits brought for infringement, to plead the general issue in a variety of cases, which the act specifies, and to give any special matter in evidence of which he may have given thirty days' notice to the plaintiff. And the judiciary act of September 24th, 1789, § 32 (1 Stat. 91), gives authority to the court to "permit either of the parties to amend any defect in the impleadings," upon such conditions as the court may prescribe.

This cause was now called on for trial; and the defendant having pleaded the general issue, and given the thirty days' notice of his special matter, Mr. Cuyler and J. Fallon, asked leave to put in several special pleas, some of which, it was said, covered the same ground as the special matter, and others of which were new defences, which, however, might have been pleaded generally, with notice. They offered to the plaintiffs, if there was any surprise on them, to continue the case till next term, but shewed no reason, except the omission of their client to inform them of all his defences, why the pleas had not been put in, or notice given of their effect, thirty days before the trial.

Mr. Titus and Mr. Stephens, for the plaintiffs, objected to the new pleas being put in now. The pleas were a surprise; and a trial, not a continuance, was wanted by the plaintiff, who had brought many witnesses from a distance.

GRIER, Circuit Justice. This practice of putting in new pleas at the moment of trial, which we derive from the state courts, is a very vexatious one; and we are not disposed at all to encourage it here. The practice puts it in a defendant's power to put off the suit almost as often as it is brought to trial; for if the new pleas are artfully drawn (as they may be on purpose), and suddenly sprung upon the counsel, he may naturally not wish to reply to them on the spot. Even in the state, while I presided in a judicial district there, though I could not, under the state law, prevent a party from putting in new pleas, I have generally done whatever I fairly could to discourage it beyond the strict requirements of the act. But in this court we are under no obligation to allow pleas to be thus put in. It is a privilege which the court may permit in its discretion. In the state courts it is different. "The defendant," says the state act, act of March 21st, 1806, may "alter his plea or defence on or before the trial, * * * and if by such alteration or amendment the adverse party is taken by surprise, the trial shall be postponed until the next court." The defendant must, in this court, shew something which addresses itself to our conscience; and even then we should probably continue the cause only on terms; as, for example, the payment of costs of the term.

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

CHILDS (SAMUEL v.). See Case No. 12,287.

Case No. 2,681.

CHILDS v. SHOEMAKER.

[1 Wash. C. C. 494.][1]

Circuit Court, D. Pennsylvania. Oct. Term, 1806.

RIGHTS OF SURETIES—BOND FOR CUSTOMS DUTIES—MISTAKE—RECTIFICATION IN EQUITY.

1. R. D. imported a quantity of merchandise, in his own vessel, consigned to E. D., who received the goods, and gave bonds for the duties to the United States, with the plaintiffs as his sureties. The invoice and bill of lading showed the goods to be the property of R. D., but the bond was executed by E. D., without calling himself the agent of R. D. *Held*, that the sureties of E. D. are not entitled to recover the amount of the bonds paid by them, from R. D., under the provisions of the act of congress, giving a preference to sureties who pay bonds for duties.

2. The law of the United States clearly marks the distinction between owner, importer, consignee or agent; and the entry is to express the character in which it is made, at the time the duties are secured. If as agent, this must be so stated in the bond.

3. The act of congress considers a consignee, for all the purposes of the law, an owner; and unless he states himself not to be so, he is the principal in the bond; and it is only in favour of his sureties, and upon him, and his effects, that the law gives the preference.

4. The bond in this case was properly given by the consignee of the goods, and therefore there was no mistake; and if there were a mistake, it is not to be rectified at law; and in equity, the plaintiff would be told that equality is equity; and that a court of equity will not rectify a mistake, in order to violate one of its favourite maxims.

This cause came on upon a case agreed. Robert Denison imported, in 1801, a cargo of goods, in the Betsey, of which he was owner, which arrived at Baltimore, consigned to

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

Edward Denison, who resided at Baltimore, and carried on trade under the firm of Robert & Edward Denison; Robert residing at Philadelphia. The invoice showed the goods to have been shipped by the order, and for the account of Robert Denison. The manifest states the cargo to be owner's property, as did the bill of lading. The cargo was entered by Edward Denison in his own name, and a bond was given by him in his own name, without mentioning Robert Denison, for payment of the duties, with the plaintiff and Brown as his sureties. Childs having been compelled to discharge the bond, and Edward & Robert Denison being bankrupts, this action was brought; and the question was, whether the plaintiff is entitled to a preference of the other creditors, or must come in equally with them.

It was contended, by Mr. Dallas, for the plaintiff, that though it does not appear, on the face of the bond, that Edward Denison subscribed the same, as agent for the real owner, yet, that this being made out in evidence, dehors the bond, the effect will be the same; and therefore, that under the 65th section of the Impost Law, Act of March 2, 1799 [1 Stat. 676], the plaintiff, the surety, is entitled to a preference of the other creditors of the owner. The agent need not sign as agent in this case, any more than in the case of an insurance made by him in England, under the statute. See Parker, Exch. 15, 16; 1 Term. R. 313; 1 Bos. & P. 345.

Rawle and Ingersoll, for the defendant, insisted: 1st. That the law which gave this preference, was unconstitutional; though under the 8th section of the first article of the constitution, congress might, as a consequence of the direct power to lay and collect impost and duties, give a preference to the United States, yet they could not transfer it to a surety, since the collection is complete by the payment of the surety; and therefore, all the power on this subject, is thereby expended. 2d. The preference is against the principal in the bond, not the owner of the goods. Edward Denison is the principal. The distinction between owner, consignee, and agent, is clearly marked out in the law. Even the United States could not sue the owner, if not principal in the bond, much less the surety, whose right is derivative. 3d. The preference given by the law which was read, was done away by the bankrupt law [2 Stat. 30], which puts all creditors on an equality, except the United States; and sureties being not included within the exception, are left on the ground of other private creditors.

Dallas and M'Kean, for the plaintiff, upon the third point, contended, that the law which gives the preference, and the section of the bankrupt law, which is relied upon, are affirmative statutes; and the latter does not repeal the former, as to priority given to the surety.

WASHINGTON, Circuit Justice. The question upon the case agreed, is, whether the plaintiff, Childs, is entitled to the like advantage, priority, and preference, for the recovery of the money, paid by him as above mentioned, out of the estate of Robert Denison, as are reserved and secured to the United States, by the act of the 2d of March, 1799. If in the affirmative, judgment must be for the plaintiff; otherwise, for defendant. Throughout the law imposing duties on imports, the distinction between owner, importer, consignee, and agent, is carefully marked, and uniformly adhered to. The entry of the goods is to be made in the name of the owner or consignee, who, for all the purposes of the law, is considered, by the 62d section, as owner; or, in cases of the absence, or sickness of those persons, by their agent or factor, in the name of the owner or consignee; and is to be verified by the oath of the person making the entry; in a way to point out distinctly the character in which he acts, whether as owner, consignee, or agent. If the entry be made by an agent, or factor, where the particulars of the merchandise are unknown, it is, by the 86th section, to be in writing, and subscribed by him in his name, as agent or factor for the owner or consignee. The bond for securing the duties, is, by the 62d section, to be in the name of the importer or consignee; or, if it be given by an agent, then in the name of such agent, and of the importer or consignee, and the sureties, with condition for payment of the duties by the principal or his agent, and the sureties. In addition to this bond, the agent, if the entry be made by him, is to give a bond in the penalty of 1000 dollars, to produce an account of the goods, verified by the owner or consignee, within a stipulated time. By the sixty-fifth section of this law, a priority of satisfaction is given to the United States, against all the obligors in the bond, in case of insolvency; and, if the principal in such bond, given either by himself, or by his agent, factor, or other person for him, should be insolvent, or if his estate in the hands of his executors or assignees, be insufficient for the payment of his debts, and the bond should be discharged by his surety; such surety is entitled to the like advantage, priority, or preference, as are reserved and secured to the United States; and he may maintain a suit upon the aforesaid bond, in his name, in law or equity, for recovering all moneys paid thereon.

Here, then, we find that the distinction between owner and importer, consignee and agent, which runs through the various sections of the law, prior to the 65th, is dropped, when the remedy for the surety in the bond is provided for. The preference given to

him is not against the owner, importer, consignee, or agent, but against the principal in the bond. Who is the principal in the bond? He is marked in the condition. The person who entered the goods, viz. the owner or importer, if the entry were made by him; or the consignee, if made by him; or either of those persons, if the entry were made by an agent, or other person, in their names, and who is an obligor in the bond, either by his own signature, or that of his agent, or other person authorized to bind him. No person can be a principal in a bond, who has not sealed it, either by himself, or by some person authorized to do it for him. If the bond be executed by a third person, in the character of owner or consignee, he is the principal, though he be not in truth the owner or consignee. If the factor make the entry in his own name, the bond will, of course, be in his own name, and he will be the principal; if made in the name of the owner or consignee, he in whose name it is made, will be the principal, if the bond be executed by or for him. But if he be not the obligor, he cannot be principal.

This is an action of debt; and the first count in the declaration states, that Robert Denison executed the bond by Edward Denison, his agent or factor. Now, in point of fact, the bond was not given by Robert Denison; because it was neither signed and sealed by him, nor by his agent or attorney for him. The second count states, that the bond was given by Edward Denison and the sureties, for and at the instance of Robert Denison. If so, it is not the bond of Robert Denison, but of those who executed it. But a complete answer to both counts is, that the bond was executed, not by an agent or factor, but by the consignee of the goods; who, as to all the purposes of the act, is to be considered as the owner; no parallel can be drawn between this case and that of an insurance effected in England by an agent. The statute directs, that the name of the agent shall be stated in the policy; but, it is not necessary that his character of agent should also be stated. But, in this case the preference is given against the principal in the bond, and the only inquiry is, who is principal. It is contended, that the not entering the name of Robert Denison, was a mistake of the public officer. In the first place, I do not agree that it was a mistake; because, Edward Denison being the consignee, he was properly the principal in the bond. But, if it were a mistake, it cannot be rectified on this side of the court; and, if the plaintiff were to seek relief on the other side, he would be told that equality is equity; and chancery will not cure a defect at law, in order to violate one of its favourite maxims. The decision of this point, renders it unnecessary to consider the other points made by the defendant's counsel. Judgment for defendant.

Case No. 2,682.

CHILDS v. SOMERSET & K. R. CO.

[Brunner, Col. Cas. 593;[1] 20 Law Rep. 561.]

Circuit Court, D. Maine. 1857.

PRACTICE—VERDICT, WHEN SET ASIDE AS BEING AGAINST EVIDENCE — CONTRACT—EXTRA WORK RECOVERABLE ON IMPLIED ASSUMPSIT.

1. This court will not set aside a verdict as being against the evidence, unless it can see that the jury, in coming to their result, were influenced by passion or prejudice, or unwittingly fell into a plain mistake.

2. The plaintiff, by special contract, agreed to build certain bridges and depots for the defendant corporation, for which he was to be paid partly in cash and partly in shares of their capital stock. In the progress of the enterprise it became necessary to do much extra work and furnish materials not provided for in the special contract. *Held*, that the plaintiff was entitled to recover the whole value in money of the extra work and materials thus furnished, upon an implied assumpsit, and that the agreement to take pay in shares did not extend to this part of the job.

At law. This was an action of assumpsit, in which the plaintiff [Enoch L. Childs] declared specially on two contracts in writing, whereby he agreed to build the bridges and depots on the line of the defendant's railroad, and also in a general count for work, labor, and materials. The contract provided, that he was to be paid for the bridges the sum of one hundred and three thousand dollars, twenty-five thousand dollars whereof was to be paid in shares of the capital stock of the corporation, and the residue in money. The payments were to be made monthly, upon certificates of the engineer of the proportion of the contract price earned during the preceding month, eighty per cent of such certified amounts being paid within ten days after the presentation of each certificate, and the remaining twenty per cent on the completion of the entire work. The depots were to be paid for wholly in money, at an agreed price for the whole work, upon similar monthly estimates. In the progress of the work it was ascertained, that it was necessary to rebuild one of the spans of one of the bridges, and to elevate it, to permit the public to use the river, and their contract was made touching such new work, for which the plaintiff was to be paid a fixed sum, seventy-five per centum in money and the residue in stock. The plaintiff alleged and offered evidence tending to prove that he had performed all these contracts, and had done a large amount of extra work upon, and furnished many materials for, the bridges and depots, not provided for by either of the contracts, and for which he was entitled to recover upon the general count for work, labor, and materials. The jury were instructed that he had a right to recover as upon a quantum meruit, for any work and

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

materials done and provided which were not embraced within either of the contracts; and the question occurring whether he was to be paid therefor wholly in money, or partly in money and partly in stock, it was agreed that the jury might find the amount, if any, which the plaintiff might be entitled to recover, and the value of the stock at the time it was demanded, and the court should afterwards decide whether the extra work and materials were to be paid wholly in money, and amend the verdict accordingly. The jury having so found, the plaintiff moved to amend the verdict, and also for a new trial, because the jury had fixed the value of the stock at only twenty-five per cent of the par value, which, it was insisted, was contrary to the evidence.

E. R. Hoar and C. T. Russell, for plaintiff.

Lot M. Morrill and H. W. Paine, for defendants.

'CURTIS, Circuit Justice. The rule followed by this court in respect to setting aside verdicts as being against the evidence is entirely settled. It requires the court to see that the jury, in coming to their result, were influenced by passion or prejudice, or unwittingly fell into a plain mistake. They were instructed that the burthen of proof was on the plaintiff to satisfy them what the market value of this stock was at the time he demanded it; and that they ought not to fix its price at any greater sum than it appeared upon the evidence, to their reasonable satisfaction, it could have been purchased for, at the time of the demand, which, according to the evidence, was in the autumn of 1855. I do not understand that this instruction is complained of as incorrect in point of law.

The only evidence respecting the market value of the stock was, that in his contract of June 3, 1853, the plaintiff agreed to take, in part payment for his work, two hundred and fifty shares of the stock at its par value; and that he made a similar agreement in 1854, when he rebuilt and elevated the single span of the bridge at Augusta. The plaintiff, who was a witness, states that he had pledged some of the stock at the rate of eighty-five dollars per share, and afterwards some at fifty dollars a share; that he sold some at sixty-five dollars a share, and exchanged some for other property at a price not fixed. The dates of neither of these transactions were stated, but it appeared they were some considerable time before the demand. It is argued that the agreements between the plaintiff and defendants, that he would take a large amount of this stock in part payment for his work, at its par value, is evidence that such was its market value, and it is no doubt true, that it has a tendency to prove that it was so at the dates when these agreements were made. But, considering the highly speculative character of railroad enterprises, which is so notorious, that I should hesitate to say that either the court or the jury must be presumed to be ignorant of it, I should feel some difficulty in declaring that in the absence of all other evidence, it was a presumption of law, that the shares continued to bear their par value after the lapse of about two years, and the completion of the road. But this question is not of practical importance now, because the evidence clearly showed that in this instance the shares did not maintain their par value. The only sale put in evidence was at sixty-five dollars in the hundred; and whether the entire cost of the road was then ascertained, did not appear. The estimated cost of the road was six hundred thousand dollars. The actual cost, exclusive of the plaintiff's claim for extra work, was seven hundred and fifty thousand dollars. It was originally intended to encumber the road with a debt of three hundred thousand dollars, and to raise from stockholders the remaining three hundred thousand dollars in money and work. In point of fact, only about two hundred thousand dollars was paid in by the stockholders. I think it must be admitted that on this state of the evidence, a very difficult task was imposed on the jury, when they were required to assess the value of this stock on a given day in the autumn of 1855. It would not have been surprising if they had said, we have no satisfactory evidence by which we can fix the value at any particular sum; the plaintiff, on whom the burthen of proof is, has not shown us, with reasonable certainty, anything concerning it, and we cannot therefore allow more than a nominal value. If they had so found, it would have been difficult, to say the least, to disturb their verdict. Having, probably, that general knowledge and skill respecting the intrinsic as well as the saleable value of similar property, which a jury may be expected in some degree to possess, and the local knowledge of the country where the road is, which they also probably possessed, and applying them to the evidence in the case, they fixed the value at twenty-five per centum of the par value. I cannot say, upon the evidence, that they fell into a plain mistake in not fixing it at a greater sum; and the motion for a new trial must therefore be overruled.

As to the motion to add to the amount of the verdict, I think it should be allowed, and the verdict amended accordingly. At the trial a doubt occurred to me, whether the rule laid down in Pepper v. Burland, Peake, 139, and since followed in England and this country, that when a building contract has been departed from, and not abandoned, the contract is still to govern the price of the work done under it, so far as it can be traced and applied, might not entitle the defendants to pay for the extra work by stock, in the same proportion in which they were to pay for work under the contract in

stock. In other words, whether the contract which the law implies, to pay for extra work, would not be a contract to pay for it in the same ways and by the same modes of payment as the other work was expressly agreed to be paid for. But after hearing counsel, and upon further reflection, I am satisfied the doubt was not well founded. The promise implied by the law, in such a case, is a promise to pay in money, what the extra work is reasonably worth; and is in no respect qualified or governed by the existence of a special contract for doing other work, however intimately the two kinds or amounts of work may, in fact, be connected together. The law cannot safely or consistently with sound principles imply any contract containing special stipulations as to the times and modes of payment. This case supplies an illustration of the difficulty of doing so. The amount of capital stock of the corporation was limited, and the value of each share depends upon the observance of such limitation. Both parties were willing to contract to give and receive a specific amount, for specific work. But it would be an unwarrantable assumption to imply from this a willingness to give or to receive an additional amount for additional work. The special contract has not been applied, in any case, so far as I know, to any work not done under it; and in Robson v. Godfrey, 1 Starkie, 275, 1 Holt, 236, Gibbs, C. J., refused to apply the terms of credit and mode of payment by a bill of exchange, to additional work not done under the special contract which provided for such credit and mode of payment. The verdict must therefore be amended by the addition of such sum as equals seventy-five per centum of the amount of stock found by the jury as due for the extra work.

CHILDS (WILSON v.). See Case No. 17,796.

CHILDS, The MINNIE R. See Cases Nos. 9,639 and 9,640.

CHILLICOTHE BRANCH BANK (LEE v.). See Case No. 8,186.

Case No. 2,683.

CHILLICOTHE BRANCH OF STATE BANK OF OHIO v. FOX et al.

[3 Blatchf. 431.][1]

Circuit Court, N. D. New York. Jan. 29, 1856.

CORPORATIONS — POWERS — OFFICERS — ENDORSEMENT OF NEGOTIABLE INSTRUMENTS—PROMISSORY NOTE—DEMAND OF MAKER—DEFENCES — MATURITY OF NOTE AFTER SUIT.

1. The usage is universal, for the presidents and cashiers of incorporated companies, acting as the executive officers and agents of such companies, to make in their behalf, endorsements and transfers of negotiable paper, by simply endorsing their names, with the additions of their titles of office.

2. Such an endorsement is sufficient to charge the corporation under whose authority the endorsement is made, and to transfer the note to the endorsee, so that he can maintain an action on it in his own name.

3. Where a note is payable "two years after date, on demand," it is not necessary, in an action against the maker, who is the principal debtor, to aver or prove any special demand.

4. Where a corporation, which has the right to do so, takes its own stock in payment of a debt due to it, it may, under general full power given to its directors to manage its business, sell such stock again; and a note taken by it on such sale is valid.

5. In an action by the endorsee of a note against its maker, if the maker fails to establish any defence to it as against the payee, he cannot claim that the endorsee is entitled to recover only so much of the note as is due from the payee to the endorsee.

6. A verdict for the full amount of a note upheld, where its full amount was due at the time of the verdict, although not due when the suit was commenced.

This was an action on a promissory note for $5,000, made by the defendants [Watson A. Fox and Elijah K. Bruce], payable "to the order of the Columbus Insurance Company, two years after date, on demand, with interest payable semi-annually." After a verdict for the plaintiffs [the Chillicothe Branch of the State Bank of Ohio], the defendants moved for a new trial, on a bill of exceptions. The facts in the case sufficiently appear in the opinion of the court.

HALL, District Judge. 1. It is insisted by the defendants' counsel, that there was no such endorsement and transfer of the note in suit, as to give to the plaintiffs, under the law merchant, the right to maintain an action upon the note in their own name.

The bill of exceptions states, that the plaintiffs, to maintain the issue on their part, proved (among other things) that the endorsement, "E. F. Drake, Presdt.," on the back of the note, was the genuine signature of the said E. F. Drake; that the said Drake, as such president, transferred the said note to the plaintiffs; that, at the time of the endorsement and delivery of the said note to the said plaintiffs, the said E. F. Drake was the president of the said the Columbus Insurance Company; and that such endorsement and transfer of the said note to the plaintiffs was made by the said Drake, as such president, by the authority and direction of the said Columbus Insurance Company. This, it is conceded by the defendants' counsel, shows a transfer and assignment of the note; but, it is contended that the endorsement was not, in terms, in the name of the insurance company, and that, therefore, the plaintiffs are not endorsees, so as to entitle them to sustain a suit on the note in their own name.

I confess I can see no force in this objection. The usage is universal, for the presidents and cashiers of incorporated com-

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

panies, acting as the executive officers and agents of such companies, to make, in their behalf, endorsements and transfers of negotiable paper, by simply endorsing their names, with the additions of their titles of office. I cannot doubt that such an endorsement is sufficient to charge the corporation under whose authority the endorsement is made, and to transfer the note to the endorsee, so that the latter can maintain an action thereon in his own name. Folger v. Chase, 18 Pick. 63; Brockway v. Allen, 17 Wend. 40; Watervliet Bank v. White, 1 Denio, 608; Babcock v. Beman, 1 Kern. [11 N. Y.] 200. In this case, however, the transfer is fully admitted, and that, too, by an endorsement duly authorized. There certainly can be no reason for holding that the suit was improperly brought in the name of the endorsees.

2. It is insisted that the note on which the suit was brought is, by its terms, payable on demand, after two years; and that the special count in the declaration contains no allegation of a special demand of payment. The declaration contains the common money counts, with a copy of the note annexed, and the note was proper evidence under the money counts, even if a special demand was necessary. But I am inclined to think that no special demand was necessary. The makers of the note, as between them and the original payees of the note, and also as between them and the endorsees, were principal debtors; and, in such case, the general rule is, that no special demand is necessary. Nelson v. Bostwick, 5 Hill. 37.

3. It is insisted that the facts set up and proved by the defendants constitute a defence to the note. It appears, by the bill of exceptions, that the Columbus Insurance Company, to whom the note was given, had taken a considerable portion of their own stock in payment of debts due to them. This they had a clear right to do. Taylor v. Miami Exporting Co., 6 Ham. [Ohio] 218. This stock, so owned by the corporation, its directors had the right to sell and dispose of, for the benefit of the corporation. The stock was not extinguished or destroyed by the purchase thereof by the corporation. And, where a corporation becomes the owner of its stock, by purchase or forfeiture, the directors of such corporation, if they have, (as the directors of this insurance company had), full power to manage and conduct the affairs and business of the corporation, may sell such stock, and issue new certificates therefor; and notes taken for such stock are valid. The transaction between the defendants and the insurance company was, in substance and effect, nothing but a sale of such stock, although the resolutions of the directors expressed an intention to increase the stock and receive subscriptions therefor. This was, however, as the facts show, a misdescription of the real character of the transaction; and I can perceive no grounds upon which the validity of this note can be impeached in the hands of the insurance company or of their endorsees.

4. It is insisted that the facts stated in the bill of exceptions show that the plaintiffs, as against the insurance company, are at all events entitled to a portion only of the amount of the note, and that, therefore, they can recover in this suit only the amount to which they are entitled as against that company. This position is untenable. The plaintiffs, being the endorsees and legal holders of the note, are entitled to recover the whole amount due; and, if the whole does not equitably belong to the plaintiffs, they will hold what belongs to another, in trust for the party entitled thereto. With these equities, the defendants, having failed to establish any defence against the insurance company, have nothing to do.

5. It is insisted that, by the arrangement and resolutions under which the note was given, the whole amount of the note was not due and payable at the time the suit was commenced; and that the verdict should, therefore, have been for the amount actually due at the commencement of the suit, and for nothing more.

I am inclined to think that there is nothing in this objection. Upon the face of the note, the whole amount was due prior to the bringing of the suit, and, as the notice required by the terms of the resolutions and arrangement was actually given more than a year prior to the commencement of the suit, the whole amount was, I think, then demandable, under the arrangement referred to. At all events, it was all demandable at the time of the trial; and, as this objection goes only against the amount of damages recovered, and could only be available when the resolutions and arrangement were set up and proved by the defendants, I do not see how it can now prevent judgment upon the verdict.

If the whole amount had not been due at the time the suit was commenced, and the defendants had previously tendered, and then, under a plea of tender, brought into court, the amount actually due, or if, after the suit was commenced, the defendants had offered to pay the amount actually due and costs, and had then applied for a stay of proceedings, the objection might have been effectually urged. But, as the plaintiffs were, at the time of the verdict, entitled to the whole amount of the note, and the question is one simply as to the quantum of damages, I do not think a new trial ought to be granted on that account, even if the whole amount was not due when the suit was commenced.

It was objected that the exception was insufficient to raise this question, but, in the view I have taken of the case, this objection need not be considered. The motion for a new trial is denied, with costs.

CHILLICOTHE BRANCH OF STATE BANK (LEE v.). See Case No. 8,187.

CHINA, The (WALSH v.). See Case No. 17,114.

Case No. 2,684.

CHINN v. DARNELL.

[4 McLean, 440.] [1]

Circuit Court, D. Ohio. July Term, 1848.

EJECTMENT OF PATENTEE — OCCUPYING CLAIMANT —COMPENSATION FOR IMPROVEMENTS.

1. An entry of land within the Virginia military district of Ohio, and a survey of the same before the extinguishment of the Indian title, is made void by certain acts of congress.

2. A person having such a claim is entitled, having a patent, to compensation for his improvements such as the occupying claimant law, he having acted in good faith.

Mr. Stanton, for plaintiff.

Mr. Lawrence, for defendant.

OPINION OF THE COURT. This is an ejectment to recover possession of a tract of land in the Virginia military district, between the Little Miami river and the Scioto. The lessor of the plaintiff claims under a patent dated 30th of January, 1827. The entry was made in July, 1819, and the survey was executed in 1821. The defendant's patent was dated 14th of April, 1806. His entry was made 16th of November, 1798, and the survey was executed 2d of April, 1799. The entry, survey and patent, under which the defendant claims, being of older date than the patent under which the lessor of the plaintiff claims, the counsel allege that the entry, survey and patent of the defendant were void, as the entry was made on the land whilst it was Indian Territory. By the proclamation of congress, at Princeton, the 12th September, 1783, "all persons were prohibited from making settlements on lands inhabited or claimed by Indians, without the limit or jurisdiction of any particular state, and from purchasing or receiving any gift or cession of such lands or claims, without the express authority and direction of the United States in congress assembled." By the act of the 3d of March, 1793, it is made a penal offense to treat with any Indians for the purchase of land. The same penalty is imposed, a thousand dollars, on any one who, without a license, shall settle upon the public lands by the act of 19th May, 1796. By the intercourse act of the 30th of March, 1802, and 5th section [2 Stat. 141], that any person who shall make a settlement upon Indian lands, and who shall survey or attempt to survey such lands, or designate any of the boundaries by marking trees, or otherwise, shall forfeit a sum not exceeding one thousand dollars, and be imprisoned not exceeding twelve months. By the Indian treaty at the rapids of the Maumee, on the 29th September, 1817, a large tract of land was ceded to the United States, within which the land in controversy was situated. It seems, then, that any entry made within this territory prior to the above cession was prohibited by law, and, of course, no right could be acquired against law. The court, therefore instructed the jury to this effect.

The jury found defendants guilty, etc. On motion, the court held that the defendant was entitled to relief under the occupying claimant law.

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

Case No. 2,685.

CHINN v. HAMILTON.

[Hempst. 438.] [1]

Circuit Court, D. Arkansas. July, 1841.

ACTION ON PROMISSORY NOTE—PLEADING—INTEREST—SPLITTING UP CAUSE OF ACTION—MERGER OF CAUSE OF ACTION IN JUDGMENT.

1. Interest need not be demanded in the declaration, nor its payment negatived in the breach.

2. The uniform practice is to declare for the debt alone, and interest is recoverable as damages.

3. Interest payable by the stipulation of the parties before the contract falls due, is a part of the contract, and the effect of a failure to demand and negative its payment, is that the plaintiff can only recover the debt and interest from the maturity of the note.

4. On a contract containing various undertakings, the plaintiff complaining of the breach of one, thereby waives any right as to the others.

5. A plaintiff is not allowed to split up various covenants or promises contained in one contract, and sue upon them separately, but he can have but one recovery, and the contract becomes merged in the judgment of the court.

[At law. Action by Richard H. Chinn against Robert Hamilton, executor of Samuel P. Carson, deceased.]

A. Fowler, for plaintiff.

Albert Pike and D. J. Baldwin, for defendant.

JOHNSON, District Judge. This is an action of debt upon a promissory note by which the testator, Samuel P. Carson, acknowledged himself indebted to Brander, McKenna & Wright, in the sum of $3,919.53, to be paid one day after the date thereof, with interest thereon at the rate of 10 per cent. per annum, from the date thereof until final payment, for value received, which promissory note has been assigned by Brander, McKenna & Wright to the plaintiff. In his declaration the plaintiff demands the sum of $3,919.53, and assigns as a breach the nonpayment of the said sum of $3,919.53, or any part thereof, and makes no averment in relation to the interest, and concludes the breach in these words: "To the damage of the plaintiff two thousand dollars." The defendant has filed a general demurrer to the

[1] [Reported by Samuel H. Hempstead, Esq.]

declaration, and insists that it is substantially defective in omitting to aver the non-payment of the interest, as well as the failure to pay the original debt; and this is the only question presented by the demurrer.

In actions upon obligations, or promissory notes for the payment of money, containing no stipulation in regard to interest, it has not been deemed necessary to demand in the declaration the interest that may be due, nor to negative its payment in the assignment of breaches. The uniform and settled practice is to declare for the debt alone, and interest is recovered as damages for its detention. Upon a failure to pay money at the time it becomes due, the creditor is justly and legally entitled to be remunerated by the debtor, the damages he has sustained by the fault of the debtor. The law has declared the amount of these damages, and fixed them at the rate of six per cent. per annum, and allowed the parties to the contract to vary this rate, so that in no case shall it exceed the rate of ten per cent. per annum upon the amount loaned or withheld. In lieu of the damages which the creditor would be entitled to recover for the unjust detention of the debt the law has given interest; and although the law denominates it interest, it is in fact the damages which the creditor has sustained. He is, therefore, always allowed to recover the interest due at the rendition of the judgment, as damages for the detention of the debt. But in cases where the parties stipulate in the contract for the payment of interest, before the debt falls due, the interest cannot be regarded in the light of damages, but constitutes a part of the contract itself. The interest in this case accrues by the stipulations of the contract, and not as a legal consequence of its breach. It cannot be in the nature of damages, for it arises before any infraction of the contract or failure to perform it.

In the case at bar the plaintiff in his declaration has demanded the original debt alone, and damages for its detention. Is the declaration defective in omitting to claim the interest due him by the contract before the debt itself became due? I think not; the promise to pay the debt, and the promise to pay interest from the date of the contract, are two separate and distinct promises or undertakings,—one may be performed without performing the other. In declaring upon a covenant or a parol contract in writing containing various undertakings, the plaintiff has his election to complain of the breach of one or of all of the covenants or promises. If he complains of the breach or nonperformance of one only of the covenants or promises, he thereby admits that the others have been performed. The intendment is to be made most strongly against the pleader, and as he complains of the breach of only one of the covenants or obligations, the presumption arises that the others have been performed. It at all events waives any right of action upon them; for, having sued upon the contract once, he is for ever barred from suing again. It will not be allowed to split up the various covenants or promises contained in one contract, and sue upon each of them; he can have but one recovery upon one contract, which then becomes merged in the judgment of the court.

If the foregoing remarks are well founded, the declaration is not defective. Can the plaintiff in this case recover interest after the debt became due; and if he can, at what rate? He is entitled to recover interest, as damages for the detention of the money after it became due, and where the contract is silent the law fixes the rate at six per cent. per annum; but when the contract fixes the rate not exceeding ten per cent. the law declares that to be the rate. In this case the contract is set out in the declaration and fixes the rate of interest at ten per cent. per annum, consequently the plaintiff is entitled to recover interest at the rate of ten per cent. per annum. The fact that the parties have agreed upon the rate of interest, does not change the nature of interest after the debt becomes due, but it is still justly regarded in the nature of damages for the failure to pay at the time stipulated by the parties. Demurrer overruled.

CHIPMAN v. WENTWORTH. See Case No. 4,623.

Case No. 2,686.

CHISHOLM v. MONTGOMERY.

[2 Woods, 584.][1]

Circuit Court, M. D. Alabama. May Term, 1875.

MUNICIPAL CORPORATIONS — POWERS — ISSUE OF BONDS — TAXATION — SUBSCRIPTION TO PLANK-ROAD COMPANY.

1. The power to issue commercial securities, the consideration of which cannot be inquired into in the hands of a bona fide holder, is not inherent in municipal corporations, nor can it be implied from the ordinary police powers given to such corporations.

2. A municipal corporation is but a subordinate branch of the government; it represents the state sovereignty in a limited district for specified purposes, which are local government and police.

[Cited in Lewis v. Shreveport, Case No. 8,331.]

3. The power of taxation is given to municipal corporations as a means of carrying out these purposes, and a diversion of the revenues to other purposes is unlawful and ultra vires.

[Cited in Lewis v. Shreveport, Case No. 8,331.]

4. A municipal corporation possesses no powers except such as are given expressly or by necessary implication.

[Cited in Lewis v. Shreveport, Case No. 8,331.]

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

5. Such a corporation has no power, without express authority, to subscribe to the stock of a railroad or plankroad company.

[Cited in Desmond v. City of Jefferson, 19 Fed. 486.]

6. A municipal corporation was authorized by a special act to borrow a specified sum of money, and issue its bonds therefor; the money was borrowed and bonds issued accordingly. *Held*, that the power was thereby exhausted and became extinct.

[Cited in Hopper v. Town of Covington, 8 Fed. 779.]

7. A municipal corporation, without authority of law, subscribed for stock in a plankroad company, and issued its negotiable securities in payment thereof. *Held*, that it was not estopped by the resolutions of the city council, the acts of its officers, or by the negotiable form or other matter appearing upon the face of the bonds, from denying the authority of its officers to pledge the faith of the city in aid of the said road, or to issue the said bonds.

[Cited in Lewis v. County Com'rs, 3 Fed. 196.]

8. The fact that plaintiffs are bona fide holders of bonds issued by a municipal corporation is not a good reply to a plea setting up the want of power in the corporation to issue them.

This was an action at law brought [by Robert T. Chisholm] upon ten bonds for five hundred dollars each, purporting to have been issued by the city of Montgomery. The defense was the want of power in the city to contract the debt for which the bonds were given, and to issue the bonds. There was no dispute between the parties about the facts in the case, and an agreed statement of the same was submitted to the court. From this the following facts appeared: The charter of the city of Montgomery became a law on the 23d day of December, 1837, and by it there was conferred upon the city authorities the usual powers granted to municipal corporations, among which were the power to clean and keep in repair the streets and alleys, and to enact such laws and regulations as might be deemed necessary in relation to the streets and highways; also the power to do every other matter and thing which they might deem necessary for the good order and welfare of the city. On February 2, 1846, express power was conferred on the city, by an act of the legislature, to raise a sum of money, not exceeding seventy-five thousand dollars, by the sale of city bonds for that amount. This power was exercised. The bonds were immediately issued, and the money raised thereby was applied to the erection of a capitol building in the city of Montgomery. On the 2d day of February, 1850, the legislature chartered the Montgomery South Plankroad Company, with authority to "locate and construct a plankroad from the southern line of the city of Montgomery in a direct line south, as near as may be, crossing the Catoma creek at or near Norman's bridge, and extending south for thirty miles, and to receive from the authorities of any city or town in which said road might terminate, or through which it might run, the use of any street or streets for the location and construction of said road, and the municipal authorities of any such city or town were authorized to grant to said company the use of any street or streets for the purpose aforesaid." On February 22, 1850, the city council passed a resolution to subscribe twenty thousand dollars to the stock of this plankroad company; on September 12, 1850, the city council authorized the issue of the bonds of the city to pay for this stock, and they were issued on the 20th of the same month. They were negotiable in form, being payable to bearer in fifteen years after date. They were delivered by the city to the plankroad company, and were by it sold as stock securities in the market of Charleston, South Carolina, through brokers, at prices ranging from ninety to one hundred cents on the dollar. The bonds in suit are a part of said issue, and were bought by the plaintiff at par, in due course of trade, in December, 1850, before maturity of the bonds or any of the coupons attached thereto, and the plaintiff was the bona fide holder and owner of the bonds sued on by him. After the subscription of stock by the city, the plankroad company commenced work on its road, and constructed it from the Exchange Hotel, in the central business part of the city of Montgomery, running thence across the south line of the city to a point distant twenty miles, the city council having first granted to the plankroad company the right of way along Montgomery street from the said hotel to the city limits. Interest was paid by the plankroad company on some of the bonds, so issued, up to January 1, 1855, and on others by the city up to January 1, 1858, and the stock purchased by the issue of the bonds was represented by the city in the control and management of the plankroad company. After January 1, 1858, no payment was made upon the bonds on account either of interest or principal. By an act of the general assembly, approved February 25, 1860, passed at the instance of the city council, it was authorized to "extend" the said bonds by an issue of new bonds running ten years, provided that at an election, held for that purpose, a majority of the real estate owners in the city should vote in favor of "extension;" but if a majority should vote against "extension," then the law was to have no force or effect whatever. The election was held under this act, and fifty-seven votes were cast for "extension," and one hundred and five against "extension." After the result of the election was made known, the city council resolved, that said bonds, in the hands of bona fide holders "are a just and honorable liability of the city, and as such, some provision should be made for their payment." The parties waived a jury and submitted the cause to the court upon the pleadings and agreed facts.

John T. Morgan, Walter L. Bragg, and Wm. S. Thorington, for plaintiff.

I. The defendant had power, under its charter, to make and issue the bonds: 1. Its pow-

ers relating to streets and highways were unrestrained and unlimited. Within the scope of these powers the city was its own judge of what property it would acquire, what streets it would have and how it would improve them. Ely v. Rochester, 26 Barb. 133; Inhabitants v. New Orleans, 14 La. Ann. 452; Royalton v. Royalton & W. Turnpike Co., 14 Vt. 322, 323; Callender v. Marsh, 1 Pick. 418; Graves v. Otis, 2 Hill, 466; Waddell v. Mayor, etc., of New York, 8 Barb. 95; Smith v. Washington, 20 How. [61 U. S.] 135. 2. To carry into effect these express powers, the power to borrow money and issue bonds is clearly implied. Mills v. Gleason, 11 Wis. 470; People v. Brennan, 39 Barb. 522; New York v. Buffalo, 2 Hill, 434; State v. Common Council of Madison, 7 Wis. 688. 3. In the exercise of these powers, the city had the same power to contract and bind itself that any other corporation, public or private, would have. Ang. & A. Corp. (9th Ed.) § 31; Atkins v. Randolph, 31 Vt. 237, 238; New England F. & M. Ins. Co. v. Robinson, 25 Ind. 536; Brady v. Mayor of Brooklyn, 1 Barb. 584; Madison Plankroad Co. v. Watertown Plankroad Co., 5 Wis. 173; Allegheny City v. McClurkan, 14 Pa. St. 81. 4. A plankroad is an improved highway, a public improvement, which comes within the rule of being "indispensable to the public interest and successful pursuit of even local business." Mitchell v. Burlington, 4 Wall. [71 U. S.] 274; Rogers v. Burlington, 3 Wall. [70 U. S.] 663. To authorize aid to such an improved highway, it is not necessary that it should even come within the city limits; it is sufficient if it be connected with the material interests of the city. Talbot v. Dent, 9 B. Mon. 535, 536. 5. In giving construction to the powers of a corporation, the language of the charter should, in general, be construed neither strictly nor liberally, but according to its fair and natural import with reference to the purpose and objects of the corporation. Enfield Toll Bridge Co. v. Hartford & N. H. R. Co., 17 Conn. 454; Cincinnati v. Stone, 5 Ohio St. 39; Downing v. Mt. Washington Road Co., 40 N. H. 230. The power to issue the bonds in this case was unmistakable, for a portion of the plankroad was built within the city limits and along one of its streets.

II. The bonds and coupons, by universal consent, have all the qualities of commercial paper (Mercer Co. v. Hackett, 1 Wall. [68 U. S.] 83; Meyer v. Muscatine, Id. 384; Aurora City v. West, 7 Wall. [74 U. S.] 105); and when a corporation has power, under any circumstances, to issue negotiable securities, the bona fide holder has the right to presume that they were issued under the circumstances which gave the requisite authority (Gelpcke v. City of Dubuque, 1 Wall. [68 U. S.] 203; Murray v. Lardner, 2 Wall. [69 U. S.] 110). The case is brought within the scope of this rule by the act of February 2, 1846, authorizing the city to issue bonds for seventy-five thousand dollars.

III. After the issue of the bonds the legislature, by the act of February 25, 1860, authorizing an extension of the bonds upon a vote of the real estate owners of the city in favor thereof, recognized the bonds as being the bonds of the city and ratified their issue. 1. The proof shows that the act was passed at the instance of the city council. It was a matter of sovereign discretion with the legislature whether or not it would recognize this bonded liability of the city as a debt, and thereby ratify it, and the court will presume that legislative discretion, in a case where it properly exists, has been properly exercised. Cooley, Const. Lim. 186, 187; People v. New York Cent. R. Co., 34 Barb. 137; People v. Lawrence, 36 Barb. 193; Mayor of Baltimore v. State, 15 Md. 376. 2. The subject matter of the act necessarily included by expression as well as direct implication the power exercised by the city in issuing the bonds. 3. Whenever a statute is passed in furtherance of an acknowledged principle of right and justice, every reason exists for its most liberal application. Hoffman v. Hoffman, 26 Ala. 545; Wolcott v. Pond, 19 Conn. 597. 4. A loan or subscription, if made without authority, is valid if confirmed by subsequent legislative authority. Bridgeport v. Housatonic Ry. Co., 15 Conn. 495; Campbell v. Kenosha, 5 Wall. [72 U. S.] 194–205; Atchison v. Butcher, 3 Kan. 104; Watson v. Mercer, 8 Pet. [33 U. S.] 38; Nutter v. Ricketts, 6 Iowa, 92; Bartholomew Co. v. Bright, 18 Ind. 93; Thomas v. Leland, 24 Wend. 65; Guilford v. Cornell, 18 Barb. 615; Thompson v. Lee Co., 3 Wall. [70 U. S.] 327; Town of Guilford v. Supervisors of Chenango Co., 13 N. Y. 143; Brewster v. Syracuse, 19 N. Y. 116. 5. What is implied is as effectual as what is expressed. Croxall v. Sherrard, 5 Wall. [72 U. S.] 283; U. S. v. Babbitt, 1 Black [66 U. S.] 61; Haight v. Holley, 3 Wend. 258; Stowel v. Zouch, 1 Plow. 366. 6. A ratification, whether express or implied, is equivalent to an original authority. Kenosha v. Lampson, 9 Wall. [76 U. S.] 478; Beloit v. Morgan, 7 Wall. [74 U. S.] 619; Campbell v. Kenosha, 5 Wall. [72 U. S.] 194. 7. A contract originally void may be made binding by an act of the legislature. Wilkinson v. Leland, 2 Pet. [27 U. S.] 627.

IV. Independent of the mere contract set out in the agreed facts, the plaintiff has the right to recover. By its transactions the city incurred liabilities which the law will enforce. 1. If a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation. Marsh v. Fulton Co., 10 Wall. [77 U. S.] 684; Maher v. Chicago, 38 Ill. 266–273; Gas Co. v. San Francisco, 9 Cal. 469, 473. 2. The legal effect of the city's transaction, as set out in the agreed facts, was a loan of money for

which the bonds sold by the plaintiff to the city were issued. Rogers v. Burlington, 3 Wall. [70 U. S.] 666, 667. The plaintiff can, therefore, recover on his count for money loaned.

John A. Elmore and Wm. A. Gunter, for defendant.

I. The city had no power to issue the bonds: 1. When a power, exercised by the officers or agents of a municipal corporation, is not expressly given by the charter, and is not necessary and proper to carry out the purposes of the incorporation, the corporation is not bound. It is unnecessary to cite authorities on this point. 2. When the power is given, but the charter requires it to be exercised by particular persons or bodies, or in a specified mode, or for a specified purpose, if not so exercised, the act is as much ultra vires and void as if the power had not been conferred. Zottman v. San Francisco, 20 Cal. 96; McSpedon v. Mayor of New York, 7 Bosw. 601; City of Leavenworth v. Rankin, 2 Kan. 351; Butler v. Charlestown, 7 Gray, 12; Mayor of Baltimore v. Eschbach, 18 Md. 276; The Floyd Acceptances, 7 Wall. [74 U. S.] 666; Head v. Insurance Co., 2 Cranch [6 U. S.] 127; White v. New Orleans, 15 La. Ann. 667; Dey v. Jersey City, 19 N. J. Eq. 412; Baltimore v. Reynolds, 20 Md. 1; Bank of U. S. v. Dandridge, 12 Wheat. [25 U. S.] 64; Diggle v. Railway Co., 5 Exch. 442; Homersham v. Wolverhampton Waterworks Co., 4 Eng. Law & Eq. 426; Trustees v. Cherry, 8 Ohio St. 564; McCracken v. San Francisco, 16 Cal. 591; Argenti v. San Francisco, Id. 255; Pimental v. San Francisco, 21 Cal. 351; Peterson v. Mayor, etc., New York, 17 N. Y. 449. 3. There is a class of cases in which it has been held that when a power is given to be exercised by certain persons upon prerequisites to be ascertained by them and they exercise the power, a holder for value of negotiable securities issued thereunder need not go behind the authority. But in all cases of this class there was express legislative authority to issue the bonds upon certain conditions, and they were issued by the body entrusted with the power to do so, and with the power of determining that the conditions had been complied with. Of this class are the following cases: Commissioners of Knox Co. v. Aspinwall, 21 How. [62 U. S.] 544; Bissell v. Jeffersonville, 24 How. [65 U. S.] 287; Moran v. Commissioners of Miami Co., 2 Black [67 U. S.] 723; Mercer Co. v. Hackett, 1 Wall. [68 U. S.] 85; Gelpcke v. Dubuque, Id. 175; Van Hostrup v. Madison City, Id. 271; Rogers v. Burlington, 3 Wall. [70 U. S.] 654; Supervisors v. Schenck, 5 Wall. [72 U. S.] 783; Lee County v. Rogers, 7 Wall. [74 U. S.] 181. 4. A distinction must be drawn between the cases of municipal and private corporations. The officers of a private corporation may, under certain circumstances, without authority, or even against positive instructions, bind the corporation. Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 14 N. Y. 623; Merchants' Bank v. State Bank, 10 Wall. [77 U. S.] 604. On the other hand, all persons who deal with a public corporation, or its officers, are bound at their peril to know whether the act done by its officers is authorized or not, or has been exercised as required by the terms of the charter. Brady v. Mayor, etc., of New York, 20 N. Y. 312; City of Leavenworth v. Rankin, 2 Kan. 357-371; Swift v. Williamsburg, 24 Barb. 427; Halstead v. Mayor, etc., 3 N. Y. 430; Marsh v. Fulton Co., 10 Wall. [77 U. S.] 676; Horn v. Baltimore, 30 Md. 218; Bridgeport v. Housatonic R. Co., 15 Conn. 475; Haynes v. Covington, 13 Smedes & M. 408; Taft v. Pittsford, 28 Vt. 286; Steam Nav. Co. v. Dandridge, 8 Gill & J. 248; Hodges v. Buffalo, 2 Denio, 110; Dill v. Inhabitants of Wareham, 7 Metc. [Mass.] 438; Branham v. San Jose, 24 Cal. 585; Sturtevants v. Alton [Case No. 13,580]; Wallace v. San Jose, 29 Cal. 180; State v. Haskell, 20 Iowa, 276. 5. The city charter gave no power to the city authorities to subscribe to the stock of a plank-road company, and to issue bonds therefor. (a) A special authority to borrow money, when once exercised, is exhausted. Savings Bank v. Winchester, 8 Allen, 109. (b) The power of a corporation can never be extended by construction beyond the object of its creation. Cooley, Const. Lim. 195, note 2; Pearce v. Madison & I. R. Co., 21 How. [62 U. S.] 441.

II. The bonds, having been issued without authority, are void in the hands of all persons. Marsh v. Fulton Co., 10 Wall. [77 U. S.] 676; Clay v. Nicholas Co. Ct., 4 Bush, 154; Logansport v. Legg, 20 Ind. 315; Pimental v. San Francisco, 21 Cal. 351; Price v. Grand Rapids & I. R. Co., 13 Ind. 58; State v. Bergen, 33 N. J. Law, 39.

III. There has been no ratification of these bonds. 1. Where contracts are ratified the ratification must be by a person or body having the power to ratify. Delafield v. Illinois, 2 Hill, 159; Hotchin v. Kent, 8 Mich. 526; Marsh v. Fulton Co., 10 Wall. [77 U. S.] 676; Dubuque Female College v. District Tp., 13 Iowa, 555; Estey v. Inhabitants of Westminster, 97 Mass. 324. 2. If the act be without the scope of the corporate authorities, no sort of ratification by them can make it good. Peterson v. Mayor, etc., of New York, 17 N. Y. 449; Brady v. Mayor, etc., 20 N. Y. 313; Hodges v. Buffalo, 2 Denio, 110; Gates v. Hancock, 45 N. H. 528; Reilly v. Philadelphia, 60 Pa. St. 467; Hood v. New York & N. H. R. Co., 22 Conn. 502; State v. Commissioners, 11 Ohio St. 183; Hopple v. Brown Township, 13 Ohio St. 311. 3. The act of the legislature authorizing an "extension" of the bonds on a condition therein specified was no ratification of the bonds. (a) The act was

to take effect upon a condition that never happened. (b) The city of Montgomery before the passage of the act was no more liable for these bonds than if they had never been made. To create a liability on the bonds by statute would be to make a contract between the parties—a matter beyond the power of legislation. Hoke v. Henderson, 4 Dev. 15; People v. Haws, 37 Barb. 440; Hasbrouck v. Milwaukee, 13 Wis. 37; Medford v. Learned, 16 Mass. 215.

IV. The plaintiff cannot recover on the common counts. When a contract is void because entered into by a corporation in violation of or without authority of its charter, the party can neither recover upon the contract nor upon any implied liability in any form. Brady v. Mayor, etc., 20 N. Y. 317; Hodges v. Buffalo, 2 Denio, 110; Halstead v. Mayor, etc., 3 N. Y. 430; Boom v. Utica, 2 Barb. 104; Grogan v. San Francisco, 18 Cal. 590; Swift v. Williamsburg, 24 Barb. 427.

BRADLEY, Circuit Justice. This action was brought to recover the amount of certain bonds and coupons thereto attached, issued by the corporate authorities of the city of Montgomery in the years 1850 and 1852, to aid in the construction of the Montgomery South Plankroad, and the Montgomery and Wetumpka Plankroad respectively, extending from points within said city to certain points several miles outside of its bounds.

The main question raised in the case is, whether the city authorities had any legal authority or power to issue said bonds. If they had, it is admitted that the plaintiffs are bona fide holders thereof, and entitled to recover; if they had not, no recovery can be had. The original charter of the city was an act of the legislature of Alabama, passed December 23, 1837, which remained without material alteration, so far as the question involved in this case is concerned, until the bonds in question were issued. A careful examination of this charter does not disclose any authority to make or issue bonds or other commercial securities of a negotiable character. It confers upon the corporation the ordinary police powers which are given to municipal bodies—such as the power to pass by-laws and ordinances necessary and proper to prevent contagious and infectious diseases, to preserve the public health, to prevent and remove nuisances, to license and regulate shows and theatrical amusements, to restrain gaming, to establish night watches and patrol, to make, alter and regulate streets, to regulate the wharves, to erect and regulate markets, the conveyance of water, etc.

In 1846, a special act was passed authorizing the city council to raise seventy-five thousand dollars by the issue of bonds to that amount; which was immediately done, and the money was applied to the erection of the state capitol in said city. The power was exhausted and became extinct. This very act, however, shows the public sense as to the incapacity of the city to issue bonds without special authority. The mode pointed out in the charter for raising revenues to meet the public expenditures was by taxation. Indebtedness incurred by the authorities at any time, in carrying out any of the prescribed objects of the charter, is undoubtedly binding on the city; but such indebtedness, and the ordinary certificates or vouchers given as evidence thereof, stand on a very different ground from that of commercial securities issued by the city officials, the consideration of which cannot be inquired into in the hands of a bona fide holder, and which might be issued to an extent involving the financial ruin of the city. It is the latter species of securities for the issue of which no authority can be found in the charter; and the power to issue these is not implied from the ordinary police powers given to a municipal corporation. Mayor v. Ray, 19 Wall. [86 U. S.] 468. In the next place, the charter contains no authority to aid or subscribe for stock in private corporations created for constructing works of internal improvement. The bonds in question were issued for this purpose, as is shown by a printed memorandum in their margin.

A municipal corporation is but a subordinate branch of the government; it represents the state sovereignty in a limited district and for specified purposes. Those purposes are local government and police. The power of taxation is granted as a means of carrying out these purposes. The diversion of these revenues to other purposes is unlawful and ultra vires. If it is desirable that a municipal body should have the power of subscribing to railroads or plankroads, or of issuing commercial securities to be sold in the financial markets, it is time enough for it to do so when authorized thereto by legislation. It possesses no powers but such as are given to it expressly or by necessary implication. These views were recently expressed by the supreme court of the United States in the case of Mayor v. Ray, 19 Wall. [86 U. S.] 468, and substantially the same conclusion was reached by the supreme court of Alabama in the case of Montgomery v. Montgomery & W. Plankroad Co., 31 Ala. 84. The ruinous extravagance and demoralization which have resulted from the possession of unlimited powers of expenditure and issue of bonds by municipal bodies all over the country, evince the wisdom of these decisions. My attention has been called to the charter of the plankroad companies in whose aid the bonds were issued; but I find nothing in them to supply the fundamental defect of want of power to grant the aid and issue the bonds in question. Reference has also been made to an act passed in 1860, authorizing the city council to issue new bonds in the place and in extension of the issues of which the bonds in

suit form a part, provided the owners of real estate resident in the city should vote consent thereto. But the vote was adverse to such reissue, and the law does not, if it could, cure the original defect of power in the issue of the bonds.

The plea that the city is estopped by the acts of its officers, by the resolutions of the city council, or by the negotiable form or other matter in the bonds themselves, from denying the authority of such officers to pledge the faith of the city in aid of said plankroads, and to issue the bonds in question, cannot be maintained. Public officers cannot acquire authority by declaring that they have it. They cannot thus shut the mouth of the public whom they represent. The officers and agents of private corporations, entrusted by them with the management of their own business and property, may estop their principals and subject them to the consequences of their unauthorized acts. But the body politic cannot be thus silenced by the acts or declarations of its agents. If it could be, unbounded scope would be given to the peculations and frauds of public officers. I hold it to be a sound proposition, that no municipal or political body can be estopped by the acts or declarations of its officers, from denying their authority to bind it. The Floyd Acceptances, 7 Wall. [74 U. S.] 666.

Finally the plea that the plaintiffs are bona fide holders of the bonds cannot avail where the defense is want of power to issue them. Of this defect the plaintiffs were bound to take notice. Had the power to issue the bonds existed, and had the question been, whether certain preliminary conditions had been complied with, the plea might, under certain circumstances, have been a good one. No doubt the plaintiffs in these cases are meritorious holders of the bonds; and no doubt there are considerations of equity in their favor; and perhaps it is to be regretted that the citizens of Montgomery did not, in their own vindication, under the act of 1860, vote for a reissue and extension of the bonds. An eminent citizen,[2] who was called upon, nearly twenty years ago, to investigate the rights of the parties holding these bonds, speaking for himself and a committee of which he was chairman, forcibly observed: "That the principles of common honesty, as well as a just regard for the credit of the city, demand that immediate provision should be made for the payment of the interest in arrear," etc., and he further observed: "The committee is aware that the authority of the city council in the issue of these bonds is questionable; that it is doubtful if such issue constitutes any valid legal obligation on the city; but as it was done in accordance with the deliberately expressed wishes of a large majority of the real estate holders of the city, and as they would have derived the principal benefit in the increased value of their property, had the enterprise to promote which the bonds were issued proved successful, they do not doubt under such circumstances, that the same property holders who united in recommending the issue and loan will most cheerfully submit to the slight increase of taxation which is proposed." Unfortunately, these anticipations have not, thus far, been realized; and the court, under the view of the law which I have been compelled to take, is powerless to afford relief. There must be a finding and judgment for the defendant.

[2] Hon. Geo. Goldthwaite.

Case No. 2,687.

In re CHISOLM et al.

[8 Ben. 242.][1]

District Court, S. D. New York. Oct., 1875.

EQUITABLE LIEN—TRUST AND TRUSTEE.

1. Certain real estate in Georgia was conveyed to Edward Willis, as trustee, in trust to and for the sole and separate use, benefit and behoof of Elizabeth L. Willis, his wife, "for and during the term of her natural life, free from the debts, liabilities or contracts of her present or any future husband, with remainder at her death to her children then in life by the said Edward begotten; * * * but, should the said Elizabeth L. die, leaving no child or issue of a child by the said Edward begotten, then with remainder to the said Edward and his heirs in fee simple: provided always, that the trustee for the time being, may at any time, by deed, in which Elizabeth L. Willis voluntarily joins, sell and convey, mortgage, or exchange the premises aforesaid, re-investing the proceeds of such sale subject to the same uses and trusts." On May 30th, 1870, Willis, as trustee under the foregoing deed, joined with his wife in conveying the premises to one Rogers, for $3000 cash, and a note of Rogers for $3000. This note and $2715 of the $3000 cash were received by Willis, and were by him used for the benefit of the firm of Willis & Chisolm, of Charleston, S. C., of which he was a member. On June 30th, 1870, he delivered to his wife a deed of real estate, which had been executed by one Johnston to the firm, with this endorsement on the deed, made by him: "For value received, we hereby transfer all our right, title, and interest to Mrs. E. L. Willis, to better secure her for money deposited with us, (Signed) Willis & Chisolm." The money referred to was the proceeds of the conveyance to Rogers. Bankruptcy proceedings were taken against the firm in January, 1872, and an assignee was appointed. Mrs. Willis claimed a lien on the real estate conveyed to the firm by Johnston. On the assignee's application, that real estate was sold, free from the lien, and the proceeds were paid to the assignee to abide the determination of the court as to the lien of Mrs. Willis: *Held*, that Mrs. Willis had only a life interest in the real estate conveyed to her husband, as trustee, or in the proceeds thereof; that she, therefore, had no title to the proceeds of the conveyance to Rogers; and that she, therefore, had no money on deposit with the firm of Willis & Chisolm, on June 30th, 1870.

2. That her claim, whatever it was, was against Willis alone, and he could not appro-

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

priate the firm's property, as against the firm's creditors, to secure such claim; and that she, therefore, had no claim or lien on the fund in question.

In bankruptcy. The assignee in this case presented a petition to the court, setting forth that the bankrupts [Alexander Chisolm and Edward Willis] were the owners of certain real estate in Richmond county, Georgia; that Mrs. Elizabeth L. Willis, the wife of one of the bankrupts, claimed to have a claim or lien upon such property; and that he had received an offer for the purchase of the property; and he prayed the order of the court that the property might be sold free and clear from all claims and liens of Mrs. Willis, and that the proceeds might be paid into court, subject to any claim of hers, to be thereafter adjudicated upon by the court. On this petition, an order was entered, authorizing the sale as prayed, and referring it to the clerk to take proofs in respect to the nature, extent and validity of the lien or claim of Mrs. Willis upon the premises or the proceeds thereof. The property was sold by the assignee for $4,500, and the money was paid into the hands of the assignee. The evidence showed that the bankrupts, previous to June, 1870, were in partnership, in Charleston, S. C., under the name of Willis & Chisolm; and that the property which had been sold by the assignee was conveyed to the firm by Adam Johnston, by deed dated January 7th, 1870, recorded 28th March, 1870. On the back of that deed was the following endorsement, made by Willis: "30th June, 1870. For value received, we hereby transfer all our right, title, and interest to Mrs. E. L. Willis, to better secure her for money deposited with us. (Signed) Willis & Chisolm. Witness, B. F. Huger."

The evidence further showed, that, on November 6th, 1863, George W. Evans conveyed to Edward Willis, trustee, certain premises in Richmond county, Georgia, therein described, which conveyance was in said deed stated to be in trust. The terms of the trust fully appear in the opinion of the court. On the 30th of May, 1870, Mr. Willis, as trustee under the deed from Evans, joined with his wife in conveying to one Rogers the premises described in the foregoing deed, and another tract of land of 50 acres, described as being in the hands of Mr. Willis as trustee under a deed from one Green. Rogers, the purchaser, paid $3,000 in cash, on the 14th of June, 1870, and gave his note for $3,000 more. Of the $3,000 paid in cash, $2,715, and also the note for $3000, were received by Mr. Willis, and were used by him for the purposes of the firm of Willis & Chisolm, and this money and the note formed the money referred to in the endorsement on the deed from Johnston to Willis & Chisolm; and it was for this money that Mrs. Willis claimed the lien upon the property sold by the assignee, by virtue of the delivery to her of the deed from Johnston to Willis & Chisolm, and the endorsement thereupon.

Hawkins, Barnett & Pannes, for Mrs. Willis.

C. W. Bangs, for the assignee.

BLATCHFORD, District Judge. The deed of November 6th, 1863, made by Evans, conveys to "Edward Willis, as trustee, as hereinafter set forth," the premises therein described, being 131 94-100 acres, and 22 93-100 acres. The habendum is to "Edward Willis, trustee, his successors and assigns, forever, in trust, nevertheless, to and for the sole and separate use, benefit and behoof of Elizabeth L. Willis, wife of the said Edward, for and during the term of her natural life, free from the debts, liabilities or contracts of her present or any future husband, with remainder at her death to her children, then in life, by the said Edward begotten, or who have issue alive at that time, the issue of any deceased child taking the parent's proportionate share; but, should the said Elizabeth L. die, leaving no child or issue of a child, by the said Edward begotten, then with remainder to the said Edward and his heirs in fee simple: provided, always, that the trustee for the time being may, at any time, by deed, in which Elizabeth L. Willis voluntarily joins, sell and convey, mortgage, or exchange the premises aforesaid, reinvesting the proceeds of such sale, subject to the same uses and trusts, and, from time to time, when needful or advisable, sell and exchange, or otherwise dispose of, in a similar way, any other property held under the provisions of this deed: and provided further, that the separate receipt of the said Elizabeth L. shall be a full and sufficient discharge to the trustee for the time being, for the yearly income of the trust estate."

It is apparent, from these provisions of the deed, that Mrs. Willis had only a life interest in the property, and was to receive only its "yearly income;" that Mr. Willis was trustee, under the deed, not merely to receive the income of the property, and pay such income to Mrs. Willis during her life, but also to dispose of the property after her death, by turning it over to her then living children by him, and the issue of her dead children by him, and, in default of any such takers, by turning it over to himself, in fee simple. If it should be sold by him, as trustee, its proceeds were to be reinvested by him, subject to the same uses and trusts, and these provisions were to apply to all property held under the provisions of the deed. Mrs. Willis had no right or title to the property, or to its principal or capital, or to the proceeds of its sale, but only a right to receive the income from the property or from the proceeds of its sale. The property, and, if it were sold, the proceeds of the sale, went into the hands of Mr. Wil-

lis, as trustee, impressed with the trust declared by such deed. It was, as to the principal or capital, a trust for the benefit of Mrs. Willis's descendants, and, if she should die leaving none, then it was a trust for the benefit of Mr. Willis and his heirs.

By the deed of the 30th of May, 1870, Mr. Willis, as trustee under said deed from Evans, joined with his wife in conveying to Rogers the said premises, declaring in the deed that he considered it "needful and advisable to dispose of said tracts of land." This deed covered, also, another tract of land, of 50 acres, described as in the hands of Mr. Willis, as trustee under a deed from one Green. The consideration for the whole is stated at $6,000. The purchaser appears to have paid $3,000 in cash on the 14th of June, 1870, and to have given his note for $3,000, payable, with interest, January 1st, 1872, secured by a mortgage back on the premises conveyed. The mortgagee is described in the mortgage as Edward Willis, as trustee for his wife, Elizabeth L. Willis, under deeds from Evans and Green. Of the $3,000 paid in cash, the sum of $2,715 seems to have gone into the hands of Mr. Willis, and to have been used by him for the purposes of the firm composed of the bankrupts, and the note was used by him for the same purpose. I am not furnished with any copy of the deed from Green of the 50 acres; but I must assume, in the absence of evidence to the contrary, that the terms of the trust in it were the same as those in the deed from Evans. Mr. Miller, the attorney for Mrs. Willis, speaks, in his testimony, of the sale to Rogers as being one which did not include the 50 acres, but this is not so. If the trust in the deed from Green was different in its terms from that in the deed from Evans, it was for Mrs. Willis to show it, and to show her absolute title to the proceeds of the 50 acres, and then to show how the $6,000 purchase money can be apportioned among the tracts covered by the deed to Rogers. As it is, Mrs. Willis shows no title to any of the proceeds of the sale to Rogers. The title to such proceeds was in Mr. Willis, as trustee, under a trust with the provisions before recited. That being so, Mrs. Willis had no money on deposit with Willis & Chisolm, on the 30th of June, 1870. Whatever claim she may have had to any income from the proceeds of the sale of the lands sold, that claim was one against Mr. Willis alone, and was not one against the firm, even though the proceeds were used by Mr. Willis for the benefit of the firm, and Mr. Willis could not appropriate the firm's property, as against the firm's creditors, to secure such claim.

These considerations require that Mrs. Willis's claim to the proceeds of the Belleville property be disallowed; and it is not necessary to pass upon any of the other questions raised and discussed.

Case No. 2,688.

CHITTENDEN et al. v. DARDEN et al.

[2 Woods, 437.][1]

Circuit Court, N. D. Georgia. Sept. Term, 1875.

JURISDICTION—FOREIGN ATTACHMENT — VOLUNTARY APPEARANCE — POWERS OF UNITED STATES COMMISSIONERS.

1. Section 6 of the "Act to further the administration of justice" [June 1, 1872]—17 Stat. 197; Rev. St. § 915—does not confer upon the United States courts jurisdiction to institute suits by the process of foreign attachment.

[Cited in Anderson v. Shaffer, 10 Fed. 267; Harland v. United Lines Tel. Co., 40 Fed. 312; Perkins v. Hendryx, Id. 657; Treadwell v. Seymour, 41 Fed. 581. Distinguished in Crocker Nat. Bank v. Pagenstecher, 44 Fed. 706.]

2. The voluntary appearance of the defendant in a suit so commenced would cure the defect of jurisdiction, but service of summons made upon him in invitum while in the district would not.

3. The giving of a bond by a nonresident defendant for the release of property seized by process of foreign attachment, issued from a United States court, is not a voluntary appearance, and does not give the court jurisdiction.

4. Commissioners of the circuit courts of the United States have not, by statute, any power to issue writs of attachment returnable to said courts.

The plaintiffs [Chittenden & Co.] were citizens of New York, and the defendants [Darden & Holston] citizens of Alabama. The action was commenced by a writ of attachment issued by a commissioner of the United States circuit court, on Nov. 23, 1874, which was levied on a stock of goods and other property of the defendants in West Point, Georgia, which is within this district. After the attachment was levied, the defendants, who, upon February 17, 1875, happened to be found by the marshal in West Point, within the district, acknowledged service of a notice provided for by section 3309 of the Code of Georgia. This section declares that "the plaintiff, his agent or attorney at law, may give notice in writing to the defendant of the pendency of such attachment and of the proceedings thereon, which shall be served personally on the defendant by the sheriff * * * at least ten days before final judgment on said attachment; * * which being done, the judgment rendered upon such attachment shall have the same force and effect as judgments rendered at common law." After the service of the notice provided for by the section just quoted, the defendants, under section 3319 of the Code of Georgia, gave bond with security, payable to the plaintiffs in attachment, binding themselves to pay them the amount of the judgment and costs they might recover in the case; whereupon, the property attached was de-

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

livered to them. The defendants moved to quash the attachment and to dismiss the cause, because the court was without jurisdiction in the premises.

E. N. Broyles, for the motion.
Geo. Hillyer, opposed.

WOODS, Circuit Judge. The theory of defendants is, that as neither plaintiffs nor defendants were citizens of the state of Georgia, and the defendants were not found within the district by service of process in personam at the commencement of the suit, the proceeding by attachment will not hold; in other words, that the United States courts have no jurisdiction to institute suits by the process of foreign attachment. Unquestionably this was true under that provision of the judiciary act (1 Stat. 79, § 11) which declares, "that no civil suit shall be brought in either of said courts, district or circuit, against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ."

In the case of Toland v. Sprague, 12 Pet. [37 U. S.] 300, the supreme court, having this subject under consideration, held, (1) That by the general provisions of the laws of the United States, the circuit courts can issue no process beyond the limits of their districts. (2) That independently of positive legislation, the process can only be served upon persons within the same districts. (3) That the acts of congress adopting the state process adopt the form and modes of service only so far as the persons are rightfully within the reach of such process, and did not intend to enlarge the sphere of the jurisdiction of the circuit courts. (4) That the right to attach property to compel the appearance of persons can properly be used only in cases in which such persons are amenable to the process of the court, and even in case of a person being amenable to process in personam, an attachment against his property cannot be issued against him, except as part of or together with process to be served on his person. The same doctrine had been previously held by the United States circuit court for the district of Massachusetts, in the case of Picquet v. Swan [Case No. 11,134].

The decision of the supreme court above cited settles the question in hand against the plaintiffs, unless it has been affected by subsequent legislation. It is claimed that this has been done by the 6th section of the act "To further the administration of justice," passed June 1, 1872 (17 Stat. 197; Rev. St. § 915), which declares that "in common law causes in the circuit and district courts, the plaintiff shall be entitled to similar remedies by attachment or other process against the property of the defendant, which are now provided for by the laws of the state in which the court is held, applicable to the courts of such state." It is claimed that this enactment repeals, by implication, the provision in the 11th section of the judiciary act above quoted. I do not think it was the purpose of the act of 1872 to enlarge the jurisdiction of the United States courts, by allowing them to issue writs of foreign attachment, and thus acquire jurisdiction over inhabitants of the United States in districts other than those wherein they resided or were found at the time of serving the writ.

The policy to require the suit against an inhabitant of the United States to be brought in the district where he resided or was found had been continued without interruption since the passing of the judiciary act of 1789, and it is reasonable to suppose that if congress contemplated a change in that policy, it would have made it clear and not left it to implication. That it was not the purpose of congress to change this policy is made evident by the enactment of sections 738 and 739 of the Revised Statutes of the United States (Rev. St. pp. 139, 140). Section 738 provides that when any defendant to a suit in equity to enforce any legal or equitable lien or claim against him is not an inhabitant of or found within the district, and does not voluntarily appear thereto, he may be brought in by publication. Section 739 reënacts the 11th section of the act of 1789, supra, by declaring that except in the cases provided by the preceding section (738) and in the two succeeding sections (740, 741), no civil suit shall be brought in either of said courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he is found at the time of serving the writ. The two succeeding sections referred to only provide for service of original process in certain cases where there are two districts in the same state. As the case of a foreign attachment does not come within either of the exceptions mentioned in section 739, it must fall under the prohibition of the body of the section. It is true that the 6th section of the act of 1872 is reënacted by Rev. St. § 915. But this section, and the section just quoted, must be construed together, and to give section 739 effect, section 915 must be held to apply only to cases of attachment when process in personam has been properly served on the defendant. I am of opinion, therefore, that there was no authority to issue the writ of attachment in this case. But it is said that notice of the attachment, and of the proceedings thereunder, which, by the law of Georgia, is equivalent to a summons, has been served on the defendant within the district, and that therefore the attachment will hold. I have no doubt that the voluntary appearance of the defendant to the suit would cure the want of personal service. Indeed, it has been expressly held in Toland v. Sprague, supra, that where a defendant, who was not within the district when process of foreign

attachment issued, afterward appeared and pleaded to the merits, the judgment is valid. But is this true when there is no voluntary appearance, but the defendant is caught within the district and served against his will? Can a plaintiff issue a writ of foreign attachment and seize the property of a person not an inhabitant of a district where the suit is brought, and not personally served within the district, and when the latter comes into the district to recover possession of his property by giving bond, or for any other purpose, serve him with summons, and thus bring him into court against his will? It seems to me, that to allow this, would be to sanction an abuse of the process of the court. The right of a citizen to be sued by original process in the district only where he resides, or in which he shall be found, is a substantial right, of which he ought not to be deprived by any artifice. In my judgment, no writ of attachment can be served on the property of a nonresident until he has been found within the district and served with process in personam. The attachment must follow personal service, or at least be contemporaneous with it. I am therefore of opinion that the service upon the defendants, by the marshal, of the notice of the proceedings in attachment, was ineffectual to bring them into court or cure the defect of jurisdiction. If what has just been said is true, it follows that the fact that defendants gave bond in pursuance of the Georgia Code for the release of the attached property does not amount to the voluntary appearance of the defendants, nor give the court jurisdiction over their persons. I am therefore of opinion that the motion to quash the attachment must prevail.

The question has been raised in the case, whether a commissioner of the circuit court has power to issue the writ of attachment. The power is claimed for this officer on the ground that by the Code of Georgia an attachment may be issued by justices of the peace, returnable to their own, and in certain cases, to the superior courts of the county. Code, § 457. It is insisted, that as section 915 of the Revised Statutes provides that in common law cases, the plaintiff shall be entitled to similar remedies by attachment or other process against the property of the defendant, which are provided by the laws of the state where this court is held, and as under the law of Georgia, a justice of the peace may issue an attachment against the property of defendants, it follows by analogy that the same power is possessed by commissioners of the circuit courts. I think this is stretching too far the interpretation of section 915, Rev. St.

Commissioners can only exercise powers expressly conferred. Section 627 of the Revised Statutes provides for the appointment of commissioners, and declares that they shall exercise the powers which are or may be expressly conferred by law upon commissioners of circuit courts. Many powers are expressly conferred on the commissioners of the circuit courts. See Rev. St. §§ 945, 727, 1014, 1778, 2025, 2026, 5076. But the power to issue process for the circuit courts is nowhere conferred upon the commissioners, and they can be considered to have such power only by the faintest implication. I think section 716 of the Revised Statutes, excludes the idea that any such power resides in a circuit court commissioner. That section declares that: "The supreme court and the circuit and district courts shall have power to issue writs of scire facias, and to issue all writs not specifically provided for by the statute, which may be necessary for the exercise of their respective jurisdictions and agreeably to the usages and principles of law." Here the power to issue process, is conferred on the courts alone, and the idea that a commissioner possesses this power is plainly excluded. Whether the circuit court could confer the power to issue attachments upon its commissioners is a question we are not now required to decide. It is sufficient for this case to say that no such power has been conferred on its commissioners by this court. On all grounds, therefore, I am of opinion that the writ of attachment was improvidently issued, and that it must be quashed and the case dismissed.

Case No. 2,689.

The C. H. NORTHAM.

[7 Ben. 249.][1]

District Court, E. D. New York. March, 1874.[2]

NAVIGATION—NEGLIGENCE—DAMAGES FROM SWELL.

1. Where a steamboat passed a tow of boats in a narrow channel without much reduction of speed, and a boat in the tow was damaged by a blow from another boat in the tow, caused by the swell of the passing boat; *Held*, that the steamboat was bound to know the depth of water, and whether her swell would endanger the tow.

[Cited in The Daniel Drew, Case No. 3,565; The Drew, 22 Fed. 855.]

2. That her right to pass at a given place depended on her ability to do so without causing injury.

[Cited in The Drew, 22 Fed. 855.]

3. That the attempt to pass when she did was negligence.

4. That the passing at such speed was negligence, and enough of itself to render the boat liable for the damages.

[Cited in The Daniel Drew, Case No. 3,565.]

In admiralty.

Wilcox & Hobbs, for libellant.

Owen, Nash & Gray, for claimants.

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

[2] [Affirmed in Case No. 2,690.]

BENEDICT, District Judge. This action, which is said to be novel in the admiralty courts of this country, is brought by the owner of the canal-boat T. F. Sheehy, to recover of the steamboat C. H. Northam, damages caused to the canal-boat by the swell made by the C. H. Northam in passing.

The weather, at the time, was fine, and there was no sea. The canal-boat was passing up the harbor to New Haven, in tow of the tug Gladwich. The tow consisted of five boats, arranged three in the first tier and two in the second. The T. F. Sheehy was the middle boat in the first tier. When the tow was passing the narrow part of the harbor, about opposite Fort Hall, the Northam, a large side-wheel steamboat, bound in the same general direction, passed the tow on the east side. As she passed, her suction first caught the tow and dragged back the canal-boats in the stern tier so forcibly as to break some of the lines, and then the following swell drove the boats ahead upon the sterns of the boats in the first tier. The suction and swell were unusual and beyond the power of ordinary tows to withstand. The libellants' boat was so injured by the blow delivered on her stern by the canal-boat which was behind her in the last tier, that it was necessary to remove her at once from the tow and beach her on the shore. For the damages thus caused this action is brought against the C. H. Northam.

The following conclusions of fact are not open to question upon the evidence. The injury complained of was caused by the suction and swell made by the steamboat as she passed the tow. No negligence on the part of the canal-boat injured, or of the tug towing her, conduced to this injury. The character of the tow, its position and course were known to the steamboat as she approached from behind. No other vessels were near her, nor was there any circumstance connected with the navigation of that harbor which made it necessary for the steamboat to pass the tow where she did. It was within the power of the steamboat, not only by waiting to pass the tow at a less dangerous point, but by slowing her speed to pass where she did without endangering the tow.

These conclusions are sufficient for a determination of this case, and they point irresistibly to a decree in favor of the libellant. For the C. H. Northam is chargeable with a knowledge of the depth of the water and of the amount of suction and swell she would create by passing in such water. She was the following boat, and if she desired to pass the tow it was incumbent upon her to do it at such a place and in such a manner as to cause no injury to the tow by her swell. Her right to pass the tow where she did was dependent upon her ability to pass without causing injury. If she could not pass in that place without causing injury by her swell, she was bound to wait until beyond the narrow place, and the attempt to pass when she did was negligence. If, on the other hand, by going slower than she did, she could pass where she did without causing a dangerous swell, then it was negligence to maintain the speed she did in passing. It seems clear, from the evidence, that the C. H. Northam could have passed the tow at this point in safety, and that without reducing her speed beyond what would be necessary to give her steerage way and carry her by the tow. This neglect to reduce her speed is, of itself, sufficient to render her liable for the damages which ensued. Let a decree be entered in favor of the libellant, with an order of reference.

[NOTE. The claimant appealed to the circuit court, where the decree was affirmed. See Case No. 2,690.]

Case No. 2,690.

The C. H. NORTHAM.

[13 Blatchf. 31.] [1]

Circuit Court, E. D. New York. Feb. 9, 1875.[2]

NEGLIGENT NAVIGATION — DAMAGES FROM SWELL.

1. A tug, with five boats in tow behind her, in two tiers, three in the first tier, and two in the second tier, was passing up the narrow part of a harbor, when a side-wheel steamboat, going in the same direction, went by the tug and her tow. In doing so, her suction dragged back the boats in the second tier, so as to break some of their lines, and then the swell she created drove them against the sterns of the boats in the first tier, so that the middle boat in the first tier was damaged: *Held*, If the steamboat desired to pass at the speed she had maintained up to the time she created the swell, she ought to have passed at a greater distance.

2. If the width of the channel was such that she could not pass at a greater distance, she should have reduced her speed in due season to prevent so heavy a swell.

[Cited in The Massachusetts, Case No. 9,258; Andus v. The Saratoga, 1 Fed. 733; The Minnie, 20 Fed. 544; The Rhode Island, 24 Fed. 295.]

This was an appeal from a decree of the district court [for the eastern district of New York], in admiralty, in a case of collision. The opinion of the district court—Benedict, J.—was as follows: [See Case No. 2,689.] [3]

Wilcox & Hobbs, for libellant.

Owen, Nash & Gray, for claimants.

WOODRUFF, Circuit Judge. I am of opinion that the evidence in this case shows very clearly the want of proper care on the part of those controlling the navigation of the C. H. Northam, and that the tug and her tow were without fault. The steamboat was, of course, at liberty, to pass the tow. If she would pass at the speed she had maintained to the time when she created the swell that

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

[2] [Affirming Case No. 2,689.]

[3] [In the original report, the opinion of the district court, as given in Case No. 2,689, is here set out in full.]

caused the injury, she should have passed at a greater distance. If the width of the channel was such that she could not pass at a greater distance, she should have reduced her speed in due season to prevent so heavy a swell. I think the proof fully sustains the views stated in the opinion of the district judge. Let a decree be entered for the libellant, with costs.

C. H. NORTHRAM, The (LONAN v.). See Case No. 8,473.

CHOAT (RAMBLER v.). See Case No. 11,542.

Case No. 2,691.

CHOATE et al. v. CROWNINSHIELD.

[3 Cliff. 184.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1868.

CARRIERS — LIABILITY FOR LOSS OR DAMAGE — PRESUMPTION — BILL OF LADING — REBUTTING PRESUMPTION RAISED BY STATEMENT IN.

1. Common carriers are not responsible for losses or damage which may happen to goods received to be carried, if the same result from the act of the owner.

2. When goods are lost or damaged after their reception by the common carrier and before their delivery, the prima facie presumption is, that the loss was occasioned by the carrier's default.

3. The legal effect of a bill of lading, affirming the goods to have been shipped in good order, is to raise a prima facie presumption that in all particulars open to inspection the goods were in that condition; but this does not preclude the carrier, in case of loss or damage, from showing that the loss proceeded from some cause which existed, but was not apparent, at the time he received the goods.

[Cited in Wolff v. The Vaderland, 18 Fed. 740.]

4. The responsibility of the carrier does not extend to damages resulting to a cargo of cotton in bales, from moisture of the contents of the bales received previous to the time of lading, which could not have been discovered by the master, and where the vessel was in all respects seaworthy, and there appeared to be no want of ordinary care, skill, and energy on the part of the master, to protect the goods against such injury while on board the vessel.

5. While cotton in bales was lying on the wharf, and while a vessel was loading with the same, it was discovered by the accidental opening of one bale that the contents thereof were wet. This fact was reported to the shippers, who said that the wet would do no injury, and the bale was thereupon tied up and placed on board. *Held*, that there was no evidence in the case to warrant the conclusion that the master had reason to believe any portion of the residue unfit for the voyage.

Appeal from the district court of the United States for the district of Massachusetts.]

In admiralty. Libellants [Daniel L. Choate and others] were the owners of the ship Sciota, and they instituted this suit against the respondent [Francis B. Crowninshield] in the district court [case unreported] to recover the balance of the freight alleged to be due to them on seven hundred and seventy-two bales of cotton which they transported in that ship from New Orleans to Boston, and there delivered to the respondent, as the consignee of the goods. The description of the goods and the terms of the shipment, as expressed in the bill of lading, were in substance and effect as follows: "Shipped in good order, seven hundred and seventy-two bales of cotton under deck, being marked and numbered as in margin, to be delivered in the like good order and condition at the port of Boston, the dangers of the seas only excepted, unto the respondent, the consignee or assigns, he or they paying freight for the goods five eighths of one cent per pound, with five per cent primage, average accustomed." Four bills of lading of that import were signed by the master, and the ship with the goods on board, on the 8th or 10th of February, 1859, sailed from the port of New Orleans, where the master received the goods specified in the bill of lading. The allegations of the libel were, that the ship arrived at the port of destination on the 22d of March in the same year, and that the master then and there made a true delivery of all the goods described in the bill of lading, to the agents of the respondents, according to its tenor and effect. The admission of the answer also was, that the whole number of bales were delivered; but the respondent denied that they were all delivered in good order and condition, as alleged in the libel. On the contrary, he alleged that the contents of some of the bales were partially lost, and that the contents of some others were wet, and otherwise damaged, and that the coverings also had been wet and greatly damaged. The true amount of the freight was $2,407; and the libellants admit that the respondent paid the sum of $1,800 at the time the freight became due; $607.10 remained due to the libellants, if, as they alleged, the master made true delivery of the goods, as he stipulated to do in the bill of lading. The respondent denied that the master did so, and alleged that he suffered damage in consequence of the failure of the master to deliver the goods in like good order and condition as he received them on board, to the amount of $500, which he claims to recoup out of the sum which would otherwise be due to the libellants, as the unpaid balance of the freight.

Sohier & Welch, for libellants.
Lothrop & Bishop, for respondent.

CLIFFORD, Circuit Justice. Exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction is conferred upon the district courts by the ninth section of the judiciary act; but the first section of the act of the 3d of March, 1821, provides that in all suits and actions in any district court in which it shall appear that

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

the judge of such court has been of counsel for either party, said suit or action may be certified to the next circuit court of the district. 1 Stat. 76; 3 Stat. 643.

Jurisdiction of the suit in this case is derived from that provision, the same having been duly certified into this court because the district judge had been of counsel to one of the parties. The obligations of a common carrier by water, who receives goods to transport from port to port, are to keep the goods safely, duly transport them, and make right delivery of the same at the port of destination. The Eddy, 5 Wall. [72 U. S.] 481; The Bird of Paradise, Id. 545; McAndrews v. Thatcher, 3 Wall. [70 U. S.] 369. Common carriers are responsible for all losses and damages which may happen to goods received to be carried, except such as result from the act of God or the public enemy, or from the act or default of the owner himself, unless such liability is limited or restrained by the terms of the contract under which the goods were received. Niagara v. Cordes, 21 How. [62 U. S.] 26; Hastings v. Pepper, 11 Pick. 42.

Dangers of the seas are excepted in the bill of lading in this case, but there is no other material limitation to the contract of affreightment. When goods in the custody of a common carrier are lost or damaged after their reception and before their delivery, the prima facie presumption is, that the loss or injury was occasioned by the default of the carrier, and the burden is upon him to prove that it arose from a cause for which he is not responsible. Nelson v. Woodruff, 1 Black [66 U. S.] 156; Clarke v. Barnwell, 12 How. [53 U. S.] 280.

Such a presumption, however, is nothing more than a prima facie presumption, and it may be overcome by any proper testimony which is sufficient to show that the fact was otherwise. The legal effect of a bill of lading such as was given in this case, affirming that the goods were shipped in good order and condition, is also to raise a prima facie presumption that, as to all circumstances which were visible and open to inspection, the goods were in that condition, but it does not preclude the carrier from showing, if he can, in a case of loss or damage, that the loss or damage proceeded from some cause which existed but was not apparent at the time he received the goods, and which, if satisfactorily proved, will discharge him from liability. Clarke v. Barnwell, 12 How. [53 U. S.] 280.

Between the shipper and the ship-owner the bill of lading is not conclusive as against proof of latent defects, even in a case where the bill of lading states that the goods were shipped in good order and condition. Ellis v. Willard, 5 Seld. [9 N. Y.] 530; Shepherd v. Naylor, 5 Gray, 592; Barrett v. Rogers, 7 Mass. 297; Haddow v. Parry, 3 Taunt. 303; Macl. Shipp. 339; Bates v. Todd, 1 Moody & R. 106; Sears v. Wingate, 3 Allen, 103; 1 Pars. Mar. Law, 37; Berkley v. Watling, 7 Adol. & El. 29; O'Brien v. Gilchrist, 34 Me. 554.

Applying these principles of law to the case, it is quite clear that the decision must turn upon the questions of fact which may be determined without any extended argument, as there is not much real conflict in the testimony, except as to a single point. The seaworthiness of the ship is not controverted, and the proofs show that she was staunch and strong, and that she was well manned and equipped. Due care was used in taking the cargo on board, and the goods of the respondent were well stowed and dunnaged.

The testimony of the master is, that there were two iron ventilators in the ship, one forward, and one aft, and that the hatches were left open till they left the bar, near the mouth of the river. The usual length of a voyage from New Orleans, as shown in the testimony, is eighteen or twenty days, but the ship in this case was detained twenty days inside the bar. During that period, the evidence is, there was little or no motion in the vessel, and that the weather was hot, sultry, and disagreeable, and that there were light showers with heavy fogs. Want of motion in the vessel doubtless rendered the circulation between decks and in the hold less than it would have been if the vessel had been under way. Proper care appears to have been taken of the goods from the time they were delivered on the wharf until they were stowed in the ship, and the proofs show that none of the bales remained on the wharf more than four days before they were shipped. The outside appearance of the bales was "ordinarily good," and nothing except a single circumstance occurred during the loading of the ship to awaken any suspicion that the contents of the bales were in any respect unfit for transportation in such a voyage. When about two thirds of the consignment had been loaded and stowed, the master discovered a man attempting to steal cotton from one of the bales on the wharf, but he escaped before he could be apprehended. He had cut the bagging so that the contents were exposed, and on examining the cotton the master found that it was wet, and immediately reported the fact to the shippers.

The statement of the master is, that when he reported the fact to the shippers, they told him that the wet would not injure it, as it was bound coastwise, and he immediately tied up the broken bale, and it was taken on board. Other than that circumstance, there does not appear that anything occurred, or that there was anything in the outside appearance of the bales calculated to create suspicion that the goods were not in a proper condition for the voyage.

Two propositions are submitted by the respondent in respect to that evidence: 1. He insists that it does not sufficiently appear that the bale cut open was one that belonged to his consignment. 2. But if it

did, then it shows that the defect in the goods, if it existed at that time, was not latent.

Neither of the propositions, however, can be sustained to an extent to benefit the respondent. The better opinion from all the evidence is, that the broken bale was one which belonged to his consignment, and there is no evidence to warrant the conclusion that the master had any reason to believe that any portion of the residue was unfit for the voyage, especially as he was assured to the contrary by the shippers. The theory of the libellants is, that the bales had been exposed to rain, either on the plantation where the cotton was grown and put in bales, or on the way down the river, or on the levee before it was delivered to the master, or that it was injured by the humidity of the atmosphere and dampness of the ship's hold, where most of the respondent's consignment was stowed. The responsibility of the carrier does not extend to damage resulting from such causes, if it appear that the vessel was in all respects seaworthy, and that there was no want of ordinary skill and vigilance and energy on the part of the master to protect the goods against such injury. Clarke v. Barnwell, 12 How. [53 U. S.] 282; Abb. Shipp. 42; Lamb v. Parkman [Case No. 8,020]; 1 Pars. Merc. Law, 136, note 1.

Examined in view of the testimony that much of the top tier between decks appeared as if wet from steam and sweat, and that the bagging and bands were mouldy, and that the bagging was much decayed, it seems almost an irresistible conclusion that the cotton must have received the damage from a combination of both the causes suggested by the libellants, as the testimony negatives every theory suggested by the respondent. Twenty or thirty bales were slightly wet by sea-water, but the same witnesses who state the fact affirm that it was hardly sufficient to deserve notice. The plain inference from the evidence is, that the bales, before they were delivered to the master, had been exposed to the rain, so that the cotton within the bales was damp. Cotton in that condition when stowed, either in the hold or between decks, will soon create heat, and the moisture under the influence of the heat will generate steam and produce all the results shown in this case.

When the ship in the course of her voyage passed into cold weather, those in charge of her noticed that steam was escaping from the ventilators of the vessel, which is strong evidence in support of the libellants' theory. Weighed in any just view of the evidence, there does not appear to be any good reason to question the credibility of the master, or those associated with him in the charge of the vessel; and it is clear that the libellants are entitled to recover, unless the statements of those witnesses can be overcome. The actual delivery of all the bales is conceded, and the testimony shows that they were accepted by the respondent and sent to certain cotton-mills and appropriated to the use for which the cotton was designed. Nothing appears in the case to show how much the cotton in the broken bale was injured, beyond what is shown in respect to it at the place of loading.

Another theory of the respondent is, that the cotton in other bales belonging to other consignments was wet, and that the damage to their cotton was occasioned in that way, but it is sufficient answer to that proposition to say that it is not satisfactorily supported by the evidence. The amount not being a matter of dispute, it does not seem necessary to send the case to an assessor. Decree for the libellants.

Case No. 2,692.

CHOATE et al. v. MEREDITH.

[Holmes, 500.] [1]

Circuit Court, D. Massachusetts. June, 1875.

DEMURRAGE—LAY-DAYS.

A bill of lading provided for demurrage after lay-days beginning "twenty-four hours after arrival at the above-named port, and notice thereof to the consignee." When the vessel arrived at the port named in the bill of lading, the consignee's wharf was inaccessible on account of ice and lack of sufficient water; whereupon the master took her to the only accessible wharf in the port, and notified the consignee, and offered to deliver the cargo, which offer was not accepted. *Held*, that the lay-days began to run twenty-four hours after notice to the consignee.

[Cited in Fish v. One Hundred and Fifty Tons of Brown Stone, 20 Fed. 202; Manson v. New York, N. H. & H. R. Co., 31 Fed. 299. Applied in The Henry Sutton, 26 Fed. 927.]

Admiralty appeal from a decree of the district court of Massachusetts [unreported]. The libel was brought by [Samuel W. Meredith] the master of a schooner, for demurrage, under the provisions of a bill of lading of a cargo of coal consigned to the appellants [Alden Choate and others].

M. F. Dickinson, Jr., for appellants.

Charles F. Walcott, for libellant.

SHEPLEY, Circuit Judge. The libellant was master of the schooner E. I. Heraty, which brought from Philadelphia to Lynn a cargo of two hundred and forty tons of coal, consigned to appellants. The bill of lading undertook to deliver the coal to appellants at Lynn, for the agreed freight, and was in terms made subject to the conditions of the bill of lading adopted by "Vessel-Owners' and Captains' Association." The reference was to the following clause for demurrage: "And twenty-four hours after arrival at the above-named port and notice thereof to the consignee named, there shall be allowed for receiving said cargo at the rate of one day, Sundays and legal holidays excepted, for

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

every hundred tons thereof; after which the cargo, consignee, or assignee, shall pay demurrage at the rate of eight cents per ton a day, Sunday and legal holidays not excepted, upon the full amount of cargo as per this bill of lading, for each and every day's detention, and pro rata for parts and portions of a day, beyond the days above specified, until the cargo is fully discharged."

The schooner arrived at Lynn, and reported to appellants on the morning of Saturday, Jan. 11, and was fully discharged Thursday, Feb. 13, making twenty-seven days beyond the stipulated time. When the schooner arrived at Lynn, the harbor was much obstructed by ice. By reason of the ice, and because the schooner drew more water than was to be found at appellants' wharf, excepting during a high course of tides, such as occurred twice a month, the appellants' wharf was inaccessible. During the delay, libellant took a steam-tug and broke through the ice, and carried his vessel to a coal-wharf in Lynn, known as "Lamper's Wharf," where he offered to deliver the coal; which offer was not accepted. Without waiving their rights, however, the appellants did take out about sixty tons of coal at Lamper's wharf; and the schooner was moved towards the appellant's wharf, but grounded, and was frozen in.

In the case of Aylward v. Smith [Case No. 687], decided in this court at the October term, 1873, affirming the decree of the district court, it was held, in the case of a bill of lading in the old and usual form, with an agreement for demurrage "after three days," that the lay-days did not begin until after the arrival at the wharf; and as in that case the schooner was frozen up thirty-five feet from the wharf, which was too far for safe delivery of the cargo, that the voyage was not completed, and the lay-days had not begun.

In this case, as the contract stipulates that the lay-days shall commence "twenty-four hours after arrival at the port, and notice thereof to the consignee," and as the vessel arrived at the port and gave the notice to the consignee, and there were suitable wharves accessible, to which the consignee could have ordered the vessel, although his own wharf was obstructed, the time commenced to run twenty-four hours after the arrival and notice to the consignee.

The new form of bill of lading seems to have been adopted to secure the ship-owner against the delay consequent upon an obstruction of the consignee's wharf by other vessels or from other causes, and against being compelled to await his turn to unlade at the consignee's wharf. Under this form of bill of lading, if the consignee desires to exercise the right of requiring the master to unlade at the consignee's wharf, he must pay for the detention consequent upon that wharf's being inaccessible, if there are other suitable and convenient wharves accessible after the arrival of the vessel in port, at which the vessel may be unladen. Decree of district court affirmed, with interest and costs.

Case No. 2,693.

CHOMQUA v. MASON et al.

[1 Gall. 342.][1]

Circuit Court, D. Rhode Island. Nov. Term, 1812.

PLEADING—STATUTE OF LIMITATIONS—REPLICATION—AGENCY.

1. It is a good replication to a plea of the statute of limitations, that the plaintiff is a foreigner, and has never been within the limits of the state where the suit is brought.

2. What words amount to an authority to take up money on credit.

At law. Assumpsit [against James B. Mason and others, executors of John Brown] to recover the amount of a promissory note, given by one Colvin Dana in behalf of the testator. The note was in the following words:

"Twelve months after date I promise to pay Mr. Chomqua or order three thousand seven hundred and sixty-four dollars with fifteen per cent. interest, being for the balance of the ship General Washington's cargo.

"For John Brown, Esq.

"Colvin Dana.

"If the note is not paid in twelve months I am to pay eighteen per cent. after.

"Witness, James Oliver.

"Canton, March 15, 1802."

The defendants pleaded, 1. The general issue. 2. That the testator did not promise within six years before the date of the writ. 3. That the action did not accrue against the defendants within six years. To the second plea the plaintiff replied, that at the time of making the promise the plaintiff was, ever since has been, and still is beyond sea, and out of the United States of America, to wit, at Canton aforesaid, in the empire of China, whereof he is and ever hath been a subject, as aforesaid; and this, &c. To the third plea the plaintiff replied in substance as to the second plea. To these replications there was a demurrer and joinder. On the trial of the general issue, the plaintiff proved the note aforesaid, and also a letter of instructions given by Brown to Capt. Simon Smith, the master of the ship General Washington, on the voyage on which the note aforesaid was given. It was admitted, that Capt. Smith died during the voyage, and before the arrival of the ship at Canton. The letter was as follows: "Providence, November, 1800. Capt. Simon Smith, Sir: You having the command and sole control of my ship General Washington, and cargo, bound round Cape Horn to the north-west coast of America, which being a long distance, you no doubt stop in Chili for refreshments of such supplies as you may stand in need of, and with the cargo you may get for the cargo you car-

[1] [Reported by John Gallison, Esq.]

ry out, you may return home or proceed to Canton, as you think most to my interest, and as it is most likely you will proceed to Canton, I shall give you my letter of credit, so as to enable you to bring home a very valuable cargo of China, bohea, and green teas, nankeens and silks, &c., but I hope you will carry such a valuable cargo to China, that you will be able to purchase a very valuable return cargo without getting any credit, say from 120,000 to 160,000 dollars. The ship being coppered and fitted at so large an expense, that there must be a very valuable cargo returned to make a tolerable voyage, as the outfits, with the additional expenses of insurance, wages, interest of money, provisions and port charges, duties, &c., &c., when all added to the outfits, will make so large a sum as without a valuable return cargo there can be but little, if any, profit in the voyage. You'll therefore get a large credit, if you find it necessary, to load. As to your prudence and economy throughout the voyage, I have the fullest confidence in it," &c., &c. "If any thing happens to you, which renders you unable to command, your first mate, Mr. Edward Cole, must command the ship in your stead, and Mr. Colvin Dana, your assistant supercargo, must act in your place as to the sale and purchase of the cargoes. I think you will find no difficulty in getting all the credit, which you may want, to fill the ship with a cargo at Canton of 150,000 or 160,000 dollars, should you not carry there more value than 120,000 dollars; but I am in hopes, that you'll carry there a cargo to the value of 150,000 dollars. But be this as it may, you will take care to lay out your money for such articles, as are not generally to be had for credit, namely, nankeens, china, and silks; the teas are generally to be had with more ease for credit than the above articles are. If you find you can fill the ship with very valuable articles with the cargo you carry, and the credit you get, which is commonly for twenty-two months or two years without interest, you will in this case take less china and bohea tea, and more of the valuable articles." The residue of the letter is immaterial to be recited.

STORY, Circuit Justice, at the trial, ruled, that in the event that happened, namely, the death of Capt. Smith, Mr. Dana had authority to purchase on credit, in the same manner as Capt. Smith, under the letter of instructions, and under his direction on this point the jury found a verdict for the plaintiff.

After verdict, the counsel for the defendants moved for a new trial, on the ground of misdirection of the judge on the point aforesaid, and this motion came on to be argued before the court at the same time with the argument on the demurrers.

Burrill and Robbins, for defendants.

The question as to the sufficiency of the plaintiff's replication, as to the second and third pleas, depends upon the construction of the proviso in the 3d section of the statute of limitations of Rhode Island. 1 Acts R. I. 472. The words are, "Provided, &c., that if any person or persons now, or who hereafter shall be, entitled to any such action, shall be, at the time any such causes of action accrued, within the age of twenty-one years, feme covert, non compos mentis, imprisoned or beyond sea, then and in such case, such person or persons shall be at liberty to bring the same within such times, as are herein before limited, after their being of full age, discovert, of sane memory, or at large, or returned from beyond sea." We contend that no person is within the proviso, except persons, who originally were resident in Rhode Island, for such persons only can be said to return from beyond sea. Foreigners, who have never resided in the country, are not within the intent of the proviso.

Tristram Burgess and Searle, for plaintiff.

The legislature never intended to apply the statue of limitations to contracts made with foreigners, but only to contracts made between citizens or residents of Rhode Island. If the legislature did intend otherwise, still as the remedy and not the right is bound by the statute, it can apply to suits only, which are brought in the state courts, and not in those of the United States. It is not competent for the legislature of a state to circumscribe actions in the courts of the United States. But at all events the plaintiff is within the proviso. He was beyond sea, when the cause of action accrued, and has not been within the United States; the statute, therefore, cannot run against him. Strithorst v. Graeme, 3 Wils. 145.

STORY, Circuit Justice. There can be no reasonable doubt in the case. The proviso saves the action, as to all persons beyond sea at the time when the action accrued. The statute does not begin to run against such person until his return. How then can it affect the present plaintiff? He has always been "beyond sea;" and admitting that the language of the exception, as to returning from beyond sea, be correctly expounded by the defendants' counsel, it will not help the defendants. It would only prove, that the statute could never run against the plaintiff, since he would be within the saving clause, and without the exception. But the true construction of the statute is, that the party shall have six years after he comes into the state to pursue his legal remedy. The case of Strithorst v. Graeme, 3 Wils. 145, 2 Bl. 723, is decisive, if so plain a position needed an authority to support it. See, also, Ruggles v. Keeler, 3 Johns. 263, the same point recognised, and Dupleix v. De Roven, 2 Vern. 540. The language of the statute of limitations of Rhode Island, as to the enacting clause and proviso, is substantially the same as the English statute, 21 Jac. 1, c. 16, §§ 3, 7. As to the more general question, which has been raised, how far a statute of limitation of a state shall be permitted, in a court

of the United States, to bar a remedy upon a foreign contract made in a foreign country, and by its terms not restricted to be executed within such state, I give no opinion. It is an important question, which will require much examination, as to the lex loci operating on contracts. It will be sufficient to decide the question, when it cannot otherwise be avoided. I shall adjudge the replications good.

Robbins then shortly argued the motion for a new trial, and contended that Dana had no authority to bind the testator upon the true construction of the letter of instructions; that the authority of Dana was confined to purchases to be made with ready money, and not on credit. He was a special and not a general agent.

STORY, Circuit Justice. I retain the opinion, which I expressed at the trial. The interests of commerce require a liberal construction of maritime contracts and authorities. The object of Brown was, in case of the disability of Capt. Smith, to confide to the mate the navigation and command of the ship, and to Mr. Dana the whole authority as to the sale and purchase of the cargoes. The owner looked to the purchase of a cargo partly on credit; he expresses his designs in the most clear and decisive language, and looking to the possible inability of Smith, he directs the purchases and sales to be made by the supercargo. What purchases, may I ask, are here meant? The defendants' counsel say, purchase for ready cash. But could this be the serious intention of the owner? The outward voyage might have been unsuccessful. The funds might have been inadequate to any considerable purchases. The vessel might have arrived at Canton without money sufficient to purchase any considerable cargo; was she then to return in ballast? I think that such a construction can hardly be contended for. The owner has not limited the purchases to be made by the supercargo to be purchases for cash. He uses the words with reference to the preceding statements, and I do not feel at liberty to interpose a limitation in his language, where he has used none. There has not been a shadow of evidence, to show that Mr. Brown was dissatisfied with this conduct, and I cannot believe that there ever could have been. I shall over-rule the motion for a new trial, and give judgment for the plaintiff.

Judgment for the plaintiff.

Case No. 2,694.

CHOTEAU v. RICE.

[This is a decision by the supreme court of Minnesota on appeal from a territorial court designated as a "district court of the United States," and is reported in 1 Minn. 192 (Gil. 166).]

Case No. 2,695.

CHOTEAU v. RICE.

[This is a decision on appeal to the supreme court of Minnesota from a territorial court designated as a "district court of the United States," and is reported in 1 Minn. 106 (Gil. 83).]

CHOTEAU (UNITED STATES v.). See Case No. 14,793.

CHOUTEAU (AMBLER v.). See Case No. 272.

Case No. 2,696.

CHOUTEAU v. REDFIELD.

Circuit Court, S. D. New York. March, 1863.

[Cited in Wetter v. Schell, Case No. 17,470; Ullman v. Murphy, Id. 14,325; Davies v. Miller, 130 U. S. 287, 9 Sup. Ct. 561. Nowhere reported; opinion not now accessible. See Fowler v. Redfield, Case No. 5,003.]

Case No. 2,697.

CHRIST et al. v. BAKER.

[17 Leg. Int. 332.] [1]

Circuit Court, E. D. Pennsylvania. Oct. 12, 1860.

CUSTOMS DUTIES—"BLANKETS."

[The commercial meaning of "blanket," in the tariff act of 1857, is to be traced only to the time of the passage of that act.]

At law. This was an action brought by Christ, Jay & Hess against Joseph B. Baker, collector of customs, to recover the difference between the duties of fifteen and twenty-four per cent., which latter rate had been exacted by the collector upon certain invoices of blankets imported from England by the plaintiffs, and which they, the plaintiffs, alleged were entitled to be entered at the former rate. The tariff act of 1846 [9 Stat., 42] arranged articles in schedules. In Schedule C, "manufactures of wool not otherwise provided for," were charged with a duty of thirty per cent.; and in Schedule E, "blankets of all kinds" were charged with a duty of twenty per cent. The tariff act of 1857 [11 Stat. 192] referred to and adopted the schedules of the act of 1846, but reduced the rates of duty—Schedule C paying twenty-four per cent. instead of thirty, and Schedule E paying fifteen per cent. instead of twenty. The plaintiffs contended that they were entitled to enter these goods at the rate of fifteen per cent., and submitted that the question to be decided was, whether the articles in question were blankets, as commercially known at the date of the act of 1857. The evidence on the part of the plaintiffs showed that these goods were known in the market as blankets as early as 1850. On the part of the defence it was contended that the goods in court, called by the plaintiffs blank-

[1] [Reprinted by permission.]

ets, were not known as such until after the passage of the act of 1846, and that the meaning of the word "blankets" as used in the act of 1857 was to be determined by its fair and honest meaning, as used in the act of 1846, because the act of 1857, adopted the schedules of the act of 1846, and merely reduced the rates of duty; that the act of 1857 was not to be taken as an entirely new and independent enactment, but as supplemental to that of 1846.

GRIER, Circuit Justice, decided that the commercial meaning of the word "blanket" was to be traced back only to the time of the passage of the act of 1857. The schedules of the act of 1846 were referred to in the act of 1857 merely to save the trouble of transcribing the list of articles therein mentioned. A verdict was therefore rendered for the plaintiffs for $719.08

[NOTE. For another action by the same plaintiffs, and involving the same question, see Case No. 2,699.]

Case No. 2,698.

CHRIST et al. v. MAXWELL.

[3 Blatchf. 129.][1]

Circuit Court, S. D. New York. Dec., 1853.

CUSTOMS DUTIES—SUFFICIENCY OF PROTEST — IMPOSITION OF PENALTY—POWERS OF COLLECTOR.

1. Where, on an appraisal both by official appraisers and merchant appraisers, the invoice value of goods was raised, and duties on the increase were paid under a protest, which objected "that the appraisals and reappraisals were not fairly, impartially, or legally made, nor by persons unprejudiced and duly qualified to make them:" *Held*, that no action could be maintained to recover back such duties on account of any irregularity either in selecting or qualifying the appraisers, or otherwise, because the protest did not, as required by the act of February 26th, 1845 (5 Stat. 727), set forth distinctly the grounds of objection to the regularity and legality of the appraisements made, or wherein the appraisers were prejudiced or not duly qualified.

[Cited in U. S. v. Earnshaw, 12 Fed. 287.]

2. The goods being the property of their manufacturer, when entered, and being consigned for sale to the party who entered them, and the collector having imposed an additional duty or penalty of 20 per cent. for such undervaluation: *Held*, that it was not legally imposed under section 8 of the act of July 30th, 1846 (9 Stat. 43), because that act relates only to goods which have been actually purchased in a foreign market, and such qualification is not rescinded or modified by section 1 of the act of March 3d, 1851 (9 Stat. 629).

3. *Held*, also, that such additional duty or penalty was not authorized by section 17 of the act of August 30th, 1842 (5 Stat. 564) or by section 13 of the act of March 1st, 1823 (3 Stat. 734), for the like reason, and also because the increased duty or penalty specified in each of those acts is 50 per cent., and the collector cannot exact a less or different one.

At law. This was an action [by George Christ and others] against [Hugh Maxwell] the collector of the port of New York, to recover back an excess of duties, and a penalty paid on an invoice of woollens. The owners of the goods, who were the manufacturers of them, consigned an invoice of woollens to the plaintiffs for sale, on which duties and a penalty were exacted at the custom-house, July 17th, 1852, amounting to $4,712.10. This action was brought to recover back $530.60 of that sum, with interest, composed of these particulars: The invoice value was advanced $414 by the appraisers, and a duty of 30 per cent. was exacted thereon, viz., $124.20; additional duty or penalty of 20 per cent. on $2,007, $401.40; fee paid merchant appraiser, $5; being a total of $530.60. The entry was made by the plaintiffs on the 28th of June, 1852. The invoice price was raised 25 per cent. by the appraisers. On the 16th of July, the plaintiffs notified the defendant, in writing, of their dissatisfaction therewith, and on the same day made a protest in writing, setting forth, among other things, that the collector had failed to order a reappraisement, as required by law. On the 12th of July, the oath prescribed by the treasury instructions was administered by one of the principal appraisers to a merchant, and, on the 13th, the merchant, in conjunction with the general appraiser, proceeded, as they stated in their return, to act upon the appeal of the plaintiffs, and reappraise the goods, pursuant to the act of congress of March 3d, 1851 (9 Stat. 629). The duty and penalty sued for were paid on this reappraisement. On the argument, the plaintiffs took fourteen exceptions to the regularity and legality of the proceedings in the custom-house.

Before NELSON, Circuit Justice, and BETTS, District Judge.

THE COURT held: 1. That the plaintiffs could not maintain an action to recover back the $124.20 for duties charged on the enhanced valuation of the goods, on account of any irregularity either in selecting or qualifying the appraisers, or otherwise, because the protest, which objected "that the appraisals and reappraisals were not fairly, impartially, or legally made, nor by persons unprejudiced and duly qualified to make them," did not, as required by the act of February 26th, 1845 (5 Stat. 727), set forth distinctly and specifically the grounds of objection to the regularity and legality of the appraisements made, or wherein the appraisers were prejudiced or not duly qualified.

2. That the collector had no authority to impose the additional duty of 20 per cent. on the importation, under section 8 of the act of July 30th, 1846 (9 Stat. 43), because that act related only to goods which had been actually purchased in a foreign market; and that section 1 of the act of March 3d, 1851 (9 Stat. 629), did not rescind or modify that qualification.

3. That the defendant was not authorized to affix the additional duty or penalty of 20

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per cent. under the provisions of section 17 of the act of August 30th, 1842 (5 Stat. 564), nor under those of section 13 of the act of March 1st, 1823 (3 Stat. 734), for the like reason, and also because the increased duty or penalty specified in each of those acts was 50 per cent., and the collector could not exact a less or different one.

Judgment for the plaintiffs for $406.40, with interest.

Case No. 2,699.

CHRIST et al. v. SCHELL.

[17 Leg. Int. 350.] [1]

Circuit Court, D. New York. 1860.

CUSTOMS—DUTY ON BLANKETS.

[The tariff act of 1857 did not change the legal effect of the act of 1846, but operated as a mere reduction of the duties provided for therein.]

At law. This action, which was concluded on Saturday, was brought [by Christ, Jay, & Hess against Augustus Schell] to recover the difference between the duties of fifteen and twenty-four per cent., which latter rate had been exacted by the collector upon an invoice of certain manufactures of wool, styled in the entry and invoice Gentian blankets. The tariff act of 1846 [9 Stat. 42] arranged articles in schedules. In Schedule C, "manufactures of wool not otherwise provided for" were charged with a duty of thirty per cent.; and in Schedule E, "blankets of all kinds" were charged with a duty of twenty per cent. The tariff act of 1857 [11 Stat. 192], reducing the duty on imports, provides that the articles enumerated in Schedule C of the tariff act of 1846, should, after July 1, 1857, pay a duty of twenty-four instead of thirty per cent., and those enumerated in Schedule E should, after the same date, pay fifteen instead of twenty per cent. The plaintiffs contended that they were entitled to enter the goods in question at the rate of fifteen per cent., and submitted that the question to be decided was whether the articles in question were blankets, as commercially known at the date of the tariff act of 1857.

NELSON, Circuit Justice, held that there had been no reconstruction of the tariff act of 1846 by that of 1857; that the latter act did not change the legal operation of the former, but operated as a mere reduction of the duties provided for in it; that the plaintiffs must, therefore, confine their testimony to a time at and previous to the passage of the tariff act of 1846.

The plaintiffs then called five or six witnesses, merchants and clothiers, to prove that the articles in question were commercially known as blankets prior to the act of 1846. Two witnesses on the part of the government testified that the article in question, before the tariff act of 1846, was imported in pieces of thirty or forty yards, and after that time it came in the shape of a pair of blankets, such as the importers produced in court; but that the article in both shapes was used mainly for the manufacture of overcoats.

The jury, having retired under the charge of the court, returned into court, and stated that they were unable to agree. The judge, at their request, again charged them that, if they believed that the article in question had been imported in its present form with a design to evade the legal duty on cloths, that they should find for the defendant. The jury again retired, and, being unable to agree, were discharged until Monday. It is understood that eleven of the jurors were in favor of a verdict for the collector.

[NOTE. For another action by the same plaintiffs, and involving the same questions, see Case No. 2,697.]

[1] [Reprinted by permission.]

CHRISTIAN (AMERICAN MIDDLINGS PURIFIER CO. v.). See Case No. 307.

CHRISTIANA CASE. See Case No. 16,705.

CHRISTIANA TREASON CASE. See Case No. 15,299.

CHRISTIANSON (GOULD v.). See Case No. 5,636.

Case No. 2,700.

CHRISTIE v. BUCKEYE INS. CO.

[5 Am. Law T. 42; 6 Am. Law Rev. 765.]

Circuit Court, N. D. Ohio. 1872.

MARINE INSURANCE—PAYMENT OF LOSS.

The question raised was whether, under a marine policy of $11,000, the insured could recover the full amount of the policy for a total loss where there had been prior general average loss, upon which the company had paid $1,208, or whether the company was entitled to have that amount deducted from the total amount due on the final loss. The company was held liable to the full face of their policy on final total loss, notwithstanding the payment of prior general average losses.

Case No. 2,701.

The CHRISTINA.

[The case reported under above title in Deady, 49, is the same as Case No. 17,059.]

CHRISTINA, The (WALING v.) See Case No. 17,059.

Case No. 2,702.

In re CHRISTLEY.

[6 Biss. 154;[1] 10 N. B. R. 268.]

District Court, S. D. Illinois. July, 1874.

BANKRUPTCY — AUTHORITY OF ATTORNEY TO ACT AT CREDITORS' MEETING.

An attorney cannot act for a creditor at meetings held in the course of proceedings in bankruptcy, unless authorized to do so by a letter of attorney acknowledged before a register in bankruptcy or United States commissioner.

[Cited in Re Butterfield, Case No. 2,248.]

On certificate of register in bankruptcy.

At the first meeting of the creditors in the above entitled matter, Edward M. Tracewell, Esq., appeared and filed proofs of debt by Marcus M. Kendall and other creditors, and at the same time presented letters of attorney, purporting to have been executed by said creditors for the purpose of authorizing him to act for them in the proceedings herein, the execution of which said letters of attorney had been acknowledged in one instance before a notary public, and in other instances before the clerk of the Crawford circuit court, in the state of Indiana. The register presiding at said meeting declined to receive or recognize the said letters of attorney, or to permit said Tracewell to cast the vote of said creditors in the election of an assignee, as he desired and offered to do; and at his request, the question then arising was certified into court by said register, with the reasons for his action set forth in the following opinion, for the decision of the judge.

By Noble C. Butler, Register: The bankrupt law provides (§ 23 [14 Stat. 528]) that "any creditor may act at all meetings by his duly constituted attorney the same as though personally present." Neither the law as orignally enacted, nor any of the amendments thereto, prescribe the manner in which an attorney may be "duly constituted." The justices of the United States supreme court, under the authority conferred upon them by the 10th section of the law, authorized the appointment of attorneys by special and general letters of attorney. Forms Nos. 14 and 26. No form of acknowledging the execution of either of these is given, but in a note at the close of the latter form it is stated that the creditor "may acknowledge the same before a judge, register, clerk or commissioner of the court, or any officer authorized to take acknowledgments of deeds or other instruments in writing." Subsequently the justices of the supreme court in their revision of the general orders in bankruptcy [made at December term, 1871, explicitly][2] designated registers in bankruptcy and United States commissioners, as the only officers before whom such acknowledgments may be taken. See general order No. 34. The recent amendment to the bankrupt law, which authorizes notaries-public to take proofs of debt in bankruptcy cases, does not change the requirements of general order No. 34, as to letters of attorney, but is wholly silent concerning them. The execution of the letters of attorney, presented by Mr. Tracewell, having been acknowledged before neither one of the officers named in said general order No. 34, I do not think that the person to whom they are addressed can be regarded as the "duly constituted attorney," within the meaning of the bankrupt law, of the creditors who subscribed the same; or that he can be permitted to act for them in the selection of an assignee or otherwise in the proceedings herein.

E. M. Tracewell, for M. M. Kendall and others, creditors.

Woodbury, Peckinpaugh & Zenor, for objecting creditors.

TREAT, District Judge. The decision of the register is in all things affirmed.

Proofs of debt taken before a notary public, who is the attorney for the creditor, are not admissible. In re Nebe [Case No. 10,073].

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

[2] [From 10 N. B. R. 268.]

Case No. 2,703.

CHRISTMAN v. HAYNES.

[8 N. B. R. (1873) 528.][1]

District Court, E. D. New York.

BANKRUPTCY — INSOLVENT DEBTOR — SUFFERING SEIZURE AND SALE ON EXECUTION — SUIT BY ASSIGNEE—MEASURE OF DAMAGES.

1. An insolvent debtor, within four months before the filing of a petition in bankruptcy, suffered his property to be seized and sold on execution by a creditor who had reasonable cause to believe the debtor insolvent at that time. *Held*, that the assignee in bankruptcy was entitled to a judgment against the creditor for the value of the property seized on the execution.

2. In this case the value of the property was fixed at the amount the creditor authorized to be endorsed upon the execution.

BENEDICT, District Judge. The present is a clear case. A bankrupt, Annie Hentall, within four months before the filing of a petition in bankruptcy against her, suffered her property to be seized on execution by the defendant, with the intent to give the defendant a preference over the other creditors. She was then insolvent, and the defendant had reasonable cause to believe her to be insolvent at the time. When chargeable with such knowledge, he took the proceedings which resulted in a judgment against the bankrupt and a subsequent transfer to him by the sheriff, through the machinery of a sale under this execution, of all the property of the bankrupt, to the exclusion of her other creditors. The evidence brings the case fully within the decisions of the circuit and supreme courts of the United States, and entitles the assignee to a judgment against the defendant for the

[1] [Reprinted by permission.]

value of the property. The testimony does not show very clearly what that value is. It is at least one thousand two hundred and two dollars; for the defendant, when he received the property, endorsed that sum upon his execution. The bankrupt says it was worth more and that if sold at retail would have realized as much as two thousand three hundred and forty dollars. But I do not feel justified upon her evidence, as she gives it, to give judgment against the defendant for the sum she states as being the value of the property received by him. Upon the evidence the judgment against the defendant must be for one thousand two hundred and two dollars, unless the plaintiff elect a reference at his own expense to take further evidence as to the actual value of the property of the bankrupt taken by the sheriff and delivered to defendant.

Case No. 2,704.

CHRISTMAN et al. v. RUMSEY et al.

[17 Blatchf. 148;[1] 58 How. Pr. 114; 17 O. G. 903; 4 Ban. & A. 506.]

Circuit Court, N. D. New York. Sept. 10, 1879.

PATENTS—"PUMP FILTERS"—VALIDITY — REISSUE —CONCLUSIVENESS OF COMMISSIONER'S DECISION —INFRINGEMENT—DISCLAIMER—COSTS.

1. The re-issued letters patent granted to John Christman, March 24th, 1874, for an "improvement in pump filters," on the surrender of original letters patent granted to him November 28th, 1865, are valid, as respects the first claim.

[Cited in Dederick v. Cassell, 9 Fed. 308.]

2. The decision of the commissioner of patents as to the existence of a ground for re-issue set forth in section 53 of the act of July 8, 1870 (16 Stat. 205), is conclusive.

3. The said re-issued patent has not new matter introduced into its specification in violation of said section 53; nor is it open to the objection that it is not for the same invention, or for any invention, described in the original specification as the invention of the patentee.

4. It was lawful, under the decision in The Corn Planter Patent, 23 Wall. [90 U. S.] 181, to re-issue said patent with claims to combinations of fewer elements than were contained in the combination claimed in the claim of the original patent, the sub-combinations of the re-issue entering into a larger combination claimed in the original.

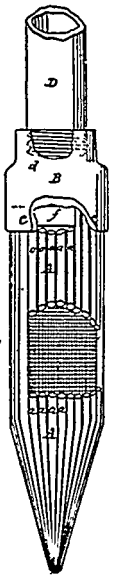
[Cited in Wilson v. Coon, 6 Fed. 620.]

5. The claims of said re-issued patent, namely, "1. The combination of a wire gauze, C, with an open grating or guard, A, of sufficient strength for the purpose required, and a point, A', constructed substantially as and for the purposes described. 2. The combination of a grating, A, having apertures through it for the passage of the water to the interior, forming the lower end of a pump tube, with a wire gauze, C, for filtering the water, substantially as described," are claims to combinations and not merely to aggregations of parts. The question of the infringement of the first claim, considered. The second claim is void for want of novelty.

6. The plaintiff was allowed to recover on the first claim, on making, before a decree, a disclaimer as to the second claim, it not appearing that there had been any unreasonable neglect or delay to enter such disclaimer, but, as the disclaimer was not made before the suit was brought, costs to the plaintiff were refused.

[Cited in Electrical Accumulator Co. v. Julien Electric Co., 38 Fed. 136.]

[In equity. Suit by John Christman and P. Elmendorf Sloan against John A. and Moses Rumsey, for the alleged infringement of re-issued letters patent No. 5,804. The original patent was granted to John Christman, November 28, 1865, and is numbered 51,145.]



J. J. Greenough and Irving G. Vann, for plaintiffs.

David Wright, for defendants.

BLATCHFORD, Circuit Judge. This suit is brought on re-issued letters patent granted to John Christman, March 24th, 1874, for an "improvement in pump filters." The specification says: "In pointed pump tubes heretofore essayed, difficulties have arisen in keeping them free from clogging and rendering them efficient. My invention was made to overcome these difficulties, in which I have fully succeeded. The construction of my apparatus is substantially as follows, referring to the accompanying drawing, which is a side elevation of the filtering point made for driving, affixed to the lower end of a pump tube, with the side grating A broken, to show the wire gauze, C. I form an open grating A, of rods of proper sized wire of a convenient length and form, the upper ends of which are permanently affixed to a collar or head piece, B, on which a screw may be cut, to affix it to the lower end of the pump tube, D. This screw may be cut on the inside, as shown by the drawing, or on the outside, as preferred, the joint being made in any well known way. The open grate A extends down cylindrically in the drawing a sufficient distance, and is thence tapered and brought into a solid point, A', as in the drawing; or it may be made rounded or square, so there is a solid, compact end adapted to the purposes intended. Inside the grating A, I insert another tube, C, made of wire gauze, and covering the spaces between the bars of the grate A, and properly fastened in place, which, I find, makes, in connection with the strong supporting grating, a perfect filter, to be used at the bottom of pump tubes. Where it is required, as in quicksands, &c., there may be a filtering medium put inside the wire gauze, to resist the outside pressure; but, for ordinary cases, no such packing is necessary." The claims of the re-issue are as follows: "1. The com-

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

bination of a wire gauze, C, with an open grating or guard, A, of sufficient strength for the purpose required, and a point, A', constructed substantially as and for the purposes described. 2. The combination of a grating, A, having apertures through it for the passage of water to the interior, forming the lower end of a pump tube, with a wire gauze, C, for filtering the water, substantially as described."

The original letters patent were granted to John Christman, November 28, 1865, for an "improvement in pump filters." The specification of the original says: "Be it known, that I, John Christman, of the city of Syracuse, N. Y., have invented a new and improved pump filter, and I do hereby declare that the following is a full, clear and exact description of the construction of the same and the form thereof, when complete, reference being had to the annexed drawings making a part of this specification. The letters used represent the same parts wherever they occur. To enable others skilled in the art to make and use my invention, I will proceed to describe the construction of the filter, and its form when complete and ready for use. I use any kind of common wire and arrange sections thereof in a tubular form, A, so that the longitudinal sections a, a, a, a, &c., will form an open grate. The ends of the wire sections designed for the lower part of the filter are welded together in a compact form, which may be round, pointed or square across. The ends of the wire sections designed for the upper part of the filter are made to pass between two shoulders, b the inner one and c the outer one, forming a part of the round head-piece B, thus keeping them in a circular or tubular form, and, to hold the same firmly, the outer shoulder, c, may be soldered down upon the wire sections, and the same thus held securely in their places. The head-piece will be of sufficient length, so that the upper end thereof may receive the cut of a screw, either on the inside or the outside, as may be desirable, as seen at d, to receive the pump tube D. Fitting the inside of the wire tube thus formed I insert another tube, C, made of common wire gauze, and the two thus formed make a strong and perfect filter to be used at the bottom of pump tubes. The tube of wire gauze may, in case there is quicksand, be packed with charcoal or other filtering substances, but, for ordinary use, no such packing would be necessary." The claim of the original patent was this: "A pump filter, composed of the parts A, B and C, substantially as and for the purposes described."

It is contended, for the defendants, that the re-issue is void. The petition for the re-issue sets forth, that, by reason of an insufficient or defective specification, the original patent is inoperative or invalid, and that such error arose from inadvertence, accident or mistake, and without any fraudulent or deceptive intention. This is a ground of re-issue set forth in section 53 of the act of July 8, 1870 (16 Stat. 205). The decision as to the fact so set forth belonged exclusively to the commissioner of patents, and his action conclusively established that fact. Seymour v. Osborne, 11 Wall. [78 U. S.] 516, 543–545; Herring v. Nelson [Case No. 6,424].

It is further contended, that new matter has been introduced into the specification of the re-issue, in violation of section 53 of the act of 1870. It is urged, that the original specification states the invention to be "a new and improved pump filter," while the re-issued specification states the invention to be "an improvement in pump filters;" that the original claims the whole and nothing less, while the re-issue makes two claims, neither of which claims the whole or includes the collar or head piece B; and that the first two sentences, above cited, in the re-issued specification, are new matter. These two sentences cannot properly be called "new matter," within the meaning of the statute. They do not at all relate to the description or operation of the apparatus of the patentee. The difficulties stated to have existed in prior pointed pump tubes may well have been known to the patentee from hearsay, although the first driven well point he may have seen was his own. Certainly, as the patentee's pump tube is a pointed pump tube, and as it does overcome the difficulties in clogging in such a tube, the presumption is that it was made to overcome such difficulties, and, therefore, that such difficulties had been heard of by the patentee.

It is further urged that the original specification describes the invention as applicable to all pump filters, whether used upon points for driven wells, or upon well tubes used in open wells or cisterns or streams, while the re-issued specification introduces new matter by confining the invention to driven wells only. This is claimed to be shown by the fact that the original states that "the ends of the wire sections designed for the lower part of the filter are welded together in a compact form, which may be round, pointed or square across." In the re-issue it is stated that the open grating, A, is formed of rods of proper sized wire, of a convenient length and form, the upper ends of which are permanently affixed to a collar or head piece, B, and that the open grate extends down cylindrically a sufficient distance, and is thence tapered and brought into a solid point, A'. The original states that sections of wire are arranged in a tubular form, A, so that the longitudinal sections form an open grate. It is contended, that, as there is no A' in the original drawing, and as A in that drawing includes the whole of the open grate from the welded point to the head piece, B, and as, in the re-issue drawing, the cylindrical part is lettered A, and the tapered part is lettered A', the restriction in the re-issue, of the grating A to the cylindrical part above the taper, and the lettering A' in the re-

issue drawing, are new matter not warranted by the original drawing or model. It is contended, that, in this, there is a violation not only of the provision of section 53 of the act of 1870 in regard to new matter, but a violation of the provision of that section, that, in case of a machine patent, neither the model nor the drawings shall be amended, except each by the other; that a new division or element is made in the drawing, called A'; that the drawing has been amended by dividing the grating into two parts, without any warrant therefor from the model; and that this was a material change, because it was intended to change the original hollow point, as described in the original specification and as shown in the original drawing and by the model, into a solid point, including all of the tapering part as solid matter.

There is no substantial difference between the drawing attached to the original patent and that attached to the re-issued patent. The form of the whole structure, as a whole, is the same in each. The forms of the several parts are the same in each. In each, the protecting grating is cylindrical above and then tapers below, in the form of an inverted cone, to a point. In the original drawing the whole grating, from the head piece to the point, is lettered A. In the re-issue drawing the cylindrical part of the grating is lettered A, and the tapering part is lettered A'.

It is not perceived that there is any force in these objections taken by the defendants. The drawing of the original patent shows a pointed pump tube, capable of being driven to make a driven well. The original specification says: "The ends of the wire sections designed for the lower part of the filter are welded together in a compact form, which may be round, pointed or square across." There is nothing in this language, properly construed, which indicates that the patentee contemplated the use of the structure in any other well than a driven well. It speaks of the "wire sections designed for the lower part of the filter." The "lower part of the filter" is the part from where the taper begins, downward. The ends of these wire sections, that is, their lower ends, are welded together in a compact form. Why in a compact form? Evidently, to get a driving point. Unless the ends were compact, in the sense of being compacted to a point, there could be no driving. There is no suggestion that the lower ends are to be rounded or square across. If they were, they could not be driven. The words "which may be round, pointed or square across" refer to something which may at the same place be, optionally, either round, pointed or square across. The extreme lower end may be pointed, but, for a driven well, it cannot be round or square across. It is not the "ends" which are to be "round, pointed or square across." It is "the lower part of the filter" which is to be "round, pointed or square across." The lower part of the filter is the part from where the taper begins, downward. Such part may not have its up and down outside line, from the lower end of the cylindrical part downward to the end, the line of a cone, as in the drawing, but such outside line may be rounded and more bulging than the line of a cone, so it be not of greater diameter than the cylindrical part, provided the lower ends of the wires are welded together in a compact form; or, such part may be pointed, that is, its outside line may be the line of a cone, going in a straight line from the lower end of the cylindrical part to the point; or, such point may be square across, that is, it may be an inverted pyramid, with its cross section any where a square, provided the lower ends of the wires in the four sides are welded together in a compact form. This is the only reasonable meaning of the words. They are inartificially put together, but in the re-issue the language is: "The open grate, A, extends [down][2] cylindrically in the drawing a sufficient distance, and is then tapered and brought into a solid point, A', as in the drawing, or it may be made rounded or square, so there is a solid compact end adapted to the purposes intended." In the drawing, the open grate, A, does extend down cylindrically for a distance, and it "is then tapered." That is, the open grate continues in the tapered part. The tapered part is not all of it solid. After that part of the tapered part which is an open grate, comes the solid driving point into which the tapered open grate is brought. The letter A', in the drawing of the re-issue, is not at or near the solid point. It is opposite the open grating, on the tapered part. The statement, that the open grate, after leaving the cylindrical form, "is then tapered and brought into a solid point, A', as in the drawing," does not mean that A' is the solid point, or that the solid point is A', or that the whole of the tapered part is solid. It means that the part below the cylindrical part is A', that it is tapered as it goes down, that it is brought at its lower end into a solid point, and that the whole part which is thus tapered and brought into a solid point is designated as A', in the drawing. The statement further is, that the part which is tapered, that is, conical, or, as in the original, pointed, may, alternatively, be made rounded or square, or, as in the original, round or square across, in the senses before explained. There is a proviso, that, in each one of the three cases, there must be a solid compact end, adapted to the purposes intended, that is, for a pointed pump tube made for driving. This same idea is found in the original specification and drawing, taken together. There is no new matter, in this regard, in the re-issued specification or in the re-issue drawing. Nor is the added lettering, A', new matter. It is not perceived that any intention is

[2] [From 17 O. G. 903.]

disclosed, in the re-issue, to make the whole of the tapering part solid.

It is further contended, that the re-issue is not for the same invention, or for any invention, described in the original specification as the invention of the patentee. The cases of Gill v. Wells, 22 Wall. [89 U. S.] 1, and Russell v. Dodge, 93 U. S. 460, are relied on as authorities. The claim of the original patent was this: "A pump filter, composed of the parts A, B and C, substantially as and for the purposes described." It is urged that such claim included the three distinct parts A, B and C, in combination, embracing the whole of the structure described; that there is no suggestion, in the original specification, that the patentee had invented any combination of parts less than the whole; and that each of the claims of the re-issue is for a combination of parts less than the whole, and is, therefore, void. The view taken by this court, in Herring v. Nelson (before cited), of the decisions in Gill v. Wells and Russell v. Dodge, seems to me to be a sound one. Under the decision in The Corn Planter Patent, 23 Wall. [90 U. S.] 181, which was subsequent to that in Gill v. Wells, the re-issue in the present case cannot be held to be void. The drawings of the original and the re-issue being the same, and the two specifications describing the same mechanical structure, with the same mode of operation, it must be held to be lawful to re-issue the patent with claims to combinations of fewer elements than were contained in the combination claimed in the claim of the original patent. The original claimed a general and larger combination, and the re-issue claims sub-combinations which enter into such general and larger combination. Such a re-issue was sustained in The Corn Planter Patent [supra], on the ground that the re-issue was for things contained within the apparatus described in the original patent, and against the effort to control the case by the decision in Gill v. Wells [supra]. It is of no importance that the wire gauze, C, may not, by itself, have been new, or that the open grating or guard, A, may not, by itself, have been new, or that any other ingredient of the combinations claimed in the re-issue may not, by itself, have been new, so long as the combinations, as claimed, were new.

As stated before, A', in the drawing of the re-issue, and in the text of the re-issued specification, does not mean the solid point alone, by itself, but includes the whole of the tapering part, which tapering part is an open grate from the lower end of the cylindrical part of the open grate down to where the solid compact end begins, and the solid compact end forms the rest of the tapering part, and the rest of A'. The re-issued specification says that the open grate is tapered from where its cylindrical part stops, that is, that the open grate continues into the tapered part down to where the solid compact end begins. The drawing shows that. So, where the first claim of the re-issue speaks of "a point, A'," it means the whole of what is lettered A', the whole of what is so tapered, from the lower end of the cylindrical part to the lower end of the solid compact end, and it does not mean merely the solid compact end.

It is further contended, that the two claims of the re-issue do not claim combinations but claim merely aggregations of parts. The object of the combination claimed in the first claim is to enable the structure to be driven into the earth, and there serve for a pump and a filter, without being injured in driving. Nothing less than a combination of all the elements in such combination will accomplish all the objects which such combination will accomplish. So, too, the grating and the wire gauze of the second claim act in combination, in controlling the passage of the water from the outside of the grating to the interior of the wire gauze. The objection is not regarded as tenable.

The application for Christman's original patent was filed in the patent office August 1st, 1865. The invention was made by h m in the spring of 1864. The model sent by him to the patent office was made in the spring of 1865. The patent to Phelps and Holton, of June 12th, 1855, for a "metallic medium for filtering," describes the use, for filtering water, of several thicknesses of fine wire gauze prepared by passing it through metallic rolls under a sufficient pressure to flatten the wire and reduce the interstices. There is no suggestion of a driven well, or of a protecting grating, or of any necessity for such grating. The patent to De Buffon, of April 14th, 1857, for an "improved apparatus for filtering liquids," describes a structure consisting of an internal metal tube, perforated with holes, through which the filtered water passes, and surrounded on the outside by a wire gauze cylinder, the space between the two cylinders being filled with permeable materials. There is no suggestion of a driven well. The patent to May, of August 1st, 1865, is subsequent in date to Christman's invention.

Hewitt's deep well pump, used in 1858, 1859 and 1860, was a perforated basket attachment, with wire gauze wound around its outside, as a water strainer. It could not be taken down by the driving of a well point. The apparatus of Hughes was a perforated pipe with a screen of wire gauze around it, and was not for driving. The apparatus of Suggett was a single tube for driving, with a point, and with perforations in the tube above the top of the point.

In the defendants' apparatus there is a perforated tube, surrounded on the outside by two thicknesses of finely perforated copper, and a covering of perforated metal outside of the perforated copper. Below this is a solid well point for driving. This solid point is enlarged near its upper part, so as to be larger in diameter than the pipe above, and thus afford additional protection to the finely perforated copper. The defendants al-

lege that their structure does not infringe the claims of Christman's re-issue. They insist that their perforated tube and driving well point are like those used by Suggett before Christman's invention, and that their finely perforated copper, if substantially wire gauze, is the wire gauze of Phelps and Holton and of De Buffon and of Hewitt and of Hughes; that they use no wires, and have no wire grating and no head piece; that their driving point is solid from where the tapering begins and not at all open;[3] that the plaintiffs' structure cannot have its tapering part enlarged at its upper part; and that it required no invention to cover the perforated part of Suggett's apparatus with wire gauze or finely perforated copper sheets.

The defendants' apparatus can be driven, and then remain as a pump bottom and a filter. The filter in it is substantially wire gauze, and such filter is protected, in driving, by the perforated outside metal. The enlargement of the top of the point may be an added protection, but the office of the metal pipe outside of the finely perforated copper is to protect the latter while the structure is being driven and afterwards. Such outside perforated metal pipe, while it protects the copper inside of it, permits the water to freely pass inwardly through it, and it is substantially an open grating. The combination found in the first claim of the plaintiffs' reissue is substantially found in the defendants' structure. The defendants have substantially a wire gauze filter with a protecting grating or guard outside of it, of sufficient strength for the purpose required, and a tapering driving point. The perforated tube inside of the copper is an addition, which does not destroy the combination of the copper with the protecting guard outside of it. The plaintiffs' tapering part may have a less part of it solid than the defendants' tapering part, but all that is necessary is to have enough of it solid or compact, beginning at the lowest point, to enable it to be driven, according to the nature of the soil. It is in evidence, that structures like that described and shown in the specifications and drawings of Christman's original and re-issued patents were driven by him in 1865, and have worked successfully ever since. If the solid point for driving is sustained by a rigid metallic tubular grating that connects it with the pump tube above, that is all that is essential. Whether this connection be by a head piece or collar, where the open grating is of wires, or whether the head piece is omitted because unnecessary, where the grating is of inflexible metal, is not of the essence of Christman's invention. In either case, the structure is equally carried by the driving of the tube, so as to arrive at its resting place in a condition to act perfectly as a filter. It, therefore, appears that the combination covered by the first claim of the plaintiffs' re-issued patent is found in the defendants' structure. It also appears, that such combination is not found in any of the prior structures adduced by the defendants, and that it involved the exercise of invention to arrive at such combination, in view of everything that previously existed.

The combination covered by the second claim of the plaintiffs' re-issue seems to be a combination of the grating above the tapering part with the wire gauze inside of such grating, excluding the tapering part and the driving point, and to have no exclusive relation to a driven well, though capable of use in it. Aside from driving, the combination of the grating and the wire gauze, as a filter, is the same thing, as a combination, whether the wire gauze is inside of the grating or outside of it, so long as the apparatus is at the lower end of a pump tube. In this view Hewitt and Hughes anticipated Christman as to such second claim, and it is invalid, provided the testimony is available to the defendants. Hughes, Hewitt, Field and McCue testify to substantially the same prior arrangement. None of them are named in the answer. Although the testimony of Hughes was objected to, on that account, when taken, the testimony of the other three witnesses was not objected to.

Although the second claim is invalid, for want of novelty, the plaintiff can recover on the first claim, under section 60 of the act of July 8, 1870 (16 Stat. 207), now section 4922 of the Revised Statutes, although no disclaimer has been made as yet as to the second claim, provided that, prior to the entry of the decree herein, as to such first claim, they make a disclaimer, under section 4917 of the Revised Statutes, as to the second claim, it not appearing that there has been, heretofore, any unreasonable neglect or delay to enter such disclaimer; but, as such disclaimer was not entered before the commencement of this suit, the plaintiffs will not be entitled to recover any costs of this suit. Rev. St. § 4922.

Let a decree be entered for an account of profits and damages and for a perpetual injunction, as to the first claim.

[3] [58 How Pr. gives "and all open."]

Case No. 2,705.

The CHRISTOPHER COLUMBUS.

[8 Ben. 239.][1]

District Court, E. D. New York. Sept., 1875.

COLLISION IN DOCK—NEGLIGENCE—LINES—COSTS.

1. A small schooner, the C. C., moored for the winter outside another vessel at a pier in Haverstraw bay, broke adrift during a storm, and, before fresh lines were made fast so as to hold her, ran into a canal boat lying on the other side of the slip, broke her fastenings and beached her. The canal boat was not in charge of any person, and before the owner came back

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

to the town had become a wreck. He made some effort to discover who did the damage, but could not find out anything for more than a year. Then he libelled the schooner: *Held*, that, upon the evidence, the schooner was in fault, not being properly fastened, and not using due diligence in getting out fresh lines when her bow fasts gave way, and therefore the libellant must recover his damages.

2. Lines, intended to hold a vessel, so fastened that they must be cast off when a strain comes upon them, are no lines.

3. Costs must be awarded the libellant, notwithstanding his delay in bringing his suit, because of the willingness shown by the claimant to keep him in ignorance as to who did the damage.

In admiralty. The schooner, Christopher Columbus, owned by parties in Haverstraw, N. Y., was laid up for the winter at a dock in Haverstraw bay. She was fastened by a bow line to the dock and other lines to a vessel inside of her. During a storm her bow line parted and she swung round so as to threaten damage to the other vessel, whereupon the other lines were cast off, and she drifted across the slip, struck a canal boat lying fastened to the pier on the other side, broke her fastenings, knocked off her cabin and did some other damage before those on board the schooner got out fresh lines to hold her. The canal boat was also laid up for the winter and was without a keeper, her captain and owner having gone to the interior of the state, and the schooner's men did not attempt to make her fast again. She gradually worked up on the beach and before spring went to pieces, no one paying attention to her. After some time the owner heard of his loss, came down to Haverstraw, and made inquiries to find who did the damage; but no one could or would give him the information till a year and seven months after the accident, when he filed a libel against the schooner to recover his damages.

R. D. Benedict and Thomas C. Campbell, for libellant.

Elliot F. Shepard, for claimant.

BENEDICT, District Judge. This is an action brought to recover for injuries to the canal boat J. P. Hewitt, caused by a collision between that vessel and the schooner Christopher Columbus, which occurred at Haverstraw in 1870. It appears that those two vessels had been laid up for the winter between a dock, called the West dock, and another called Peck's dock, at Haverstraw. The canal boat lay above West's dock, and the schooner lay above her, but on the opposite side of the slip, moored alongside another vessel, to which vessel she was fastened, as well as to Peck's Dock. On the morning of the accident a wind arose, by which the fasts of the schooner were broken and she was carried across the slip and against the canal boat, causing the injuries complained of.

Two questions of fact are raised by the evidence, upon which the liability of the schooner depends, viz.: whether the schooner was properly secured, and whether the drifting of the schooner against the canal boat could have been prevented by the exercise of due diligence, after the fasts were broken. Upon both these questions my opinion is adverse to the schooner. The evidence shows, that while the schooner had lines sufficiently strong to hold her if properly fastened, she was so fastened as to make her safety depend upon a single part of a three-inch hawser, run to a spile on the dock. There were other lines out to the schooner which lay inside, but when the headline parted it became necessary to cast them off to avoid damage to that schooner. If these lines had been run to the dock, instead of to the schooner inside, it can hardly be doubted that the vessel would not have gone adrift. Lines, so fastened that they must be cast off when the strain comes upon them, are no lines. The fact, that of the two vessels moored on the lower side of Peck's dock, only the smaller and lighter vessel broke adrift, also leads to the conclusion that some defect existed in the fastening of the lighter vessel. I find, therefore, that the drifting of the schooner was the result of negligence in omitting to have more fastenings from the schooner to the dock forward. It seems also to me that reasonable activity on the part of those upon the Columbus, when the bow line parted, would have enabled them at that late time to have run a line to the dock and thus to have held the vessel. If this be so, there is also negligence in this regard.

I must, therefore, award to the libellant his damages sustained by the collision in question, and he must also recover his costs. I should refuse him costs because of the delay in instituting his action, were it not that the evidence indicates a willingness on the part of the claimant, to say the least, that the inquiries made to ascertain the names of the parties responsible for the damage should prove unsuccessful,—as they did, according to the evidence, for a year and nine months. Decree for libellant, with order of reference to ascertain the amount.

[NOTE. For decision overruling exceptions to the commissioner's report as to damages, see Case No. 2,706.]

Case No. 2,706.

The CHRISTOPHER COLUMBUS.

[8 Ben. 510.] [1]

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

COLLISION—DAMAGES—SUBSEQUENT INJURY.

1. A schooner, having parted her lines during a storm, as she lay at a pier, was held liable for the damages occasioned to a canal boat against which she was driven. The canal boat

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had no one on board. She was injured by the collision. Her lines were also parted by the collision, and she was left so as to be subject to additional injury from the storm. The commissioner, to whom it was referred to report the damages sustained by the canal boat by the collision, reported as such damages the value of the boat as being totally lost. Exceptions were filed to the report. *Held*, that the schooner was liable for all the damages sustained by the canal boat, both from the collision and from the storm subsequently.

2. That, on the conflict of evidence, the court would not disturb the finding of the commissioner who had had the witnesses before him.

[In admiralty. A decree was given for libellant, with a reference to ascertain the amount of damages (Case No. 2,705), and the cause is now heard on exceptions to the commissioner's report.]

T. C. Campbell, for libellant.

E. F. Shepard, for claimant.

BENEDICT, District Judge. This case comes before the court upon exceptions to a commissioner's report of the damage arising from a collision between the schooner Christopher Columbus and the canal boat J. P. Hewitt. The canal boat had been laid up at Haverstraw, and when injured by the Christopher Columbus was in a proper location, but without any person on board of her. The accident occurred on March 16th, 1870, when, during a storm, the Christopher Columbus parted her fastenings and was driven upon the canal boat, so as to carry off her cabin, break her transom, part her lines and leave her subject to additional injury from the storm during its continuance. Upon the trial it was held that the collision between the vessels arose from negligence on the part of the Christopher Columbus, and it was referred to a commissioner to ascertain the amount of damages arising from such collision. Upon such reference a mass of testimony was taken before the commissioner upon the question of damages, and he has reported the sum of $1,300, with interest, being the value of the canal boat as totally lost, with interest. The correctness of this report is now to be determined by the court. Upon the evidence I am of the opinion that the schooner is liable for all the injuries sustained by the canal boat by the actual contact of the boats and by the storm of March 16th. The schooner was bound to know that she had parted the boat's lines and placed her in peril of further immediate injuries from the storm then raging. It was apparent that there was no one on board the canal boat, and under such circumstances it was the duty of the schooner to secure the boat again and do all that in her lay to prevent further immediate injury to the boat. If no efforts would diminish the injury to the boat, the responsibility for her condition rests upon the schooner. If timely efforts would have prevented further loss, the schooner was bound to make such efforts, and she made none. The injuries sustained by the boat on this occasion, as well by the elements as by the actual contact with the schooner, were the natural results of the schooner's acts and omissions, and may therefore with entire justice be charged to her as the damages caused by the collision in question.

As to the extent of these injuries the evidence is conflicting, but the weight of it appears to sustain the view taken by the commissioner, that they were such as to render her worthless. No doubt some injury was caused to the boat by winds and waves during the ten days that elapsed between the time of the accident and the time that the owner was notified of the occurrence, but the evidence points to the conclusion that the accident left the boat of little value. I therefore concur with the commissioner that the value of the boat before the accident is the measure of the damages to be recovered in this action. That value the commissioner, upon very conflicting evidence, has found to be $1,300. There is evidence to show that the boat was worth this if worth anything. Plainly she was a boat able to do work and of some value. The value found is supported by testimony apparently trustworthy; and the finding having been made after seeing the witnesses, I should hardly feel justified in disturbing it, even if I had more doubt than I have as to its substantial correctness. The exception is therefore overruled and the report confirmed.

Case No. 2,707.

The CHRISTOPHER NORTH.

[6 Biss. 414;[1] 7 Chi. Leg. News, 387.]

District Court, N. D. Illinois. July, 1875.

LIBEL FOR REPAIRS.

Where a vessel goes from her home port to another state for the express purpose of being repaired, and the owners have no personal credit, a libel will lie against her at her home port for the balance due for such repairs.

[Cited in The James Farrell, 36 Fed. 501.]

In admiralty.

Tenneys, Flower & Abercombie, for libellant.

Magee, Oleson, & Adkinson, for respondents.

BLODGETT, District Judge. This is a libel for repairs made by the Manitowoc Dry Dock Company, upon the schooner Christopher North, in the month of September, 1872. The facts of the case appear to be these: The Christopher North was owned in the city of Chicago, by Jacob Hansen and one Scharvey. She was in need of repairs, and for the purpose of having her repaired in the best and most economical manner, one of her owners, Hansen, went to Manitowoc and made a contract there with the Manitowoc Dry Dock

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

Company, a corporation doing business at Manitowoc, Wis., in the repair and building of vessels. This company were to do certain repairs to the vessel, for which they were to receive a fixed price, half the money down, and the remainder in sixty days. After making the contract, Hansen telegraphed to Scharvey, who was captain and part owner of the vessel, to make sail with her for Manitowoc for the purpose of having her repaired there. The schooner accordingly proceeded to Manitowoc, and underwent the repairs which had been ordered. When they were completed and the vessel ready to leave the dock, a draft was made for one-half of the expense, the captain giving a certificate of indebtedness for the remaining half, and certifying that it was for repairs done to the schooner, payable in sixty days. On account of this indebtedness the libel was filed against the schooner.

The defense is now interposed that this work was done upon the credit of the owners, and not upon the credit of the vessel, although it was done in a foreign port, Chicago being the port of the Christopher North. She, however, did not leave this port upon a commercial voyage in the ordinary course of maritime employment, but for the express purpose of receiving these repairs, and the question is whether upon the facts of the case the relations of the parties are not precisely the same as though these repairs had been made while the vessel was in the home port; whether for the purpose of these repairs Manitowoc may not be said to have been the home port of this vessel, and whether it was not upon personal credit rather than upon the credit of the vessel that the repairs were made. The evidence shows that the owners of the vessel were not men in financial credit. One of them was a shoemaker residing in this city, and the other was master of the vessel, and having no means outside of his interest in the vessel to give him credit. Neither of the owners had any property or credit at Manitowoc aside from this vessel. There is no doubt but that if this vessel had put into the port of Manitowoc to undergo repairs, that these repairs would have been a lien on the vessel upon the facts shown, and, although the owner took the precaution to go to Manitowoc and make a contract before taking the vessel there, yet that, it seems to me, does not divest the parties making the repairs of their maritime lien. Under the circumstances of the case it seems to me that the court must find, as a matter of fact, that the repairs were made on the credit of the vessel.

[The further objection is made to this proceeding, for the reason alleged in the answer, that the vessel, as soon as the repairs in question were made upon her, was libeled in this court and sold under a decree. The present owners own her under the sale made in pursuance of this decree. But there is no proof upon that point. If it is true, I should be obliged to hold that the present owners hold her free and clear of this lien because of that sale. The parties should have come into court and put in their claim before the sale, and I do not think, although one of the present owners is the same man, Scharvey, who was captain of her at the time, that the principle is changed. I find nothing in that. That objection, I think, must be overruled for want of proof in the record.][2]

The decree will be for the amount due on the certificate of indebtedness.

Case No. 2,708.

CHRISTY et al. v. CUMMINS.

[3 McLean, 386.][1]

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

RESCISSION OF CONTRACT OF SALE — RETURN OF SUBJECT MATTER—ACTION ON PROMISSORY NOTE —DEFENSES.

1. To rescind a contract for the sale of a chattel, the property must be returned, unless it be valueless to both parties.

[Cited in Lyon v. Bertram, 20 How. (61 U. S.) 155.]

2. A plea to an action on a note given for the consideration, which avers that the goods purchased are of no value to defendant, is not good.

Powell & Bryan, for plaintiffs.

Mr. Southwick, for defendant.

OPINION OF THE COURT. This is an action on a note. The defendant pleaded that the note was given for merchandise which was represented to be sound, but was unsound and damaged. To this plea the defendant demurred, on the ground that there was no offer to return the goods. A vendee of a chattel cannot rescind the sale without offering to return it, unless it is worthless to both parties. Perley v. Balch, 23 Pick. 283. To render a rescission of a contract valid, the rescinding party must place the other party in statu quo. Holbrook v. Burt, 22 Pick. 546; Conner v. Henderson, 15 Mass. 319. The plea avérs, "that the goods were unsound and damaged, so as to be of no value to defendant." But there is no averment that they are of no value. For the purposes of the defendants they may have been, to them, of no value; but it does not appear that, if returned to the plaintiffs, they would have been of no value to them. The demurrer to the plea is sustained.

CHRISTY (HOWARD v.). See Case No. 6,754.

CHUBB (CAUSIN v.). See Case No. 2,527.

[2] [From 7 Chi. Leg. News, 387.]

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

Case No. 2,709.

CHUBB et al. v. SEVEN THOUSAND EIGHT HUNDRED BUSHELS OF OATS.

[26 Law Rep. 492.]

District Court, S. D. New York. June 16, 1864.

LIABILITIES OF COMMON CARRIERS—VARYING BILL OF LADING—CUSTOM AND USAGE.

[1. Where the loss of a portion of a cargo is caused by a "danger of navigation," within the meaning of that term in a bill of lading exempting the carrier from liability for a loss so occasioned, the carrier is entitled to freight upon the portion of the cargo actually delivered.]

[2. The general usage and custom, in the transportation of goods by water, to stow them under deck, annexes to a clean bill of lading; and carriage on deck is such a violation of the contract as will render the carrier liable for loss by a "peril of the sea," notwithstanding that the bill of lading exempts the carrier from liability for loss from such a cause.]

[3. This legal import of the bill of lading implied by the general custom may be varied by proof of the custom of a particular trade, and the contract then withdrawn from the operation of the general rule requiring carriage under deck.]

[Cited in The William Gillum, Case No. 17,693.]

[In admiralty. Libel by John H. Chubb and others against a quantity of oats (Louis Renaud, claimant).]

Mr. Van Santvoord, for libellants.

Mr. Bulkely, for claimant.

SHIPMAN, District Judge. This suit in rem is instituted to recover freight, at eight cents per New York bushel, on 7,800 bushels oats, transported on the libellants' boat, Mary Eva, from St. Antoine, Canada East, to New York, on account of Louis Renaud, of Montreal. A larger quantity of oats was shipped, as appears by the bill of lading, and not denied; but the excess over 7,800 New York bushels was lost overboard during a heavy blow on Lake Champlain. The libellants now seek to recover freight on the quantity actually delivered, and also demurrage for detention of their boat in New York, in consequence of the failure of the claimant's agents to discharge her in proper time.

The bill of lading was, so far any question before the court is concerned, in the usual form. The contract was to carry, and deliver in good order, "the dangers of navigation excepted." I think the proofs establish the fact, that the loss did occur from the dangers of navigation, and is therefore within the exception of the bill of lading, and it would follow that the libellants are entitled to recover their freight money on the quantity delivered, if there were no other question in the case. But the claimant resists this claim, and insists that the value of the oats lost should be first deducted, on the ground that they were stowed on deck in violation of the contract contained in the bill of lading, and that this departure from the contract was the occasion of the loss. The claimant also resists the demand for demurrage.

The bill of lading, under which the oats were shipped, was what is well known in law as a clean bill. It is well settled that the general usage and custom, in the transportation of goods by water, to stow them under deck, annexes to such a contract the condition, as the general rule, that they shall be so carried. If they are carried on deck, it is deemed a violation of the contract; and a loss occasioned thereby, although immediately produced by perils of the sea, falls upon the carrier. The Waldo [Case No. 17,056]; The Peytona [Id. 11,058]; The Paragon [Id. 10,708]. This is the rule which prevails wherever the maritime law is administered. The carrier can, of course, exempt himself from this liability by obtaining the express consent of the shipper. No express consent of the shipper has been proved in the present case. It is, however, insisted that a custom of this particular trade, to stow goods of this description on deck, has been clearly proved; and that the legal effect of this local custom is to relieve this contract from the operation of the general rule. The evidence in support of this custom is objected to by the claimant, on the ground that proof of such a usage is inadmissible to vary the well-known legal import of this contract. This is an important question, and demands an attentive consideration. In deciding this question, it must not be forgotten that this obligation of the master to stow the cargo under deck, does not rest upon any express provision in the bill of lading. That is usually silent on the subject. Neither is the obligation founded upon any legal construction of the terms of the instrument. It is an implication of law drawn from a well-known and general commercial usage or custom. The parties, where they enter into a contract of this character, are understood to recognize the usage, and to include its conditions in the unwritten terms of their agreement. Though the bill of lading is silent on the subject of the place of stowage of the articles named in it, whether in the hold or on deck, the eye of the law reads in every such bill the stipulation that they are to be stowed in the former. The obligation rests on the usage or custom of the maritime world, to which the shipper and carrier are presumed to be consenting parties, and which the law attaches to the instrument itself, where it is silent on the subject. This silence is a recognition of the usage and the rule founded upon it, and binds the parties as firmly as an express and formal stipulation. The Peytona [supra]; The Waldo [supra]; The Paragon [supra]; Vernard v. Hudson [Case No. 16,921].

The question then is presented—Can that part of the legal import of the bill of lading, which is implied by law from the general custom, be varied by proof of the custom of a particular trade, and thus with-

draw the contract from the operation of the general rule requiring the cargo to be carried under deck? On this question, the case of The Paragon, above cited, is an authority in point. In that case, Judge Ware says: "It is not denied that such a custom may exist in a particular trade, as well as authorize the master to carry a part of his cargo on deck, without subjecting himself to responsibility for its loss, or any damage it may sustain from dangers of the seas, in being thus exposed." He also adds, after referring to the French Ordinance de la Marine, "In our law, the rule requiring the cargo to be safely stowed under deck, does not stand upon any express text of any act of the legislature, but upon the authority of general usage and custom. A rule of law that is established by custom may be repealed, or restrained by custom." On the nature of the proofs which should be required to establish a special custom of a particular trade, in conflict with the general rule of the maritime law, the same learned judge remarks: "But the general rule being founded on the custom of the country, universally known, and having the force of a general law, he who would exempt himself from its obligation, by a special local custom, is bound to prove the local custom by clear and conclusive evidence. Because the legal presumption is, that every contract is entered into with the understanding and intention of the parties that their rights under it are governed and determined by the general law. A local custom, in order to be binding on the parties and withdraw their contracts from the application of the common law, must be so generally known and understood, that it may fairly be presumed that all persons engaging in that particular trade are acquainted with it, and assenting to it. The presumption, then, will be that they form their engagements with a silent reference to the custom. And the custom, to be obligatory, must not be a loose practice, but precise, definite and certain, so as to supply the place of the general law in the given case, and be capable of being applied to the contract, and defining and fixing the rights of the parties under it. Such a custom, where it is established, and so generally known and recognized that the parties are presumed in their engagements tacitly to refer to it, applies itself to the contract, and forms, as it were, the complement to the terms in which the obligation is expressed by the parties, and, within its proper sphere, is equally binding with the general law." I have cited at length from this opinion, in the case of The Paragon, not because it is an isolated authority, but for the reason that it states the law on this point with singular clearness and accuracy. Judicial decisions to the same effect are abundant. It is well remarked by Hosmer, C. J., in Barber v. Brace, 3 Conn. 13, that the doctrine is "trite and familiar," that "a commercial usage, having existed a sufficient length of time to have become generally known, and to warrant a presumption that contracts are made with reference to it, is evidence of the intention of the parties, and illustrative of their agreement." Nearly the same language is held by the court in New York in Smith v. Wright, 1 Caines, 43. In both of these cases, the question was one of liability for loss of goods stowed on deck. The general doctrine of the admissibility of parol evidence to prove the existence of usage or custom to vary the effect of contracts, is now well settled, both in the English and American courts, and has been repeatedly applied to the contract contained in a clean bill of lading. 1 Conk. Adm. p. 233, and cases there cited. It is true that Mr. Justice Story, in the case of The Reeside [Case No. 11,657], makes some trenchant remarks on the subject, but they are levelled at the abuse, rather than the existence of the doctrine. He concedes the principle, but energetically protests against extending it, so as to embrace "loose and inconclusive usages and customs."

But it is objected that the admission of parol evidence to prove the existence of the custom, where the contract of lading is in writing, contravenes the well-known rule that such evidence is not to be received to vary the terms of the written instrument. But evidence of usage or custom is never deemed within this rule. Renner v. Bank of Columbia, 9 Wheat. [22 U. S.] 581; 1 Smith, Lead. Cas. (5th Am. Ed.) 682; 1 Greenl. Ev. § 292. The case of Creery v. Holly, 14 Wend. 25, is relied on, as sustaining the objection to this evidence. But in that case the question arose not on objection to evidence of a custom, but to evidence of a parol agreement, that the goods might be carried on, instead of under, deck. The opinion of the court is expressed in the following terms: "It is true that nothing is said in the bill as to the manner of stowing away the goods—whether on or under the deck; but the case concedes that the legal import of the contract, as well as the understanding and usage of merchants, impose upon the master the duty of putting them under deck, unless otherwise stipulated; and if such is the judgment of law upon the face of the instrument, parol evidence is as inadmissible to alter it as if the duty was stated in express terms. It was a part of the contract." And, again: "If the implied obligation of the master in this case, arising out of the conceded construction of this bill of lading, may be varied by parol testimony, I do not see how any other stipulation included in it could be sustained in an offer to impeach it in the same way. Following the decisions of the federal courts, we have already suggested that the obligation of the master to stow the goods under deck, is not drawn by construction from the instrument itself, but is an implication of law springing out of the ordinary course of business. This implication of law rests upon general custom, and not upon

judicial construction of the written contract. The Peytona [supra]; Vernard v. Hudson [supra]. In the latter case, Mr. Justice Story remarks: "I take it to be very clear, that, where the goods are shipped under a common bill of lading, it is presumed that they are shipped to be put under deck, as the ordinary mode of stowing the cargo. This presumption may be rebutted, by showing a positive agreement between the parties; or, it may be deduced from other circumstances, such, for example, as the goods paying deck freight only. The admission of proof to this effect is perfectly consistent with the rules of law; for it neither contradicts nor varies anything contained in the bill of lading, but it simply rebuts a presumption arising from the ordinary course of business." In that case the bill of lading was in the common form, and a witness was admitted to prove a parol agreement to carry the goods on deck. It is true that the judge, in his comments upon the evidence, incidentally remarks that if such an agreement had existed, "one of two things ought to have occurred, either that mere deck freight should be payable, or that there should have been some written memorandum on the bill of lading, to repel the inference from a full freight being stipulated for." But these latter remarks evidently refer to the preferable character of a written memorandum, and the bearing of its absence on the probability of the existence of such an agreement as that set up, and not to the exclusion of parol evidence of the agreement itself; for he had just previously stated that proof of such an agreement "neither contradicts nor varies anything contained in the bill of lading." But it is not essential, in deciding the case now before the court, to attempt to reconcile the principle laid down in Creery v. Holly, with other cases involving the precise point there determined; or, if it shall be deemed in conflict with them, to go into the inquiry as to which lays down the true doctrine. If that case conflicts with those here cited from the federal courts, we should feel called upon to follow the rule held by the latter. As we have already stated, proof of usage or custom, with reference to which parties are presumed to have entered into their contracts, is, under the law as declared by the courts of the United States, clearly admissible, as to their extent and scope, upon all matters which are not expressed in terms or evolved by construction. And especially where the law attaches conditions to a contract founded, not on the terms of the agreement, but on general custom, proof of a different custom of a particular trade may be given to show that the general custom does not apply to that trade. Indeed, such proof merely shows that, so far as that particular trade is concerned, the general custom does not exist, and therefore no presumption of law can be founded upon it.

We now come to the application of this doctrine to the present case. It is contended by the libellants that they have conclusively proved a clear, well-settled and uniform usage of the particular carrying trade in which this contract had its origin, in conformity to which goods of this description are stowed on deck in bins, as well as under deck. The evidence supports this claim. The route over which this trade passes, after leaving the St. Lawrence river, is by the Chambly river, the Chambly canal to Lake Champlain, down the latter to Whitehall, and from thence by the Champlain canal to the Hudson river, and by the latter to Albany and New York, the usual ports of destination. Owing to the shallow water of the canals, it is always necessary, when a full load is taken, to lighter the boats in passing through them, and this is done by removing the deck load, which is put in bins for that purpose, and replacing it when the deeper water is reached. This is the only way the business can be made remunerative to the carrier. The claimant in this case has long been engaged in shipping grain, including oats, over this route, and is chargeable with knowledge of this uniform usage—a usage which rests on the necessities of the trade as affected by the limited depth of water over the artificial portions of the route. By this arrangement of bins on deck the carrier is able to transport the commodity at less rates of freight than could possibly be done, if he could take only what he could stow under deck. Thus the practice inures to the benefit of the shipper as well as the carrier, and the custom has become uniform and established with the consent and acquiescence of both parties, until it has assumed a clear and well defined usage of the trade. This usage being thus shown by clear proof, it follows that the general custom of the maritime world, by which common bills of lading are understood to import that the goods named in them are to be carried under deck, has no application to this particular trade, and such bills of lading therein are relieved from its operation.

The accident by which a portion of the cargo was lost, occurred in a gale on Lake Champlain, while the libellants' boat was, with others, in tow of a steamer, the usual mode of passing this lake. The bins in which the deck load was contained, appear to have been built in the ordinary manner, staunch and strong; but as the steamer turned Cumberland head, to go into Plattsburg, to avoid the violence of the gale, the boats she had in tow rolled heavily in the trough of the sea, striking against each other with violence, when one of the bins of the libellants' boat gave way, and a portion of the cargo was lost overboard. On a review of the whole evidence on this point, I am satisfied that the loss must be attributed to the perils or dangers of navigation, and is therefore within the exception in the bill of lading. The burden of proof on this point, as

well as that touching the existence of the particular custom, is on the libelants, and I think they have made a clear case on both. The libellants are also entitled, on the proofs, to fourteen days' demurrage. As to the rate of demurrage, I am not so clear. The testimony of the libellants on this question is confined mainly to one witness. He evidently states the highest rate. On the whole, I have fixed upon the rate at twenty dollars per day. As there is no serious dispute as to the quantity of oats delivered, or the rate of freight, or the number of days of detention, I see no occasion for a reference. Let a decree, therefore, be entered for the libellants for $624 freight, and $280 demurrage, making in all $904, with interest from December 16, 1861, the date of filing the libel.

Case No. 2,710.

CHUCK et al. v. MESRITZ.

[2 Woods, 204.] [1]

Circuit Court, D. Louisiana. April Term, 1876.

COMPOSITION WITH CREDITORS—VALIDITY—SECRET ARRANGEMENT.

If a debtor in embarrassed circumstances enters into an arrangement with all his creditors to pay them a certain proportion of their claims, in consideration of a discharge of their demands, and he privately agrees to give a better or further security to one than to the others, the contract with the other creditors is void.

This case was submitted to the court upon the law and facts, the parties having waived the intervention of a jury.

George W. Race, for plaintiffs.

Thomas J. Cooley and Edward Phillips, for defendants.

WOODS, Circuit Judge. The suit is brought on two promissory notes made by defendant at New Orleans, and payable to his own order, both dated August 26, 1867; one for $652, due November 26, 1867, and the other, $656, due December 26, 1867, with current rate of exchange on New York, and by him indorsed to J. B. Jaroslowskie Brothers & Co., and by them to the plaintiffs. The execution, as well as the indorsement and transfer of the notes is admitted by the answer. The defense set up is as follows: That in February, 1869, an agreement was signed by all the creditors of defendant, including Jaroslowskie Brothers & Co., who then owned the notes sued on, to accept twenty-five per cent. of the amount due on their respective claims, in full satisfaction thereof. Of course it is incumbent on the defendants to establish their defense by the preponderance of evidence. There is some conflict of testimony as to the terms of this agreement, but I think the decided weight of evidence is in favor of the version of plaintiffs, that the defendant agreed with Amberg, a member of the firm of Jaroslowskie Brothers & Co., that if he would procure the written assent of all the other creditors of defendant to accept twenty-five cents on the dollar of their claims, he, the defendant, would pay Jaroslowskie Brothers & Co. their claim in full.

A most persuasive piece of evidence on this point is found in the fact that Berwin, of New Orleans, who acted in the matter of the adjustment as an agent of the defendant, and who furnished the money to the defendant wherewith to pay the twenty-five cents on the dollar, was informed by a letter from Jaroslowskie Brothers & Co., written by Amberg, that he, Amberg, had succeeded in getting the signatures of all the creditors to the contract of compromise, "ours, of course, excepted," stating that some of the creditors had imposed the condition that the money should be paid during the then current month of February, and urging him to instruct Converse & Co. of New York, by telegraph, to pay the amount of the compromise agreed on to the creditors. Berwin, in a letter dated February 22, 1869, acknowledged the receipt of this letter, and adds: "Everything is O. K. I will advise to-morrow Mr. Converse to pay all creditors according to settlement. You can rely upon it that everything is settled in regard to the balance between you and Mr. Mesritz. I had a conversation with him, and he told me he would inform you himself, and will settle everything satisfactory with you." But the defendant says that if the contract between him and Jaroslowskie Brothers & Co. was as claimed by the plaintiff, it was a fraud on the other creditors and void. The authorities sustain this position. Where a debtor, in embarrassed circumstances, enters into an arrangement with all his creditors to pay them a certain proportion of their claims in consideration of a discharge of their demands, if he privately agree to give a better or further security to one than to the others, the contract with the other creditors is void, because the very basis is that each creditor shall receive an equal benefit and take a proportionate share. Story, Eq. Jur. §§ 378, 379, and notes. A neglect by Jaroslowskie Brothers & Co. to make known to the other creditors the fact that they were to be paid in full, while the other creditors were to receive only twenty-five cents on the dollar, was a fraud on the other creditors, and if it was the understanding between Mesritz and Jaroslowskie Brothers & Co. that the arrangement should be kept secret from the other creditors, the contract is void. But if the contract is void, it is void on account of the fraud of both parties. It is void totally. This would leave the parties just where they would have been had no such contract been made.

The case is then in this position: The plaintiffs are the transferees of notes made by the defendant, the execution and transfer of which is admitted. The defendant having failed to prove that Jaroslowskie Brothers &

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

Co. agreed, in common with the other creditors, to accept twenty-five cents on the dollar of their debt, now insists that if the contract was as claimed by Jaroslowskie Brothers & Co., it was fraudulent and void. If this be conceded, the defendant is in the position of striving to protect himself against a recovery on his own promissory notes, by alleging that the contract by which he agreed to pay them in full was fraudulent, and, therefore, void. The only successful defense that defendant could make was, by establishing the compromise at twenty-five cents on the dollar by a valid contract. In this he has failed. If the contract of compromise was as claimed by Jaroslowskie Brothers & Co., then whether it was valid or void, there must be a recovery against defendant for the full amount of his notes. If valid, the contract bound him to pay the full notes with interest. If the contract was void, the notes bound him to do the same thing. There must be judgment for plaintiff for the amount claimed.

CHURCH (FISK v.). See Case No. 4,826.

Case No. 2,710a.

CHURCH v. The H. L. SCANTON.

[Betts' Scr. Book, 534.]

District Court, S. D. New York. 1856.

ADVANCES TO SEAMAN BY BROKER—LIABILITY OF VESSEL.

[A vessel is liable for authorized advances to a cook, made by the broker who shipped him, although the cook subsequently deserts, as his continuance on board after being accepted is at the vessel's risk.]

[In admiralty. Libel by James C. Church against the schooner H. L. Scanton for advances.]

BETTS, District Judge. The libellant claims recovery of a payment of wages made by him to a cook hired for the ship. The evidence of a competent agency or authority in the libellant to charge the vessel for his advances is meagre, but may be regarded prima facie sufficient to put the owner or master on defence. The man was shipped as a cook, and was taken on board the schooner in that capacity, after having been paid twenty-five dollars advance wages by the libellant. The master now objects to paying the demand on the allegation that the cook did not perform the voyage he was shipped for, but deserted the ship in this harbor. His continuance on board, after being placed there by the shipping broker, was at the risk of the ship, and she is equitably and legally chargeable for the advance, by accepting him as one of the crew.

Ordered a decree for the libellant for twenty-five dollars, with interest from August 20, 1854, and costs.

Case No. 2,711.

CHURCH v. MARINE INS. CO.

[1 Mason, 341.][1]

Circuit Court, D. Rhode Island. Nov., 1817.

MARINE INSURANCE—TOTAL LOSS.

Where a vessel was stranded, and afterwards, before abandonment, was gotten off without material injury, but was, in the intermediate time, sold by the master at public auction, and purchased by him, it was *held*, that the plaintiff was not entitled to recover for a total loss.

[Cited in Barker v. Marine Ins. Co., Case No. 992; The Tilton, Id. 14,054; Michoud v. Girod, 4 How. (45 U. S.) 556; Veazie v. Williams, 8 How. (49 U. S.) 152; Allan v. Gillet, 21 Fed. 275; The Gulf Stream, 58 Fed. 606.]

At law. Assumpsit on a policy of insurance on the schooner Topaz for three months, the risk to be continued at the same rate, if, at the time, she shall not have arrived at Providence. The loss was alleged to be by perils of the sea and stranding. Plea, the general issue. At the trial it appeared that the policy was underwritten on the 2d of April, 1816. On the 12th of the same month the vessel was stranded on a bar, called New River bar, about thirty miles below Wilmington, in North Carolina. The master and crew abandoned the vessel soon after the stranding, and returned the next day and got on shore her sails, rigging, &c.; and on the 20th of the same month the hull, as it lay, and the sails and rigging, were, under the direction of the master, who was also a part owner, sold at public auction. The whole was bought by one Kendrick, who was a shipper on board of the schooner; and on the same day he conveyed all his right and title to the master, who immediately took measures to get the schooner off, and on the 23d of the same month, by the assistance of favorable winds and tides, effected his purpose. On the 29th of the same month, the plaintiff, who was a part owner, having received information of the disaster, abandoned to the defendants for a total loss. The schooner received very little damage from the stranding, and was soon repaired, and made a voyage with a cargo to Philadelphia, and from thence safely arrived at Providence. The master certified, that at the time of the stranding he was in prosecution of his voyage under a charter-party with Kendrick, by which he engaged to perform a voyage from New York to New River inlet, there to take a cargo of lumber for Wilmington, and perform three trips backwards and forwards, and then return to New York. And that, in consequence of the stranding, the subsequent part of the adventure was entirely abandoned by the parties to the charter-party. No charter-party was produced. There were some other circumstances, on which the defendant relied to establish his first

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

point of defence, but which it is unnecessary to state in detail.

Mr. Searle, for plaintiff, contended that, under these circumstances, the plaintiff was entitled to recover for a total loss; and he cited and relied on the case of Sawyer v. Maine Fire & Marine Ins. Co., 12 Mass. 291.

Mr. Hazard, for defendant, contended: 1. That the loss was occasioned by fraud or gross negligence. 2. That the loss, if bona fide, was, by the subsequent events, a partial loss only, and that the plaintiff was not entitled to recover upon the abandonment, as for a total loss.

STORY, Circuit Justice. The question of fraud or gross negligence is a question of fact, which I shall leave to the jury, with proper directions as to the evidence. But as to the other point, I am decidedly of opinion, that there is no color to claim for a total loss. The vessel was stranded, and it is true, that if the abandonment had been made, while she remained in that state, the plaintiff might have been entitled to claim as for a total loss. But here the vessel was actually gotten off, without having sustained any essential injury, before the abandonment was made. It is argued, however, that the voyage under the charter-party was defeated, and a loss of the voyage is a good cause of abandonment. But how was the voyage defeated? Certainly not by the incapacity of the vessel to perform it, in consequence of any perils insured against; for she sustained very little damage, and was soon repaired, and capable of performing the chartered voyage. The voyage then was voluntarily abandoned by the parties, as not worth pursuing. But this, in respect to the underwriters, is no cause of abandonment, if the ship was capable of performing it. They engage, that the ship, notwithstanding any of the perils insured against, shall be capable of performing the voyage, not that she shall actually perform it. A loss of the voyage, as to the cargo, is not a loss of the voyage as to the ship. This is the doctrine of the supreme court (Alexander v. Baltimore Ins. Co., 4 Cranch [8 U. S.] 371); and, of course, is of conclusive authority in this court, even if I entertained (which I certainly do not) any doubts of its correctness.

The doctrine, too, is equally well recognised in England. Everth v. Smith, 2 Maule & S. 278; Falkner v. Ritchie, Id. 290; Cazalet v. St. Barbe, 1 Term R. 191; Parsons v. Scott, 2 Taunt. 363. The most, that can be said in this case, is, that the voyage was retarded by the accident. But the mere retardation of a voyage, is no ground for an abandonment as for a total loss. Anderson v. Wallis, 2 Maule & S. 240; Pole v. Fitzgerald, Willes, 641; Everth v. Smith, 2 Maule & S. 278; Falkner v. Ritchie, Id. 290. Besides; this is an insurance on time; and it does not insure any specific voyage, much less does it undertake to guaranty the performance of the voyage in the charter-party.

But it is argued, that the vessel was sold by the master while stranded; and that the ownership, once destroyed, never can return to the plaintiff, unless he elects again to become owner; and that, as the plaintiff has never made such election, the loss, as to him, continues total. And this case is assimilated to the case of a purchase by the master under a judicial sale. Assuming that the purchase of a ship, under a judicial sale, can be legally made by the master on his own account, and not solely for the benefit of his owners (on which I give no opinion); and assuming also, that the owners in such case may recover as for a total loss (on which also, until better instructed, I reserve giving any opinion); it is sufficient to say, that the present is not such a case. Marsh. Ins. bk. 1, c. 13, § 1, p. 581; McMasters v. Shoolbred, 1 Esp. 237; Story v. Strettell, 1 Dall. [1 U. S.] 10; Storer v. Gray, 2 Mass. 565; Oliver v. Newburyport Ins. Co., 3 Mass. 37; Sawyer v. Maine Ins. Co., 12 Mass. 291; Queen v. Union Ins. Co., Cond. Marsh. Ins. 582b, note; Abbott v. Broome, 1 Caines, 292; United Ins. Co. v. Robinson, 2 Caines, 280, 1 Johns. 592; Abbot v. Sebor, 3 Johns. Cas. 39; Walden v. Phoenix Ins. Co., 5 Johns. 310; Ogden v. New York Firemen Ins. Co., 10 Johns. 177, 12 Johns. 25; Havelock v. Rockwood, 8 Term R. 268. The sale, in this case, was made by the master, or under his immediate direction; and nothing can be clearer than that, at such a sale, he could not become a purchaser. He cannot be at once vendor and vendee. The sale was either merely an amicable sale, and the whole property bought in on account of the master; or it was a bona fide sale, which the purchaser declined to enforce, and released all his right acquired by the sale to the master. In either view, it is a void or ineffectual sale. Nothing can be better settled, than that an agent or trustee cannot, directly or indirectly, become the purchaser of the trust property, which is confided to his care. The law will not suffer any man to earn a profit, or expose him to the temptation of a dereliction of his duty, by allowing him to act at the same time in the double capacity of agent and purchaser, either at a public or private sale. This case then stands before the court, as if there was no sale; the ownership has never been legally devested, and the ship was, at the time of the abandonment, in good safety. There is no foundation, upon which to rest the claim for a total loss. Verdict for the plaintiff for a partial loss.

Case No. 2,712.

CHURCH v. SEVENTEEN HUNDRED AND SIXTY DOLLARS.

[The case cited under this title in Marv. Wr. & Salv. 26, note, is the same as Case No. 2,713.]

Case No. 2,713.

CHURCH v. SEVENTEEN HUNDRED AND TWELVE DOLLARS.

[4 Adm. Rec. 647.]

District Court, S. D. Florida. June 3, 1853.

SALVAGE—COLLUSIVE SPOLIATION — ARBITRATORS' AGREEMENT TO SHARE COMPENSATION —FORFEITURE OF COMPENSATION—SALVOR'S LIABILITY FOR WRONGFUL ACTS—PROCEEDS.

[1. Neither the salvor nor any person affected by his acts is entitled to compensation for services rendered to a vessel which has been wrecked, pursuant to an agreement between the salvor and the master of the vessel, for the purpose of salvage and division of the compensation allowed therefor.]

[2. The master of a wrecked vessel has no authority, as such, to submit the question of compensation for salvage to arbitration, where he acts in bad faith, and no existing necessity for the submission exists, his duty being to consult the owners, or await a decision in admiralty; and an award made under such circumstances is void as against the owners. The North Carolina, 15 Pet. [40 U. S.] 40, followed.]

[3. Such an award is not even prima facie correct as against the owners, but the burden is on the claimants under it of showing its correctness and validity. The North Carolina, 15 Pet. [40 U. S.] 40, followed.]

[4. Although a settlement by arbitration so made may be void, yet, unless the salvors have forfeited their right by fraud or other misconduct, they are entitled to reasonable salvage, which may be allowed to them in a proceeding in admiralty brought by the owners against the proceeds of the vessel and cargo assigned as salvage. The North Carolina, 15 Pet. [40 U. S.] 40, followed.]

[5. If salvors knowingly permit the master of a wrecked vessel, with or without knowledge of the fact, to consign to one of their number, or a partner, and the parties, by agreement, settle the matter of salvage by arbitration, when a court of admiralty is within easy access, the salvage compensation is forfeited.]

[6. A purchaser, with notice, under an award so made, takes no title.]

[7. An agreement whereby a salvor agrees with the master of a wrecked vessel to give him 10 per cent. of the salvage compensation, while immoral and illegal, may be lawfully performed, but in awarding the salvage the 10 per cent. should be taken into consideration, and the compensation made that much less.]

[8. The fact that a master has voluntarily cast away or destroyed his vessel will not prevent a salvor from recovering compensation, providing he has not aided the master in the criminal design, or concealed knowledge of the transaction.]

[9. A salvor having knowledge of the master's criminal act is bound to make a full statement of the facts within his knowledge to the tribunal deciding the question of salvage.]

[10. An admiralty court has jurisdiction to entertain a libel for "collusive spoliation" by the owners of a vessel wrecked in pursuance of an agreement between the master and a salvor, as against the salvor, and all persons responsible for his acts, in personam, for all the damage occasioned by the wreck.]

[11. Money paid to prevent a sale of property liable to be proceeded against as for salvage services, and not paid over to the claimants, may be treated as proceeds, and proceeded against by the owners of the property, on a libel for "collusive spoilation" in like manner.]

[In admiralty. Libel by Samuel W. Church and others, owners of the bark Empress, against $1,712.32 salvage money in the bark.]

S. I. Douglas, for libellants.
Thomas F. King, for respondent.

MARVIN, District Judge. This is a suit in rem against $1,712.32, being salvage money on the bark Empress and cargo, commenced by Church and others, as owners of the bark. The libel alleges that, in the month of August last, this bark, then under the command of James A. Leet, sailed from Havana, with a cargo of sugar and other merchandise, for Boston, and was afterwards run on to the Florida reef by her master, in pursuance of a previous understanding and agreement entered into in the port of Havana, between him and one Manuel Acosta, claimant in this case, with the intent to make money out of the salvage, and a division between them. That while the bark was aground on the reef several wrecking vessels and men rendered her assistance, and got her off, and brought her into the port of Key West; where the salvors claimed salvage for their services. That among these salvors was Manuel Acosta, master of the smack J. A. Latham, with whom the agreement in Havana is alleged to have been made. That the claim of the salvors to salvage was submitted by them and Captain Leet to the award of arbitrators agreed upon between them; and that the arbitrators awarded salvage; and that, that portion of the salvage, given by the award to Acosta for himself, owners and crew, amounts to the sum of $1,712.32, which is alleged to have been advanced and paid by the owners of the bark, in ignorance of these facts, by their acceptance and payment of Captain Leet's draft upon them, in Boston, for the amount of the salvage and expenses. That the salvage and expenses were advanced by Wm. H. Wall & Co., of Key West, on the captain's drafts, and that this sum of $1,712.32 still remains in their hands unpaid over to Acosta and crew, and ought to be considered as so much money substituted in place of the ship and cargo; and that the award of the arbitrators was void, on account of the fraud and collusion, and conferred no title upon Acosta and crew to the money, and that the sum should be restored to the owners of the bark. The libel then prays a special monition to W. H. Wall & Co., commanding them to bring into court the $1,712.32 or show cause why they should not be required to do so, and that the money may be de-

creed to be paid to the libellants. On the return of the monition, Wall & Co. appeared and filed their answer, stating, in substance, that after the award of the arbitrators in the case of the bark Empress [Case No. 4,476], that the sum of $1,712.32 came to their hands, as the share and earnings of the smack J. A. Latham, owners, master, and crew, and that they still had the same in their possession ready to be paid as the court might direct. The court ordered them to bring in the money and deposit it with the clerk. The money being brought into court, Acosta, as master of the smack J. A. Latham, now appeared and claimed the sum of $1,027.35 for himself and four of the crew; that sum being the aggregate amount of their shares of $1,712.32 awarded to them and the owners of the smack. The owners put in no claim to the balance. Acosta also put in an answer denying the alleged bargain or understanding, and all frauds or collusion.

The case thus presented by the pleadings is mainly one of facts, and involves an inquiry into the circumstances connected with the stranding or wreck of the bark Empress. Was this bark run ashore, on the Florida reef, voluntarily and in pursuance of an agreement or arrangement entered into between the captain and Acosta, in Havana, to divide the salvage or other moneys between them? The testimony must determine this fact. Captain Fish testifies, in substance, that he was master of the smack Eliza, and Acosta of the smack J. A. Latham. That they were lying together, at the smack wharf in the harbor of Havana, opposite the city. That on his return from the city, one day, some of his men said to him, that a captain of a vessel had been then talking with Acosta, which induced him to inquire of Acosta about it. That Acosta thereupon told him, that there was a want of men and sickness in the crew, and he supposed the bark Empress, Leet, master, was to come ashore on the Florida reef, that she was laden with sugar. Witness told Acosta, if the bark was to be wrecked, he wanted a chance. Acosta agreed to this. In the same conversation, Acosta further told him that he was acquainted with the master, Captain Leet; had seen him in Key West, and that the agreement was, that the bark was to run ashore, on the Florida reef, and that he (Acosta) was to wreck the bark and give the captain $1,500. He is positive that Acosta mentioned to him, the name of Captain Leet and the bark Empress. He supposed the bark would sail a few days after the smacks. Witness did not see the bark or Captain Leet in Havana. There were plenty of men there. Witness and Acosta left Havana together, in their respective smacks, and arrived at Key West. Acosta remained at Key West one day, and the next day left in his smack. Witness did not go to the wreck. Captain Geiger testifies, in substance, that the day after Acosta arrived in Key West from Havana, he asked the witness if he would consort? The witness asked why? Acosta answered that there was two or three vessels in Havana short of crews, and he believed that one of them would get ashore on the Florida reef; that the captains had said they were coming over here for crews; and that there was a bark there laden with sugar, cigars, cochineal or indigo. Witness consorted his vessel and men with Acosta's, "vessel for vessel and man for man, for four or five days." The second day after Acosta arrived from Havana, he and witness left Key West, in their respective vessels, on a cruise together, to go as far as Knight's Key. The witness anchored for the night, at Sall Bunches, about fifteen miles from Key West. Acosta passed him, and went on to the windward. The next day he saw a sloop coming down from the windward loaded with cargo. He proceeded up the coast to where the bark had been ashore. She had been got off before he arrived, and was in the charge of Temple Pent. Acosta was there. He told witness that this was the bark that was to come over to Key West to get a crew. In the conversation at Key West, Acosta told him that he believed the bark would run ashore, not that she was to run ashore. Acosta further told him, that he had had a conversation with the captain of the bark, on board his smack in Havana, and that the captain said if he did run ashore, he would consign to a big man who, Acosta thought, was the witness. The consignment was not made to witness, nor did he get any of the salvage.

Temple Pent testifies, that when he boarded the bark Empress, she was hard and fast aground. He offered his assistance to Captain Leet, who said: "I want to make some money as well as you. How much will you give me for the privilege of wrecking?" Pent answered that he would give him 8 per cent. on the salvage that might be awarded him. The captain replied that that was not enough. Witness then said that he would give him ten per cent., which he agreed to. They then went to work, and loaded the Hawkins, and the Lavinia, and while loading the Joseph Alexander, the smack J. A. Latham, Acosta, master, arrived and was taken in as a co-salvor. After loading these vessels, the bark was got off and brought to Key West, and upon the payment of the salvage, the witness paid Captain Leet the 10 per cent., according to agreement.

It does not appear in this case what sum was awarded by the arbitrators, for the entire salvage, but it is admitted that an award was made, and that the share awarded to the smack J. A. Latham is $1,712.32, which remained in the hands of Wm. H. Wall & Co.—they having advanced the whole salvage on the captain's drafts upon the owners—which sum, not having been paid over to Acosta and crew, is the sum now brought into court, $1,027.35 of which is claimed by

Acosta and crew, as salvors, under the award; the balance, being the share of the owners of the smack, is not claimed by them. The testimony fully proves the fact that this bark was voluntarily run aground, on the Florida reef by her master, in pursuance of an agreement or understanding, had with Manuel Acosta, the claimant in this case, in Havana, to divide the salvage or other charges upon the property between them. This fact being established, the case is decided. Neither Acosta, nor any person affected by his acts, could earn or acquire any right to salvage, for any services rendered to a vessel under such circumstances. Consequently, this money belongs to the owners of the bark, and must be decreed to them.

One point, however, arises in this case, which, although not very much relied upon by Acosta's counsel, is nevertheless entitled to some consideration, and cannot, with propriety, be wholly overlooked by the court. The point is, that Acosta and crew are entitled to this money under the award of the arbitrators. There is no testimony before me as to who the arbitrators were, or what was the character of the proceedings before them. It is stated, that they were selected by the master of the bark and the salvors, and it is presumed that they were respectable and competent men, and made up their award according to their best judgment upon the facts as presented to them. The question is what authority, if any, had the master, under the circumstances, to submit this question of salvage to the arbitrament of arbitrators; and what effect or validity has the award made by them? The general duty of the master is to navigate his ship, and carry his cargo to its port of destination; and as a general rule his powers are equal to, and commensurate with, his duties. If he is compelled by stress of weather, or injuries to his ship, to put into an intermediate port; or if his ship strike upon the rocks, and is saved, or the ship be lost and the cargo saved, in all these and other cases of unforeseen accident and misfortune, his powers are commensurate with his duties and adequate to the emergency. But they do not go beyond. His duty is to do the best he can, in honest good faith, to protect, save and preserve the property committed to his care. In cases of necessity, he may borrow money on bottomry, or sell a part, or even the whole, of the property, but his authority to do so is founded on urgent necessity and good faith, to be judged of, afterwards, by the tribunals of the law. If he borrow or sell without justifiable necessity, or in bad faith, his acts are void, and the lender or purchaser will take no title. In these cases, which arise out of the ordinary line of his duty, necessity,—a real and certain necessity, not a fancied one,—and good faith on his part, seem to furnish the rule by which to determine the extent of his power. Applying these general rules to the present question, and there is no difficulty in deciding it. There was neither good faith on the part of the master, nor any necessity under the circumstances, to authorize him to submit this question of salvage to arbitration.

But the subject of the authority of the master to submit a question of salvage to arbitration has been considered by the supreme court of the United States in the case of Houseman v. The North Carolina, 15 Pet. [40 U. S.] 40. The case was this: The schooner North Carolina, laden with cotton, got ashore in the night on Pickle's reef, and was lightened by the schooner Hyder Ali, got off by removing 110 bales of cotton, and carried into Indian Key, where, by the agreement of the master and salvors, the question of salvage was submitted to Otis and Johnson, who awarded 35 per cent. upon the value of the vessel and cargo for salvage, and 122 bales of cotton were assigned in payment of the salvage on the cargo. The consignees residing in Charleston disapproved the master's acts, and caused a suit in admiralty, in the superior court of this district, to be instituted against the cotton taken in payment of salvage. Houseman appeared and claimed the cotton, as purchaser, under the award. The supreme court decided: First. That the master had no authority to bind his owners by the settlement at Indian Key. Second. That the settlement was fraudulently made. Third. That the salvors by their conduct, had forfeited all claims to compensation even for the services actually rendered. Fourth. That the owners were entitled to recover their cotton, or the value thereof.

In arriving at this conclusion the court says, that "there may be cases in which the contract of the captain in relation to the amount of salvage to be paid to the salvors, or his agreement to refer the question to arbitrators, would bind the owners. In times of disaster it is always his duty to exercise his best judgment, and to use his best exertions for the benefit of the owners of both vessel and cargo, and when, from his situation, he is unable to consult them, or their agent, without an inconvenient and injurious delay, it is in his power to compromise a question of salvage; and he is not bound in all cases to wait for the decision of a court of admiralty; so, too, when the salvage service has not been important, and the compensation demanded is a small one, the master may settle in order to proceed on his voyage." These remarks imply, that in addition to the master's exercising his best judgment, and using his best exertions, in times of disaster, that it is also his duty to consult the owners of the vessel and cargo whenever he can do so without injurious delay. They imply, also, that in some cases he is bound to wait for the decision of a court of admiralty, and not undertake himself to settle the question of salvage or to refer it to arbitrators. The court further say "that in all such cases

of settlement of salvage, unless the acts of the master are ratified by the owners, his conduct will be carefully watched and scrutinized by the court, and his contracts will not be regarded as binding upon the parties concerned, unless they appear to have been bona fide, and such as a discreet owner placed in the like circumstances would probably have made. If he settles the amount by agreement, those who claim under it must show that the salvage allowed was reasonable and just. If he refers it to arbitrators, those who claim the benefit of the award must show that the proceedings were fair, and the referees worthy of the trust. These remarks imply that even in cases where, from the smallness of the demand, or the difficulties of consulting the owners, or other circumstances, the captain is supposed to have authority to settle a question of salvage or to refer it, yet, still, such settlement or award will not be deemed to be even prima facie correct or valid, but those who claim under it must show its correctness and validity by proving the settlement to be just and reasonable, or the award fair and the referees worthy of the trust.

The facts relied upon by the court to show that the captain of the North Carolina had no authority to bind the owners are: First. That the salvage demanded was exorbitant. It was 35 per cent. Second. That he could in a very few days, have communicated with the owners at Charleston or Apalachicola. Third. No reason is assigned for this hurried and extraordinary settlement. Fourth. It was his duty to have brought the subject before the proper tribunal, at the same time advising the owners or consignees, of what had happened, in order that they might have an opportunity of attending to their own interest. The facts relied upon to show that the settlement by arbitration was fraudulently made are: First, and principally. That Houseman became, at Indian Key, the consignee of the vessel and cargo, and took upon himself, to represent the interest of the owners, when he himself was a partner with the salvors, and had a direct interest in pushing the salvage to the highest possible amount. Second. That the captain did not appear to know anything about the arbitrators, but their situation obviously placed all their feelings and partialities on the side of the salvors. If Houseman selected the arbitrators for the captain, then both arbitrators were in fact selected by the salvors. It does not appear, in the present case, whether the consignee of the Empress, in this place, was, like Houseman, a partner with the salvors, or interested in the salvage. If so it would be difficult to distinguish this case, in this particular, from that of The North Carolina. The supreme court evidently considered, in such cases, the duty of a consignee and the interest of a salvor to be in opposition and incompatible with each other. Although a settlement by agreement or by arbitration may be void on account of a want of authority in the master to make it, or on account of his bad faith, or of the salvage being unreasonable, yet, in proceeding in a court of admiralty, by the owners against the property assigned for salvage, as in the case of The North Carolina [supra], or against its proceeds, as in the present case, the salvors are entitled to have allowed them a reasonable salvage, unless they have forfeited their right by fraud or other misconduct. The Sarah Ann [Case No. 12,342]; The Perseverance, 2 C. Rob. Adm. 239; The Nostra Conceicas, 5 C. Rob. Adm. 294. The supreme court adjudged the salvage to be forfeited in the case of The North Carolina for fraud and misconduct. Let us see if we can learn in what that misconduct consisted. It is not expressly and in few words stated in the opinion, but it may be gathered from the opinion that their misconduct consisted in taking the schooner into Indian Key and there making a demand of what the court thought an exorbitant salvage and permitting and assenting to the settlement by arbitration, under the advice of Houseman, acting as the master's consignee, he being, at the time, "their partner and interested in pushing the salvage to the highest possible amount." The court says "the evidence does not show whether the master was apprised of Houseman's connection with the salvors." And if he were ignorant of that connection, then, the salvors permitted him to act under a false impression when it was their duty to undeceive him. But the court says "the master's conduct leads strongly to the conclusion that he was not deceived, and that he knowingly betrayed the interest of his owners." If so, the salvors knowingly aided him in that betrayal.

The law of salvage, like all laws formed in reason, is tolerant of the frailties and imperfections of men. It often overlooks their errors of judgment, and mistake of ignorance, and pardons much in their conduct which may be attributed to a keen sense of interest, provided their conduct does not go beyond the bounds of common honesty and fair dealing. But there are principles of right and wrong, of honesty and dishonesty, of truth and falsehood, founded in the law of nature, known to all men, and recognized in the laws of all societies without a general observance of which no society can long exist. The great fundamental laws every court must enforce. The law cannot, therefore, tolerate in salvors dishonesty, corruption, fraud, falsehood, either in rendering the service, or in their proceedings to recover the salvage. If, therefore, salvors knowingly permit the master of a wrecked vessel to consign to one of their number, or a partner, and do not inform him of that connection, or he, knowing that connection, nevertheless, does make such consignment, and they afterwards go on to settle by agreement or arbitration the matter of salvage, when there is a tribunal, established by the government within reach, clothed with

authority to make such settlement and protect the rights of all parties, and which holds the legal standard by which to measure the value of their services, there is no escaping in my judgment from the conclusion, that their salvage, under the authority of the decision made by the supreme court, may be justly and legally forfeited, and purchasers under the award, with notice, will take no title. The settlement being at Indian Key, and the fitness of the arbitrators not shown, are circumstances noticed by the court, but not as important in themselves, for had the settlement been, in other respects, honest and legal, the place of the settlement would not have made it illegal. By applying the principles of the decision of the supreme court to the present case, there is no difficulty in deciding the award of the arbitrators to be void. See, also, the case of The Britain, 1 W. Rob. Adm. (N. S.) 40, on the subject of the authority of the master of the saving vessel to bind his crew by submission to arbitration.

There is another feature in the history of this case disclosed by the proof to which I feel bound to advert. Temple Pent, not Acosta, was the first person to board the Empress when she lay upon the reef. He was met by Captain Leet with the declamation, "I want to make some money as well as you. How much will you give me for the privilege of wrecking?" This was really a proposal, on the part of Captain Leet, that the two should take the property of other people, without any right, but under color of salvage, and apply it to his own use; that Pent should aid him to appropriate to himself a portion of the cargo. Pent agreed to give him, and did give, 10 per cent. on the salvage. The immorality and illegality of this transaction is too plain for argument or comment. Pent's duty was, not to listen to the captain's proposal, but to reject it at once. Let the property be lost, if a captain will not permit it to be saved without the salvor's consenting to bribe and corrupt him, and that, too, with money belonging to neither of them. The making of such agreement is immoral and unlawful, but when made, it may be lawfully performed, if salvage be allowed, by taking the sum agreed to be given the captain into consideration in fixing the amount of salvage, and making the salvage so much less. In this manner, the agreement may be performed to the owner of the property, who, if anybody, is entitled to the benefit of it, and not the captain.

In the case of The James,[1] the court of appeals of Florida decided, in 1839, that an agreement to give the master of the ship a portion of the salvage was unlawful and immoral, and worked a forfeiture of the salvage. And the court forfeited the salvage of vessels and men in that case, on account of such agreement. The principle of law is that the master cannot, in any manner, directly or indirectly, lawfully make any money out of the wreck of his own vessel, or out of any business growing out of the wreck; and any agreement or arrangement enabling him to do so is deemed, in law, fraudulent and corrupt. Masters sometimes voluntarily cast their vessels ashore on this coast, and bore holes in them, or burn or otherwise destroy them without any previous communication or collusion with any of the wreckers. When this is the case, the wreckers, by saving the property, entitle themselves to salvage, provided they do not forfeit it by aiding the master in his criminal design; and do not conceal their knowledge of the transaction. But they are bound to make a full statement of the facts to the tribunal that decides upon the question of salvage, and to give evidence of the facts within their knowledge in order to a conviction of the master. Concealment in such cases is a participation in the crime.

One further point remains in the case, that of the jurisdiction of the court. Ships and their cargoes, crews, and passengers, in a voyage, upon the high seas, are governed and protected by the maritime law, which law is administered, appropriately, but not exclusively, in the admiralty courts. Assaults, beatings, imprisonments, collisions, pillage, unlawful seizures or restraints, spoliations and depredations upon property, tortious or collusive wrecks, unlawful deviations and negligences, and other wrongs, committed or happening upon the high seas, are within the jurisdiction of these courts. The jurisdiction in the present case is, I conceive, founded in a marine tort which consisted in the tortious wreck of the Empress, to which Acosta was a party, by his previous bargain, and by being present and aiding in the main design, and seeking to derive advantage from it. The act may be termed, in the language of the maritime law, collusive spoliation; and Acosta, and all persons responsible for his acts, may be sued, in admiralty, in personam for all the damage occasioned by the wreck. The libel does not seem to be drawn with reference to this idea of the foundation of the jurisdiction, but still it states the facts in such a manner as to enable the court to take jurisdiction and decree upon them.

The jurisdiction, in the present case, may be considered in another point of view. If goods be wrongfully taken at sea and brought to the land or if rightfully taken at sea, as by salvors, and afterwards wrongfully withheld, they may be seized in admiralty, and restored to the rightful owner. Bacon's Abr. tit. "Admiralty," B.; [Houseman v. The North Carolina], 15 Pet. [40 U. S.] 48. The libel seeks this remedy and is in rem against $1,712.32, which, it alleges, stands in place of so much cargo as the money represents; the cargo having been wrongfully taken at sea, and wrongfully withheld on land, under a pretended claim of salvage, and the money having been paid or placed

[1] [Not reported.]

in lieu thereof. Were this money a deposit in court, as a security for salvage, it would be restored; or were it the proceeds of an actual sale of cargo, it clearly might be proceeded against (Willis v. Commissioners of Appeals in Prize Causes, 5 East, 23); or, were it cargo itself, the case would be the same in principle as Houseman v. The North Carolina, 15 Pet. [40 U. S.] 48, and Peisth v. Ware, 4 Cranch [8 U. S.] 347. But as it is neither cargo nor proceeds of an actual sale, it is agreed that the suit is really for money paid and advanced, or had and received, over which it is conceded that the admiralty has no jurisdiction. But the whole subject matter of the dispute being a marine tort, and a pretended claim of salvage, as to which the court has a clear and peculiar jurisdiction, the objection here raised goes not so much to the court, as to the form of the remedy, i. e. whether the suit should be in personam or in rem. And I think it would be refining too much to say that money paid to prevent a sale of property liable to be proceeded against may not be treated as proceeds of that property and be proceeded against in like manner, when that money has not been paid over to the claimants, but remains in the hands of a third person. 5 East, 32; Sheppard v. Taylor, 5 Pet. [30 U. S.] 675; Brown v. Lull [Case No. 2,018]. For the purposes of the trial Acosta has admitted the libellants, Church and others, to have been the owners of the bark; but proof of their ownership, at the time of the disaster, must be made to authorize the decreeing of the money to them. Upon such proof being made, the money will be decreed to them, or their authorized agent, and Acosta condemned in costs. U. S. v. La Jeune Eugenie [Case No. 15,551].

[NOTE. For the determination of a subsequent suit by one of the owners of the cargo to recover moneys paid by him for salvage compensation and other expenses, see Shelton v. Church, Case No. 2,714, next following.]

Case No. 2,714.

CHURCH et al. v. SHELTON.

[2 Curt. 271.][1]

Circuit Court, D. Massachusetts. May Term, 1855.

COLLUSIVE SPOLIATION — SUIT BY SHIPPER — ADMIRALTY JURISDICTION — EVIDENCE — PROCEEDINGS IN OTHER SUIT.

1. Where a master fraudulently concerted with wreckers to strand his vessel and they came to his relief, and the libellant as owner of the cargo paid a large sum of money for salvage, it was held that the admiralty had jurisdiction of a suit in personam, against the owners, founded on the contract made by the master as their agent, by the bill of lading, to convey the merchandise safely, dangers of the seas excepted.

[Cited in The A. M. Bliss, Case No. 274; The Electron, 48 Fed. 690.]

2. Ordinarily a libel filed by a party to another suit, cannot be given in evidence against him as his confession. But if he brought the suit as a trustee, and recovered, the cestuis que trust may put the whole record in evidence, to show the recovery and the title on which it rested.

[Cited in Richardson v. Winsor, Case No. 11,795.]

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

F. C. Loring, for libellant.

Bell & Goodrich, contra.

CURTIS, Circuit Justice. This is an appeal from a decree of the district court, sitting in admiralty. [Unreported.] The libel alleges that in August, 1850, the libellant caused to be shipped on board the bark Empress, Leet, master, belonging to the respondents, then lying at Havana, in the island of Cuba, 1,588 boxes of sugar, of the value of forty thousand dollars, to be carried to Boston, and delivered to the libellant, for an agreed freight. That bills of lading in the usual form were signed by the master making the sugars deliverable, dangers of the seas excepted, to the libellant or his assigns. That in the course of the passage from Havana to Boston, the vessel got ashore on one of the reefs in the neighborhood of Key West, was relieved by wreckers, and went into that port in distress. The master there referred to arbitrators the question of the amount of salvage; and the libellant, upon information of what was thus awarded as due from him, paid the sum of six thousand two hundred dollars, as and for his contributory share of the salvage compensation and its attendant necessary expenses. Thus far, the averments of the libel are admitted by the answer. The libel further alleges that the stranding of the bark was done by design of the master, in barratrous concert with the persons who came to her relief as wreckers, and with the purpose of sharing between the master and the wreckers, the sum which might be awarded as a salvage compensation. That all this was unknown to the libellant, until after he had finally paid his alleged contributory share, and had received his property. That the respondents also were ignorant of the truth, until after the money had been contributed and paid over, to satisfy the salvage claim; but that having ascertained the fraud, and that some portion of the money which they, in behalf of all concerned had paid, towards the claim for salvage, was still in the hands of the agents in Key West, who had received the same for the salvors, the respondents instituted a suit in the court of admiralty in Key West, in their own names, and upon allegations of the fraud above described, recovered the money, part of which had been contributed by the respondents. [Case No. 2,713.] The answer admits that

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

the one of the respondents who was the managing owner of the bark, gave a power of attorney to a person in Key West to bring a suit to recover back so much of the money paid for salvage compensation, as was then in the hands of third persons there; and that when a recovery had been had, the same managing owner gave another power of attorney to receive the avails of the suit. But it denies that the bark was run on shore by design, and alleges it was by a peril of the sea.

The libellant has offered in evidence, an exemplification of the record of the suit in admiralty at Key West, brought by the respondents, first, as evidence of their confessions of the facts therein alleged, among which is the barratrous stranding of the bark by the master, in concert with the wreckers,—and second, that the decree being in rem, is conclusive evidence of the facts which it finds, and that it finds, though not in terms, by necessary implication, all the essential facts alleged in the libel.

Two principal questions have been argued at the bar. The first is whether this court, as a court of admiralty has jurisdiction. The second is, whether the record of the suit at Key West is admissible in evidence in this case. The first question has been argued as if this were a suit to recover back from the respondents money which they had received at Key West, by reason of the suit there. Viewed solely in that aspect, it would be difficult to sustain the jurisdiction of the admiralty; for it would be only another form of an action for money had and received. But I think this not the correct view of the relations of these parties. The owners of this vessel are responsible for the contracts made by its master within the scope of his authority as such. It is not questioned that he was authorized to sign the bill of lading of these goods, promising to deliver them to the libellant, dangers of the seas only excepted. By this promise he bound the respondents. This promise was broken; for instead of delivering the merchandise to the libellant, he fraudulently caused it to come into the hands of wreckers, and concerted with them a pretended lien thereon for salvage; and caused the libellant to pay a large sum of money to get possession of his property, instead of keeping the promise in the bill of lading and delivering it to him free from any such claim. That the contract contained in the bill of lading was broken, if the allegations in the libel are true, is clear. That the libellant has, without fault on his part, and only through the barratrous conduct of the respondents' master, suffered damage to the amount he has paid in ignorance of the facts, to relieve his property from a supposed lien for salvage, is also clear. And there can be no doubt, since the decision of the supreme court of the United States in New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344, that the admiralty has jurisdiction of such a contract of affreightment, in personam, as well as in rem. Having jurisdiction over the entire contract, it will proceed to inquire into all its breaches, and all the damages suffered thereby, however peculiar they may be, and whatever issues they may involve. Upon the question of the admissibility of the exemplification of the record of the suit at Key West, it has already been stated, that it is admitted in the answer, that the suit was instituted under a power of attorney executed by one of the respondents, who was the managing owner of the bark. And it appears by the record, that the object of the suit was, to recover a sum of money which had been paid over to certain agents of the alleged salvors, by the respondents, and remained in their hands undistributed; that the principal alleged salvor became a party to the proceeding, and a recovery was had, the court taking jurisdiction in the admiralty, upon the ground, as is stated, that it was a case of collusive spoliation, which was a marine tort, and that the money in the hands of the agent of the asserted salvors, was substituted for the property saved, and might be followed by a proceeding in rem, as the property itself could be; and that it is also admitted in the answer, that the same managing owner, after a decree in favor of the owners, gave another power of attorney to receive the money from the registry of the court.

The question whether a bill in equity, or a libel in the admiralty, can be used in evidence as a confession by the party filing it, of the particular facts stated therein, has been the subject of much doubt. Mr. Phillips, though he admits there is a conflict of decisions, inclines to the opinion the evidence ought to be received. 1 Phil. Ev. 371; 2 Phil. Ev. 28. Mr. Greenleaf says it is admissible, though very feeble evidence, so far as it may be taken as the suggestion of counsel. 1 Greenl. Ev. 225; 3 Greenl. Ev. 263. Mr. Daniell, though he does not consider it evidence at law, declares it is so in equity. 2 Daniell, Ch. Pr. 976. On the other hand, Mr. Gurley (Eq. Ev., 2d Ed., 426) denies that the statements of fact in a bill can be used against the complainant as confessions.

In Boileau v. Rutlin, 2 Exch. 664, decided in 1848, the court of exchequer, after very careful examination of all the previous authorities, at law and in equity, in England and Ireland, came to the decision that a bill in chancery is not evidence of the truth of the facts stated in it, as against the party in whose name it is filed, even though his priority be shown; but is only admissible to show that a suit was instituted, and the subject-matter of it. I consider this decision to be in conformity with the weight of authority in this country. The American cases are collected by Cowen & Hill (volume 4, p. 48). More recent decisions are, Adams v. McMillan, 7 Port. [Ala.] 73; Durden v. Cleveland, 4 Ala. 225; Isaac's Lessee v. Clarke, 2 Gill, 1. But though I do not think

this record is admissible merely as evidence of the confessions of the respondents, there is another ground upon which it may be competent evidence. The libellant was the freighter, the respondents the owners, of a vessel, which met with what was believed to be, a general average loss. The managing owner saw to its adjustment, and collected from the respondent his contributory share for the purpose of paying it over. The libellant now alleges, among other things, that the respondents did not finally part with this money. That they brought a suit, arrested the money, tried their title to it, upon the ground that the claim, out of which the general average contribution grew, was a fraud, got a decree in rem, and authorized their agent to receive the money, or some part of it. If this be true, the libellant was the equitable owner of at least a part of what was thus recovered, and may, undoubtedly, show its recovery, and the title upon which the recovery was had. For this purpose, all the authorities agree the record would be admissible. And it is wholly immaterial for this purpose, whether the court had jurisdiction or not. The pertinency of the evidence, or its validity, does not depend on the validity of the decree of the court. If the respondents had made a claim to this money in pais, upon the same ground, and obtained it, their acts and the declarations accompanying them, and the receipt of the money, might be shown. Here, also, it is competent to prove that they received the money under a claim of title, which made the libellant interested in what was recovered; and as the claim was made, and the recovery had, in a court, which, de facto, took jurisdiction, the production of a copy of its record, accompanied by evidence, aliunde, of the power given by the respondents to receive the money under the decree, is competent proof of the claim made, its nature and grounds, and the recovery had. I am strongly inclined to the opinion, also, that the court at Key West had jurisdiction; and that its decree has the usual legitimate operation of decrees in rem. But I have not thought it necessary to examine the question, for the reasons drawn from the relations of these parties to each other and to the subject-matter of the suit. This evidence being admissible, has a pretty strong tendency to support the allegation of the libel that there was a fraudulent stranding of the vessel by concert between the master and wreckers. And the case is entirely bare of evidence to oppose this allegation. Neither the master, nor any one from on board of the vessel, nor any salvor, or other person, is examined by the respondents, and no suggestion of any reason, why some of these are not produced.

By consent of parties the libellant has, in this court, amended his libel, so as to allege, that some of the sugars which arrived, were damaged by stranding. It was also agreed in the district court, by a written stipulation on the record, that the decree there, which had been made for the libellant, should be for a nominal sum, and that instead of referring the cause to an assessor, that the amount should be increased or diminished here as might be found just. Let the case be referred to an assessor to ascertain the amount of damage, including the damage done to the sugars, by the stranding alleged in the libel, or by bad storage, if any, and all moneys paid by the libellant to the respondents to relieve the goods from an asserted claim for salvage compensation, making to the respondents all just allowances.

Case No. 2,715.

CHURCHILL et al. v. The BRITISH AMERICA.

[9 Ben. 516.][1]

District Court, E. D. New York. May, 1878.

COLLISION — LIMITATION OF LIABILITY — THE RIGHTS OF FOREIGNERS—PRACTICE—INJUNCTION.

1. The statutes of the United States, limiting the liability of ship-owners, Rev. St. 4282 to 4289, cannot be resorted to for the purpose of limiting the liability of a foreigner for a collision between an American and a foreign vessel, occurring on the high seas and beyond the territorial limits of the United States.

[Cited in Re Long Island Transp. Co., 5 Fed. 620.]

2. Courts of admiralty of the United States are authorized in a proper case to apply the rule of the general maritime law according to which the extent of the liability of owners of foreign vessels for collisions upon the high seas may be determined.

3. Where a British ship has been proceeded against in a district court of the United States, for a collision, happening on the high seas, and the parties affected have appeared, such district court has jurisdiction to decree the owners of such ship to be entitled to the benefit of a rule of the general maritime law, permitting them to abandon their vessel and freight, and thereupon to be exempted from further responsibility.

4. The district court has the power to issue an injunction order restraining the prosecution of suits against the ship and the ship-owners who have sought the benefit of the rule of the maritime law limiting their liability. Such an order is an essential part of the relief intended to be conferred by the rule of the maritime law.

5. The libellants in this court, having also commenced an action in personam against the owners of the ship in the southern district of New York, and having been unable to serve process upon any of them because of their being foreigners and non-residents, and such owners never having voluntarily appeared in that action, the injunction prayed for was ordered to be issued, provided that the ship-owners should first enter their appearance in the action pending in the southern district.

[In admiralty. Libel by George Churchill and others against the ship British America to recover damages caused by collision.]

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

W. W. Goodrich, for libellant.
Scudder & Carter, for Miller.

BENEDICT, District Judge. On the 12th day of February, 1878, the above-named defendants, who are the owners of the American brig called the Carrie Winslow, commenced an action in rem in this court against the British ship called the British America, to recover the sum of $201,000, being the damages alleged to have been sustained by reason of a collision between the two vessels above mentioned. [See Case No. 1,895.] The value of the British America being far less than the damages claimed, another action was commenced by the same libellants, against the owners of the British America, to recover of them in personam the same damages. This latter action was commenced in the southern district of New York, and as yet no service of process has been effected therein nor any appearance entered.

Thereafter the owners of the British America commenced this proceeding to obtain from this court a limitation of their liability to the value of their vessel at the time of the collision, and an injunction restraining the farther prosecution of suits against them to recover damages arising out of this collision. This proceeding was commenced by the filing of a libel in which, while denying any liability for the collision, the owners of the British America claim that in any event their liability is limited to the value of their vessel, and they tender a stipulation with sufficient sureties for the full value of the vessel at the time of the collision, whereby they agree to pay into court, for distribution in this action, the amount of such value, and they pray that in case it be found that the collision in question arose from fault on the part of the British America they may have the benefit of the limitation of liability according to the general maritime law, and as provided by section 4283 of the Revised Statutes of the United States. They further pray that a monition issue citing and admonishing all persons having claims against them arising out of the collision referred to, to appear and make proof of their respective claims, and that the value of said vessel may be apportioned by this court among the parties entitled thereto, and that an order may be made to restrain the further prosecution of all and any suit or suits against the said ship or her owners, in respect of any claim arising out of said collision, and that the depositions already taken in the action against the ship may be used on the trial of this action, and that such further relief may be granted as to the court shall seem meet.

Having filed their libel the owners of the British America now ask this court to ascertain by appraisement the value of the ship, and for leave to file a stipulation to represent the vessel according to the prayer of their libel, and that the monition prayed for be now issued, and also that meanwhile, and until the hearing of the cause, an order be made restraining the owners of the Carrie Winslow and her cargo from prosecuting any suits against them to recover damages arising out of the collision in question. Notice of those several applications having been given to the proctors of the owners of the Carrie Winslow, and of the officers and crew, and of the owners of the cargo, an appearance for those parties has been entered in this proceeding by their proctor and they now oppose the present motion.

The ground taken in opposition is that the owners of the British America are not entitled to a limitation of their liability to the value of the vessel, and that the court has no jurisdiction to entertain the present proceeding or to grant the relief prayed for, by reason of the fact that the ship British America is a British vessel, and the collision referred to occurred on the high seas and without the territorial limits of the United States. In disposing of this objection the first question to be considered is, whether the statute of the United States, limiting the liability of ship-owners (section 4283, Rev. St.), has any effect to limit the liability attaching to the owners of this British vessel by reason of a collision occurring on the high seas and without the territorial limits of the United States.

My opinion in regard to the extra territorial effect of this statute of the United States has been recently expressed in the case of Thomassen v. Whitwell [Case No. 13,929]; it is therefore sufficient here to refer to the opinion there delivered, for the reasons which have led me to the conclusion that the statute of the United States to which reference has been made, has no extra territorial effect and cannot be resorted to for the purpose of limiting the liability of a foreigner for a collision occurring on the high seas and beyond the territorial limits of the United States.

The question then arises whether there may be any rule of the general maritime law by which the extent of the liability of these ship-owners for the collision in question is fixed. And it must here be held—as in the case just cited it was held upon the authority of the supreme court of the United States—that there is a rule of the general maritime law, according to which the extent of the liability of ship-owners for collision upon the high seas may be determined, and which courts of admiralty are authorized in a proper case to apply.

But it is supposed that those conclusions are not sufficient to dispose of the present case, because of the fact that one of these vessels was American and the other British, and here the application is by British subjects to have enforced by an American court against American citizens a rule from which these applicants could derive no benefit in the courts of their own country, inasmuch as the English have enacted a statute, in terms made applicable to foreigners, which

deprives not only citizens but foreigners in the courts of that country of any benefit of the rule of the general maritime law.

Whether a foreigner, in such a matter as this, is entitled to ask at the hands of this court a greater exemption than is allowed him by the laws of his own country, and whether it rests with the courts to take notice of the absence of reciprocity in statutory provisions respecting the limitation of the ship-owner's liability, and whether the enactment of such a statute as the English statute above referred to, can have the effect to suspend the operation of the rule of the maritime law in regard to the citizens of that nation, and whether the rule of the maritime law can be given effect in a case like this between a British and an American vessel, are questions that have not been very fully argued before me, and cannot properly be finally disposed of upon this motion. It appears sufficient, therefore, for the present occasion, to say that it is not so clear to my mind that these ship-owners are without a right to resort to this court for the relief they seek, as to justify me in refusing them protection during the pendency of the litigation, provided such protection is a part of the relief that this court is competent to grant.

It has been contended that this court has no jurisdiction to entertain such a proceeding as this, and if the proceeding can be upheld, that the court is without power to issue a restraining order, such as is sought to be obtained by the present motion. If these ship-owners, whose vessel has been proceeded against in this court, and who have also been sued in another district upon demands arising out of the same collision, have the right to be exempted from further liability upon abandoning their interest in the vessel, no reason occurs to me upon which to deny them access to the courts for the purpose of enforcing that right, and that they may resort to a court of admiralty for that purpose seems to follow from the decision of the supreme court in the case of the City of Norwich (Wright v. Norwich, 13 Wall. [80 U. S.] 104) and the general admiralty rules Nos. 54, 55, 56, and 57. In the case cited it was held that courts of admiralty have jurisdiction to enforce the provisions of the statute in respect to the limitation of the liability of ship-owners, because of the subject matter, and if a proceeding to take the benefit of a statute in regard to the limitation of a ship-owner's liability, is within the jurisdiction of the admiralty, by reason of the subject matter, a fortiori is a proceeding to take the benefit of a rule of the general maritime law upon the same subject within that jurisdiction. I am therefore of the opinion that this court, where the vessel is being proceeded against, and where the parties to be affected have appeared, has jurisdiction to decree these libellants to be entitled to the benefit of a rule of the general maritime law, permitting the ship-owner to abandon his vessel, and thereupon be exempted from further responsibility.

An essential part of the relief intended to be conferred by the rule of the maritime law, to which reference has been made, consists in restraining actions brought to enforce the liability from which exemption is sought. This is made evident by the provision in respect to an injunction, which appears in the rules prescribed by the supreme court for proceedings taken to obtain the benefit of the statute. The only difference between such a proceeding and the one under consideration is, that the former is taken to obtain the benefit of a limitation, declared by a statute of the United States, while this is taken to obtain the benefit of a limitation declared by the general maritime law. The two proceedings are alike in character, have the same object in view, should be conducted substantially in a similar manner, and must be given equal scope and effect. The general admiralty rules referred to, therefore, not only make manifest that the power to issue such an injunction is a power necessary to the exercise of the jurisdiction in question, but they furnish authority for the existence of such a power. The power, by virtue of which an injunction is issued in proceedings under the statute, is not derived from the general admiralty rules, but follows from the provisions of the constitution and the statutes by which the district courts of the United States are given jurisdiction of all admiralty and maritime cases. The general admiralty rules do not confer jurisdiction, but simply regulate the manner of exercising the jurisdiction conferred by law under authority derived from the statute which makes the form and modes of proceeding, in cases of admiralty and maritime jurisdiction, subject to regulation by the supreme court, by rules prescribed from time to time, not inconsistent with the laws of the United States. Rev. St. § 913.

Since then the power to issue such an injunction as is here prayed for, is by the general admiralty rules recognized as existing in the district courts, those rules, of themselves, furnish authority in favor of the existence of the power here sought to be called into action. For these reasons I am of the opinion that the application for a preliminary injunction cannot be denied upon the ground of want of power in this court to grant the relief sought.

A single feature of this case remains to be noticed. On the part of the creditors of this ship it is contended that if it be held that this court has the power to restrain their proceedings, brought to recover the damages they have sustained by the collision, the injunction should issue only upon the condition that the ship-owners enter their appearance in the action already commenced in the southern district of New York. In this

I am of the opinion that the creditors are right, and for this reason. The questions involved are new, and the proceeding here instituted is without known precedent. An injunction at the present time without such a condition, might inflict irreparable injury, because the creditors may now be able to serve their process, or compel an appearance by attaching property in their action in personam, but may be wholly unable to do so hereafter, and may thus lose the benefit of their action, although the final decision as to the present proceeding should be in their favor; while on the other hand no injury will result to the ship-owners by so appearing, if in the end the present proceeding be sustained. These considerations appear to me to entitle the creditors of this ship to ask of the ship-owners, as a condition of obtaining an injunction at this time, that they appear in the action now pending against them in the southern district of New York.

The order will therefore be that a monition issue, according to the prayer of the libel, and that an appraisement of the vessel be had, and that upon the filing in this proceeding of the stipulation tendered in the libel, a preliminary injunction issue restraining, until the final decree of this court in this cause, all proceedings on the part of the parties now before the court, to enforce against these libellants any liability arising out of the collision in the pleadings mentioned, either in the two actions heretofore mentioned, or any other action, provided the libellants first duly enter their appearance in the action pending in the southern district.

Because of the novelty of the proceeding the injunction should also be so framed as to permit testimony to be taken in the action in rem, as well as in the one in personam, provided consent be given that such testimony be read in any of the three proceedings. If for any cause it be deemed undesirable to enter such appearance at this time, the libellants may take a denial of the present motion, with leave to renew the same when they shall be served with process in the action referred to, or their appearance be otherwise compelled.

Case No. 2,716.

The CHUSAN.

[1 Spr. 39.] [1]

District Court, D. Massachusetts. Dec., 1842.[2]

LIEN ON FOREIGN VESSEL FOR SUPPLIES—WAIVER—STATE STATUTE.

1. Vessels belonging to one state when in the ports of another, are deemed so far foreign that a lien for necessary supplies is given by the general maritime law.

[Cited in The E. A. Barnard, 2 Fed. 722.]

2. The statute of New York was not intended to impair such liens; and if it were so intended, it would be nugatory. Such liens are beyond the reach of state legislation.

3. Taking the negotiable note of one of the owners, on time, is a waiver of such lien, upon the authority of The Nestor [Case No. 10,126].

[In admiralty. Libel by J. & G. Ring against the Massachusetts barque Chusan for supplies furnished in the port of New York; Broughton & Cushing, claimants.]

Mr. King, for libellants.

F. C. Loring, for claimants.

SPRAGUE, District Judge. This is a libel against a vessel owned in Massachusetts, promoted by material men, who furnished necessary supplies to her while in the port of New York. There is no question that vessels belonging to one state, when in the ports of another, are deemed to be so far foreign that a lien for necessary supplies is created by the general maritime law. The General Smith, 4 Wheat. [17 U. S.] 438.

But it is contended that such lien has been prevented or defeated. In the first place it is said, that by a statute of New York (2 Rev. St. 493), all such liens are terminated when the vessel leaves the state. To this there are two answers; first, that the statute was not intended to impair liens arising under the general maritime law; and second, that if it were so intended, it would in that respect have been nugatory. Such liens are beyond the reach of state legislation. The courts of the United States will enforce them to their full extent, notwithstanding any attempt to abrogate or limit them, by local legislation.

The second objection is far more formidable. It appears that the supplies were furnished upon a credit of six months, and were charged by the libellants to the barque Chusan and owners. A negotiable note, signed by one Broughton, a part owner, was subsequently taken by the libellants, and a receipt signed by them was given therefor at the foot of the bill, as follows: "Received from N. Broughton, his note at six months, from September 3d, for the above amount." The note was negotiated by the libellants, and was not in their possession at maturity. Not being paid by Broughton, they took it up as indorsers, and it is now offered to be surrendered.

It is contended that the taking of the note was, under the circumstances, a waiver of the lien. This objection I sustain solely upon the authority of the opinion given by Mr. Justice Story in the case of The Nestor [supra]. In that case, speaking of a negotiable note given by the owner, on time, he says "that the receiving of such a note is direct proof that credit is given to the personal responsibility of the owner, and presumptive proof that no credit is given to the ship; or, in other words, that there is a waiver of any lien on the ship."

The circuit court for this district having a

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

[2] [Reversed in Case No. 2,717.]

right to revise the decrees of this court, I think it proper that so strong and direct an opinion, deliberately given and promulgated by that tribunal, should govern the present case, although such opinion was not necessarily called for by the point decided. Libel dismissed.

Harris v. The Kensington [Case No. 6,122]; 1 Pars. Mar. Law, 492, note 3. See, also, Page v. Mackey [Case No. 10,663]; Bristowe v. Whitmore, 35 Law T. 175; Page v. Hubbard [Case No. 10,663]; Moore v. Newbury [Id. 9,772].

[NOTE. Libellants appealed to the circuit court, where the decree of the district court was reversed, and a decree entered for libellants. See Case No. 2,717, next following.]

Case No. 2,717.

The CHUSAN.

[2 Story, 455.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1843.[2]

LIEN ON FOREIGN VESSEL FOR SUPPLIES AND REPAIRS—WHAT LAW GOVERNS—STATE STATUTE—REGULATION OF COMMERCE—FEDERAL COURTS—WAIVER OF LIEN.

1. The barque Chusan, belonging to Massachusetts, being libelled for materials supplied for repairs done to it in the port of New York, it was *held*, that a lien therefor attached to the barque, as being a foreign vessel; but that the nature, extent, and character of such a lien is to be determined by the general maritime law, and not by the local law of any particular state; and, therefore, that it was not destroyed by the departure of the barque from New York, according to the statute of New York of 1829, (volume 2, p. 493).

[Cited in Leland v. Medora, Case No. 8,237; The Globe, Id. 5,483; Page v. Hubbard, Id. 10,663; The Canada, 7 Fed. 121; The Allianca, 56 Fed. 612.]

2. In a lien for supplies or repairs to a domestic vessel, the admiralty jurisdiction depends upon the local law of the particular state where they are made; but questions of lien upon a foreign vessel are governed by the general maritime law, and not by the local law of any state.

[Cited in The Eclipse, Case No. 4,268; U. S. v. New Bedford Bridge, Id. 15,867; The Alida, Id. 199; Crapo v. Allen, Id. 3,360; The Ann C. Pratt, Id. 409; Ashbrook v. The Golden Gate, Id. 574; Hill v. The Golden Gate, Id. 6,492; The N. W. Thomas, Id. 10,386; Pendergast v. The Kalorama, 10 Wall. (77 U. S.) 212; The Comet, Case No. 3,050; The Albany, Id. 131; The E. A. Barnard, 2 Fed. 722; The Lyndhurst, 48 Fed. 841.]

3. The statute of New York (2 Rev. St. 1829, pt. 3, c. 8, tit. 8, § 1, p. 493), giving a lien to material men for repairs and supplies, &c., is to be considered as remedial in its nature, and not as restrictive; and is perfectly constitutional, as applied to cases of domestic vessels, but not as applied to foreign vessels.

[Cited in Ashbrook v. The Golden Gate, Case No. 574; Hazlehurst v. The Lulu, 10 Wall. (77 U. S.) 203; The Acme, Case No. 28.]

4. The courts of the United States, in the exercise of their admiralty and maritime jurisdiction, are exclusively governed by the legislation of congress, or, in the absence thereof, by the general maritime law; and no state can, by its local legislation, narrow or enlarge such jurisdiction.

[Cited in U. S. v. New Bedford Bridge, Case No. 15,867; The Passenger Cases, 7 How. (48 U. S.) 555; The New York v. Rae, 18 How. (59 U. S.) 226; Shannon v. Cavazos, 61 U. S. (Lawy. Ed.) 929; McAllister v. The Sam Kirkman, Case No. 8,658; The Kate Tremaine, Id. 7,622; The Selah, Id. 12,636; Hall v. De Cuir, 95 U. S. 499; Watts v. Camors, 10 Fed. 149; The Graf Klot Trautvetter, 8 Fed. 833; The H. E. Willard, 53 Fed. 600.]

5. The power given by the constitution of the United States to congress, to regulate commerce with foreign nations, and among the several states, includes the power to regulate navigation with foreign nations, among the states, and is an exclusive power in congress, which may be exercised with or without positive regulations.

[Cited in the dissenting opinion in Thomas v. Osborn, 19 How. (60 U. S.) 43.]

6. Congress, by conferring the admiralty and maritime jurisdiction upon the courts of the United States, have, by implication, adopted the maritime law, inasmuch as such law is the law of the admiralty jurisdiction, until modified by congress. The case of The Nestor [Case No. 10,126] affirmed.

7. Where the libellants, being ship-chandlers, furnished materials to the barque Chusan, while in New York, and took therefor the promissory note of one of the owners, and gave a receipt, it was *held*, that the matter was governed by the lex loci, by which a note taken for a debt is only conditional payment, until it is duly paid.

[Cited in The Active, Case No. 34; Brown v. Noyes, Id. 2,023; Leland v. The Medora, Id. 8,237; Macy v. De Wolf, Id. 8,933; Reppert v. Robinson, Id. 11,703; The Young Mechanic, Id. 18,180; Carter v. The Byzantium, Id. 2,473; Logan v. The Aeolian, Id. 8,465; Harris v. The Kensington, Id. 6,122; McAllister v. The Sam Kirkman, Id. 8,658; The Bird of Paradise, 5 Wall. (72 U. S.) 561; The Emily Souder v. Pritchard, 17 Wall. (84 U. S.) 670; The Champion, Case No. 2,583; In re Hurst, Id. 6,925.]

8. By the general maritime law, material men have a threefold remedy for supplies and materials furnished to a foreign ship; 1st, against the vessel; 2d, against the owners; 3d, against the master; and neither remedy is displaced, except upon proof that an exclusive credit was given to one of the parties, or to the vessel.

[Cited in The Paul Boggs, Case No. 10,846; The Mary Bell, Id. 9,199.]

9. The lien of material men upon the vessel must be enforced within a reasonable time after the debt is due, or it will not avail against a bona fide purchaser, without notice.

[Cited in Packard v. The Louisa, Case No. 10,652; Leland v. The Medora, Id. 8,237; The John Walls, Jr., Id. 7,432; The Velocity, Id. 16,911; The Celestine, Id. 2,541; The Dubuque, Id. 4,110; The Lyndhurst, 48 Fed. 840.]

10. Under a bill in equity, proof is not admissible with respect to matters not alleged in the bill or answer; and, therefore, one of the parties, who claimed to be a purchaser for a valuable consideration, without notice, not having so stated in his answer; it was *held*, that evidence with regard to the fact was not admissible.

[Cited in The Eliza Jane, Case No. 4,363; Palmer v. Priest, Id. 10,694; In re Hurst, Id. 6,925; The Helen M. Pierce, Id. 6,332.]

11. In this case, one of the owners gave a note to the libellants, as payment for their

[1] [Reported by William W. Story, Esq.]

[2] [Reversing The Chusan, Case No. 2,716.]

claim, and, subsequently, on settling with the other owner, who was the master of the Chusan, he charged his portion thereof to the master; and it was *held*, that the master was not thereby relieved from liability to the libellants, it being a matter between the owners solely.

[Cited in Hazlehurst v. The Lulu, 10 Wall. (77 U. S.) 200; Thomas v. Osborn, 19 How. (60 U. S.) 28; The Mary Bell, Case No. 9,199; The Napoleon, Id. 10,011; The Sarah J. Weed, Id. 12,350.]

[Appeal from the district court of the United States for the district of Massachusetts.

In admiralty. Libel for materials for repairs of the barque Chusan, belonging to the port of Marblehead, in Massachusetts, done in the port of New York. The material facts, set forth in the libel and answer, sufficiently appear in the following statement of facts, agreed to by the parties: The libellants, who are ship chandlers in New York, in September, 1841, furnished a large amount of copper, as per bill, for the barque Chusan, then lying at the port of New York. The said vessel was then owned, three quarter parts by N. Broughton, and one quarter part by —— Cushing, who was also master; both of whom were inhabitants of Massachusetts. The copper was purchased for the barque on a credit for six months, and was charged in the books of the libellants to the barque Chusan and owners. A negotiable note signed by Broughton alone, was subsequently taken by the libellants, and a receipt given therefor, as follows: "Barque Chusan and owners to J. & G. Ring, Dr. to copper materials, $1214.45. New York, Sept. 3, 1841. Received from N. Broughton, his note at six months, from Sept. 3d. for the above amount. J. & G. Ring, per J. N. Phillips." The note was negotiated by the libellants, and was not in their possession at maturity. Being not paid by Broughton, they took it up as indorsers, and it was offered to be surrendered at the hearing in the court below. In 1842, an action at common law was commenced by the libellants, in the court of common pleas, on the said note against the said Broughton and sundry persons summoned as trustees, which suit was ordered to be discontinued before this libel was filed, but is still on the docket of that court. At the time of the purchase of the copper, a part of the vessel belonging to Broughton had been transferred to Bates & Thaxter, two of the claimants, as collateral security, and stood in their names, but they were not in possession, and had no interest in the management and navigation of the vessel. Mack, the other claimant, proves that the said Cushing, the then other owner, settled an account with Broughton, in which the latter charged the said bill, Cushing being showed said receipt, and acting on the credit of it. Subsequently, Cushing sold his interest in the said vessel to the said Mack, who claimed to be a bona fide purchaser, without notice. The questions intended to be submitted are: First. Whether, under the circumstances, the taking the note was a waiver of the lien upon the vessel for the supplies created by the general maritime law? Second. Whether any lien existed after the departure of the vessel from the state of New York?

[For proceedings in the district court, see Case No. 2,716, next preceding.]

Mr. Ring, for libellants.

The argument for the libellants was as follows:

1. The libellants furnished the materials in September, 1841, on a credit of six months, to the bark Chusan and owners. This is proved by the entries in the books and the account rendered, all showing the bark and owners to be the thing and persons trusted for this debt; by the maritime law, therefore, they had a lien upon the bark in addition to the personal security of the owners. They had an inchoate right to sell the bark for the payment of the debt, at the time of furnishing the supplies, which right became complete, on the termination of the credit. The General Smith, 4 Wheat. [17 U. S.] 438; Peyroux v. Howard, 7 Pet. [32 U. S.] 341; The Nestor [Case No. 10,126].

2d. The subsequent taking of the note of one of the owners, did not discharge the original debt against the barque and owners, unless it was expressly agreed to be taken as such, of which, in the present case, there is no pretence. 6 Term R. 52; 7 Term R. 66; [Chappedelaine v. Dechenaux] 3 Cranch [7 U. S.] 311; [Sheehy v. Mandeville] 6 Cranch [10 U. S.] 264; [Peyroux v. Howard] 7 Pet. [32 U. S.] 344; 2 Camp. 515. On this point the law of New York, as the lex loci, ought to govern (Story, Confl. Laws, 266–274; 1 Conn. 409; 1 Wash. C. C. 340 [Camfranque v. Burnell, Case No. 2,342]); and the law of New York is well settled, that a note is neither payment nor a waiver, except it be agreed to be taken as such (7 Johns. 311; 1 Cow. 290).

3d. If the note be not a waiver of the libellants' claim against the other owners, it cannot be presumed to be a waiver of their lien upon the ship, which the law has expressly given them for their own protection, in case the personal security of the owners should be insufficient. Peyroux v. Howard, 7 Pet. [32 U. S.] 341; The Nestor [supra]. The taking the note is not inconsistent with the full intention on the part of the libellants to retain their lien, and that is the criterion.

4th. Were the note now outstanding, and not surrendered, the case would be different. The law would not then enforce the lien, because the party might be compelled to pay twice. Ramsay v. Allegre, 12 Wheat. [25 U. S.] 611; The Nestor [supra].

5th. In the case of a lien upon real estate, for the purchase money, it has been expressly held, that the debtor's own note does not extinguish the lien; and the principle, in the present case, is precisely analogous. 15 Ves. 347; 1 Wash. C. C. 191 [Harris v. Burchan, Case No. 6,117].

6th. There is no pretence of any equities by third persons, purchasing without notice, except as to one quarter owned by Mack. It is, therefore, exactly as if Broughton, whose note the libellants took, claimed protection for his ship, because he had not paid his own note, when the law gives the libellants both as security.

7th. As to Mack's one quarter, Cushing is responsible to him. Cushing settled with Broughton in his own wrong. Their receipt on the bill informed him, that he was holden, and he was bound to know, that Broughton's note did not pay the debt. 2 Dow. 37, 38.

8th. The statute of New York is merely a domestic law, operating upon domestic ships. It does not pretend to, and could not, overrule the jurisdiction of the district court, as it existed before.

F. C. Loring, for claimants, argued:

1st, that the contract and lien in this case, were to be governed by the local law, by which the lien ceased when the vessel left the state. 2 Rev. St. N. Y. p. 493. That this law applied both to foreign and domestic vessels; and that it was competent for a state to pass laws regulating the maritime lien on foreign vessels.

2d. That if the lien was to be governed by the general maritime law, it was determined by the giving and receiving of a negotiable note of one of the part owners. The Nestor [supra]; Ramsay v. Allegre, 12 Wheat. [25 U. S.] 611; The William Money, 2 Hagg. Adm. 136.

STORY, Circuit Justice. This is a libel by material-men for materials supplied for the repairs of the bark Chusan. The bark belongs to the port of Marblehead, in Massachusetts, and the materials were supplied for her repairs, while she lay in the port of New York. So that, in the sense of the maritime law, as recognized in this country, it is a case of supplies for a foreign ship lying within a port in a foreign jurisdiction, the different states of these United States being for this purpose held foreign to each other. By the general maritime law, a lien attaches upon the foreign ship, under such circumstances; and the nature, extent, and character of that lien is to be determined, not by the local law of the particular state, but by the general principles of the maritime law applicable to the case. This I conceive to be clearly established by the case of The General Smith, 4 Wheat. [17 U. S.] 488, and Peyroux v. Howard, 7 Pet. [32 U. S.] 324, 341; and it has been fully recognised in this court in the case of the Nestor [supra].

At the threshold of the present case, we are, however, met by the argument, that, by the statute of New York, respecting the lien of material men, and repairers of ships, it is provided, that the lien shall cease, when the ship, for which the supplies are furnished, has left the state. The language of the statute (2 Rev. St. 1829, pt. 3, c. 8, tit. 8, § 1, p. 493), is, that whenever a debt amounting to fifty dollars or upwards, shall be contracted by the master, owner, agent, or consignee of any ship or vessel within this state, for either of the following purposes: (1). On account of any work done, or materials or articles furnished in this state for or towards the building, repairing, fitting, furnishing, or equipping such ship or vessel: (2). For such provisions and stores furnished within this state, as may be fit and proper for the use of such vessel, at any time when the same were furnished. (3). On account of the wharfage, and the expenses of keeping such vessel in port, including the expenses incurred in employing vessels to watch her; such debt shall be a lien upon such ship or vessel, her tackle, apparel, and furniture, and shall be preferred to all other liens thereon, except mariners' wages. It is observable, that, in this language, there is no allusion to foreign vessels as contradistinguished from domestic vessels. The object of the provision seems to be to enlarge the maritime law by giving the same remedy in regard to domestic vessels, which already existed in relation to foreign vessels. The fair interpretation is, that it is remedial, and not that it is restrictive. The next section provides for the limitation of the lien to twelve days, when the vessel departs from the port of repairs to any other port of the state, and it is to cease when the vessel leaves the state. This statute is, as I conceive, perfectly constitutional, as applied to cases of repairs of domestic ships, that is, of ships belonging to the ports of that state. And if the present were the case of materials and supplies furnished to a ship belonging to New York, and the lien were sought to be enforced in the admiralty courts of the United States, I should have no doubt that the lien created by the law of that state, and not existing by the general maritime law, must be governed throughout by the law of that state, and that, when the ship left the state, it would cease. But in cases of foreign ships, and the supplies furnished to them, the jurisdiction of the courts of the United States is governed by the constitution and laws of the United States, and is, in no sense governed, controlled, or limited by the local legislation of the respective states. The constitution of the United States has declared that the judicial power of the national government shall extend "to all cases of admiralty and maritime jurisdiction;" and it is not competent for the states, by any local legislation, to enlarge, or limit, or narrow it. In the exercise of this admiralty and maritime jurisdiction, the courts of the United States are exclusively governed by the legislation of congress, and in the absence thereof, by the general principles of the maritime law. The states have no right to prescribe the rules by which the courts of

the United States shall act, nor the jurisprudence which they shall administer. If any other doctrine were established, it would amount to a complete surrender of the jurisdiction of the courts of the United States to the fluctuating policy and legislation of the states. If the latter have a right to prescribe any rule, they have a right to prescribe all rules, to limit, control, or bar suits in the national courts. Such a doctrine has never been supported, nor has it for a moment been supposed to exist, at least, as far as I have any knowledge, either by any state court, or national court, within the whole Union. For myself, I can only say, that, during the whole of my judicial life, I have never, up to the present hour, heard a single doubt breathed upon the subject. The distinction between foreign ships and domestic ships, as to this very matter of lien, was stated with great precision and accuracy by Mr. Justice Thompson in Peyroux v. Howard, 7 Pet. [32 U. S.] 341, where he said: "In the case of The General Smith, 4 Wheat. [17 U. S.] 438, it is decided, that the jurisdiction of the admiralty in such cases, where the repairs are upon a domestic vessel, depends upon the local law of the state. Where the repairs have been made, or necessaries supplied to a foreign ship, or to a ship in the ports of a state to which she does not belong, the general maritime law gives a lien on the ship, as security, and the party may maintain a suit in the admiralty to enforce his right. But as to repairs and necessaries in the port or state, to which the ship belongs, the case is governed altogether by the local law of the state, and no lien is implied, unless it is recognised by that law. But if the local law gives the lien, it may be enforced in the admiralty." Language of a similar import was used in the case of The General Smith, 4 Wheat. [17 U. S.] 443. Now, it is impossible to read this language, and not perceive, that the court never entertained the slightest notion, that the question of lien for repairs and supplies of a foreign ship did depend, or could depend, upon the local law of a state. It was treated throughout as governed solely by the maritime law. The very article of the code of Louisiana (article 2748) on which the case of Peyroux v. Howard, 7 Pet. [32 U. S.] 34, turned, makes no distinction between foreign and domestic ships, as to the lien or privilege for repairs; and yet, as we have just seen, the court considered the distinction as clear between the application of that article to a domestic ship, and its application to a foreign ship, in the matter of the lien.

Suppose a state legislature should declare that there should, in future, be no lien of seamen for their wages, on any ship foreign or domestic, or no lien for salvage on any ship foreign or domestic; and no lien for any bottomry bond on a ship foreign or domestic; will it be pretended, that such a law would be obligatory upon the courts of the United States in the exercise of admiralty and maritime jurisdiction? If it would be, a more forcible and complete device to dry up and extinguish the jurisdiction of the courts of the United States in admiralty cases, could scarcely be imagined. The truth is, that the admiralty and maritime jurisdiction of the courts of the United States, given by the constitution, covers not merely the cognizance of the case, but the jurisprudence and principles, by which it is to be administered. It covers the whole maritime law applicable to the case in judgment, without the slightest dependence upon or connection with the local jurisprudence of the state on the same subject. The subject-matter of admiralty and maritime law is withdrawn from state legislation, and belongs exclusively to the national government and its proper functionaries. Besides, by the constitution of the United States, congress has the power to regulate commerce with foreign nations, and among the several states. The power to regulate commerce includes the power to regulate navigation with foreign nations and among the states; and it is an exclusive power in congress. This I conceive has been firmly established by the supreme court of the United States (see Gibbons v. Ogden, 9 Wheat. [22 U. S.] 193–198); and the doctrine stands, as I conceive, upon grounds which cannot be shaken, without endangering the interests of the whole Union, if not the very existence of the constitution as a frame of government for the professed objects and purposes, which it was intended to accomplish. Now, there cannot be a doubt, that the prescribing of rules for the shipping of seamen, and the navigation of vessels engaged in foreign trade, or trade between the states, is a regulation of commerce. In what respect does the exercise of a power to regulate, control, or extinguish the liens given by the maritime law for material men upon foreign vessels, differ from the power to regulate the shipping of seamen, or the navigation of foreign vessels? Each is a regulation of foreign commerce, or commerce among the states. Each includes the assumption of a power to act upon the subject-matter as one of concurrent jurisdiction, instead of belonging exclusively to congress. It would not, I presume, be doubted, that congress might, by an express act, adopt the whole maritime law upon this subject; and if it had so done, no state could rightfully interfere to control, or limit, or restrict it. It seems to me, since the maritime law constitutes the law of the admiralty and maritime jurisdiction of the United States, until modified by congress, that congress, by conferring this jurisdiction upon its courts, has, by implication, adopted that law as a regulation of commerce essential to its proper exercise. Perhaps it will be suggested, that if congress had passed an act upon this subject, it would be of paramount authority, and suspend or control state legislation upon the same subject; but that until congress shall pass such

an act, the states have full authority to act upon it. This I utterly deny. If the power to regulate foreign and inter-state commerce be, as I conceive it to be, exclusive in congress, all state interference therewith is unconstitutional and void. Congress, having power to regulate the whole subject, regulates it as much by what it leaves without any positive regulations, as by what it expressly provides for. The will of congress is equally expressed in both cases. It cannot be that a state has a right to step in, and, by way of compliment, fill up by its own legislation, what is not actually occupied by that of congress. Such was the doctrine maintained by the supreme court in Houston v. Moore, 5 Wheat. [18 U. S.] 1, 21, 22; Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1, 196–222, and Holmes v. Jennison, 14 Pet. [39 U. S.] 540, 569, 574–579.

I have thought it right to say thus much upon the general question of the operation of the statute of the state of New York. I ought to add, that I entertain not the slightest doubt that that statute was never intended to be applied to cases of foreign ships, or the repairs thereof, but was designed to be auxiliary to the maritime law, and to give it an extended application to domestic ships, from motives of public policy and general convenience. New York is the last state in the Union, which, in point of interest, could entertain the purpose of crippling the national authority over the regulation of commerce, or of interfering with the great principles of maritime law, upon liens for repairs and other kindred purposes. From what has been already stated, the first point relied on in the defence,—that the lien, if any was, under the circumstances, created by the repairs, ceased with the departure of the ship from the ports of the state, is overruled by the court, as incapable of being maintained as a bar to the suit.

We are next met by the question, whether, in the first place, any lien was created upon the brig for the repairs; and in the next place, if created, whether it was not waived or extinguished by the note of Broughton. The argument, that no lien was created, because of the credit given for the repairs, is not now relied upon, because it is completely disposed of by the case of The Nestor [supra] in this court; and to the considerations there stated, and the decision there made, my judgment still adheres with unabated confidence. Then, as to the note, it is a contract governed altogether by the law of New York (since it is not a maritime contract), at least, to the extent of disposing of the present objection. By the law of New York, as by the law of England, and, indeed, as far as I know, by the law of all the states of the Union, except Massachusetts and Maine, which are governed by a somewhat modified doctrine, a note taken in payment of a debt is ordinarily but a conditional payment thereof; that is, it is an absolute payment only when duly paid. See Schermerhorn v. Lorines, 7 Johns. 311, and the cases cited in the reporter's note to the third edition, 1832; Muldon v. Whitlock, 1 Cow. 290. The presumption, prima facie, in New York is, that a note taken for a debt is a conditional payment only; but this presumption may be rebutted by proof, that it was taken as an absolute payment. On the contrary, in Massachusetts and Maine the presumption is, prima facie, that a note taken for a debt is an absolute payment, but this presumption may be rebutted by proof, that it was intended as a conditional payment only.

Now, in the present case, there are no circumstances to repel the ordinary presumption, that the note taken in this case was taken otherwise than according to the lex loci contractus. The ship was not a domestic, but, in the sense of the law, a foreign ship; the owners were strangers, belonging to another state. The ship was, in New York, subject to a general lien for repairs. Under such circumstances, the natural presumption would be, that exclusive personal credit was not given to the owners of the ship, and a fortiori not to one of the owners. The very credit allowed might be naturally and conveniently allowed upon the ground, that the ship itself was a collateral security for the debt, from the lien of the maritime law adhering to it. Besides, upon the very face of the account, there is evidence that credit was originally given to the ship for the supplies and materials. The language of the account is: "Bark Chusan and owners bought of John and George Ring." So that this repels the notion that any mere personal responsibility of the owners was exclusively relied on or taken. We all know, that, by the general principles of the maritime law, material-men have a three-fold remedy for supplies and materials furnished for a foreign ship. First, the ship itself; secondly, the owners; and thirdly, the master; and neither of these remedies is displaced, except by conclusive proof, that an exclusive credit has been, in fact, given to one or more of the parties so liable, or to the ship itself. I need not quote authorities in support of this doctrine. It was fully recognised by Lord Mansfield in Rich v. Coe, Cowp. 636, and Farmer v. Davies, 1 Term. R. 109; and this is regularly true in all cases where the general maritime law governs, whatever may be the case, where the municipal jurisprudence inculcates a more restricted rule. See Abb. Shipp. (Ed. 1829) pt. 2, c. 3, §§ 2, 3, 10. It is certainly the well established doctrine in America, as the cases already referred to abundantly show. The lien, however, which is given by the maritime law on the ship, although it is, or may be treated as, a permanent or abiding lien upon the ship, until the debt is paid, as between the original owners and the material-men, and their personal representatives, is liable to a very different con-

sideration, when the ship has passed into the hands of a bona fide purchaser, for a valuable consideration, without notice of the lien. In respect to such a purchaser, the lien must be enforced within a reasonable time after the debt is due, and the credit, if any, has expired; otherwise a court of admiralty will protect him, as a court of equity would do, against the claim as stale, and inequitable. What will constitute a reasonable time must depend upon the circumstances of each particular case, and is not a point susceptible of any definite or universal formulary of interpretation.

In the present case, no ground of this sort is set up as matter of defence in the answer; and, therefore, I am bound to presume, that none exists; for certainly it is not admissible, without being set up in the answer; for the cause must be decided secundum allegata et probata. Proof is not enough without a suitable allegation to allow its introduction, as allegation would not be enough without proof. In respect to Messrs. Bates & Co., it is clear, that they do not stand in the predicament of bona fide purchasers for a valuable consideration, without notice. Their title is as mortgagees only under Broughton, taking the property as collateral security for a debt due to them by Broughton; and with the admitted fact, that they never took possession of the ship, or interfered with her management, and that the mortgage was antecedent to the supplies of the libellants to repair the ship. Under such circumstances, they were benefited by the supplies, and must be deemed, by their conduct, to admit the right of Broughton to contract as absolute owner for them and to bind the ship by a lien; and this upon the plain maxim, qui sentit commodum, sentire debet et onus. In respect to Cushing's one quarter part of the ship, he paid his proportion of the amount to Broughton; but he was also master of the ship, and if the receipt on the account was shown him, that receipt would also prove, that the account had not been paid by Broughton, but that the latter had given his note only therefor; and under such circumstances he was bound to know that, by law, the note was no discharge of the debt, unless it was duly paid. If, on the other hand, he never saw the account or the receipt thereon, but he trusted entirely to the affirmation of Broughton, that it was paid; then his confidence in Broughton, although it might have misled him, is not to prejudice the libellants in their claim. In either view, therefore, it is plain, that the taking of the note would not discharge him personally, or his share of the ship from the maritime law. The case falls within the principle acted upon in Stewart v. Hall, 2 Dow, 29, and Wyatt v. The Marquis of Hertford, 3 East, 147, although the circumstances of those cases were not identical with those of the present. The case of Muldon v. Whitlock, 1 Cow. 290, goes the full length of the doctrine; and perhaps presses it somewhat further. See Story, Ag. §§ 433, 434. In respect to Mack, who is the purchaser under Cushing, of his share of the ship, there is nothing in the answer suggesting when he became the purchaser, or under what circumstances, or whether he had notice of the fact of repairs, and the giving of the note by Broughton, and the settlement between the latter and Cushing. This was certainly material to have been stated; and the defect is not entirely supplied by the statement of facts. It is only there stated, that Mack became a purchaser from Cushing, and "claims to be a bona fide purchaser, without notice." When he purchased does not appear. Now, there is nothing in the answer suggesting (as has already been stated,) that the libel was not filed within a reasonable time after the credit had expired, so as to entitle the libellants to enforce the lien. And under such circumstances, the court must presume, that it was filed within a reasonable time. If Mack purchased before the filing, with knowledge of all the facts, he must stand in the same predicament with Cushing. If he purchased without such knowledge, and yet the libel was filed within a reasonable time, he must take his purchase cum onere, and cannot be exempted from the lien. Of course, if he purchased after the libel was filed, he is affected with all the equities between the libellants and Cushing. But as between Broughton and Mack, the latter would have a clear right to have the whole repairs charged upon Broughton's three quarters of the ship, to the exoneration of Cushing's one quarter; and the only open question is, whether, under the circumstances of the present case, Bates & Co. are not affected with the same equities as Broughton. I incline to think, that they are; but if the parties desire to be heard upon that point, I will leave that part of the case open for argument.

My judgment upon the merits is, that the libellants have a complete subsisting lien upon the ship for the amount of their account; and that it is to be enforced by a decree. The decree of the district court (which is understood to have been given upon the mere footing of the authority of the case of The Nestor [Case No. 10,126]) is therefore reversed, and a decree will be entered, according to the opinion which I have now delivered, for the amount of the libellants' account, with costs.

CICCARIELLO, In re. See Case No. 3,747.

Case No. 2,718.

The CIMBUS.

[5 Adm. Rec. 30.]

District Court, S. D. Florida. May 23, 1853.

SALVAGE COMPENSATION.

[For saving the cargo of a wrecked vessel, consisting of a locomotive and a quantity of railroad iron, the court allowed one-half of the net value of the property saved.]

[Cited in 35 Fed. 542.]

[See The Isaac Allerton, Case No. 7,088.]

[In admiralty. Libel by John P. Smith and others against the brig Cimbus and cargo, for salvage.]

Wm. R. Hackley, for libelants.

S. J. Douglas, for respondents.

MARVIN, District Judge. This brig, laden with an assorted cargo, a locomotive engine, and a quantity of railroad iron, bound from Philadelphia to New Orleans, ran ashore on the Dry Rocks, and soon broke up, and sank in two fathoms water. A portion of the cargo, including the locomotive and iron, was saved by divers. The value of all the property saved is $18,264.19. I shall decree one-half of the net value of the property saved, as a reasonable salvage. It is therefore ordered, adjudged, and decreed, that the 753 bars of railroad iron saved by different salvors be charged with a net salvage of fifty per cent., i. e. that the salvage be ascertained by deducting from $6,617.18, the appraised value, the bills for wharfage, storage, and labor thereon, and its proportion of the proctor's fee for defending the cargo, and Captain Lodge's recompence for superintending the saving of the same, and, after such deductions, the salvage be one-half the remainder. That upon the payment of the aforesaid salvage and charges, and the merchant's commissions, if any, its proportion of the notary public's fee, and such other charges as shall be allowed thereon by the court, the marshal restore said iron to I. E. Martin, who claims the same, as agent for the owners, under a bill of lading assigned to him by the Brooklyn Warehouse Company in New Orleans. That the salvage on the locomotive and appurtenances be the same as upon the iron, and ascertained in the same manner; and that the charges upon the remaining proceeds be the same as upon the iron, or ascertained in the same manner; and that the residue be paid to Mr. R. W. Welch, agent for the Mercantile Mutual Insurance Company of Philadelphia; Captain Lodge, of the brig, consenting thereto. That the salvage to the Boat Union, which saved, of iron and other cargo, $1,655.24, and the Lizzy Wall, which saved $1,013.50 of iron and other cargo, be the same, and ascertained in the same manner, as upon the locomotive. That the residue of the property saved pay a salvage of fifty per cent., and that the residue of the costs, expenses, and charges not hereinbefore provided for be chargeable to the residue of the proceeds in court. That the recapitulation and statement hereunto attached be approved, and that the clerk pay the salvage and bills accordingly, and the residue undisposed of to Captain Lodge, for the benefit of whom it may concern.

CINCINNATI (ROGERS v.). See Case No. 12,008.

CINCINNATI & C. A. L. R. CO. (PULLAN v.). See Cases Nos. 11,461 and 11,462.

CINCINNATI COAL CO. (JONES v.). See Case No. 7,458.

Case No. 2,719.

In re CINCINNATI ENQUIRER.

[4 Cin. Law Bul. 904.]

Circuit Court, S. D. Ohio. Nov. 24, 1879.

RIGHT OF CITIZEN TO INSPECT COURT RECORDS.

[1. A citizen of the United States has not an unlimited right, as such, to inspect and examine all the records and papers belonging to the circuit and district courts, but only, under the express provision of the act of 1848, those books containing the docket or minute entries of the judgments and decrees of the court.]

[2. A petition, alleging the refusal by the clerk of the court of leave to inspect "books containing the docket and minute entries, judgments, and decrees" of the district and circuit courts, prayed an order that "the judgment and decrees of the said court, including the fee books and other books containing the public records and orders of said court," be open for inspection of petitioner. It was supported by an affidavit alleging that petitioner's agent was refused permission to examine the "public records, fee books, and decrees of said court." *Held*, that notwithstanding that the prayer was broader than the allegations of the petition, and that neither was supported by the affidavit, the petition was good on general demurrer, for petitioner was entitled to part of the relief prayed.]

In the matter of the application of the Cincinnati Enquirer Company for an order allowing them to examine the books and records of the court. Ex parte on demurrer to the petition.

Before BAXTER, Circuit Judge, and SWING, District Judge.

SWING, District Judge. This is a petition filed by Mr. John R. McLean and the Enquirer Company, in which they set out that "heretofore, to-wit, on the 7th day of November, 1879, application was made to Thomas Ambrose, clerk of this court, by J. H. Woodard, an agent of said Enquirer Company, for leave to inspect during office hours books containing the docket and minute entries, judgments, and decrees of the said district court and the United States circuit court, and that the said clerk then and there refused the said J. H. Woodard the privilege to so inspect or examine the books aforesaid. Your applicants would, therefore, respectfully ask the court to order that the judgments and decrees of said court, including the fee books and

other books containing the public records and orders of said court, be open to the inspection of the said J. H. Woodard, agent of the said Enquirer Company and of said John R. McLean, under such regulations as to the court may seem proper." With this application there is filed the affidavit of one James H. Woodard, in which he says that he is employed by the Cincinnati Enquirer Company, a corporation doing business under the laws of the state of Ohio, and that acting under the orders of John R. McLean, the manager of said corporation, he made personal application to Thomas Ambrose, clerk of the United States circuit and district courts, for permission to examine the public records, fee books, and decrees of said court, and permission was refused him by the said Thomas Ambrose, clerk as aforesaid, and said application was renewed on this day and date by him as a citizen having the right to inspect said books, decrees, and minutes, and was again refused. To this application there is filed by the clerk, in the form of a demurrer, that the petition does not contain facts enough to entitle the applicants to the order they pray for.

This proceeding, in one sense, at least, is adversary in its character, and yet it is based upon the alleged refusal by an officer of this court for permission to exercise an alleged right of the petitioners. The right which they allege was refused was that of having one J. H. Woodard to inspect, during office hours, books containing the docket and minute entries, judgments, and decrees of the district court and the United States circuit court. This right is based solely upon the ground that John R. McLean is a citizen of the United States, and that the Enquirer Company is located in the United States. It is not claimed for either that they have any interest in the docket or minute entries, judgments, and decrees recorded in said books. If the prayer of the petitioners prayed simply for the right which they claimed an officer of this court had deprived them of, there would be no difficulty in determining the case. But such is not the fact. They pray for an order that the judgments and decrees of said court, including the fee books and other books containing the public records and orders of said courts, be open for the inspection of one J. H. Woodard. It will be seen at a glance that their prayer is greatly beyond what they alleged they were not permitted to examine. That was the books containing the docket or minute entries of the judgment and decrees, but this is not only that the judgments and decrees may be examined, but that all other books containing the public records and orders of the court shall be opened to their inspection. So much for the allegations of the petition itself.

But let us see how the allegation of the right which they allege they were deprived of is supported by the affidavit which has been filed. The petition says that the application was for leave to inspect the books containing the docket and minute entries, judgments, and decrees. The affidavit of the man Woodard is that he applied for permission to examine the public records, fee books, and decrees, showing clearly and conclusively that the petition is not supported by the affidavit. Such is this application as shown from the papers filed. But it is claimed that notwithstanding the variance between the allegations of the petition and the prayer, and the variance between the proof and allegations, that petitioners are entitled in law to the order prayed for; that they are so entitled by the statutes of the United States, or, if not by them, that they are by the common law entitled to it; that all the books and papers of a court of record are subject to the examination and inspection of any citizen, whether they have any personal interest in them or not; that it is the high and indefeasible right, at any time he pleases during working hours, to make such inspection. If this is true, it is very clear that the petitioners are entitled to the order prayed for. This doctrine is a new and strange one, and certainly finds no support in any adjudication which I have been able to find, and I am very certain none can be produced sustaining any such proposition. But the very formation, purposes, and duties of a court forbid such an idea. The court is composed of judge, ministerial and executive officers, together with the attorneys and members of it. To this party so organized is committed for determination the highest interest of the citizen, in his property, his reputation, and his person. And a careful record of every step which may be taken in relation to either must be carefully recorded; every paper connected with any proceeding affecting any one in either of these must be carefully filed and preserved. The title to the entire property of the whole country passes through the courts of this country almost in every half century. They are the repositories of the rights of persons and of property, and in many cases the only evidence in either, and the law imposes upon the court the duty of their secure and careful protection and preservation; a protection and preservation which would be greatly jeopardized if every citizen of the United States, at his pleasure and will, should be permitted to examine and inspect them in his own way. Not only is such an idea in opposition to the formation, purposes, and duties of the court, but it is clearly in opposition to the views of the highest judicial and legislative branches of this government. At a very early day, the supreme court of the United States adopted a rule, known as the fourth rule, which provides that "All motions, rules, orders, and other proceedings made and directed at chambers, or on rule days at the clerk's office, whether special or of course, shall be entered by the clerk in an order book,

to be kept at the clerk's office, on the day when they are made and directed, which book shall be open at all office hours to the free inspection of the parties in any suit of equity and their solicitors." If the supreme court believed that all the books and records belonging to the court were open to the inspection of every citizen of the United States, why did they enact such a rule? Or why did they limit the right of inspection to parties or their solicitors? This rule itself is the most convincing proof that no such right as claimed by the petitioners, was supposed by the judges of the supreme court to have existed. But it is claimed by the learned counsel for the petitioners that there is a difference between suits in equity and at law; that there could hardly be a case in equity in which the government could have any interest. It is not perceived by the court upon what reason there can exist any difference in the care and custody of the records and papers in equity causes and actions at law, but learned counsel are mistaken in regard to the interest of the government in equity causes. The records of this court show numerous causes in equity in which the government of the United States is plaintiff. But it is said, if that is so, that the citizen is a party in interest, and would have a right to look into the records. In some general political sense it may be true that the citizen is a party in interest in every suit prosecuted in the name of the United States; but in a legal sense he is not such a party in interest as is contemplated by this rule.

That congress entertained the same view is abundantly shown by its acts. In 1848 it enacted a law providing that "all books in the office of the clerks of the circuit and district courts containing the docket or minutes of the judgments or decrees thereof, shall during office hours be open to the inspection of any person desiring to examine the same without any fees or charge therefor." [9 Stat. 292.] If congress believed the right already existed, why did they think it necessary to create such right by special legislation? Or if they believed it ought to exist, why did they limit the right to particular books, such only as contained the docket or minutes of the judgments or decrees? And again, by the act of February, 1875 [18 Stat. 333], congress provided "that the account and vouchers of clerks, marshals, and district attorneys shall be made in duplicate to be marked 'Original' and 'Duplicate,' and it shall be the duty of the clerk to forward the original accounts and vouchers of the officers above specified, when approved, to the proper accounting officers of the treasury, and to retain in his office the duplicate, which shall be open for public inspection at all times." If the public had the right already to inspect such papers, why did congress deem it necessary to create such a right by the passage of this act? It is, therefore, very clear to my mind that the unlimited right of a citizen of the United States to inspect and examine all the records and papers belonging to the court does not exist. The right to examine certain records and papers does exist. It exists as to the books containing the docket or minute entries of the judgments and decrees of the court, and these the petitioners allege that they have been refused by an officer of this court. The prayer of the petition is not in accordance with this averment, and the affidavit is different from both. This petition, however, must be governed by the rules of pleading in other cases, so far as the demurrer is concerned. If the party is entitled to any part of the relief he prays for, a general demurrer must be overruled. This application for the interference of the court is based upon the allegation that the petitioners have been deprived of a right given them by the law by an officer of the court. This is denied on behalf of the officer by two members of the bar, who are officers also of the court, and who appear in this proceeding on behalf of the clerk. This is a charge which the court is interested in having examined, and the truth or falsity thereof established. The demurrer therefore will be overruled, but no order will be made until a further hearing of the matter is had before the court, when we shall finally determine whether the petitioners are entitled to the order as prayed for.

To the above opinion, BAXTER, Circuit Judge, added afterwards, concurring: "The arguments and the discussion relate to the legal rights of the citizen to inspect the public record of the courts. I do not take issue with any principle announced by the district judge in reference to the questions there involved. But in consultation we agree that this is not a case for the application of technical law. The examination proposed professes to be in the public interest. No injury can result to any one from such examination."

CINCINNATI ENQUIRER (GIBSON v.). See Cases Nos. 5,391 and 5,392.

CINCINNATI GAS-LIGHT & COKE CO. (STILWELL & BIERCE MANUF'G CO. v.). See Case No. 13,453.

CINCINNATI, H. & D. R. CO. (SMITH v.). See Case No. 13,025.

CINCINNATI, PERU & CHICAGO R. CO. (DUNHAM v.). See Case No. 4,148.

CINCINNATI, W. & Z. R. CO. (THOMPSON v.). See Case No. 13,950.

CINQUE (UNITED STATES v.). See Case No. 14,794.

Case No. 2,720.

The CIRCASSIAN.

[See Case No. 2,727.]

Case No. 2,720a.

The CIRCASSIAN.

WICKES v. The CIRCASSIAN.

[5 Chi. Leg. News, 146; 12 Am. Law Reg. (N. S.) 291; 5 Am. Law T. Rep. U. S. Cts. 482; 6 Alb. Law J. 401; 7 Am. Law Rev. 575.]

District Court, S. D. New York. Nov. 1872.[1]

SUPPLIES FURNISHED IN HOME PORT — LIEN — CONSTRUCTION OF ADMIRALTY RULE 12.

1. Where necessaries are furnished to a vessel in the port or state where she belongs, the general maritime law does not give to the party furnishing them a lien on the vessel herself for his security.

2. The history of the 12th rule in admiralty given, and the decisions under it explained.

3. The amended 12th rule of May 6, 1872, which provides that "in all suits by materialmen, for supplies or repairs, or other necessaries, the libellant may proceed against the ship and freight in rem, or against the master or owner alone in personam," does not apply to suits brought, or to supplies, etc., furnished, before that date.

4. The purport of the rule is to provide that, in every case of a contract for supplies, etc., to a vessel, domestic or foreign, being a maritime contract, made after the rule takes effect, process in rem against the vessel or in personam against her master or owner, may optionally be resorted to where a suit is required to enforce the contract.

[In admiralty. Libel by Henry N. Wickes, against the steamboat Circassian for supplies furnished in the home port.]

W. W. Goodrich and W. R. Beebe, for libellant.

W. A. Butler and T. E. Stillman, for claimant.

BLATCHFORD, District Judge. This libel is filed to recover against the steamship Circassian the sum of $3,936 for coal and wood furnished to her at New York, in October, 1866, she being then a domestic vessel, owned in New York, and bound on a voyage to Europe. The supplies were furnished by the firm of C. H. Bass & Co., who have assigned their claim to the libellant. The debt was contracted at the request of the agent of the vessel, the supplies were put on board of the vessel, and receipted for by the master, they were proper supplies for her intended voyage, and the evidence shows that credit was, in fact, given to the vessel, because of the want of pecuniary responsibility of the owner of the vessel. The libellants supposed at the time that the statute of New York would give them a lien which they could enforce by proceedings in rem against the vessel, according to the mode prescribed by that statute. The libel alleges that the claim is, by the maritime law, a lien on the vessel, and also that it was, at the time the supplies were furnished, and now is, a lien on the vessel by the law of the state of New York.

After the decision in the case of The General Smith, 4 Wheat. [17 U. S.] 438, in 1819, it was no longer open to question, in the courts of the United States, that, where necessaries are furnished to a vessel in the port or state where she belongs, the general maritime law does not give to the party furnishing them a lien on the vessel herself for his security. The point arose directly, in that case, and was necessarily decided. The vessel was owned in Baltimore, Maryland, and the supplies were furnished to her at Baltimore. The supreme court held that there was no lien by the law of Maryland. This being so, there was no lien at all, and no foundation for the suit, which was one in rem, unless there was a lien by the general maritime law. The supreme court decided that there was no lien by the general maritime law. This decision has been recognized as a correct one in numerous cases since, which have come before the supreme court, to and including the case of The Kalorama, 10 Wall. [77 U. S.] 204, 208, 211, at the December term, 1869, in which last case it is said that "the question was put to rest" by the decision in the case of The General Smith. It had become a rule of property, established for nearly fifty years, when the supplies in the present case were furnished.

In the opinion of the court in the case of The General Smith, it was remarked that, "in respect to repairs and necessaries in the port or state to which the ship belongs, the case is governed altogether by the municipal law of that state, and no lien is implied, unless it is recognized by that law." This remark was understood to suggest that, where the municipal law of the state gave or recognized the lien, it would be enforced in the admiralty court. Accordingly, in the case of Peyroux v. Howard, 7 Pet. [32 U. S.] 324, in 1833, it was held that the district court had jurisdiction of a suit in rem against a vessel for materials supplied and work performed, in repairing her at New Orleans, on the ground that the contract was a maritime contract, that the service was to be performed within the ebb and flow of the tide, and, therefore, within the jurisdiction of the admiralty, and that the local law of Louisiana gave a lien in the case. In The Orleans v. Phoebus, 11 Pet. [36 U. S.] 175, in 1837, it was stated that the decision in Peyroux v. Howard proceeded on the ground that, where the contract was a maritime one and the state law gave a lien, the admiralty had, in the first place, jurisdiction of the contract, as a maritime one, and then, finding that the lien had, by the state law, attached, would enforce such lien according to the mode of administering remedies in the admiralty. The jurisdiction of the admiralty was regarded as vesting under the laws of the United States, and not under the local law of the state, the latter law only conferring the right to a lien, which the admiralty, having jurisdiction of the maritime contract, would enforce by the appropriate admiralty remedy. Accordingly,

[1] [Affirmed in Case No. 2,726.]

the court decided that the admiralty court had no jurisdiction of a suit in rem against a vessel, to recover a claim by a master for his wages, as master, and for necessaries advanced by him to the vessel, while he acted as master, because the services and disbursements were not maritime, and that it made no difference that a lien was given by the local law, so long as the contract was not maritime. Following out these principles, it was stated by the supreme court, in Ferry Co. v. Beers, 20 How. [61 U. S.] 393, 402, in 1857, that it had never sanctioned the doctrine that admiralty jurisdiction in rem existed against a vessel, to enforce a carpenter's bill for work and materials furnished in constructing the vessel, because a lien had been created by the local law of the state where the vessel was built.

At the December term, 1844, the supreme court, in the exercise of what it regarded as the authority given to it by the sixth section of the act of August 23, 1842 (5 Stat. 518), to prescribe and regulate the forms of process and the forms and modes of framing proceedings and pleadings, and generally the forms and modes of proceeding to obtain relief, and generally to regulate the whole practice in suits in admiralty in the federal courts, promulgated the following rule, to take effect from the 1st of September, 1845, as a rule for the regulation and government of the practice of the circuit and district courts of the United States in suits in admiralty on the instance side of the courts: "Rule 12. In all suits by material-men for supplies or repairs, or other necessaries, for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight in rem, or against the master or owner alone in personam. And the like proceeding in rem shall apply to cases of domestic ships, where, by the local law, a lien is given to material-men for supplies, repairs or other necessaries." This rule recognized, in regard to domestic vessels, the principles as to liens which the supreme court understood to be recognized by the cases of The General Smith, Peyroux v. Howard, and The Orleans v. Phoebus, and established no new rule or practice. Those principles were, that where repairs were made or necessaries were furnished to a vessel in the port or state to which she belonged, the case was governed by the local law of the state, and no lien was implied unless it was recognized by that law; but that, if the local law gave the lien, it might be enforced in admiralty. The supreme court stated the principles in those terms, in 1847, in New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344, 201. At the December term, 1858, in Allen v. Newberry, 21 How. [62 U. S.] 244, the supreme court held that the district court for Wisconsin had no jurisdiction of a libel in rem against a vessel for the loss of goods shipped on board of the vessel at one port in Wisconsin, to be delivered at another port in Wisconsin, and, at the same term, in Maguire v. Card, Id. 248, it held that the district court for California had no jurisdiction of a suit in rem against a vessel to recover for coal furnished to it in California, it being engaged in trade exclusively within California, although a lien for the coal was then given by local law of California. The court then proceeded, at the same term, to repeal the 12th rule of December term, 1844, and to substitute in its place the following rule of practice, to take effect from May 1, 1859: "In all suits by material-men for supplies or repairs, or other necessaries for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight in rem or against the master or owner alone in personam. And the like proceeding in personam, but not in rem, shall apply to cases of domestic ships, for supplies, repairs or other necessaries." The first sentence of the new rule was in the same words as the first sentence of the old rule. The second sentence of the old rule read as follows: "And the like proceeding in rem shall apply to cases of domestic ships, where, by the local law, a lien is given to material-men for supplies, repairs or other necessaries." The words in italics in the old rule were omitted in enacting the new rule, and the words in italics in the new rule were inserted in enacting that rule. By the new rule the court intended to provide, and did provide, that a proceeding in rem should not be allowed in the admiralty against a domestic ship, for supplies, repairs or other necessaries, furnished to her, even though a lien on the vessel was given therefor to the material-man by the local law. The right to proceed in rem against the vessel in the admiralty, in the case of Maguire v. Card, was given by the letter of the old rule, then in force, but the court held that it did not extend to a contract growing out of the purely internal commerce of a state, and not extending to or affecting other states or foreign countries. It also said, in its opinion in the case, referring to the new 12th rule, that it had provided, by that rule, for leaving all liens which depended on the state laws, and did not arise out of maritime contracts, to be enforced by the state courts.

The purport and meaning of the new 12th rule were explained by the supreme court in the case of The St. Lawrence, 1 Black, [66 U. S.] 522, in 1861. The case was one of supplies furnished to a domestic vessel, at New York, in regard to which a lien on the vessel had been acquired under the local law, and a suit in rem, to enforce the lien, had been brought in the district court, against the vessel, before the new 12th rule took effect. The supreme court held that the libellant was entitled to a decree. It upheld the jurisdiction of the admiralty to enforce such a lien, founded on a maritime contract, even

though the lien was created by the local law, and did not exist as a maritime lien. It stated that the alteration in the 12th rule applied altogether to the process to be used, and had no relation to the question of jurisdiction; that, in reference to the enforcement of a maritime contract, justifiable in the admiralty, congress, and the supreme court, by authority of congress, had a right to prescribe whether the jurisdiction should be exercised by an attachment of property, or merely by a suit against a person, or by both; that the contract, if maritime, was equally within the jurisdiction of a court of admiralty, whether process against the vessel were issued, because the supplies were presumed to be furnished on her credit, under the Maritime Code, or because a lien on the vessel therefor was given by the local law, or whether only process against the person were issued, because the supplies were presumed, by the Maritime Code, to be furnished on the personal credit of the master or owner of the vessel, and no lien therefor was given by the local law; that the old 12th rule, as well as the new 12th rule, was merely "a rule of practice;" that a lien given by a state law was enforced in the admiralty, not as a right which the admiralty court was bound to carry into execution on the application of the party, but as a discretionary power; and that the repeal of the old 12th rule proceeded on the ground that it was not convenient or practicable for the admiralty court to enforce liens which rested on the local law for their support. The old 12th rule was held to apply to cases commenced before the new 12th rule took effect, and the new 12th rule was held not to apply to such cases. At the December term, 1866, the supreme court, in The Moses Taylor, 4 Wall. [71 U. S.] 411, had under consideration a statute of the state of California, which made a vessel liable for services, supplies, materials, and some other matters of contract, and sundry torts, and constituted such causes of actions liens on the vessel, and authorized actions for such causes to be brought directly against the vessel, by name, with an attachment of her, and, if a judgment should be recovered, a sale of her, to satisfy the judgment. The court held that such statute, to the extent in which it authorized actions in rem against vessels for causes of action cognizable in the admiralty, invested the courts of California with admiralty jurisdiction; that the cognizance by the federal courts of civil causes of admiralty and maritime jurisdiction had been made exclusive by congress; and that the state court of California had no jurisdiction of a proceeding in rem against a vessel, under such statute, for a breach of a contract by her owner to transport a passenger from New York to San Francisco. In the case of The Hine v. Trevor (at the same term) 4 Wall. [71 U. S.] 555, the supreme court had under consideration a statute of Iowa, which gave a lien on a vessel for injury to property by such vessel, and authorized the seizure and sale of the vessel therefor, without any process against her owner or master. It held that a state court of Iowa had no jurisdiction, under that statute, of such direct proceeding against a vessel for such a cause of action, for the reason that the cause of action was one of admiralty cognizance, and within the exclusive jurisdiction of the admiralty courts of the United States. In March, 1868, the court of appeals of this state, in the case of In re The Josephine, 39 N. Y. 19, following the two decisions in 4 Wallace, held that a proceeding against a vessel, by name, in a state court of New York, under the New York statute of April 24, 1862 (Laws 1862, c. 482), on a lien given by such statute for supplies furnished to the vessel, was void, for want of jurisdiction, because exclusive cognizance of such a proceeding belonged to the district courts of the United States, the contract being a maritime one. This view was reiterated by the same court, in Brookman v. Hamill, in May, 1871, 43 N. Y. 554. Judge Rapallo, in delivering the opinion of the court in that case, says, with great accuracy: "Although our courts of admiralty may not recognize the lien of material-men for supplies to domestic vessels, not deeming the credit given to the vessel, they have retained jurisdiction over the subject of these claims, and whatever restrictions now exist as to the remedy are self-imposed by our own courts, and do not arise from any lack of jurisdiction over the subject. In view of the doctrine of the case of The St. Lawrence, I can see no want of power in the supreme court, should it see fit so to do, to restore the rule of 1844, or to allow a remedy in rem to material-men in all cases. * * * And, if the necessities of commerce require that, in this country, there should be a remedy in rem in all cases of material-men, it is much more appropriate that it should be administered by the courts of admiralty, than under the laws which may, from time to time, be in force in the several states, especially in respect to vessels not engaged exclusively in the internal commerce of a state, but which may be subject to liabilities incurred in different states, or in foreign countries, in favor of persons other than the attaching creditor." In this state of the decisions, the supreme court, on the 6th day of May, 1872, amended the 12th rule, so as to make it read as follows: "In all suits by material-men, for supplies or repairs, or other necessaries, the libellant may proceed against the ship and freight in rem, or against the master or owner alone in personam." The 12th rule of May 1, 1859, which was so amended, read thus: "In all suits by material-men for supplies or repairs, or other necessaries, *for a foreign ship, or for a ship in a foreign port,* the libellant may proceed against the ship and freight in rem, or against the master or owner alone in personam. *And the like proceeding in personam, but not in rem, shall ap-*

ply to cases of domestic ships, for supplies, repairs, or other necessaries." The words in italics above, in the rule of 1859, were stricken out, and that was the only change made, to arrive at the rule of 1872.

What is the meaning and effect of the rule of 1872? The rule of 1859, recognizing the law of the courts of the United States as to maritime liens for supplies, etc., gave process in rem or in personam, optionally, in case of supplies, etc., to a foreign ship, or a ship in a foreign port; and gave process in personam, but not in rem, in case of supplies, etc., to a domestic ship. Jurisdiction of all contracts for such supplies, etc., belongs to courts of admiralty of the United States, under the constitution and statutes, because such contracts are contracts of admiralty and maritime jurisdiction, but process in rem was allowed, by the rule of 1859, only in the case of a foreign ship, and was refused in the case of a domestic ship. The rule of 1872 provides, and was intended to provide, that, in every case of a contract for supplies, etc., to a vessel, domestic or foreign, being a maritime contract, process in rem against the vessel, or in personam against her master or owner, may, optionally, be resorted to, where a suit is required to enforce the contract. The libel in this case was filed on the 21st of May, 1872. The coal was furnished in 1866. The suit was brought after the rule of 1872 went into effect, but the supplies were furnished before that rule went into effect. When the supplies were furnished, no process in rem could be issued against the vessel therefor. There was no lien on the vessel therefor by the general maritime law, and the 12th rule of 1859 forbade the issuing of process in rem against the vessel, because she was a domestic vessel. The contract was made in view of this state of things, and no remedy in rem existed under the state law, because the provision therefor was void. The rule of 1872 now comes into effect. But, in the absence of all words indicating an intention that the rule shall apply to cases of supplies, &c., furnished before the rule took effect, it must be held, on familiar principles of interpretation, to apply only to cases of supplies, &c., furnished after it takes effect. The same principle which always applies to the interpretation of a statute must be applied to the construing of this rule. All statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect. U. S. v. Heth, 3 Cranch [7 U. S.] 399; Harvey v. Tyler, 2 Wall. [69 U. S.] 328, 347. There is nothing in the rule of 1872 to indicate an intention to give a remedy in rem against a domestic vessel where the supplies, etc., were furnished before the rule took effect.

Another consideration is of force. The supreme court, on the 6th of May, 1872, expressly state that they amend the 12th rule of 1859 so as to read thus and so. They do not repeal the 12th rule of 1859. By their order of May 1, 1859, they repealed the 12th rule of December term, 1844, and prescribed a new 12th rule. The 12th rule of 1859 is amended from and after May 6, 1872, so as to read in the new form thereafter, in respect to suits to be brought thereafter for supplies, etc., to be furnished thereafter. In respect to suits brought before May 6, 1872, and on or after May 1, 1859, for supplies, etc., furnished between those dates, and in respect to suits brought on or after May 6, 1872, for supplies, etc., furnished before May 6, 1872; and after the 12th rule of 1859 went into operation that rule is to govern; for, it is still left in force in respect to cases not covered by the amendment of 1872. That rule expressly forbids process in rem in the present case. It results that the libel must be dismissed, with costs.

[NOTE. Libellant appealed to the circuit court, where the decree herein was affirmed. See Case No. 2,726.]

Case No. 2,721.

The CIRCASSIAN.

[1 Ben. 128.] [1]

District Court, E. D. New York. 1866, 1867.

CONFLICT OF JURISDICTION—MARSHAL'S RETURN—VOID WARRANTS—ACTUAL CUSTODY BY OFFICER—INTERVENTION BY SHERIFF CLAIMING POSSESSION.

1. A vessel was seized by a state sheriff under a state lien law. Afterward, process was issued against her in the United States district court, in a suit on a bottomry bond. The proceedings in the state court having gone to a sale, the purchaser, who had paid twenty per cent. of the purchase money, but had not completed the purchase, applied to the district court for an order directing the marshal to surrender the vessel to him, *Held*, that the purchaser was not in a position to ask such an order, having bought her with full knowledge of the admiralty proceedings, not having completed his purchase, and not averring that the sheriff could not or would not put him in possession on his completing the purchase.

2. The question whether the custody by a sheriff of a vessel under a writ alleged to be void, is such as to prevent a court of admiralty from acquiring jurisdiction of the vessel, is one which should not be determined on motion.

3. Cases of Taylor v. Carryl, 20 How. [61 U. S.] 583, and of The General Smith, 4 Wheat. [17 U. S.] 438, commented upon.

4. Where a marshal who had process against a vessel, made return that he had attached her, but that previous to his attachment she was in custody of a state sheriff, and where it appeared that, of the warrants under which the sheriff held the vessel, all that were in his hands at the time of the alleged attachment by the marshal were afterwards declared void for want of jurisdiction, and the libellant thereupon applied for an order to compel the marshal to amend his return by striking out all reference to the custody of the sheriff, *Held*, that the marshal is responsible for the execution of the process put into his hands, and should be left

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free to state what he does with it, subject to that responsibility, and that the court therefore would not interfere.

5. Where a question arose between the marshals of the southern and eastern districts of New York, as to which made the first seizure of a vessel in waters over which both district courts exercise concurrent jurisdiction, and on a petition by one marshal to the court to have the other give up the custody of the vessel to him, the court heard evidence as to which seizure was prior, *Held*, that such a question was more properly raised on a petition by the marshal, than on a plea to the jurisdiction by a party in whose favor the marshal held process.

6. As long as one court of competent jurisdiction has custody of property, no other court of concurrent jurisdiction can acquire jurisdiction of it.

7. The custody of the law, having been once fixed by the valid levy of an officer duly authorized to seize, continues whether the officer be present or not, unless acts equivalent to a surrender and withdrawal are shown.

8. On the facts, the petitioning marshal did not have the prior seizure. A marshal's return stating a seizure of the vessel, but that at that time the vessel was in custody of a state sheriff, does not imply any such seizure as would make the marshal responsible, or would give the court jurisdiction.

9. Where a libel was filed on a bottomry bond, on which process was issued and returned, and on the return a state sheriff filed a claim and answer, setting up that he was in custody of the vessel at the time of the alleged seizure by the marshal, and the libellant moved to strike out the claim, *Held*, that the power of the sheriff to bring, in this way, proceedings in a state court, before a United States court for adjudication as to their validity, is doubtful.

10. Where a conflict of this sort arises between a sheriff and a marshal, the sheriff has two courses open to him, either to apply to the state court to be protected, or to apply by petition to the federal court to order its officer to withdraw. The sheriff's answer stricken out, and leave given him to apply by petition.

In admiralty. On the 21st of September, 1866, the steamship Circassian returned to the port of New York, from a voyage to Antwerp. Previous to her departure from New York, she had been owned by William Salem of that city, who had mortgaged her to Ernest Fiedler, for $90,000, and had subsequently conveyed the title, subject to the mortgage, to the Continental Mail Steamship Company. When she sailed on that voyage, there were bills against her for supplies, &c., for which specifications of lien had been filed against her under the lien law of the state of New York. Sess. Laws 1862, p. 956. While she was in Antwerp, a bottomry bond was executed by her master to Jonathan R. Bischoffsheim. In Halifax, on her return home, another bottomry bond was executed to Edward Cunard. Before she returned to New York her owners had become insolvent, and on the day of her arrival she was seized by the sheriff of the city and county of New York, under a warrant issuing out of the supreme court of the state of New York, to enforce a claim of Benner & Burr, who had filed specifications of lien as above stated. Similar attachments were afterward issued to the sheriff, as follows: September 24th, in favor of Alex. Irwin. September 28th, in favor of Zeno Secor. October 9th, in favor of James Shaw. October 10th, Horatio G. Seeber. Several other attachments were afterwards issued, but need not be specified. On October 30th, the sheriff made a sale of the vessel under the warrant in favor of Benner & Burr, and Appleton Sturgis became the purchaser at the sale, and paid twenty per cent. of the purchase money. He, however, declined to complete his purchase, and, on his motion, the supreme court on November 8, 1866, set aside the sale for want of jurisdiction to issue the warrant (the affidavit on which that warrant was issued not complying with the requirements of the statute), and ordered the twenty per cent. to be refunded. The affidavits on which were issued the warrants in favor of Irwin, Secor, and Shaw, contained similar defects. On November 23, 1866, the sheriff made another sale under the Seeber warrant, and Sturgis again became the purchaser, and paid twenty per cent. of the purchase money, but never completed the purchase. During this time, proceedings against the vessel had been taken in the United States district courts of both the southern and eastern districts, the vessel lying in the waters of the city of New York, which are by statute within the jurisdiction of both those courts. 13 Stat. 438.

The proceedings in the southern district were as follows: On September 25th, Bischoffsheim filed his libel in the southern district to enforce his bottomry bond. Process against the vessel was issued to the marshal of that district on that day, returnable on October 16th. On October 2d, Cunard filed his libel in the southern district to enforce his bottomry bond. Another libel was also filed the same day, and process was issued to the marshal on that day on both libels. On October 16th, the marshal returned the process in the Bischoffsheim case, with the following return: "In obedience to the within monition, I attached the steamship or vessel called the Circassian, her tackle, &c., therein described, on the 25th day of September, 1866, and have not given due notice to all persons claiming the same that this court will, on the 16th day of October inst. (if that should be a day of jurisdiction; if not, on the next day of jurisdiction thereafter), proceed to the trial and condemnation thereof, should no claim be interposed for the same. Previous to my attachment the vessel was in custody of the sheriff of the city and county of New York, under various attachments issued out of the state court. Robert Murray, United States Marshal." This return being made, proceedings in the cause were postponed from time to time. The returns to the other processes were subsequently made in similar form, differing only in the dates of the service, and proceedings on these processes were also postponed. On November 18th, by order of the court, the marshal made a special return of his proceedings in all the suits, which

was similar in form to the other returns, but which fixed October 2d as the day of the service of the Bischoffsheim process. On November 20th, an alias process was issued in the Bischoffsheim case, and a return was made of its service on the same day, the return being otherwise similar to the one given above. In this position of the matter, Sturgis, who, as above stated, had purchased the vessel at the sheriff's sale on November 23d, presented to the district court of the southern district a petition setting forth the proceedings under the state law, and that, by virtue thereof, the sheriff seized this vessel on the 21st day of September, and continued in possession up to the sale to the petitioner; that the marshal of the southern district claimed also to have taken possession of the vessel under the admiralty process in these causes, and claimed to have said vessel in custody, or to be entitled to the custody thereof; also, that the petitioner was ready to pay the balance of his bid to the sheriff, and was advised and believed that the sale by the sheriff passed to him a valid title to the vessel, free from all claims; wherefore he prayed that the vessel might be discharged from the custody of the marshal, and that the marshal might, by an order of this court, to be entered in these causes, be directed to surrender the possession of the vessel to him.

T. E. Stillman and Wm. Allen Butler, who appeared in support of the motion, argued that the case of Taylor v. Carryl [supra] had settled the law, that where a sheriff had possession of a vessel under a warrant from a state court, a United States marshal could not execute any process against her, and that the marshal's own return here showed that the sheriff was in such possession when the marshal undertook to attach, and that, therefore, the marshal never did or could attach, and should be directed by this court not to keep up the semblance of an attachment upon the vessel.

In opposition to the motion, J. Larocque, after arguing that the Irwin warrant, issued September 24th, under which the sheriff claimed to have been in possession on the 25th of September, when the process was issued to the marshal, was void for defect in the affidavit on which it was granted, argued the following points:

1. It has been held, that it is the right and duty of the court of the United States to enforce its possession when it is prior, as against a state officer. Slocum v. Mayberry, 2 Wheat. [15 U. S.] 1.

2. The warrant being void, it follows, that when the vessel was attached and seized by the marshal under the process in this action on the 25th September, the sheriff was not in possession qua sheriff, and held no legal or valid process. His presence was, therefore, no more an obstacle to the taking possession by the marshal than that of any other individual could have been.

3. The present, moreover, is not an application by the sheriff complaining of interference by the marshal. It is a petition of Appleton Sturgis claiming to be a purchaser, not under process issued prior to the attachment by the marshal in this suit, but under process confessedly issued only on the 10th of October. The petitioner makes the effort to tack the possession under this warrant of the 10th October, subsequent to the attachment by the marshal under the process in this action, to a prior alleged possession under other warrants. This he could not do even if those prior warrants were valid.

4. Mr. Sturgis, moreover, has become the purchaser under the sheriff's sale, and has not yet completed his purchase. He comes to the court in advance of doing so to obtain from it a judicial declaration by order that the marshal was not lawfully in possession before the right to take possession accrued to the sheriff under the warrant under which he purchased, for the purpose of concluding the libellant here on the question of jurisdiction in this suit. He has not even a standing in court for such an application. He is not owner of the vessel, and could not appear even to claim her in the ordinary way. Rule 26 of the supreme court in admiralty.

5. If, therefore, the court is satisfied that the marshal has the lawful possession of the vessel under the process in this suit, it is its duty so to declare and to enforce it. In any event, however, there is no state of facts shown which prevents the sheriff claiming to be in possession from delivering his bill of sale to the petitioner, and doing every formal act necessary to the delivery of possession. If in law the marshal is not in possession or entitled to possession on the facts shown, his process remains in abeyance until the possession of the sheriff has ceased. The return of that process on the 16th of October, stating that before he attached on the 25th of September the sheriff was in possession, does not interfere with the lawfulness of his possession from the time of the original attachment which he returns upon the facts now shown; and this case differs from those of Taylor v. Carryl, 20 How. [61 U. S.] 583; Freeman v. Howe, 24 How. [65 U. S.] 450; and Buck v. Colbath, 3 Wall. [70 U. S.] 334, in the essential particular that here has been no attempt as in those cases to proceed to adjudication in rem before the property shall be in the undisputed possession of the marshal of this court, and thus clearly under its jurisdiction.

6. This being an admiralty suit in rem to enforce the lien of a bottomry bond upon the vessel given by the master in a foreign country, the jurisdiction in admiralty under the constitution and laws of the United States is exclusive. The distinction between cases where it is exclusive of, and where it is concurrent with that of the state courts, is that it is exclusive where that of the British court of admiralty was so at the time of the Revolution, and concurrent in cases where the courts at Westminster exercised concurrent

jurisdiction at that time; and at that time they did, and both in that country and this they have ever since exercised exclusive jurisdiction of an action in rem to enforce the lien of a bottomry bond. It is not material to inquire whether a court of common law has or has not concurrent jurisdiction of an action in personam against the owner or master of a vessel on a bottomry bond for subtraction of the security, or after it has become absolute and when there is a personal covenant to pay. Const. U. S. art. 3, § 2; Judiciary Act, § 9 (1 Stat. 76); 1 Pet. Adm. 91, 92, 93 [Brevoor v. The Fair American, Case No. 1,847]; [American Ins. Co. v. 356 Bales of Cotton] 1 Pet. [26 U. S.] 545; The Volunteer [Case No. 16,991]; 16 Johns. 327; 1 Wheat. 304, 335; 1 Kent, Comm. 318, 319; 18 Johns. 392; Doug. 594; Menetone v. Gibbons, 3 Term R. 267; Ladbroke v. Crickett, 2 Term R. 649; Buggin v. Bennett, 4 Burrows, 2035; Blacquiere v. Hawkins, Doug. 378.

7. If, however, the state courts could exercise concurrent jurisdiction, the jurisdiction in this court has already attached by the filing of the libel to enforce the bottomry bond. Even if the libellant might have availed himself of the provisions of the act of the legislature of New York of April 24, 1862, entitled "An act to provide for the collection of demands against ships and vessels" (Sess. Laws 1862, c. 482), he has not chosen to do so. That act, whenever any lienholder under the state law originates proceedings, assumes to foreclose by those proceedings and to cut off, in favor of the claims of citizens of New York against the vessel arising in this state, whether prior or subsequent, every other lienholder having a claim, whether of exclusive admiralty jurisdiction, or concurrent admiralty jurisdiction, except seamen having claims for wages. Section 1, subd. 5. The act in this respect is a plain infringement of the jurisdiction of the federal courts in cases of admiralty conferred by the constitution of the United States, and void. It is to the suitor in admiralty that the United States judiciary act saves a "common law remedy in all cases where the common law is competent to give it"—not to the defendant or respondent. It is the suitor who is entitled to exercise the option as to the forum, where one exists. With that single saving, the jurisdiction of the admiralty is expressly made exclusive of the state courts. And even that saving is fully satisfied by the construction that the common law remedy must be sought in the federal court and not in the state court, and full effect cannot be given to all the language of the section by adopting any other construction. U. S. Judiciary Act, § 9; 1 Stat. 76.

8. The present motion, moreover, under color of that act of the legislature of New York, undertakes to deprive this libellant, who is an alien, of his right of proceeding in the federal court against a domestic ship owned by citizens of New York, and claims to abrogate the plain language and import of the contract of bottomry executed in the foreign port of Antwerp.

9. The state law also seeks to reverse the well-established rule of the general maritime law of the world, that a bottomry bond is entitled to a priority in payment over every other claim against the ship, and successive bottomry bonds in the inverse order of their dates and of the exigencies calling for them, the last given being entitled to be first paid. This state law postpones them all to claims of its own citizens under liens acquired prior or subsequently, in the ship's home port, as against a foreigner acquiring a lien in good faith in a foreign port, and in reliance upon the general maritime law adopted expressly by the constitution, laws, and decisions of the courts of the Union, but attempted to be set aside by this state enactment.

10. The court will, moreover, not pass upon such a question adversely to the libellant on motion. It would be in effect deciding against him a jurisdictional question involving that of the continuance of his lien under the bottomry bond, in a form which would deprive him of his right to appeal to the supreme court of the United States. The petitioner should be left to set it up by claim and answer in this suit. The prayer of the petitioner should therefore be denied with costs, and the order should declare that the marshal has possession of the vessel under the process in this action in law and in fact.

In behalf of Cunard, the other bottomry bondholder, G. D. Lord, also presented a brief, but cited no other authorities than those cited above.

[Dec. 24, 1866.]

BENEDICT, District Judge. I fully appreciate the unfortunate position of this steamer, and have considered with care the reasons which are urged in support of this petition. The impressions formed upon the argument are, however, confirmed, and I am satisfied that the motion should be denied. In the first place, the petitioner is not in a position to entitle him to ask such an interference of this court. He is simply a bidder at the sheriff's sale, who has not yet completed his bid. He bid off the vessel with full knowledge of the admiralty proceedings against her. He avers in his petition that he is advised and believes that if he completes his purchase he will receive a valid title to the vessel. He does not aver that the sheriff is unable or unwilling to put him in possession on receipt of the balance of the purchase money. It is not seen how a party so situated can ask this court to direct the marshal to surrender to him the possession of the vessel. If the action of the marshal had been such as improperly to delay or embarrass the proceedings before the state officers, the state court was competent to protect its officer and its custody of the vessel, if such it claimed to have; and the

sheriff in such case might perhaps with propriety have applied to this court to restrain any unlawful action of the marshal. It might also be that the owners or creditors of the vessel could have applied to forbid action, on the part of the marshal, which was likely to prevent realizing a full price from the sheriff's sale. But since the service of the process by the marshal, proceedings in admiralty have been stayed; the proceedings under the state law have gone on: the vessel has been sold by order of the state officer, and for aught that appears, for a full price, under notice of all that has been done or is claimed in the admiralty causes. Neither the sheriff, nor the owners, nor the creditors, complain of any improper exercise of the powers of the officer of this court. How, then, can the petitioner, who has suffered no injury, and may never have any interest in the vessel, ask this court to interfere in his behalf?

There is another reason for denying this application, which is, that it raises a question which should not be adjudicated upon a motion. That question is, whether the custody of the sheriff, by virtue of the statute, is sufficient to prevent the court of admiralty from acquiring jurisdiction for any purpose during the custody of the sheriff, although the officer issuing the warrant to the sheriff had failed to acquire jurisdiction, and the proceedings before him were void. Such is claimed to be the nature of the sheriff's custody in this case; and it appears that the first proceeding taken before the state officer has been declared void by the state tribunal; that the second contains the same defect, and that the third and only other proceeding, previous to the marshal's attachment, is open to objections which may prove equally fatal. It is also to be noticed that the order of sale made by the state officer, under which the petitioner claims, was not made in either of the proceedings commenced before the marshal's attachment, and that it recites that the sheriff seized the vessel on October 10th, which was subsequent to the marshal's attachment.

Now, I do not decide that the proceedings in the state tribunal are void for want of jurisdiction; nor do I examine those proceedings further than to see that the objections taken to the jurisdiction are not frivolous, but simply determine that such a question as this petition raises, and on which the rights of these bottomry holders depend, if the theory of the petition be sound, should not be disposed of in a summary manner, on a motion which cannot be reviewed on appeal.

If there was no ground to contend that the case raised any other question than the one decided in the case of Taylor v. Carryl, 20 How. [61 U. S.] 583, on which the petitioner relies, it might, perhaps, be the duty of the court to end the controversy now. But the case is not identical with the case of Taylor v. Carryl. In that case, the prior custody was the custody of the superior court of the state, whose jurisdiction was conceded. The question was one of title, and what the court decided was, that a title derived from the sale of the vessel, as perishable, by a superior court of the state in a valid proceeding, made after the marshal had retired, and when the custody of the state court had been actual and continued, was a better title than one dependent on the marshal's seizure in the admiralty proceeding.

It may be, that for the same considerations which influenced the high tribunal which decided Taylor v. Carryl, it must also be held in this case that the custody of any state officer, whether acting with or without jurisdiction, is sufficient to oust the jurisdiction of the admiralty, even in an action like the present, where its jurisdiction is exclusive. But in the absence of any such decision by the supreme court, and in view of the effect of such a decision in cases of prize, in cases under the revenue and neutrality laws, and in this case, where the result, claimed by the petitioner to follow, would be to supersede the bottomry bonds by the prior state liens, and in effect destroy them, I do not feel bound so to decide on a motion like this, and enforce the decision by a final order directing the marshal to surrender possession to the petitioner.

So far this application has been treated as an application for the interposition of the court to avoid a conflict between federal and state authority; but it is not quite clear that the petition presents a case of conflicting jurisdictions. The averment of the petitioner is, that the proceedings before the state officer have gone to a sale of the vessel to him, and that the sheriff continued in possession, from his first seizure "up to the sale to the petitioner." There is no definite averment of any custody by the sheriff since the sale, and the prayer is, that the marshal deliver the vessel, not to the sheriff, but to the petitioner. It would not be a very strained construction of this petition, which is certainly ambiguous, to hold that it showed no conflict between the marshal and the sheriff, but that the controversy now lay between the bondholders and the buyer at the sheriff's sale. If such be the nature of the controversy, no reason is discovered for determining it by a summary order like the one prayed for.

In dismissing this application, I venture to add to these remarks a single observation, in the hope that the attention of the appellate court, before which this case will doubtless come, may be called to it.

The source whence such conflicts as the present, in regard to liens upon ships arise, is the distinction between foreign and domestic vessels, laid down in 1816 in the case of The General Smith, 4 Wheat. [17 U. S.] 438. It is that decision, long considered by

many able lawyers to be without solid foundation, which compels resort to state lien laws, and gives birth to statutes like the one here involved—a statute which assumes to foreclose and cut off by proceedings in the state court all other lien creditors except seamen, including those having claims of exclusive admiralty jurisdiction—a statute which creates a sort of state admiralty, liable at all times to be brought in conflict with the national courts, to which the admiralty and maritime jurisdiction has been intrusted under the constitution—of which statute I speak the more fully, as many of its features originated with me, when acting as a member of the legislature which passed it. Such laws are now deemed necessary to obviate the consequences of the decision in the case of The General Smith, but they would seldom or never be resorted to if the distinction of The General Smith could be reconsidered, and it be held that, "it is the ship, and not the ship of a particular owner, nor the ship of a particular flag, or national character; not a domestic ship, nor a foreign ship; not a ship in a port of a state to which she does not belong, or in which her owner does not reside; but a ship, every ship, that is bound for the bill of lading, the charter party, the wages of the seamen, repairs, supplies, materials, and maritime loans."

Application denied.

After this petition of Sturgis was thus disposed of, Bischoffsheim applied to the district court of the southern district for an order directing the marshal to amend the return in his action by striking out of it all reference to the prior attachment by the sheriff. This application was based on affidavits to show that the warrants held by the sheriff on September 25th, the day when the process was served by the marshal, were void for want of jurisdiction.

J. Larocque appeared in support of the motion, which was opposed, in behalf of the parties who held the state attachments, by W. R. Beebe, R. D. Benedict, and Wm. Allen Butler.

[Jan., 1867.]

SHIPMAN, District Judge. I have given the questions involved in this motion, and those with which they are necessarily and directly connected, an extended and a careful consideration, and am of opinion that this motion, so far as it calls upon the court to direct the marshal to amend his return to the process, should be denied. There are serious and almost unsurmountable objections to the court's dictating to the marshal what return he should make in any given case touching the facts to which the return properly relates. The marshal and not the court is responsible for the execution of this process, and he should be left free to state what he does in the premises subject to his responsibility to the law under which he acts. These remarks refer to the material facts touching an officer's action, and not to the mere form of the return. In the case of Wortman v. Conyngham [Case No. 18,056], Mr. Justice Washington, after argument of a rule to show cause, took the same view even as to a return on an execution. Much more should it apply to mesne process. If the marshal desires to amend his return, he will be permitted to do so, the court reserving all questions as to law or fact which may arise in the further progress of the cause.

Motion denied.

After the above motion, no further proceedings were taken in the southern district, the activity of the litigation being transferred to the eastern district.

The proceedings before the district court of the eastern district were as follows:

On the 27th day of September, two days after the filing of the first libel in the southern district, a libel was filed by C. K. Porter and others, seamen on board, to recover wages, and process in rem was issued. Thereafter three other libels, also for wages, were filed, the claims in all amounting to some $6,000. To the first of these processes the marshal made return that he had seized the vessel on the 27th of September, and given due notice to all parties to appear; and to the others a like return, except as to date. The return made no reference to any possession by the sheriff or the marshal of the southern district, and the marshal claimed that there was no such possession at the time of the service of this process. No one appearing to contest these claims, decrees were in due course entered by default, condemning the vessel. Subsequently, on application of Edward Cunard, who had filed the second libel in the southern district, and also on application of Ernest Fiedler, the mortgagee of the vessel, the defaults were opened, and, claims and answers being duly filed, the causes were placed on the calendar, and thereafter called in their order for hearing, when it was suggested that this court had no jurisdiction of the vessel for the reason that on the 27th of September, when the process of this court was served, the vessel was in the custody of the marshal of the southern district. Upon this suggestion, the hearing of the causes was postponed, and leave given to raise the question suggested by proper averment, and a day set for its determination. The leave thus given was never availed of, and the causes subsequently proceeded to trial on their merits, without objection, and after consideration decrees were rendered in favor of the libellants, according to which a venditioni exponas was issued to the marshal, and the vessel advertised to be sold at the foot of Joralemon street, Brooklyn, where she then lay. In none of these actions in either court did any owner appear to claim the vessel. It was always insisted by the

libellants in this court, and by the marshal of the eastern district, that after the 27th day of September the vessel was always in his manual possession and under his actual control. Matters being in this position, after the denial of the motion to compel the marshal of the southern district to amend his return, an application was made to this court, on behalf of Bischoffsheim, to open the default in the seamen's wages suit, and to allow him to file a plea to the jurisdiction of the court, he claiming that this court never acquired any jurisdiction, because at the time of the alleged seizure by the marshal of this district the vessel was in custody of the marshal of the southern district. The court intimated that such a question would more properly be brought up by an application in behalf of the marshal of the southern district to remove the marshal of the eastern district. Accordingly the marshal of the southern district filed a petition, stating that he attached the vessel on September 25th, and had been interfered with by the marshal of the eastern district, and praying this court to have the "priorities of the respective attachments and of the jurisdictions of the courts of the respective districts investigated and determined by this court." Notice of hearing on this petition was ordered to be given to the libellants in this court, and the hearing was brought on before the court.

Mr. Larocque appeared for Mr. Bischoffsheim and for the marshal of the southern district.

Mr. Vanderpoel appeared for the sheriff of New York, and said that he had just heard of the proceeding, of which he had had no notice, and if the sheriff was to be prejudiced by it he should wish to be heard in the matter. It was stated, however, that the sheriff would not be affected by this proceeding, which was to affect the two marshals only, and Mr. Vanderpoel withdrew.

In support of the petition, Mr. Larocque put in evidence the libel of Mr. Bischoffsheim in the southern district and the process issued on it, on the 25th of September, with the return of the marshal of the southern district upon it, that he had on that day attached the vessel, and that previous to his attachment the vessel was in the custody of the sheriff of New York.

Mr. Hill, who appeared for the libellants, put in evidence the special return made by the marshal of the southern district in all the cases in that district, in which he returned that he attached her on the 2d of October, and previous to his attachment she was in custody of the sheriff, &c.; and the alias process issued in the Bischoffsheim case, with the marshal's return on it, that he had attached the vessel on the 20th of November, and previous, &c.

Mr. Larocque then put in evidence the proceedings in the state attachments, and rested.

Mr. Hill also rested.

Mr. Larocque then insisted that the court in this state of the case, must decide that the marshal of the southern district had the custody; that he had returned that he had it, and an officer's return was conclusive. He added that he had understood that evidence was to be given that no one was on board the vessel at the time the marshal of the eastern district made his arrest of her, and he had come with witnesses to give testimony on that point; but none had been given on the other side, and he supposed the court would at once pass on the case without his calling them.

The judge said he should pass on the case on the evidence which parties put in, but they must themselves decide as to what evidence to put in, and he should give it due consideration, as it was a matter of importance.

Mr. Larocque then asked leave to introduce further evidence, which was granted.

Witnesses were then called on both sides as to the facts of the service of the process by the marshal of the southern district. Their testimony is sufficiently detailed in the following opinion delivered by the court, in disposing of the petition.

BENEDICT, District Judge. Controversies like the present cannot always be avoided in a port where three sheriffs of three different counties, and two marshals of two different districts, to say nothing of other officers, have concurrent jurisdiction to make seizures on its waters. Of this class was the late case of the ship Ferdinand, cited on the hearing, where all the three sheriffs claimed to have the simultaneous custody of the vessel; and somewhat similar was the older case of the Alida, before Judge Betts, where the controversy was between the marshal, a sheriff, and a receiver.

This case differs, however, from most others in this important feature, that the rights and priorities of the various parties proceeding in admiralty, as between themselves, will not be affected by a determination of the question of the priority of seizure. This is because the character of the demands determines the order of payment, in whichever court the vessel may be sold and the proceeds distributed.

The application now made, therefore, does not look to a determination of any question of priority in payment, but rather seeks a determination of the question which of the two courts has legal custody of the vessel, and can make a valid decree of sale.

This question I much preferred to have raised and decided in the southern district, where the first libel was filed, but as more than ample time and opportunity have been given for its examination there, and as it is now distinctly raised here by the marshal of that district, I do not hesitate to examine and dispose of it.

As to the general principle of law which is applicable to this case, no question can arise; for it is settled that so long as one court of competent jurisdiction has custody of property, no other court of concurrent jurisdiction can acquire jurisdiction thereof; and this custody of the law having been once fixed by the valid levy of an officer duly authorized to seize, continues, whether the officer be constantly present or not, unless acts equivalent to a withdrawal and surrender are shown. 2 Pars. Mar. Law, p. 523; The Julia Ann [Case No. 7,577]. As to the controlling facts of the case there can be no reasonable doubt, and they are such as to render it unnecessary to consider whether the evidence offered with a view of showing a withdrawal by the marshal of the southern district, and an acquiescence in the custody of the marshal of the eastern district, does or does not establish that fact. The undisputed facts are such as to render it only necessary to consider whether the marshal of the southern district ever made any valid levy on this steamer prior to the 27th of September, the day when the process from this court was served.

Prior to the 27th of September, the marshal of the southern district had but one process in his hands, that in the suit of Bischoffsheim. This process Bates was deputed to serve, and what he did is proved by Bates himself, and by him alone. He says that he received the process on the 25th, and on the same day, by virtue thereof, seized a wooden side-wheel steamer, with two smoke stacks, which he supposed to be the "Circassian," which, when he seized her, lay in Brooklyn, south of the Hamilton ferry, opposite the Atlantic stores. This vessel, he says, went subsequently into the Atlantic basin, where he was several times on board of her, and she then went away, but where to he does not know.

Now the Circassian is an iron vessel, a propeller, with one smoke stack. She was at no time south of the Hamilton ferry or in the Atlantic basin. On the 25th, and when seized by the marshal of the eastern district on the 27th, she was between the Hamilton and Wall Street ferries, and has there since remained. Bates resided near the Hamilton ferry, and is well acquainted with the locality of which he speaks, and is positive as to where he found the vessel which he seized, and that he was on her in the Atlantic basin. He had no other process against any steamer, and if his evidence be true, he went to the wrong vessel, and made no levy at all on the Circassian prior to the 27th of September. Moreover, Bates could not read writing, or write, and says that he received no instructions from the marshal, or any other person as to the wharf at which the Circassian lay, but went on his own knowledge, having seen her come in a day or two before, as he supposed.

The probability is that he mistook for the Circassian another steamer belonging to the same company, which it is proved did at this time lie at the Atlantic stores, and subsequently went into the basin. It is quite clear he did not visit the Circassian, for of several persons present in court at this hearing, who were on board of her on the 25th, he can identify but one, and that one declares that he saw no such man as Bates at the vessel; while the quartermaster who was at the gangway the whole of the 25th, swears that Bates was not there on that day, nor was any seizure made on that day.

To this evidence is added the circumstance that when on the 2d of October, the marshal received a second process against the Circassian, he did not depute Bates to serve it, according to the usual practice, but gave it to another deputy, and in his special return he state his first seizure of the Circassian to have been made on the 2d of October. It would seem to be difficult upon such evidence to hold that the marshal of the southern district made any seizure of this vessel prior to the 27th of September. But supposing the Circassian to have been the vessel which Bates visited on the 25th, there are still other features of this case which are decisive of the present application.

It is conceded that on the 25th of September, the sheriff of New York was on board the Circassian claiming to have her in custody. The marshal of the southern district must therefore have done one of two things, either he ignored the custody of the sheriff and took the vessel into his own custody and control, or he acknowledged the custody of the sheriff and made no seizure himself. He could not acknowledge the special property of the sheriff and at the same time take the possession and control himself. That he acknowledged the possession of the sheriff, and took no possession himself is apparent from the returns which he made to the original and alias process in the case of Bischoffsheim.

The apparent inconsistency in the phraseology of this return is doubtless owing to the use of the ordinary blank return printed on the process, in which the marshal filled the date of the supposed visit of Bates to the vessel, and to which he added in writing the statement that the vessel was found to be in the custody of the sheriff. This written portion of the return is the controlling portion, and it announces and was intended to announce that the vessel was already in the custody of the law, and that therefore the marshal could not bring her before the court for condemnation. Taken together, the return cannot, as I view it, be held to return any such seizure of this vessel as would render the marshal responsible, or would give the court jurisdiction. The fact stated in it showed a seizure to be impossible, and the statement was useless and immaterial except as an excuse for his failure to levy.

That such is the true construction of this

return is shown by the testimony of the marshal's chief clerk, Mr. Thompson, who swears that the return made in this case is the return made in all cases where the sheriff is found in custody, and I am not aware that the returns made in this form have ever been understood to import anything more than that the marshal had on a certain day presented himself at the vessel for the purpose of seizure and had been unable to make it because of the prior custody of the sheriff. Such seems to have been the construction put on the return in this case, for on its being made, an alias process was moved for and issued. Why an alias if the vessel was already in court? Why if the marshal levied on the 25th of September, did he return upon the alias that on the 20th of November the sheriff was in custody? Why in his special return say that the sheriff was in custody on the 2d of October? Why, if this return showed the vessel in court, was a motion made to compel the marshal to strike out the reference to the sheriff's custody? Why, if that portion was not material, does the marshal decline to strike it out? Why, if on such a return the court can entertain jurisdiction do the processes still lie over without action thereon, and the suits, although involving a large amount and pending five months without any defence being interposed, remain stagnant, without entry of default, time to answer, or other steps looking towards a final determination? I can conceive of but one answer, and that an obvious one. The return of the marshal showed that the court had not acquired jurisdiction of the vessel against which the suits were brought. Both the return and suspension of proceedings were in accordance with the opinion of the court in the case of The Robert Fulton [Case No. 11,890], where it was said: "If the marshal found the vessel held by the sheriff under his attachment, he should have so returned upon his process, and all further proceedings of the court would have been arrested." These considerations are, in my opinion, sufficient to remove all doubt as to the jurisdiction.

But if doubt does exist as to the jurisdiction of this court, it certainly would be neither useful nor just to the libellants here, to prevent the proposed sale, which, if the court lacks jurisdiction can injure no one, and which the libellants are urgent should be made, and of the validity of which they are willing to take the risk; thereby compelling them to resort to a tribunal where the action and return of the marshal have rendered it impossible to proceed beyond the filing of the libel. Nor is it seen that any advantage could be derived from such an order by any of the parties who have filed their libels in the southern district, but rather the contrary, inasmuch as proper proceedings on their part will enable them at once to obtain payment in this court out of the proceeds of the proposed sale, in the order of the priority to which they may be entitled, unembarrassed by the marshal's return in their present proceedings, which renders them ineffective.

A further feature of this case should be alluded to in order to explain the difference between the return of the marshal of the eastern district and that of the marshal of the southern district, and to prevent any inference that the propriety of either Marshal Murray's or Marshal Dallon's action as regards the sheriff is here called in question.

The custody of the sheriff of New York, announced by Marshal Murray as existing on the 25th of September and subsequently, was a custody, as it now appears, under two warrants issued by a judge of the supreme court of New York, in statutory proceedings against this vessel under the state lien law. One of these proceedings has been since held void for want of jurisdiction by the supreme court, and the other is claimed to be equally invalid, and all such proceedings in a state court are brought in question by the late decision of the supreme court in the case of the Moses Taylor. These warrants were however valid on their face, and the marshal of the southern district deemed it his duty to acknowledge the custody of the officer who held them. The marshal of the eastern district, on the other hand, saw fit to treat them as void, and insufficient to authorize any levy by the sheriff, or prevent a seizure by him, and he therefore took possession and assumed and has maintained control of the vessel. Whether the warrants held by the sheriff were void, and whether the marshal of the eastern district could lawfully terminate any possession which the sheriff may have had on the 27th of September, are questions not raised or disposed of here, but are properly left by the parties interested in them to be raised in such possessory action, replevin suit, or other proceedings, as may be instituted to test the validity of any title based upon the action of the marshal of this district.

What it is intended to determine here is simply the question of priority between the two marshals, and the consequent jurisdiction over the vessel. On this question my conclusion is, that the marshal of the southern district made no valid seizure of this vessel prior to the 27th of September, and that the sale of the vessel by the marshal of the eastern district under the writs held by him should be allowed to proceed. The prayer of the petition must therefore be denied.

The vessel was not, however, sold under these proceedings, the claims of the libellants being paid. The question which court had jurisdiction of the vessel being, however, thus disposed of, Bischoffsheim, before the discharge of the libellants' process, filed his libel anew in the district court of the eastern district.

Process against the vessel was issued on this libel, and the marshal made return that he had seized the vessel and given due notice

to all parties to appear and defend. Upon the return of this process, besides other claimants, the sheriff of the city and county of New York appeared as a claimant and filed a claim, averring "* * * that as sheriff he was in possession of the said steamship at the time of the alleged attachment thereof by the marshal of the eastern district of New York, and prior to any attachment of or custody of said steamship by said marshal, and was lawfully entitled to such possession under divers attachments and process issued in due form of law to said sheriff out of the supreme court of the state of New York, and thereunder he has sold the said steamship, which attachment and process said sheriff is ready to produce, wherefore he prays to defend accordingly." To this claim and appearance the libellant, Bischoffsheim, objected, and moved that the claim be stricken out.

Larocque & Barlow, for motion.
Brown, Hall & Vanderpoel, for the sheriff.

BENEDICT, District Judge. I do not conceive that this court has any power by any form of process to require an officer of a state court to submit himself, and with him the tribunal which he represents, to the jurisdiction of this court; and I greatly doubt the power of the sheriff by making himself a party to proceedings in rem in this court, as here proposed, to bring proceedings pending in a state tribunal before this court for adjudication as to their validity. It is not seen how the decree of this court, adverse to the legality of the proceedings pending in the state tribunal, should such decree be made upon the issue sought to be raised by the sheriff, could be rendered effective to stay the action of the state court, and any determination which this court might make upon such issue, would seem, therefore, to be nugatory. If, on the other hand, the sheriff can submit himself to the jurisdiction of this court, it may be doubted whether, when he has appeared in an action in rem, and made himself a party by filing a claim to the vessel, he is in a position to insist that the vessel is not in the custody of the court. The appearance and claim may amount to an acknowledgement of a seizure by the marshal, and a seizure acknowledged by the sheriff would in such case doubtless give this court jurisdiction of the property.

What is desired by the sheriff is to bring to the notice of this court the fact that the marshal of this district has undertaken to seize a vessel which was in the custody of the sheriff, as minister of the law by virtue of proceedings pending in a tribunal of the state, in order that this court may stay its hand, and allow the proceedings in the state tribunals to go on without interference. In such an emergency two ways lie open to the sheriff. He may bring the facts before the court whose officer he is, and that court has doubtless full power to protect its own custody, if such it has; or he may bring the facts before this court by petition, and pray this court to instruct its officer to withdraw from the vessel. And whenever the latter course shall be adopted, this court will always be found prompt to investigate the facts and solicitous to respect the action of the state officers, and will always avoid a conflict of authority when it is possible to do so consistently with law and justice.

This method of procedure, if followed in the cases of conflicting jurisdictions which must sometimes arise in a harbor like this, will in most instances result in a summary and final determination of the question of possession between the officers of the respective courts, and promptly relieve those officers as well as the courts themselves from many of the embarrassments which otherwise attend such controversies; or if cases arise where questions of such novelty and difficulty are found to be involved as to make a final disposition of them upon a summary petition inadvisable, it will be made apparent to both courts at the outset that a disputed jurisdiction is necessarily exercised, to prevent injustice, and not from any want of regard or respect for the action of another tribunal. My opinion, therefore, is that the claim and appearance of the sheriff should be stricken out, and leave given him to apply by petition for the relief which he desires.

NOTE [from original report]. The proceedings in the United States courts against this vessel resulted in the payment of the seamen, the settlement of one bottomry claim, and the bonding of the vessel in the Bischoffsheim Case, in the eastern district, by the mortgagee. That suit is still pending. A brief statement of what was subsequently done in the state court will be of interest. While the above proceedings were pending, the decisions of the supreme court of the United States in the cases of The Moses Taylor, 4 Wall. [71 U. S.] 411, and the Ad. Hines (not yet reported), were made, and Judge Barnard, of the supreme court of New York, had in the case of the steamboat Josephine decided that under those decisions the state courts had no jurisdiction to enforce a lien on a seagoing vessel, and that the lien law of the state was so far unconstitutional. From this decision an appeal was taken to the general term. While this appeal was pending, a motion was made in the Circassian Case, on behalf of Fiedler as assignee of Sturges, who had bought at the sheriff's sale, to set aside the sale and all the proceedings as void. On the other hand, a motion was made in behalf of parties who had warrants against her, to compel Sturges to complete his purchase and pay the purchase money. The motions were heard together before Judge Sutherland, and his decision, denying both motions, will be found reported in 50 Barb. 490. The general term of the supreme court reversed the decision in the case of The Josephine [50 Barb. 501], holding the law constitutional. An appeal was taken to the court of appeals, which reversed the decision of the general term, and affirmed Judge Barnard's decision [39 N. Y. 19]. While this appeal was pending, Fiedler, who had acquired the title to the vessel by a sale under his mortgage and an assignment from Sturges, the purchaser, having paid off the decrees in the seamen's wages cases and bonded the vessel in the other cases in the United States courts, brought an action

against the sheriff of New York to have the proceedings under the various warrants set aside and the twenty per cent. refunded, and to have the sheriff enjoined from further meddling with the vessel. He paid into court also a sum sufficient to cover the lien claims, which was by agreement to stand for the vessel, and she went to sea on the 10th day of August, 1867, having been in the custody of the law for nearly a year. In this suit by Fiedler, the sheriff set up the lien proceedings by his answer; and after the decision of the court of appeals, his answer was stricken out by the supreme court, and the money refunded to the mortgagee. The various material men, who had relied upon the lien law of the state, lost every dollar of their claims, amounting to nearly $20,000.

Case No. 2,722.

The CIRCASSIAN.

[1 Ben. 209.] [1]

District Court, E. D. New York. June, 1867.

LIEN—STEVEDORE'S WORK—JURISDICTION.

Where a libel was filed to recover for stevedore's services, and exceptions were filed to it on the ground that the services were not maritime, and therefore the claim was not within the jurisdiction, *held*, that though the court would be disposed, if the question were a new one, to hold that such services were maritime, yet as the question had been repeatedly determined otherwise in the southern district, the law of those decisions would be followed until modified by concurrent action on the part of both courts, or by the circuit court on appeal.

[Cited in The William, Case No. 17,710; The George T. Kemp, Id. 5,341; Roberts v. The Windermere, 2 Fed. 729; The Canada, 7 Fed. 122; The Wivanhoe, 26 Fed. 928; The Esteban De Antunano, 31 Fed. 924; The Gilbert Knapp, 37 Fed. 211; The Main, 51 Fed. 956; The Seguranca, 58 Fed. 908.]

In admiralty. The libel in this case was filed by James Adams to recover for stevedore services performed in taking in, storing, and in breaking out and landing cargo of the steamer Circassian. Exceptions were filed to it upon the ground that the services were not of a maritime character, and not within the jurisdiction of the court.

O'Sullivan, for libellant.

T. E. Stillman, for claimant.

BENEDICT, District Judge. I confess that I have never been able to see any sound distinction between the nature of the services performed in stowing and breaking out the cargo of a ship, and the services performed in its transportation. The stowage and the landing of the cargo form a necessary part of the contract of affreightment. Without the performance of this duty no freight can be earned. The safety of the ship and of the cargo depends in a great measure upon the care and skill displayed in the performance of this duty, and for its non-performance in a proper manner the ship is liable in the admiralty. It is a service which, when performed by the crew, as is frequently the case, is considered a maritime service, and compensated in the admiralty under the name of wages. And when not performed by the crew, it devolves upon a class as clearly identified with maritime affairs as are the mariners, and fitted for the duty by a special and peculiar experience.

These considerations seem to me sufficient to establish the maritime character of the service, and to bring it within the admiralty and maritime jurisdiction of the district courts, and were the question a new one I should so hold.

But I do not feel at liberty to follow my individual opinion; for, although the question is now for the first time presented in this district, it has been repeatedly decided by Judge Betts adversely to the jurisdiction, and when a question frequently arising in the past has been thus settled, so far as the district court is concerned, by decisions in the southern district, I consider it to be my duty to declare the same law here, until the rule shall be modified by concurrent action on the part of the two district courts, or by the circuit court on appeal.

The exception is therefore allowed, but without costs, and leave given the libellant to file an amended libel within ten days.

[NOTE. For hearing and decision on exceptions to amended libel, see Case No. 2,723, next following.]

Case No. 2,723.

The CIRCASSIAN.

[2 Ben. 171.] [1]

District Court, E. D. New York. Feb., 1868.

SALVAGE—PLEADING.

1. Labor in unloading the cargo of a ship, which is on fire and in danger of destruction, attended with danger to life, and of unusual severity by reason of the danger to the ship, is not simple stevedore's services, and would be ground for sustaining an action in admiralty to recover compensation for them.

[Cited in Francis v. The Harrison, Case No. 5,038.]

2. The contract to render such services is none the less a maritime contract, because the compensation did not depend on the result.

[Cited in The Kate Tremaine, Case No. 7,622.]

3. Where a libel had been dismissed on exception, but leave had been given to amend, and a new libel was filed setting out a valid cause of action, but adding a second cause of action, which was substantially a repetition of the first libel which had been dismissed: *Held*, that this was an irregular and improper mode of pleading, and the libel must be dismissed, as not within the spirit of the order giving leave to amend.

BENEDICT, District Judge. This case, which has heretofore been before the court, —see 1 Ben. 209 [Case No. 2,722],—upon exceptions filed to the original libel, now comes up again upon exceptions to the amended libel. The original libel was dismissed upon the ground that under the ad-

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

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judged cases binding this court, it could not, sitting in admiralty, entertain jurisdiction of a claim for stevedore labor. On application, leave was, however, given to amend, under which the present amended libel has been filed, to which exception is also taken upon the ground that it shows no facts which make the action other than one to recover for stevedore services, and consequently that, under the previous decisions, it must be dismissed. Upon the argument of the exceptions, it seemed to be assumed on the part of the claimants, that in order to sustain the libel, the facts presented must show a case of salvage, and it was argued that, upon the face of the libel, it appeared that it was no case of salvage, inasmuch as it is expressly averred that the services sued for were rendered in pursuance of an agreement to pay reasonable compensation for them without regard to the result. The assumption upon which this argument is based I cannot consider as well founded. There may well be a contract to render services to a ship in danger for a sum certain, without regard to the result, which, if it would not form the basis of a claim for salvage, in the strict sense of the word—that is, for a compensation exceeding the value of the services, and allowed out of considerations of public policy—would still be a maritime contract, enforceable as such in admiralty, and to be adjudicated upon according to the principles applicable to cases of contract. The A. D. Patchin [Case No. 87]. The facts set forth in this libel, in what is called the first cause of action, are sufficient, if proved, to make out such a case of contract clearly within the jurisdiction of a court of admiralty. These facts are, that the steamer was on fire in her lower hold, and in danger of being destroyed; that to save her, it was necessary to remove the cargo to get at the coal which was on fire, and to remove it; that owing to the fumes of the burning coal the labor could only be performed at the exposure of life; that the danger to the ship required unusual labor by day and by night, which the libellants performed at request of the owner. The distinguishing features which these facts present are, that the services in question were performed in aid of a ship in danger of destruction; that they were attended with danger to life, and were unusual in their severity by reason of the danger of the ship. Such circumstances have been considered as sufficient to change the character of a contract of affreightment where the agreement was to transship a cargo for a remuneration "according to the services rendered and the risk encountered" into a salvage contract. The Westminster, 1 W. Rob. Adm. 229. And in my opinion they change the character of the services sued for in this case, and render inapplicable the decisions upon cases of simple stevedore labor—decisions which I feel bound to follow, but which I conceive to be without any solid foundation in principle. My conclusion, therefore, is, that the facts set forth in this libel, and designated the first cause of action, are sufficient, if proved, to enable the libellants to maintain their action. But this libel, in addition to the matter already considered, contains what is called a second cause of action, which appears to be the same transaction again set forth in a different form, and here presenting only the features of a simple claim for stevedore labor. It is, in fact, no more than the contents of the original libel once dismissed again presented to the court in the same form, and designated a second cause of action. Such a mode of procedure is irregular and improper, and could hardly have occurred had proper attention been paid by the draughtsman, and I shall mark my disapproval of it by dismissing the libel under the fourth exception, as not within the spirit of the order giving leave to amend. Leave is given to file a proper pleading upon payment of costs of the exceptions.

Case No. 2,724.

The CIRCASSIAN.

[3 Ben. 398; 3 Am. Law T. Rep. U. S. Cts. 4.][1]

District Court, E. D. New York. Sept., 1869.

BOTTOMRY—ARREST OF SHIP—TELEGRAPH.

1. Where a steamship, arriving in Antwerp from New York, was consigned to S., who took the agency of the vessel, put her up for passengers and freight, and paid bills for her, and the vessel was attached for a private debt due from her owner, and it became necessary to relieve the vessel from that attachment, in order that she might sail as advertised, and thereupon the master of the steamer executed a bottomry bond to S. for the amount of the claim of the attaching creditor, and also of the advances made by S. for the steamer: *Held*, that inasmuch as the advances had been made without any agreement, or any reasonable expectation, that they were to be secured by bottomry, the bond was invalid as to that item.

[Cited in The Roslyn, Case No. 12,067; The Edward Albro, Id. 4,290.]

2. Although the design of the bond to release the ship from arrest, might be a ground sufficient to sustain the bond, yet, as it appeared that the master took no means whatever of communicating with the owner, although he could have done so by telegraph, (the arrival of the ship at Antwerp having been so announced to the owner,) he had no authority to bottomry the ship, and that S. was chargeable with notice of his want of authority, and the bond was invalid.

[Cited in The Eureka, Case No. 4,547.]

In admiralty. This was a libel by Daniel Steineman and Hermann Ludwig, composing the firm of Daniel Steineman & Co., of Antwerp, against the steamship Circassian, to enforce payment of a bottomry bond for the sum of 61,133 francs, given by the master to the libellants in the port of Antwerp.

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 3 Am. Law T. Rep. U. S. Cts. 4, contains only a partial report.]

The material facts were as follows: The Circassian was an ocean steamer, owned by one William Salem, a resident of New York, and was by him dispatched to Antwerp, as the first vessel of a line of steamers which it was proposed to establish between the ports of Antwerp and New York. The intention was to have such line conducted by a corporation, and such a corporation, called the Continental Mail Steamship Company, had been organized, and its officers designated; but its capital was not yet paid in, and it had neither the title nor the possession of the Circassian, or any other steamer. The Circassian, accordingly, went out under the command of a master appointed by Salem, her owner. Herman Troost was on board, in the capacity of secretary of the Continental Mail Steamship Company, and was also authorized by the owner to make the necessary arrangements, on the part of the ship, for the opening of the line in Antwerp. Upon the arrival of the steamer in Antwerp, the libellants were duly appointed agents of the proposed line, and the vessel was placed in their hands, as agents and consignees. They collected the inward freight, made arrangements with the government for the carriage of the mails, advertised the vessel to sail with the mails and passengers on a day certain, and procured for the vessel, furniture, bedding, provisions, &c., necessary and proper for a passenger steamer on the intended route. Passengers were also engaged, who paid their passage-money in advance. Freight also was shipped, on part of which the freight was paid in advance. After the vessel had fairly entered upon the adventure, and passengers had been engaged, the vessel was seized under an attachment issued to collect a personal debt of Salem, the owner; he being then insolvent, and his paper under protest in Antwerp. Efforts were at once made in court to procure the discharge of the attachment, but without success. Efforts to procure money sufficient to discharge the debt, for which the attachment was issued, were also made, and the master and Troost went to London for that purpose, but failed. An additional embarrassment arose out of the fact that the breaking out of the cholera had interfered with the engaging of passengers, so that, as the day of sailing approached, it appeared that the total amount of freight and passage-money collected was insufficient to pay the advances actually made by the agents towards fitting out the vessel for the voyage. When the sailing day arrived, the alternative was thus presented to the master of procuring, at once, the amount of the attaching creditor's claim, or of announcing that the departure of the steamer must be postponed until the termination of the legal proceedings by a judicial sale of the owner's interest in the vessel, which, with a vessel situated like this, was equivalent to a breaking up of the voyage, an abandonment of the line, and a termination of the prospect of a regular employment for the steamer on the proposed route. The result of such a breaking up of the voyage, or even of any extended delay in the departure of the steamer, would have been to encumber the vessel with maritime liens to the passengers and freighters, for damages and freight pre-paid, which would, in all probability, have far exceeded in amount the debt for which the vessel was attached. In this emergency it was agreed between the master and Steineman & Co., the libellants, that they should procure the release of the vessel from the attachment, by guaranteeing the payment of the demand, and should be secured therefor, and also for the amount of their previous advances, by a bottomry bond upon the vessel. The release of the vessel was accordingly effected as thus proposed; the master executed to Steineman & Co. the bottomry bond in suit, and the steamer sailed on her appointed day, with the cargo and passengers which had been engaged. The voyage was performed in safety. Upon the arrival of the vessel in New York, she was taken possession of by Ernest Fiedler, who held a large mortgage upon her, which he proceeded to foreclose, and who, when she was proceeded against in this action, appeared as claimant, and disputed the validity of the bond.

Bowdoin, Larocque & Barlow, and W. W. MacFarland, as counsel for the libellants, presented the following points:

1. The bond was absolutely necessary to protect the interest of the respondent, who was a mortgagee, inasmuch as the ship was liable for the engagements for freight and passage entered into by the captain, in the regular course of business, and within the scope of his authority as master. As to this liability the following authorities are quite conclusive: The Phebe [Case No. 11,064]; The William & Emmeline [Id. 17,687]; The Freeman v. Buckingham, 18 How. [59 U. S.] 182; Thomas v. Osborn, 19 How. [60 U. S.] 22; Jackson v. The Julia Smith [Case No. 7,136].

2. The general principle that the master cannot give a valid bottomry bond to a creditor, to secure an antecedent debt, where that is the primary object of the bond, and without the existence of other circumstances making it necessary, is not denied, but fully conceded. The principle is sustained by numerous authorities. Greeley v. Smith [Case No. 5,750]. The same general rule was laid down in Hurry v. The John & Alice [Id. 6,923], where it is accurately said, that the money must be advanced "for a purpose necessary to enable the master to complete the voyage he was about to perform at the time the necessity existed for making the contract."

3. It is obvious that this rule can have no application to a case where the primary object is not to secure an antecedent debt, and

where the contract is not with the creditor, but where, on the contrary, the advance is absolutely essential to enable the master to "complete the voyage he was about to perform when the necessity arose," and likewise essential to enable the ship to fulfil her engagements, and escape condemnation for a failure to do so; and where the advantage to the creditor is incidental, but unavoidable. While necessity may be said to be the mother of bottomry bonds, yet the necessity itself may spring from innumerable causes. The law only requires that its existence should be shown, in order to pronounce the bond valid. The origin of that necessity is a comparatively unimportant consideration. "The advantage of allowing the master to take up money on bottomry consists in its enabling him to procure assistance when no other resource is at hand, and the adventure would be frustrated if no other resource was afforded." Smith Merc. Law, p. 418. "Necessity, to use the expression of Lord Stowell, is the vital principle of hypothecation, and the court of admiralty will consider every circumstance; will go into the whole history of the voyage, in order to determine whether there be that necessity without which an instrument of hypothecation is void." Id. p. 419. "Necessity creates the law, it supersedes rules, and whatever is reasonable and just in such cases is likewise legal." Sir Wm. Scott in the case of The Gratitudine, 3 C. Rob. Adm. 240, 266. See, also, The Nelson, 1 Hagg. Adm. 169; The Radamanthe, 1 Dod. 201; The Gauntlet, 3 W. Rob. Adm. 82. "That is a sufficient necessity which would induce an owner to do it on the spot." The Fortitude [Case No. 4,953]. "The master may hypothecate the vessel in a foreign country, to enable him to return home, though the original voyage was broken up by capture, and the compulsory sale of the cargo." Crawford v. The William Penn [Id. 3,373]. "In all these cases much must be left to the master's discretion, and he must exercise it conscientiously, for the general interest. If he acts bona fide, and with reasonable care, the rights of the parties are bound up by his acts, although it should afterwards be found that he had committed an error of judgment, and might have acted more beneficially in another manner." Judge Story in The Packet [Id. 10,654]. Bottomry bonds are the creatures of necessity and distress, and may be expected, therefore, to assume different shapes, which cannot be limited except by the condition of a faithful and beneficial discharge of the authority exercised in granting them, as being necessary for the preservation of the property. The Vibilia, 1 W. Rob. Adm. 7.

4. We come now to consider, in the light of the foregoing authorities, the precise question, whether, in any case, a bottomry bond may be given to obtain the money necessary to liberate a ship from arrest, where the cause of arrest is a claim constituting per se no lien on the ship, and to secure which a valid bottomry bond could not be voluntarily given. In examining this question, it will appear: 1. That in no case, English or American, is it decided that a valid bottomry bond cannot be given to relieve a ship from such arrest. 2. That in all the American cases, in which the question has arisen, it has been held that a valid bottomry bond may be given, if necessary to relieve the ship from such arrest. 3. That a stronger case of necessity would not be likely ever to arise than the one which gave birth to this bond.

The attention of the court is invited first to the American doctrine on this subject. Mr. Parsons says: "Nor can a master make this bond merely to secure former debts of the owner, but might, perhaps, if it were the only way to liberate the ship from arrest and sale for those debts." 1 Pars. Mar. Law, 417. And again, at page 423: "So we hold, generally, that if the liberation of the ship from arrest for debt is a good cause for bottomry, yet, if the attaching creditor is himself the obligee, the bond is invalid." Judge Story was clearly of the opinion that the master might raise money on bottomry to redeem a ship from actual arrest, while "a mere threat to arrest the ship for pre-existing debt would not be sufficient, nor could a valid bond be executed to the creditor himself," This opinion must be taken as the opinion of the whole court, inasmuch as there was no dissent from the judgment, or the reasoning on which it was founded. The Aurora, 1 Wheat. [14 U. S.] 105. A bottomry bond is good if bona fide made in a foreign port to relieve a ship under arrest at the suit of a foreign creditor, but it is doubtful if the creditor himself could acquire a valid title thereby. Abb. Shipp. p. 157, note. In the case of The Boston [Case No. 1,669], decided by Judge Betts in 1832, the precise question was involved, and was decided. Certain creditors of the ship for debts incurred on a previous voyage threatened to arrest her, whereupon another person bought the debts, and to secure them, took a bottomry bond. In the course of a very elaborate opinion, the judge says: "The pre-eminent security of bottomry, with its high privileges, is sanctioned only when a ship is under positive arrest, and cannot take effect when the money is advanced only to avert a menaced arrest." It is plain, therefore, that according to the received American doctrine, this bottomry bond was authorized by the necessities of the ship, and is valid.

The English rule is thus stated in Maclachlan on Shipping: "The want which exacts the loan must be such as, if not supplied, would prevent the prosperous completion of the voyage, not extending to the master's own debts, or the discharge of his person from prison, or even the liberation of the ship herself from arrest without other circumstances combined." In Smith v. Gould, 4 Moore, P. C. 21, Lord Campbell expressed the opinion that a master might hypothecate his vessel in any case, where it might

be arrested and sold for a demand for which the owner would be liable. In an earlier case, The Augusta, 1 Dod. 283, Sir William Scott uses this language: "It has been said that the party might, by the law of Russia, have detained this ship till the money was repaid, but I do not think that circumstance alone will be sufficient to convert this into a case of hypothecation." In The Lochiel, 2 W. Rob. Adm. 44, Dr. Lushington says: "Lord Stowell, when he decided the case of The Augusta, entertained great doubt, in the first instance, whether a vessel could be legally hypothecated merely to avoid her detention, but upon subsequent consideration, he was inclined to hold that it might be an additional reason for hypothecation, and that opinion I also adopted in a case that came under my own consideration, that of The Vibilia [1 W. Rob. Adm. 7]." This case was decided in 1843. In 1849, The Osmanli was decided, a case that will doubtless be mainly relied upon by the respondent, but which is in nowise hostile to the claim of the libellant in the case at bar, as to the point actually involved and decided. Mongredieu owned the larger share in, and had the management of the ship. Messrs. Duckworth & Co. were the agents of the ship at Malta. On the occasion in question she put into Malta, and applied to the agents for coal, who, instead of supplying it, arrested the ship for a balance of Mongredieu's account current. Leonard, the managing partner of Duckworth & Co., persuaded the master to give a bottomry bond, and undertook to find a person to advance the money. He did so. Messina nominally advanced the money, and the bond was given to him. There were no peculiar circumstances in the case. After laying much stress on the fact that the bond was, in substance, a bond to the ship's agents to secure an antecedent debt, the court declared it invalid. 3 W. Rob. Adm. 198.

From these authorities, then, it would seem to be a fair and accurate statement of the present English rule on this subject, to say that, independent of other circumstances rendering it necessary and proper, a valid bottomry bond cannot be given, directly or indirectly, as security for an antecedent debt. But a valid bottomry bond may be given to relieve a ship from arrest, where that is the primary object, and the security of the debt an incident, or, as it were, an accidental circumstance, the circumstances of the ship being such as to render it prudent and judicious to obtain her discharge in this mode. And it will, therefore, upon careful examination, appear that there is really no or very little conflict between the English and American courts, the latter being, if anything (as they always are in admiralty cases) rather more liberal and catholic than the former. And it may be safely asserted that under this rule, the bond in question would be sustained owing to the overpowering necessity that gave birth to it. This class of bottomry bonds bears a very strong analogy to a ransom bill. The creditor in the former derives a benefit from the necessity which he has imposed upon the ship, as does the captor in the latter; but the obligation is given, not that this benefit may be received, but that the ship may go free.

5. It is to be inferred from the answer that it is to be contended that it was the duty of the master to communicate with his owners, but inasmuch as his owners were in New York, and he was in Antwerp, it is submitted that this point is quite destitute of plausibility. 1 Pars. Mar. Law, p. 414 et seq.

Barney, Butler & Parsons and T. E. Stillman, on behalf of the claimant, argued as follows:

1. The bottomry bond, so far as it embraces the sum of 16,575 frs., the general balance of account between the steamship Circassian, and the libellants, her consignees, is invalid for the following reasons: Advances having been made, even though by a stranger, it is too late to secure them by a subsequent bottomry, unless that security was in contemplation at the time the advances were made, or unless the advances were made upon the exclusive credit of the ship; and in respect to consignees, no presumption arises, that in making advances they do so either relying upon the credit of the ship, or in contemplation of the security of a bottomry bond. On the contrary, the true rule is, that in order to enable a consignee to secure himself by a bottomry, if, indeed, he can do so in any case, he must give notice of his intention to do so, before making the advances. 3 Kent, Comm. 460; The Augusta, 1 Dod. 283; The Jane, Id. 461; The Hunter [Case No. 6,904]; The Hero, 2 Dod. 143; The Lord Cochrane, 2 W. Rob. Adm. 320; The John & Alice [supra]; Hurry v. Hurry [Case No. 6,922]; Liebart v. The Emperor [Id. 8,340]; Selden v. Hendrickson [Id. 12,639], and cases cited; The Yuba [Id. 18,193]; The Panama [Id. 10,703]. Here the advances were made by Steineman & Ludwig, relying upon the funds which they had, and would receive as consignees, and before a bottomry bond for them was in contemplation.

2. The lender on bottomry must exhibit an account of the items advanced, with sufficient proofs to support them, to enable the court to judge of their necessity, and in order that they may be separately weighed and considered. The Aurora, 1 Wheat. [14 U. S.] 96; The Bridgewater [Case No. 1,865], and cases cited. The only account exhibited, in the case at bar, is the general one, amounting to frs. 52,886. It shows, in a great measure, only the kind of supplies and materials furnished, and not the things, nor their amount. "Ship chandlery," to the amount of frs. 7,873.64, and "cash to captain, frs. 12,300,"

are general terms. The court can form from them no opinion as to the necessity of such expenditure. It is incumbent upon the creditor who claims an hypothecation, to prove both the actual existence of the necessity of those things which give rise to his demand, and that the funds requisite to obtain those things could be procured in no other way than by the execution of a bottomry bond. The Aurora, 1 Wheat. [14 U. S.] 96. (a) As to the necessity of the items, it must be shown that the expenditure was for the safety or security of the ship, or for repairs or necessaries which were reasonably fit and proper for the completion of the voyage, and such as a prudent owner would have ordered, under all the circumstances, had he been present. Prince of Saxe Cobourg, 3 Hagg. Adm. 392, 3 Moore, P. C.; The Reliance, 3 Hagg. Adm. 74; Selden v. Hendrickson [Case No. 12,639], and cases cited; The Orelia, 3 Hagg. Adm. 75; Rucher v. Conynham [Case No. 12,106]; The Hersey, 3 Hagg. Adm. 404; Hurry v. Hurry [supra]; The John & Alice [supra]; The Augusta, 1 Dod. 287; The Medora [Case No. 9,391], and cases cited; The Osmanli, 3 W. Rob. Adm. 198; The Lord Cochrane, 2 W. Rob. Adm. 320; The Aurora, 1 Wheat. [14 U. S.] 96; The Virgin, 8 Pet. [33 U. S. 538]; The Fortitude [Case No. 4,953]; 3 Wash. C. C. 484 [Crawford v. The William Penn, Case No. 3,373]; Wainwright v. Crawford, 4 Dall. [4 U. S.] 225; Merwin v. Shailer, 16 Conn. 489; 3 Kent, Comm., and cases cited; 1 Pars. Mar. Law, p. 422, and cases cited; Burke v. The M. P. Rich, Cliff. R. 314 [Case No. 2,161], and cases cited. (b) Libellants having failed to exhibit an account of the items covered by their general balance of account, must show the actual existence of the necessity of their entire expenditure, in order to sustain the bottomry given to sustain a general balance. This they fail to do. (c) Nor can the bottomry bond be sustained on the plea that the consignees might have arrested the ship for their advances by the general maritime law. They must meet the same question of necessity as to the items furnished, in order to sustain their claim to a maritime lien, that they have to meet in order to sustain a bottomry bond (Pratt v. Reed, 19 How. [60 U. S.] 359); and a mere liability to arrest will not sustain a bottomry bond (The Osmanli, 3 W. Rob. Adm. 198; The Prince George, 4 Moore, P. C. 21; The Augusta, supra; The Royal Arch, Swab. 279), nor will a mere threat to arrest the ship, though it be for a debt of the ship (The Aurora, supra; The Boston [Case No. 1,669], and cases cited). (d) Advances to the officers and crew are not such necessaries as will justify the giving of a bottomry bond. The Cognac, 2 Hagg. Adm. 385; Furniss v. The Magoun [Case No. 5,163]. In the former case, advances paid before the termination of the voyage, and included in a bottomry bond, were disallowed, on the ground that it was a premature payment, and might never become due, and, if paid in this form, might fall upon the owners of the cargo. In the case at bar, if such advances were allowed, they would fall upon a prior mortgagee. And, on the general principles of maritime law, the wages of the crew are made to depend upon their fidelity to the ship when she is in distress. 3 Kent, Comm. 274, and cases cited; 2 Pars. Mar. Law, 589, and cases cited; Abb. Shipp. Marg. p. 173. (e) The libellants cannot avail themselves of the words "fit and proper," found in the opinion of Judge Story, in the case of The Fortitude, supra, for these words are qualified by the expression, "such as a prudent owner would have purchased, had he been present." The conduct of the consignees, in the case at bar, was far from prudent. With the ship under attachment for frs. 39,000; forewarned, by the prevalence of cholera, that their expectations of procuring a full complement of passengers would not be realized; professedly aware of the impossibility of raising funds upon the credit of the owner of the ship, or of the Continental Mail Steamship Company; and fully aware of the existence of Mr. Fiedler's mortgage for $90,000 on the ship, they made no effort to check the reckless expenditure proven in this case, but paid bill after bill, without investigation or inquiry, and, at the last moment, sought to save themselves from loss, by shifting it upon the shoulders of the mortgagee. Such conduct, if it be not willfully fraudulent, is so grossly negligent as to be virtually so. Libellants have entirely failed to prove any effort to obtain the money necessary to cancel their claim for general balance of account in any other way than by the giving of a bottomry. As to the general balance of account, there is no evidence of the necessity of a resort to bottomry, in order to secure it. It does not follow that, because no one would advance frs. 39,000, without the security of a bottomry bond, that the sum of frs. 17,000 could not be raised without that security; and, indeed, libellants nowhere say or pretend that it could not.

3. The bond in suit is not only clearly invalid, so far as it sought to secure the general balance of account, but it is equally invalid as to the amount raised upon it to release the vessel from arrest for the debt of Salem. The attachment of the vessel at Antwerp was to enforce the payment of a debt due from William Salem, growing out of bills of exchange drawn on him, and protested for non-payment. By the general maritime law, such debt did not constitute a maritime lien upon the Circassian, nor is there any evidence that it did by the laws in force at Antwerp. The prayer of the request to seize the Circassian invokes a principle of equity, that creditors may be protected by the "order of the courts of the country where the personal property or real estate of a foreign debtor is situated, even though the creditor be also a foreigner." In every respect, so far as the papers disclose,

the proceedings at Antwerp were precisely identical with our state proceedings by attachment against non-resident debtors, and could no more constitute or give rise to a maritime lien, than could an attachment, issued out of the courts of the state of New York against a non-resident debtor, and levied upon his interest in a foreign ship. Therefore, only the interest of William Salem, over and above the mortgage, could have been attached, or sold, had the proceedings so commenced terminated in a judicial sale. The vessel was not seized under a law giving a specific lien upon the ship, as contradistinguished from a lien upon the interest of the owner in the ship, and the cases in which the master may hypothecate his ship to procure her discharge from arrest to enforce such lien do not apply. In such cases, good sense and equity support the bottomry, because: (a) It has been given in discharge of a debt, by which the ship has been preserved, or its value enhanced—i. e., a debt for repairs, supplies, or to relieve the vessel from distress, enable her to perform her voyage and earn freight—and has imposed no new burden upon the ship. In such a case, the lien has only changed its form from a tacit to an express one, with the addition of maritime interest. (b) The liability of a ship, in specie, for supplies and repairs furnished in a foreign port, and for advances made to relieve her when in distress from casualties incident to navigation, may be presumed to be known to all interested in her; and the law presumes their assent, when, under such circumstances, her master, unable to communicate with her owners, gives a bottomry for her relief. In the case at bar, however, the above reasons do not apply. Here, the question is simply, can a general creditor, finding a ship of his insolvent debtor in a foreign port, by means of an attachment, turn his debt from a simple contract debt into a maritime one, and thus secure the advantage of maritime interest, and the security of a bottomry? This proposition cannot be maintained. (1.) It would be unjust, and productive of irreparable damage and confusion of rights and remedies, if a creditor could, at his option, enforce and secure his simple contract debt against a debtor happening to have a ship, or an interest in a ship, in a foreign port, by converting it into a maritime lien, by hypothecation, upon the entire ship. If he could do this, then, whether the debt were valid or invalid, honest or dishonest, outlawed or still existing, usurious or otherwise, the sacred obligation of bottomry would exist therefor; and, made payable at the end of a voyage other than to the home port, it would be enforced, without an opportunity to the owner to defend himself against a claim, which, in the place where the contract was made, could never be enforced. "It would seem against the policy of the law," says Judge Story, in the case of The Aurora, "to permit a party in this manner to obtain advantages from his contract, for which he had not originally stipulated. It would hold out temptations to fraud and imposition, and enable creditors to practice gross oppressions, against which even the vigilance and good faith of an intelligent master might not always be a sufficient safeguard in a foreign country." These results would follow, whether the bond were given directly to the creditor or to a third person. If, in the latter case, the bond could be allowed, the creditor would only need to secure the services of a friend, who should appear upon the scene as a stranger, and, after the plunder was secured, divide the profits with his principal. Rarely, if ever, could the collusion be proved to the court. (2.) In the case supposed, the rights of part owners must be overridden, and the bottomry, given to release the vessel from arrest for the debt of one part owner, must be enforced against the whole ship. The only remedy of the part owner, whose property has thus been, through the prostitution of legal process, appropriated to pay another man's debt, is a civil action against a probably insolvent debtor. (3.) If the creditor be rapacious, or the debt exceed the value of the ship, then the cargo must be embraced in the bottomry bond; for, where the master may hypothecate the ship, he may the cargo also. (4.) Not only the foregoing consequences would result from the proposition that a bottomry bond may be given to release a vessel in a foreign port from an arrest for a general debt of her owners, but, as in the case at bar, mortgagees who in good faith have advanced their money to the owner upon the security of the ship, are robbed of their priority, and postponed to subsequent general creditors, who, in their contracts, trusted to the personal credit of the owner, without any security. And, generally, it is not too much to say, that to maintain such a doctrine, would be to overturn well-settled principles of the maritime law, to the great detriment of commerce, and the security of property in ships and vessels. The bond in the case at bar is not only void upon principle, so far as it includes the moneys given to release the vessel from arrest, but is also void according to the decisions in the following cases: The Osmanli, 3 W. Rob. Adm. 198; The Aurora, 1 Wheat. [14 U. S.] 96. Even if the bond could be sustained upon principle or authority as to the frs. 39,000, there is no proof of any debt due from Salem to the attaching creditor, or that the proceedings commenced by the attachment ever established any such debt, or indeed ever proceeded to a judicial determination, or that the libellants ever paid or were called upon to pay the debt, or any part of it, or to make good their guaranty to the attaching creditors, or any part of it. They stand only in the relation of sureties to Salem, their principal. They

show neither that Salem has been called upon to pay the amount of the debt, nor that they have paid it, in his default, as sureties.

4. The evidence shows clearly that, although means existed, and were available, by which the master and consignees of the Circassian could have communicated with the owners in New York, and received their advices as to giving a bottomry bond on the ship, long before the appointed day for sailing, and long before the giving of the bond, no such communication was made or attempted. The testimony is positive, that they telegraphed to the owners in New York the arrival of the Circassian at Antwerp, and that by the same means they could have asked instructions as to the proposed bottomry bond. They should have done so. However great the necessity, and notwithstanding the presumption or probability that the owner cannot respond, the authority of the master to execute a bottomry, arising as it does clearly ex necessitate, does not exist when he can communicate with the owner. There is no pretence of an attempt to do so in this case, nor any excuse for its omission. The omission to do so is fatal to the validity of the bond in suit. La Ysabel, 1 Dod. 274; Royal Arch, Swab. 275; Wallace v. Fielden, 3 W. Rob. Adm. 243; same case, 7 Moore, P. C. 398; The Bonaparte, 8 Moore, P. C. 460; The Lord Cochrane, 2 W. Rob. Adm. 333; The Hamburg [33 Law J. Adm. 116].

BENEDICT, District Judge. In considering the questions which the facts of the case present, it may be noticed at the outset, that, although the circumstances under which this bond was taken afforded opportunity for collusion between the creditor, who attached the steamer, and the agents, who subsequently took the bond, none is suggested here. Had any circumstances appeared in any way pointing to collusion, it would have been incumbent upon the bond-holders to present a full and satisfactory explanation of them, before the court could be asked to consider their demand.

Nor is there anything oppressive in the rate of interest, which was inserted in the bond; but it is shown that the ten per cent., which is provided for, is the usual charge upon commercial advances on merchandise, intended to cover simple interest, with the difference of exchange, commissions, and insurance; so that the demand represented by the bond is simply a sum of money advanced by the libellants, with the ordinary expenses of such an advance. The case thus presents no features of hardship, as against the claimant, but, on the contrary, shows a strong equity in favor of the libellants. There appears, therefore, no reason why the bond in question should not receive that favorable consideration which courts of admiralty are always inclined to give to this class of security. It must also be held subject to those rules which the courts have declared to be applicable to such instruments.

Turning then to the bond, it is found to be composed of two items, differing from each other in their nature. One is that of frs. 16,575, consisting of the general balance of the libellants' account of advances, as agents of the steamer. As to this balance, it has been shown in evidence that the libellants made no suggestion of security for it, until after the advances had been made, and the vessel was ready to depart, when, on presenting the bond to the master for signature, they stated that they had not intended to ask security for the account, but it might as well be inserted, since a bond was to be given. This evidence brings the portion of the bond now under consideration clearly within the rule which declares that advances cannot be secured by bottomry, unless made under an agreement, or at least a reasonable expectation, founded upon surrounding circumstances, that such security would be given. The rule must therefore be applied, and, accordingly, it must be held that, as to this item, the bond is invalid.

The remainder of the principal of the bond represents the amount claimed to have been advanced by the libellants, to procure the discharge of the attachment which had been levied upon the vessel for the personal debt of the owner, as to which bottomry security was agreed on by the master.

To this item several objections have been taken, a single one of which will be noticed here. It is said that the item—assuming that it represents an actual advance by the libellants—cannot be allowed, for the reason that the maritime law does not authorize the master of a ship in any case, to raise money by bottomry for the purpose of releasing his ship from an attachment levied to collect a personal debt of the owner, for which the ship herself is in no way liable.

To the important question thus raised I have given great consideration, aided by very careful arguments on the part of the advocates, and a reference to all the cases calculated to throw light upon it. There are, undoubtedly, difficulties and dangers in permitting the exercise of such a power by the master of a ship; but there are also strong reasons against the absolute denial of the power, arising out of the nature, employment, and possible necessities of this peculiar class of property; and I greatly doubt whether the rule contended for by the claimants can be laid down as a fixed rule, applicable in all cases.

Bottomry bonds are the creatures of necessity and distress. They are permitted, in order to enable the ship to save herself from disaster, and to continue the employment for which she is constructed; and when, in any case, that object has been attained in a proper manner, by means of a bottomry bond, as a last resort, it is doubtful whether

it will do to hold that the instrument is unauthorized.

As Sir William Scott has well said: "Necessity creates the law—it suspends rules—and whatever is reasonable and just, in such cases, is likewise legal." The Gratitudine, 3 C. Rob. Adm. 266. It would seem neither reasonable nor just to say that a steamer sent out to Europe to be the pioneer vessel in a new line, when attached for a debt of the owner, and the owner's interest liable to be sold by due process of law, must therefore throw herself out of a permanent employment, and abandon her voyage, thereby rendering herself liable in rem to demands by way of damages exceeding the amount of the attaching debt, when she possesses in her bottom a sufficient basis of credit upon which the master could raise the smaller sum needed to discharge her from the attachment, and thus avert the disaster.

If, therefore, the validity of this bond depended upon the question whether a sufficient necessity existed to authorize its execution by the master, I should be inclined to hold that the peculiar and embarrassing circumstances which attended the seizure of this steamer—certain as they were, in all human probability, to bring disaster to the vessel, and great loss to all interested in her, if the seizure could not be promptly terminated—were such as to authorize the master to raise by bottomry the amount necessary to discharge the attachment. The primary object of the bond was to avoid the disaster to the steamer, which these attending circumstances would certainly entail, if the attachment continued; and the bond should not lose the characteristic which it derives from its primary object, because an incidental effect of it would be to pay a debt for which the ship herself was not liable.

But the validity of this bond cannot be made to depend upon the determination of this question alone, inasmuch as an additional objection, applicable to the whole bond, has been taken by the claimants, which the libellants have not been able satisfactorily to answer; and that is, that the master omitted to communicate with his owner, before executing the bond. Such a communication, when it can be had, is as important to be shown as the necessity of the ship. In the case of The Oriental, where the point escaped the attention of the court below, a reversal was granted upon this point alone. 7 Moore, P. C. 398. The utility of the rule requiring notice to the owner, when practicable, is obvious. It imposes no additional burden upon the ship, and no difficult duty upon the lender, while its observance makes fraud and collusion more difficult, and often dispels doubts which would otherwise arise in cases of this class. It is a rule which should not be relaxed, and in the present case—a case the equities of which I have fully stated, in order that my opinion may indicate the importance which I attach to the rule—it is fully applicable, for it is shown that there was, at the time, telegraphic communication between Antwerp and New York, the home of the owner, and that resort was had to that mode of communication to announce the steamer's arrival in Antwerp. This fact must have been known to the libellants, from their position as agents of the ship, and ordinary prudence on their part would have suggested notice to the owner of the necessity of the ship, and the intention to take a bond. They knew that such notice was practicable, and that it had not been given, and they are chargeable with knowledge that, in the absence of such notice, under the circumstances, the master was without authority to bottomry his ship.

For this reason, therefore, I must declare the bond in question not to be binding upon this steamer, and, accordingly, I dismiss the libel, with costs.

Case No. 2,725.

The CIRCASSIAN.

[6 Ben. 512.] [1]

District Court, S. D. New York. May, 1873.

MARSHAL'S COSTS—CUSTODY FEES—PROPERTY HELD UNDER SEVERAL PROCESSES.

1. Where the marshal holds property under several processes in admiralty, the proper rule, as to the per diem custody fee, is to divide it equally, for each day, among the cases wherein the vessel was held by process in force on that day, saving to the marshal, in case any party fails to pay his proper proportion, a remedy therefor against the other parties.

2. No compensation for custody of property held by the marshal under process, in admiralty, can be made to him, beyond $2.50 per day.

H. E. Tremain, for marshal.

C. Donohue, for libellants.

BLATCHFORD, District Judge. The vessel being in the custody of the marshal on process in each one of several cases, the question is presented, whether the entire custody fees are to be charged in the suit wherein the process was first served. I think the proper rule is that laid down by Judge Sprague, in the case of The John Walls, Jr. [Case No. 7,432]. In that case, the vessel was in the custody of the marshal on a previous libel, when the second suit was instituted, and it had been the practice of the marshal, where he held property by virtue of two warrants of arrest, to charge the whole custody fees in the first suit; but the court directed that they should be apportioned equally, charging one-half to each suit. The proper rule in the present cases is to divide the per diem custody fee, for each day, equally among the cases wherein the vessel was held by process in force on such day, saving to the marshal,

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

in case any party fails to pay his proper proportion, a remedy therefor against the other parties.

As to an allowance to the marshal for keeping the personal property attached in these cases, as a compensation beyond the sum of $2.50 per day, as the necessary expenses of keeping the property attached, I do not think the court has any power to make such allowance. These suits are civil suits, in rem, in admiralty, against a vessel. The act of February 26, 1853 (10 Stat. 161), provides, that no other compensation to marshals than that prescribed by said act shall be taxed and allowed, and that the compensation prescribed by said act shall be taxed and allowed. Under the head of "Marshal's Fees," the act says: "For service of any warrant, attachment, summons, capias, or other writ (except execution, venire, or a summons or subpoena for a witness), two dollars for each person on whom such service may be made, provided, that, on petition, setting forth the facts on oath, the court may allow such fair compensation for the keeping of personal property attached and held on mesne process, as shall, on examination, be found to be reasonable." But, subsequently in the act, there are provisions covering compensation for the sale of property under process in admiralty, in the nature of commissions on the proceeds, and the fee for serving process in admiralty, and the expense of keeping property attached in admiralty, and commissions to the marshal in case of a settlement by the parties of a claim in admiralty without a sale of the property attached. Among the provisions is this one: "For serving an attachment in rem, or a libel in admiralty, two dollars; and the necessary expense of keeping boats, vessels, or other property, attached or libelled in admiralty, not exceeding two dollars and fifty cents per day." This covers the entire subject of the expense of keeping property attached or libelled in admiralty. Only the necessary expense can be allowed, but the amount can never exceed $2.50 per day. The clause in regard to the allowance of a fair compensation, by the court, on petition, for the keeping of personal property attached and held on mesne process, refers to property other than that attached or libelled in admiralty. The word "compensation" means the same thing, in the act, as fees or expenses; and, when the expenses of keeping property are limited, that is, within the meaning of the act, a limitation on the "compensation" of the marshal in respect of such keeping. The act authorizes the bill of "fees" of the marshal to be taxed and included in the judgment or decree against the losing party; and it forbids the marshal from receiving any other or greater "compensation," for any services rendered by him, than is provided in the act, and repeals all acts allowing to him any other or greater "fees" than those allowed in the act. It may be that the limitation in respect to the expense of keeping property attached in admiralty is, at present, fixed at too low a rate, for this port; but the remedy is with congress. Since the act of 1853 was passed, there has never been, so far as I am informed, any allowance made, in this district, or in any other district, for the expenses of keeping property attached in admiralty, beyond $2.50 per day.

Case No. 2,726.

The CIRCASSIAN.

[11 Blatchf. 472.][1]

Circuit Court, S. D. New York. Feb. 19, 1874.[2]

MARITIME LIENS—EFFECT OF ADMIRALTY RULE 12—PRIORITIES.

The new 12th rule in admiralty, of 1872, cannot, in respect to a libel filed since such rule was adopted, have the effect to revive a claim which is almost barred by the statute of limitations, and make it a lien upon a vessel, so as to cut off titles thereto perfected or acquired before such rule was adopted.

[Cited in Whittaker v. The J. A. Travis, Case No. 17,599. Stated in The John Farron, Id. 7,341, to be overruled in part by The Lottawanna, 21 Wall. (88 U. S.) 558.]

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

This was an appeal from a decree of the district court, dismissing a libel in rem. The opinion of the district court was as follows: [The original report contains the opinion of the district court in full. For this opinion, see Case No. 2,720a.]

William W. Goodrich and Thomas M. Wheeler, for libellant.

William Allen Butler, for claimant.

WOODRUFF, Circuit Judge. The decision I have felt constrained to make in the case of The Edith [Case No. 4,283], in which an opinion is herewith filed, is conclusive against the libellant in this case. That opinion, mutatis mutandis, must be taken as my opinion herein. It differs only in the form of proceeding, the absence of any bond taken on the attachment in the state court, and the fact that the libel herein was filed since the new 12th rule in admiralty, of 1872, was adopted. Neither of these differences can affect the result; and it may well be added, that, by their new rule, the supreme court did not intend to revive claims which were almost barred by the statute of limitations, and to make them liens, either directly or by implication, upon vessels, so as to cut off the rights of mortgagees and subsequent purchasers of the ship, whose title had been perfected or acquired before the rule was adopted.

Let the libel be dismissed, with costs, in accordance with the decision appealed from.

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

[2] [Affirming Case No. 2,720a.]

Case No. 2,727.

The CIRCASSIAN.

[19 Leg. Int. 220.] [1]

District Court, S. D. Florida. 1862.[2]

PRIZE—INTENT TO VIOLATE BLOCKADE—EVIDENCE.

[1. The act of sailing for a blockaded port with knowledge of the blockade, and an intention to violate it, is of itself an attempt to break it, which will authorize the capture and condemnation of a vessel employed in carrying out the intent of such a voyage.]

[See note at end of case.]

[2. If after the sailing of the vessel, and before her capture, the original purpose is voluntarily abandoned, and the direction and destination of the vessel changed, the original offense will be condoned.]

[See note at end of case.]

[3. A vessel bound from Bordeaux, ostensibly for Havana, was captured about 30 miles from the latter port on suspicion of a purpose to run the blockade. When she was stopped, but before she was boarded, the master destroyed a packet of letters, but from other letters and papers found on the vessel it was evident that the intention was to break the blockade, and discharge the cargo at New Orleans. *Held*, that the ship and cargo should be condemned.]

[See note at end of case.]

[4. As none of the cargo was to be delivered at Havana, the intent to touch there in no way changed the character or extenuated the criminality of the voyage, nor interrupted its continuity.]

[See note at end of case.]

[Proceedings by the United States to condemn the British steamship Circassian, Hunter, master and claimant, and her cargo, as a prize. Decree of condemnation.]

MARVIN, District Judge. This ship of the burden of about 1,500 tons, having a British register, wherein Zachariah Charles Pearson, of London, is stated to be the owner, and Edward Hunter, master, laden with a large and valuable cargo of assorted merchandise, bound from Bordeaux, in France, ostensibly for Havana, in Cuba, was captured on the 4th day of May, 1862, about thirty miles from Havana, by the United States armed vessel, the Somerset, English commanding, on the supposed ground of a purpose to break the blockade of the port of New Orleans, and was sent into this port for adjudication. Breaking through or attempting to break through the cordon of vessels stationed off the blockaded port is not essential to the commission of the offense of breaking a blockade. The act of sailing for a blockaded port, with a knowledge of the blockade, and with an intention to violate it, is itself an attempt to break it, which authorizes the immediate capture and condemnation of the vessel and cargo. The capture, however, must be made while the vessel is in delicto,—that is to say, while she is employed in carrying out the illegal purpose with which the voyage was commenced; for it is quite possible that, after the sailing of the vessel, and before her capture, the original purpose may be repented of and voluntarily abandoned, and a new and lawful purpose formed. The direction and destination of the vessel may be voluntarily and wholly changed. If such should be the case, the original offense would be condoned and overlooked, and the vessel and cargo acquitted. The authorities are: The Columbia, 1 C. Rob. Adm. 154; The Neptunus, 2 C. Rob. Adm. 110; The Adelaide, Id. 111, in notes; The Imina, 3 C. Rob. Adm. 167; The Minerva, Id. 229; The Spes & Irene, 5 C. Rob. Adm. 76; Yeaton v. Fry, 5 Cranch [9 U. S.] 335; 1 Duer, Ins. 691, note; 1 Kent, Comm. (5th Ed.) p. 147. Such being the law, it is only necessary to a just decision in the present case to ascertain the facts, and apply the law to the facts as ascertained. The facts are to be ascertained by the testimony, and I think the testimony shows that the ship owner, master, freighters and underwriters got up this voyage, and entered upon its prosecution, with the deliberate purpose of violating the blockade of the port of New Orleans, and that the vessel was taken in delicto.

The testimony consists mainly of letters and other papers found on board the vessel at the time of her capture, and in the legitimate inferences to be drawn from the fact that the master destroyed a package of letters after the vessel had been stopped by the captors, and before they had boarded her. He says, in his deposition: "A package of letters, which were sent on board at Pauillac after the Circassian had cleared from Bordeaux, was burnt after the vessel was hove to, and before the officers of the Somerset came on board at the time of the capture." The chief engineer also testifies to having seen a package of papers put into the furnace at the time referred to. The nature and character of the letters and other papers which escaped the flames, and which are now in evidence before the court, justify the conclusion that the burnt package contained the letters of advice from the shippers to their consignees in New Orleans, enclosing the bills of lading, invoices, etc., and that, if produced, they would show conclusively that it was intended that the vessel should force the blockade of New Orleans, and deliver her cargo in that port. The letters burnt were put on board the vessel just before sailing. The letters preserved were taken from the post office in Bordeaux, and are mostly under cover to persons residing in Havana. It was undoubtedly supposed by the master that these letters possessed no relation to the cargo, and that none of them would disclose the ultimate end of his voyage; otherwise these would probably have shared the fate of the others. But in this supposition he was mistaken. These letters and papers do show that the intention was that the vessel should violate the blockade at New Orleans. There appears to have

[1] [Reprinted by permission.]

[2] [Affirmed in 2 Wall. (69 U. S.) 135.]

been no concealment, or disguise of the intentions of the parties concerned in getting up this voyage in Great Britain and France; on the contrary, their intentions seem to have been openly avowed. Messrs. Nartigne & Bigourdan of Bordeaux, writing to Messrs. Carriere & Co., of New Orleans, under date of the 13th March, say: "We are going to have a British steamer here which will take 1000 tons cargo for your port. There will be only about 150 tons of wine and brandy. The rest of the cargo will consist of coffee, preserved meats, &c. This steamer will endeavor to force the blockade. The freight is $40 and ten per cent. per ton, and the British insurance companies have insured against marine and war risks at fifteen per cent. and twenty per cent., and at present they are charging twenty-five per cent. We have shipped nothing by this vessel, because, according to our judgment, this affair has been badly managed. Instead of keeping it a secret, it has been announced in Paris, in London and in Bordeaux. Of course the American government is well informed as to all its details, and if this merchant steamer enters your port it must be because the commanding officer of the blockading squadron closes his eyes; but, if the contrary, she must be captured." Several other letters, some of them from shippers of goods, speak of the purpose of the Circassian to run the blockade. One from Drouet & Gautier, of Bordeaux, to Mr. Victor Maignan, of New Orleans, says: "This will reach you by British steamer Circassian, which arrived in this port a month since to take on board a very fine cargo with which to force the blockade of your port." One from the York Street Flax Spinning Company, Belfast, covering an invoice of linen and cotton goods for their correspondent in New Orleans, says: "We take it for granted that the Circassian, by which we send this, will proceed to New Orleans with her freight." But it is unnecessary to refer to any more of these letters, which may have been written by unauthorized or ill-informed persons, and which speak only in a general way of the purpose of the Circassian to run the blockade, for the fact is clearly proved by a regular business transaction between parties concerned in getting up the voyage. Mr. Eugene Bouvet, of Bordeaux, under date of the 1st of April, 1862, writes to his correspondents, Messrs. Brulatour & Co., of New Orleans, and says: "We enclose you a charter party and private memorandum per Circassian, in order that you may have no difficulty in settling the freight by that vessel." Now, the copy of the charter party enclosed contains an agreement between Z. C. Pearson, the owner of the vessel, and J. Soubey, Esq., "agent to the merchants in Paris," dated at Paris, February 11, 1862; wherein it is agreed that the Circassian shall proceed to Bordeaux, and there load from the factors of the said merchants, a full and complete cargo; "and being so loaded, shall proceed to Havana, Nassau, or Bermuda, as ordered on sailing, and thence proceed to a port of America and to run the blockade if so ordered by freighters, and to sail for such final port of discharge, within ten days if practicable after receiving such orders, which are to be given immediately on arrival," the freighters to pay freight at the rate of forty dollars per ton of twenty hundred weight, or of forty feet by measurement. There is also in the charter party a stipulation that the ship owner shall not cover more than half the value of the vessel as against war risk. The private memorandum or memorandum of affreightment, enclosed in the letters with the copy of the charter party by which the freight in New Orleans was to be settled, is a printed form, the blanks being filled up as the parties had agreed, wherein the shipper, M. Bouvet, hires of Mr. Soubey, the charterer, the quantity of fifty or sixty-five tons of the ship at the rate of forty dollars per ton, besides ten per cent. average and primage. The agreement then says: "Mr. J. Soubey engages to execute the charter party of affreightment,—that is to say, that the merchandise shall not be disembarked but at the port of New Orleans; and to this effect he engages to force the blockade." The memorandum is signed by Laibertveven "for account and with the authority of J. Soubey," by Eugene Bouvet and by P. Desbordes, who appears to have been the ship's agent at Bordeaux. Now, here appears to be an express agreement between the charterer of the vessel and the shipper, that the goods should not be unloaded at Havana, or any other place than at New Orleans, and for this purpose the charterer binds himself to force the blockade. The owner of the ship binds himself not to insure against war risks over one-half of the value of the ship, and engages that the vessel shall run the blockade if the freighters require. One of the freighters, at least, does require that the vessel shall run the blockade, and exacts a written agreement from the charterer that she shall. He accordingly writes to his correspondent in New Orleans, enclosing the agreement, a bill of lading, and an invoice of goods, and informs him that the premium of insurance will be about twenty-five per cent. Now, is it unreasonable to infer that other freighters, and perhaps nearly or quite every one of them,—some seventeen, at least, in all,—exacted from Mr. Soubey, the charterer of the vessel, a similar agreement; that is to say, that the goods should not be unloaded except at the port of New Orleans, and for that purpose the vessel should run the blockade? It is true no other letter produced before the court besides that of M. Bouvet encloses a copy of the charter party and a memorandum of the affreightment, but it is equally true that not more than three or four of the letters produced have any business relation whatever to this cargo. They relate mostly

to other and different business transactions.

The letters relating to the shipment of this cargo, and which ought to contain the bills of lading, invoices, etc., were burnt by the master, but, had they been preserved and produced here, it is not unreasonable to suppose that they would show that the freighters very generally had taken the precaution which M. Bouvet had, to exact from the charterer a stipulation that their goods should be unloaded only at the port of New Orleans, and that they had effected insurances accordingly. One of the invoices from a house in La Rochelle enclosed to Messrs. Brulatour & Co., of New Orleans, charges the premium of insurance upon the goods shipped, covering marine and war risks, at over twenty-seven per cent. of the value. But, passing by the further consideration of these letters and their enclosures, let us look at the bills of lading taken and kept by the master for his own use and convenience. They are seventeen in number. The master, in his deposition says that they are like those delivered to the shippers. Fourteen of them required the goods to be delivered to the order of the shippers,—two of them to Messrs. Brulatour & Co., who are shown by the correspondence established in New Orleans, and one to Messrs. Leon Pierre & Co., whose residence is not disclosed. Every one of these bills of lading bind the master to carry the goods to Havana, there to receive orders for the final destination of the vessel, and then to deliver them. Not one of these bills of lading calls for a delivery of the goods at Havana. Every one of them calls for a delivery of the goods at some other port after touching at Havana.

Upon the whole, is it possible that testimony could be any more overwhelmingly convincing to prove that ship owner, charterer, shippers, and underwriters, got up and prosecuted this voyage with the deliberate purpose that the vessel, after touching at Havana, should proceed and force her way through the blockading vessels to the port of New Orleans, and there deliver her cargo? The intention to touch at Havana in no way changes the character or extenuates the criminality of the voyage, nor interrupts its continuity. The Richmond, 5 C. Rob. Adm. 325; The William, 5 C. Rob. Adm. 385; The Minerva, 3 C. Rob. Adm. 229; The Imina, Id., 167; The Thomyris, Edw. Adm. 17. The voyage, notwithstanding the intention to touch at Havana, was a voyage to New Orleans, and although the character of the voyage seems to have been quite generally known in London, Paris, and in Bordeaux, yet the attempt is made to conceal and disguise its true character on board the vessel. The vessel is cleared for Havana, the letters on board intended for New Orleans are put under cover and directed to Havana, and the bills of lading conceal the port of delivery. In addition to this, when the vessel is arrested by the Somerset, important letters and papers are destroyed. The case is too plain to my mind to admit of any argument. A simple statement of the facts decided it. The parties concerned engaged in a speculation; they took a risk. Had they succeeded they would have made large profits. They have failed. They are caught in delicto. They will not now probably deem it unreasonable if they are called upon to submit to corresponding losses. A decree of condemnation of ship and cargo must be entered.

[NOTE. The claimant appealed to the supreme court, which affirmed the decree of the district court. The following is the substance of the opinion of the majority of the court, delivered by Mr. Chief Justice Chase, for the affirmance: The blockade of New Orleans was not terminated by the military occupation by the United States forces on May 1, 1862, but was in force on May 4, 1862, the date of the capture of the Circassian, and the evidence established the contention of the captors that, at the time of the capture, the intention of the vessel was to violate the blockade, and consequently she was liable to capture as prize. The Circassian, 2 Wall. (69 U. S.) 135.]

Case No. 2,728.

In re CIRCUIT COURT.

[1 Dill. 1.][1]

Circuit Court, D. Missouri. 1870.

CIRCUIT COURTS—SCHEME OF ORGANIZATION—DISTRICTS OF MISSOURI.

1. The organization of the circuit court for the districts of Missouri is peculiar, and is provided for by the act of March 3, 1857 (11 Stat. 197).

2. By this act it was provided that Missouri should be divided into two districts, with but one circuit court for both, and that the two judges of the district court should sit in the circuit court: *Held*, that the act of April 10, 1869 (16 Stat. 44), creating the office and providing for the appointment of circuit judges, and declaring who should hold the circuit courts, did not exclude either of the district judges from the right still to sit in the circuit court.

3. The scheme of the organization of the national courts by the judiciary act and the purpose of congress in creating the new circuit judgeships, commented on by the circuit judge.

Before DILLON, Circuit Judge, and TREAT and KREKEL, District Judges.

DILLON, Circuit Judge. Respecting the constitution of this court, an important question has been started, which it is necessary to determine at the outset of this, the first regular term which has been held since the taking effect of the act of April 10, 1869, entitled "An act to amend the judicial system of the United States" (16 Stat. 44), and which modified the scheme of the national judicial tribunals, by providing for the appointment, in each circuit, of a judge called and commissioned as the "circuit judge." That question is: What judges have the legal right to sit in this court? Or more specifically stated, have both the dis-

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

trict judges, or has either of them, this right?

The answer to this inquiry depends on the effect of the above-mentioned act of 1869, upon the prior act of congress of March 3, 1857, dividing the state of Missouri into two judicial districts and making special provisions, of an unusual character, as to the constitution of the United States circuit court therein. 11 Stat. 197.

Prior to the year 1857 the national courts in Missouri were organized on the usual plan, that is, the state constituted one district, having a district court, and a circuit court for the district, held by the supreme justice, sitting with the district judge, or by either, in the absence of the other; but in that year the act of March 3d, before referred to, was passed. By it the state was divided into two districts, the eastern and western, each district to have a judge and a district court of its own, the court for the eastern district to be held at St. Louis, and that for the western district at Jefferson City. Before this division of the state, the circuit court had always been holden in the city of St. Louis.

Respecting the circuit court, the 10th section of the act of 1857 made the following peculiar provisions which it is necessary to notice with particularity. This section is in these words: "The circuit court of the United States in and for the present district of Missouri shall be held at the same times (the first Mondays of April and October in each year) and place (St. Louis) as heretofore; shall retain jurisdiction of all matters now pending therein, and shall have and exercise the same original jurisdiction in said state as is vested in the several circuit courts of the United States, as organized under existing laws: and shall also have and exercise the same appellate jurisdiction over the district courts of the United States for said eastern and western districts of Missouri, as by existing laws is vested in the several circuit courts of the United States over the district courts of the United States, in their respective circuits. The said circuit court shall be called the circuit court in and for the districts of Missouri, and shall be composed of the justice of the supreme court assigned to said circuit, and the two judges of the eastern and western districts of Missouri; but may be held by one or more of said three judges in the absence of the remainder." Then follows a provision that in the circuit court the district judge shall not sit in appeals from his own district, and certain regulations respecting a division of opinion, &c., not essential to be now specially noticed.

It will be seen that instead of the usual mode of providing a circuit court for each district, only one such court was established for both, but it was provided that each of the district judges should sit therein, and the court should continue to be held in this city. If the act of 1869 does not repeal or modify the act of 1857, it is clear that the two judges of the United States district courts may continue, as heretofore, to sit in this court as members of it. It is to be observed that the act of 1869 makes no express repeal of the act of 1857. If there is any repeal it is by implication: therefore, on plain, familiar, and acknowledged principles of construction, both acts are to stand and both are to be considered in force except so far as the latter act is necessarily inconsistent with the former one.

It is now proper to notice the act of 1869. Section 2 enacts as follows: "For each of the existing nine judicial circuits there shall be appointed a circuit judge, who shall reside in his circuit and possess the same power and jurisdiction therein as the justice of the supreme court allotted to the circuit. The circuit courts in each circuit shall be held by the justice of the supreme court allotted to the circuit, or by the circuit judge of the circuit, or by the district judge of the district sitting alone, or by the justice of the supreme court and circuit judge sitting together, in which case the justice of the supreme court shall preside, or in the absence of either of them, by the other (who shall preside), and the district judge."

How far, then, are the provisions of the two acts in conflict? Not as to the supreme justice, for by both his right to sit in the court is expressly given. By the prior act no such officer as the "circuit judge" was given the right to sit, but this right is conferred by the act of 1869 [16 Stat. 44]. This necessarily changed, to this extent, the provisions of the act of 1857 as to the constitution of the circuit court, but this change did not operate to displace those who had previously the right to sit there, but simply to confer this right upon the newly created circuit judge.

By the act of 1857 [11 Stat. 197], it was enacted that the two district judges should be members of the court, and that any one of the three judges might hold it in the absence of the others. And so by the act of 1869 "the district judge of the district" may hold the circuit court alone if the other judges are absent.

Manifestly, then, it was not the intention of congress that there should, in any case, be a circuit court in which no district judge should be entitled to sit, for it is expressly provided that the district judge may sit alone or in connection with the supreme justice or the circuit judge. No construction is admissible which would exclude both of the district judges from seats in the court, for the plain reason that such a result would frustrate the clearly declared legislative will. To my mind it is plain that if both the judges of the eastern and western districts of this state may not sit in this court, neither can.

There is no act of congress providing a

distinct circuit court for each of the two districts. The statute of 1857 enacts that the "court shall be called the circuit court for the districts of Missouri." This act is not repealed. It is still the constituent statute of this court. It is by virtue of it that the court is authorized to sit here at all.

What superior right has the judge of the eastern district to that of the judge of the western district to be regarded as a member of the court? Surely the circumstance that the law directs this court to be holden alone at a place in the eastern district, is not material, since it does not make it alone the court for that district, and hence, as it would seem, does not give to the judge of that district any more right to sit here than is given to the judge of the western district. The same construction which would exclude Judge Krekel would exclude Judge Treat, and the exclusion of both would be a result so plainly in conflict with the scheme of the organization of the circuit court, with the language of the act of 1869 not less than that of 1857, that the view which leads to it or involves it, cannot be sound.

This court owes its existence to the act of 1857 which gave it its constitution. In passing it congress was adopting special provisions to meet the wants of this state. The act of 1869 had no reference to the special case of Missouri. It did not abolish the circuit court for Missouri, nor change the law by which that court was created and organized, except in the particulars wherein the two acts are repugnant. It conferred powers and jurisdiction upon the judges it created, but did not destroy or interfere with the rights, powers, or jurisdiction of the district judges, to sit with the justice of the supreme court, or with the newly created circuit judge. This conclusion finds support in other considerations to which I may briefly advert.

The "Judiciary Act" [1 Stat. 73], so styled by way of eminence, passed during the same year in which the constitution itself went into operation, and which organized the national courts, provided both for the district and the circuit courts. The states were erected into districts, and the districts arranged into circuits. By that act the district judge sat in the circuit court, and except for a brief period under the act of 1801, repealed in 1802, the district judges have ever been entitled to sit in the circuit court. Through the district judge, the circuit court had a connection with the district court, and through the supreme justice with the supreme court. The plan though complex, was nicely adjusted, and its different parts skillfully fitted together and made into a symmetrical and harmonious system. The scheme of juridical organization and jurisdiction provided by judiciary act, has, from that time to this, been the object of the unqualified admiration of statesmen, lawyers, and judges, so much so, indeed, that congress has hesitated to touch or amend it even when it seemed clearly defective or inadequate.

If the act of 1869, which it is suggested has wrought so great a change as to deprive one or both of the district judges from sitting in, or holding, this court, is carefully examined, it will be seen how cautious congress was, in attaining the end designed, to innovate as little as possible upon the long established and approved judicial system. The care and deliberation which it evinces, as well as the plain, direct and perspicuous language in which its provisions are expressed, make it a fitting supplement to the famous act which it amends.

By the judiciary act the circuit court was peculiarly constituted. It was a distinct tribunal, with a separate, clearly defined, and most important jurisdiction, original and appellate, embracing causes criminal and civil, at law, in equity, and in admiralty. Though it was a court thus distinct and thus important, it had no judge of its own. It was held by the justice of the supreme court and by the district judge, each of whose duties was mainly in another tribunal, and neither of whom was commissioned as a circuit judge. In 1789, and for years thereafter, the judicial force thus provided was adequate to the wants of the country; but long prior to 1869 it had ceased to be so. The business of the supreme court had increased and accumulated so as to demand quite all the available time of the judges of that court. It had become simply impossible for them to do all their circuit and all their appellate work. Additional judicial force was absolutely necessary, and congress was called upon to supply it. To provide this, was the object of the act of April 10, 1869. To provide it without radical and unnecessary changes in a system of judicial organization which long experience had sanctioned and approved, was the obvious dictate of wisdom and sound policy. Thus viewing the matter, congress, in passing the act of 1869, in substance, said: We have courts enough, but not judges enough to do the work; there is no need to recast the courts; the district courts in general are not overworked, and when they are the remedy is easy; the circuit court has no separate judges of its own; we will create them, thus at once relieving the labors of the supreme justices, and furnishing additional force in the circuits, but we will otherwise maintain the existing constitution of the circuit courts by still requiring, in the manner specified, both the supreme justices and the district judges to sit in and hold the same.

Such was the purpose of the legislation of 1869. The general language of the act should be viewed in the light of the objects sought to be effected, and construed accordingly. Thus viewed and thus construed, it cannot have the effect to annul special provisions in other acts passed to meet special

wants, when thus to hold would be to declare that congress, with respect to the circuit court for this state, had departed from a line of policy almost coeval with the existence of the government, and which has been sanctioned by the approving judgment of nearly three generations of lawyers, judges, and statesmen. 3 Webst. Works, 150 et seq. The argument might be extended and the reasons multiplied, but it is not necessary. I am of the opinion, in which the district judges concur, that the latter are both members of this court, with the powers, jurisdiction, and duties conferred and enjoined by the act of 1857, except so far only as the same are necessarily modified by the act creating the circuit judges.

It may be added that by the statute of 1869 the district judge does not, in any case, sit in the circuit court when the supreme justices and circuit judges are both present. In this respect that act necessarily modifies the prior act of 1857, and to this extent innovates upon the judicial system established by the judiciary act. But this is a conjunction not likely often to occur, and the change in this respect is more nominal than real; and congress was induced, doubtless, to give its sanction to it, perhaps partly to keep the circuit court from being too large to allow divisions of opinion to be certified, and perhaps to economize the judicial force, and not unnecessarily to take the district judges from their own courts.

The result is that both or either of the district judges of this state may sit as heretofore with either the supreme justice or the circuit judge, and in their absence, both or either of the district judges may, as before, sit in or hold the circuit court.

NOTE. Confirmatory of the correctness of the foregoing view, see the act of July 1, 1870 (16 Stat. 179), passed since the above opinion was delivered.

CISCO (VICTOR v.). See Case No. 16,934.

CISNA (CURTS v.). See Case No. 3,507.

CISNA (UNITED STATES v.). See Case No. 14,795.

Case No. 2,729.

CISSEL v. McDONALD.

[16 Blatchf. 150;[1] 25 Int. Rev. Rec. 138; 7 Reporter, 553; 57 How. Pr. 175.]

Circuit Court, S. D. New York. April 3, 1879.

REMOVAL—JURISDICTION—CITIZEN OF STATE AND FOREIGN CITIZEN—CITIZEN OF DISTRICT OF COLUMBIA.

1. A citizen of the District of Columbia brought a suit, in a state court, against a subject of Great Britain. The defendant removed the case into this court, under section 2 of the act of March 3d, 1875 (18 Stat. 470). *Held*, that, as the suit was not one between a citizen of a state and a foreign citizen or subject, it could not be removed.

[Cited in Darst v. City of Peoria, 13 Fed. 564; Glover v. Shepperd, 15 Fed. 836.]

2. A citizen of the District of Columbia is not a citizen of a state.

[This was an action by George W. Cissel, a citizen of the District of Columbia, against Augustine R. McDonald, on a promissory note, and was commenced in a court of the state of New York. The defendant removed the cause into this court under the act of March 3, 1875, § 2 (18 Stat. 470), and the plaintiff now moves to remand same to the state court.]

Henry Greenfield, for plaintiff.

Solomon F. Higgins, for defendant.

BLATCHFORD, District Judge. This is an action at law, commenced in the marine court of the city of New York on the 28th of February, 1879, by the personal service on the defendant of a summons and complaint. It is a suit to recover $804.11, with interest, on a promissory note made by the defendant. On the 11th of March, 1879, the defendant presented a petition to the marine court for the removal of the cause into this court, accompanied by a proper bond. The petition sets forth, that the plaintiff was, at the time of bringing the suit, a citizen of the city of Washington in the District of Columbia, and that the defendant was, at the said time, an alien and a subject of the queen of Great Britain. The marine court made an order removing the cause into this court. The papers from the state court have been filed in this court and the plaintiff now moves to remand the cause to the state court, on the ground that this court has no jurisdiction to entertain it. The constitution of the United States (article 3, § 2) provides, that the judicial power of the United States shall extend to controversies between the citizens of a state and foreign citizens or subjects. This is the only grant of jurisdiction over cases to which foreign citizens or subjects are parties. The distinction between the District of Columbia and a state is clearly recognized in article 1, § 8, of the constitution. The ground taken by the plaintiff is, that he is not a citizen of a state, being only a citizen of the District of Columbia.

The 11th section of the judiciary act of September 24th, 1789 (1 Stat. 78), gave original cognizance to the circuit courts, of all suits of a civil nature, involving more than $500, exclusive of costs, where "an alien is a party." Section 12 of the same act provided, that if a suit should be "commenced in any state court against an alien," involving more than $500, exclusive of costs, it might be removed into the circuit court of the United States. Such provision of section 11 is embodied in subdivision 1 of section 629 of the Revised Statutes, and such provision of section 12 is embodied in subdivision 1 of section 639 of the Revised Statutes. The provision of section

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 25 Int. Rev. Rec. 371, contains only a partial report.]

11 came before the supreme court, for construction, in 1800, in Mossman v. Higginson, 4 Dall. [4 U. S.] 12, where it appeared that the plaintiff was a British subject, but it did not appear that the defendants were citizens of the United States. The court said, that the section must receive a construction consistent with the constitution, and that, although the statute said, in general terms, that the circuit court should have cognizance of suits where "an alien is a party," yet, the legislative power of conferring jurisdiction on the federal courts, was, in this respect, confined to suits between citizens and foreigners. In Jackson v. Twentyman, 2 Pet. [27 U. S.] 136, in 1829, the plaintiff was alleged to be a subject of the king of Great Britain, but no citizenship of the defendants was alleged, and the supreme court held, that section 11 "must be construed in connection with, and in conformity to, the constitution of the United States;" and "that, by the latter, the judicial power was not extended to private suits in which an alien is a party, unless a citizen be the adverse party." In Prentiss v. Brennan [Case No. 11,385], Mr. Justice Nelson says, speaking of section 11: "This act is defective in respect to the jurisdiction conferred upon the circuit courts in the case of aliens, as it would seem, from its language, that it might be sufficient to give jurisdiction to the court, if one of the parties was an alien. Construing it, however, in connection with the provision of the constitution, there can be no difficulty as to the meaning intended by congress. The controversy, in order to give jurisdiction, must be between a state, or a citizen thereof, and a foreign state, or a citizen or subject thereof; that is; speaking with reference to individual parties, the suit must be one in which a citizen of a state and an alien are parties." The above defects in sections 11 and 12 of the act of 1789 are corrected in the act of March 3d, 1875 (18 Stat. 470). By the 1st section of that act, original cognizance is given to the circuit courts, not of suits where "an alien is a party," but of suits in which there is "a controversy between citizens of a state and foreign states, citizens or subjects," thus returning to the language of the constitution in respect to foreign citizens or subjects. So, section 2 of the act of 1875 provides, that a civil suit in which there is "a controversy between citizens of a state and foreign states, citizens or subjects," brought in a state court, may be removed by either party into the circuit court of the United States. There is no ground, therefore, for saying that this cause is removable into this court because the defendant is a foreign subject, unless the plaintiff is a citizen of a state.

The plaintiff is alleged to be a citizen of the District of Columbia. He is not alleged to be a citizen of any state. As a citizen of the District of Columbia, is the plaintiff a citizen of a state? In Hepburn v. Ellzey, 2 Cranch [6 U. S.] 445, in 1804, it was held, that a circuit court had no jurisdiction of a suit between a citizen of the District of Columbia and a citizen of a state, because a citizen of the District of Columbia was not a citizen of a state. The question arose under that clause of section 11 of the act of 1789 which gave original jurisdiction to the court, of a suit "between a citizen of the state where the suit is brought and a citizen of another state." This ruling was followed in Wescott v. Fairfield [Case No. 17,418]. In New Orleans v. Winter, 1 Wheat. [14 U. S.] 91, in 1816, the supreme court held, that the circuit court had no jurisdiction of a suit between a citizen of a territory and a citizen of a state, because a territory was not a state. The above ruling in regard to a citizen of the District of Columbia was followed in Vasse v. Mifflin [Case No. 16,895]. In Picquet v. Swan [Id. 11,134], in 1828, Judge Story says: "A citizen of one of our territories is a citizen of the United States, but he is not by law entitled to sue or be sued in the circuit courts of the United States." In Prentiss v. Brennan, ut supra, Mr. Justice Nelson says: "A person may be a citizen of the United States and not a citizen of any particular state. This is the condition of citizens residing in the District of Columbia, and in the territories of the United States, or who have taken up a residence abroad, and others that might be mentioned. A fixed and permanent residence or domicil in a state is essential to the character of citizenship that will bring the case within the jurisdiction of the federal courts." This view was again asserted by the supreme court in 1867, in Barney v. Baltimore City, 6 Wall. [73 U. S.] 280, 287, in reference to a citizen of the District of Columbia.

The defendant refers to section 1891 of the Revised Statutes, as making the plaintiff a citizen of a state. That section reads thus: "The constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within all the organized territories, and in every territory hereafter organized, as elsewhere within the United States." It is a compilation of the provisions found in eight statutes, in regard to eight different territories, which statutes are referred to in the margin of the section. The provisions were substantially alike, and are found in the statutes organizing the several territories, from 1850 to 1868. One is a specimen of all. The latest, Wyoming, in 1868, reads thus: "The constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said territory of Wyoming, as elsewhere within the United States." It is sufficient to say, that these enactments have no reference to the District of Columbia, as originally enacted. They refer only to the specific territory named in each statute. The words "organized territories," in section 1891, cannot be so construed as to include the District of Columbia. And, if they could, the section could not be properly

so construed as to have the effect to convert a citizen of such District into a citizen of a state, within the meaning of the statutes in regard to the jurisdiction of the circuit courts over suits, either by original cognizance or by removal.

As it appears, within section 5 of the act of 1875 [18 Stat. 470], that this suit does not involve a controversy within the jurisdiction of this court, an order will be entered to that effect, and that this court will proceed no further therein, and that this suit will be remanded to the marine court of the city of New York, and that the defendant pay to the plaintiff his costs in this court, to be taxed.

NOTE [from original report in 57 How. Pr. 175]. Before making the above application in the United States court, the plaintiff applied in the state court to vacate the ex parte order for the transfer upon the ground it was improvidently made, and the following opinion was filed thereon:

McAdam, J. The record in this action has been removed to, and filed in, the United States circuit court on the usual petition and bond. Any order I might now make in the premises would be coram non judice (see Dill. Rem. Causes, p. 67, note; Kanouse v. Martin, 15 How. [56 U. S.] 198; Insurance Co. v. Dunn, 19 Wall. [86 U. S.] 214; Livermore v. Jenks, 4 How. Pr. 479; Mahone v. Manchester & L. R. Co., 111 Mass. 72; Stevens v. Phoenix Ins. Co., 41 N. Y. 149), for, as Judge Allen (in Bell v. Dix, 49 N. Y., at page 237) says: "It is a novel proceeding for a suitor to apply to a court from which the record and cause have been removed for relief which the court having jurisdiction can only effectually grant." Having no jurisdiction, it would be unbecoming to say one word upon the merits of the application either pro or con, although I have fixed impressions in regard to the matter. If the United States court determines to remand the record to this court, the order will be respected and enforced.

CITIZEN, The (BIBBINS v.). See Case No. 1,384a.

CITIZENS' SAV. BANK (WATSON v.). See Case No. 17,279.

Case No. 2,730.

CITIZENS' BANK v. NANTUCKET STEAMBOAT CO.

[2 Story, 16.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1811.

CARRIERS — RIGHTS—DUTIES AND LIABILITIES — WHAT CONSTITUTES A CARRIER — EVIDENCE — PROOF OF DOCUMENT—COMPETENCY OF WITNESS —"MERCHANDISE"—PLEADING IN ADMIRALTY—BLENDING ACTIONS IN REM AND IN PERSONAM.

1. The transportation of passengers, or of merchandise, by common carriers, does not necessarily imply that the owners are not common carriers of bank notes or specie. The nature and extent of that employment or business which the owners expressly or impliedly hold themselves out as undertaking, furnishes the limits of their rights, duties, obligations and liabilities.

[Cited in Baxter v. Leland, Case No. 1,124; The New World v. King, 16 How. (57 U. S.) 473.]

2. No person is a common carrier, in the sense of the law, who is not a carrier for hire. It is not necessary, that the compensation should be a fixed sum; it is sufficient if it be in the nature of a quantum meruit, enuring to the benefit of the owners. Nor is it necessary, that the goods or property should be entered upon a freight list, or the contract be verified by any written memorandum; although both may be important ingredients in ascertaining the true understanding of the parties, as to the character of the bailment.

[Cited in New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 420.]

3. Where, in answer to a cross interrogatory, proposed by counsel in a deposition, as to whether the witness had received a release from all liabilities, the witness produced the release from his own possession, as a part of his testimony; it was *held*, that he need not prove the execution of the release by the subscribing witness. And the question having been asked by the respondents, in order to establish the competency of the party as their own witness, they were estopped from denying it.

4. But in the case of a release, produced by a party to a suit, to establish his own title he must prove its due execution by the subscribing witness.

5. A release of all actions and causes of action, or of a particular cause of action, which has happened before the time of the release, will discharge the witness from all liability, dependent upon the event of the suit, in which he is called to testify, touching his conduct in the matters on which the suit is founded.

[Cited in The Peytona, Case No. 11,058.]

6. Quaere, whether usages and customs can be introduced as evidence to control the construction of contracts, and the principles of law.

7. Where a certain charter, incorporating the Nantucket Steamboat Company, granted a right to run a steamboat "for the transportation of merchandise," and the master thereof, being intrusted with a certain sum of money in bank bills, lost it, or never duly delivered it; it was *held*, that the term "merchandise" does not apply to mere evidences of value, such as notes, bills, checks, policies of insurance, and bills of lading, but only to articles having an intrinsic value, in bulk, weight, or measure, and which are bought and sold; and that, in order to render the company liable, it must be clearly proved, that they had held themselves out to the public as common carriers of bank bills for hire; and that they had authorized the master to contract on their account and not on his own, for the carriage thereof, which in the present case was not established by proof.

[Cited in The Marine City, 6 Fed. 416.]

8. The onus probandi was upon the libellants to make out a prima facie case, in the affirmative; and then the onus probandi of displacing this inference was shifted upon the respondents.

9. The knowledge of the owners, that the master carried the money for hire, would not affect them, unless the hire was on their account, or unless the master held himself out as their agent in that business, within the scope of the usual employment and service of the steamboat.

10. Proceedings in rem and in personam cannot be blended in one libel.

[Cited in The Zenobia, Case No. 18,208; Ward v. The Ogdensburgh, Id. 17,158; The Young America, Id. 18,178; The Clatsop Chief, 8 Fed. 164; The Alida, 12 Fed. 344; The Director, 26 Fed. 710.]

Appeal from the district court of the United States for the district of Massachusetts.]

Libel in admiralty. The libel states in

[1] [Reported by William W. Story, Esq.]

substance as follows: That on or about the 22d day of October, last past, the libellants were the owners of a certain package, containing a large number of bank bills, issued by the president, directors and company of the Pacific Bank, in Nantucket, the particular denominations of which the libellants are unable to set forth, but the whole sum and amount whereof was $1,600, of the lawful money of the United States of America, and, also, containing a check drawn by the cashier of the said Pacific Bank on the president, directors, and company of the New England Bank, a banking corporation duly established by law in the state of Massachusetts, for the sum of $422, which said package was directed to J. B. Congdon, Esq., cashier of the Merchants' Bank, New Bedford. That the respondents were the owners of a certain steamboat called the Telegraph, whereof Lot Phinney was master, which said steamboat was then, and had been for some time, employed in carrying passengers and freight from the island of Nantucket to the main land of Massachusetts, and particularly to the town of New Bedford. That the libellants by their cashier, Mr. Starbuck, delivered the said package to the said Phinney, to be carried by and on board the said steamboat from Nantucket to New Bedford aforesaid, and there to be delivered, the dangers of the seas excepted, to the said Congdon, for a certain reasonable freight to be paid therefor; and the said master thereupon accepted the said package, and understood and agreed, that the same should be carried and delivered as aforesaid, or else, as the libellants aver, the said package was delivered as aforesaid to the respondents, through the said master, to be, by the said respondents, transported and delivered as aforesaid; all dangers and accidents and losses excepted, save such as should arise from want of ordinary care on the part of the said respondents or their agents. That the said respondents never did deliver the said package or any of the contents thereof to the said J. B. Congdon, or to any other person at New Bedford aforesaid, or elsewhere, for the use of the said libellants, but through want of ordinary care did lose the same. That by reason of the premises, the libellants have wholly lost and been unlawfully deprived of the said package and the contents thereof, and of all benefit and advantage therefrom, and have suffered damage to the extent of $1,600, for which the respondents are liable, and ought justly to pay to the libellants. The libel concludes with a prayer for the allowance of the said damages and for general relief.

The answer denies any knowledge on the part of the respondents, that the libellants were the owners of the package, as alleged, and of the contents of the package, or that the said package was delivered to Lot Phinney, in the manner and for the purpose alleged, or that the package, if so delivered to him, was not by him safely carried and delivered, as is alleged, or that the libellants have suffered any loss, or the respondents incurred any liability as alleged. The answer goes on to allege that the libellants, and other corporations and persons in Nantucket and New Bedford, have frequently, as these respondents have been informed and believe, delivered sums of money or packages of bank bills to the said Phinney, to be by him carried, as their agent and for their accommodation, to and from the said places, for the purpose of making payments and deposits, and of other mercantile transactions, but that the said packages were not so delivered to or received by the said Phinney, in his capacity of master of the said boat, nor as within the scope or course of any business, which he was authorized to transact, as such master, and were not delivered to him, and received by him, to be carried for any stipulated or implied hire or reward, to be paid to him or to the owners of the said boat, but were so received and delivered for the accommodation of the said corporation and persons; that if any compensation was made to the said Phinney, it was made as a gratuity or voluntary donation for his private and personal benefit, and not as stipulated or agreed reward or hire; that these respondents have never authorized directly or indirectly the said Phinney to carry on such transactions on their account and risk, and in their behalf, and have never received any payment, hire or reward, for such services, as will appear by their book of accounts, which is submitted for examination; and that such services were in behalf of the persons sending such packages, and of the libellants in the case alleged, as their agent and servant, and not as the agent and servant of the respondents; that the said Phinney had no authority to enter into any such contract to carry and deliver such packages as is set forth in the libel, in behalf of these respondents, and that they have never received any reward therefor, nor has any been tendered to them or to any one as their agent; but that the same, if received and carried by the said Phinney, was received by him to be carried on his own individual risk and responsibility, and not on the risk and responsibility of these respondents. That from the insulated position of the community, it has been necessary to send, at all times, money by water conveyance, a portion of the distance, to the various places with which they have business connections, and that packages of money have been for a long period of time, conveyed by packet masters, without receiving compensation.

The cause came on to a hearing in the district court upon the libel and other pleadings, and evidence in the case; and the late district judge, (Judge Davis,) upon the hearing, in January, 1840, dismissed the libel with costs. [Case not reported.] From the decree of dismissal an appeal was taken by the libellants to the circuit court.

C. P. Curtis, for libellants.

The respondents are common carriers. The charter incorporating this steamboat company (Stat. 1833, c. 11) grants to sundry persons the authority to run a steamboat and two other vessels, for the convenience of the public travel and the transportation of merchandise, between Nantucket and New Bedford. The respondents do not aver, that the company have not the right to carry bank bills or specie as freight, but only, that the libellants and others have sent packages of bills by Phinney as their agent, and not as master of the vessel, and that the respondents have never authorized Phinney to carry money in their behalf, nor have received any compensation for so doing. The respondents cannot argue, (as they have not so averred), that the property sent by the libellant, was not such property as they might legally carry; and if they could, such would not be a true construction of the charter. Specie and bank notes come within the definition of merchandise, "any thing to be bought or sold." By the Revised Statutes (c. 97, p. 21), bank notes may be taken in execution and sold like other chattels. So, in New York (Handy v. Dobbin, 12 Johns. 220), a policy of insurance on "property" covers bank bills. Whiton v. Old Colony Ins. Co., 2 Metc. [Mass.] 1–7. Shaw, C. J., says in 20 Pick. 9, 13: "The word merchandise is broad enough to cover stocks or shares in incorporated companies;" and the same court decided in another case, that the sale of such shares was within the statute of frauds. Tisdale v. Harris, 20 Pick. 9. Bona et catalla include choses in action. Calye's Case, 8 Coke, 33. In Allen v. Sewall, 2 Wend. 327, it was decided by the supreme court, and afterwards by Chancellor Walworth, that bank notes came within the words "goods, wares, and merchandise," and judgment was given against the defendants. The court of errors, however (6 Wend. 335), overruled the decision, it appearing, that the master had been forbidden by his employers to carry bank bills.

There may be common carriers of bank bills, as well as of any other species of property. Kemp v. Coughtry, 11 Johns. 109; Dwight v. Brewster, 1 Pick. 50. And there is nothing in the present charter to prohibit the respondents from carrying bank bills, either gratuitously or for compensation. It is not necessary, in order to charge a person as a common carrier, to prove that a specific sum was agreed on for the hire; for if none is agreed on, he is entitled to a reasonable compensation. Story, Bailm. 505; 6 Wend. 350. And common carriers are liable for property lost or destroyed by gross negligence, even where they carry it without hire. Foster v. Essex Bank, 17 Mass. 498. Common carriers are responsible for the acts of their servants and agents, and any arrangements with them, whereby they may receive exclusively the compensation for the carriage of particular packages, will not exempt the carrier from responsibility for loss, unless it be known to the party, when it may be deemed that he contracts exclusively with the servant or agent. Tracy v. Wood [Case No. 14,130]; Story, Bailm. 507. Where the master of a vessel is consignee of the goods to sell them, and it is the course or usage of trade for the master to receive, on behalf of the owner, a compensation, which is divisible between the owner and master, by private agreement, the owner is responsible. Id. 546; Emery v. Hersey, 4 Greenl. 407; Kemp v. Coughtry, 11 Johns. 107. The freight of the cargo is the compensation for the whole duty performed. 2 Kent, Comm. (3d Ed.) 609; Kemp v. Coughtry, 11 Johns. 107. So, if the master of a vessel, who is the agent of the owners, receive the property of another to be carried in his vessel, the owners are bound by his contract, unless they can prove that his authority was limited, and that it was known to be so to the other party. Ward v. Green, 6 Cow. 173; 1 Bell, Comm. § 432; 2 Kent, Comm. (3d Ed.) 609; Story, Ag. 119; The Rebecca [Case No. 11,619]; The Phebe [Id. 11,064]. It is the duty of the carriers to take the utmost care of the goods; to make a right delivery of the property, according to the usage of trade, or the course of business; and to expose the property to no unnecessary hazard. Story, Bailm. 327, 509, 543. And the onus probandi is on the carrier to exempt himself from liability (Id. 529), which attaches from the time of his acceptance of the goods, and does not cease until no duty remains to be done by him (Id. 533, 538). Where there is no fraud or intentional concealment of the value of the parcel, the carrier is responsible for the whole value, unless he bring home to the other party notice of the limitation of the carrier's authority.

In the present case, Capt. Phinney is the master of a steamboat established expressly for a carrier. The cashier of a bank delivers to him parcels to be delivered to another cashier. He knows from the course of dealing, and also from his being paid for carrying them, that the parcels contain money and valuables. He asks no questions as to value, and prescribes no limits to his responsibility; and various small sums are paid to him, as the cashier testifies, by way of freight. No notice of any private instructions of his employers is brought home to the libellants or their cashier; nor does it appear there were any such, forbidding him to take money, although it is matter of notoriety that he carries such packages for pecuniary reward. A parcel is lost by gross carelessness of the master; for what could be more so, than for the carrier or his servant to hang his coat, containing a package of bank notes, on a chair, and to go to bed and to sleep, in another room, in a house filled with people, some of whom were strangers? Tracy v. Wood [Case No. 14,-

130]. Why did he not carry it to Mr. Congdon's house, if the bank was closed? But Phinney declared, that he did not think of the package after leaving the bank till the next morning.

What is the ground of defence against this claim? 1st. A general denial of the delivery of the parcel to Phinney, of its contents, and of its loss by him, all of which we have proved. 2d. That the libellants delivered their parcel (if at all) to Phinney, as their agent, and not as the servant or agent of the owners (respondents.) This we deny. Phinney was and had been for a considerable time in the open and notorious command of the boat, with all the usual powers of master. No limitation or restriction of the common authority of the master of a carrying vessel was prescribed by his owners, and his contracts have the same effect in law as if they were the personal acts of the owners. The Phebe [supra]. The property was delivered on board the respondent's vessel, to the respondent's servant, who was the master of said vessel. It was carried in their vessel. Whatever time was occupied by Phinney in transacting the business was their time, for the whole time of the master is due to the owners. Abb. Shipp. p. 132. It was delivered under a contract to pay for the transportation. Mr. Starbuck swears to this positively, and that when he first sent packages of money he did not know Phinney by sight; he was a stranger to him. But if no specific compensation had been expected, to obtain the freight of other merchandise was the object in view, and this was the motive of the directors in permitting their master to carry small packages without particular charge of freight; and this was a sufficient consideration on their part. This case closely resembles that of Foster v. Essex Bank, 17 Mass. 498, which was to recover the value of a special deposit of specie, taken without reward. The court say, "As the building and vaults of the company were allowed to be used for this purpose, and their officers employed in receiving into custody the things deposited, the corporation must be considered as the depositary, and not the cashier or other officer, through whose peculiar agency commodities may have been received into the bank." There, the bank derived no benefit whatever from the deposit, yet were holden to be liable for any loss arising from gross negligence. Here the steamboat company obtained the benefit derived from the freight of the merchandise of the directors and principal owners of the bank; for if the respondents had refused to carry bank bills, &c., for the bank, they would have lost the carriage of their merchandise. The capacity in which Phinney received the package was as master of the boat, and therefore as agent of the owners, and they were bound to give notice if they meant to limit his authority. There was not a syllable of his receiving it in any other capacity. If Starbuck, when he first sent money by him, did not even know him by sight, why should he trust him personally? It is incredible, that the cashier should confide a large sum of money to a stranger, unless he relied on his official character as agent and servant of the respondents. The contract of the respondents was that of common carriers, and carriers are liable for every species of loss, except such as are caused by inevitable accidents or by the public enemies. This rule is enforced in the case of a steamboat, grounding by mistaking a light in another vessel for a light-house. McArthur v. Sears, 21 Wend. 190. The case at bar is almost exactly like the case of Allen v. Sewall, 2 Wend. 327. But the respondents attempt to set up a usage, by which the master of their boat is to be deemed the agent of the bailors, and not of the steamboat company. There is no evidence in this case sufficient to establish a certain and uniform usage by the respondents to carry packages without making themselves responsible for them, in case of loss. Such a usage cannot be determined by the opinion of witnesses, but must be established by instances. Winthrop v. Union Ins. Co. [Case No. 17,901]; Cunningham v. Fonblanque, 6 Car. & P. 44, 2 Burrows, 1223; Savill v. Barchard, 4 Esp. N. P. 53. And such a usage cannot be sustained in opposition to established principles of law. Homer v. Dorr, 10 Mass. 26; The Reeside [Case No. 11,657]. There is no evidence here to establish any certain and uniform usage to carry money without compensation and without the carriers making themselves accountable for it. Wood v. Wood, 1 Car. & P. 59, 7 Car. & P. 711; Bleaden v. Hancock, 4 Car. & P. 152. To exempt themselves, they must also prove a usage not to pay for such property, if lost. 22 Pick. 108. The burden of proof is on the respondents to establish the entire usage. Not a single instance of loss by the respondents is shown: if the previous practice of the packet masters is admitted, only two instances are shown, in all time; one was by shipwreck, the other by theft; and this last was of a sum of money received by the master for goods sold by him as agent of the shipper.

F. C. Loring, for respondents.

On the evidence, the matters in dispute are the nature of the contract, and the parties to it, and the question of negligence. To make the respondents liable as carriers, the libellants must prove a delivery of the package to the master of the boat, as the agent of the respondents, and that it was to be carried for hire. The proof of a special contract is not made out, and is contradicted by the evidence in the case. The libellants then resort to the presumptions arising from the facts, that the respondents were owners of the boat,—the master their servant, viz., that the package was received by him to be

carried as their agent, and for a reasonable compensation. Their own evidence does not make out such a case. For it appears, that it was not the usual business of the boat to carry packages of money for hire, and there is no proof of any authority in the master so to do. It also appears, that, for many years, the libellants have been in the habit of sending packages of this kind by the boat, and that the whole amount paid by them as a compensation or gratuity to the master is $13. The entire inadequacy of this sum, considered as a compensation for the trouble of carrying these packages, and the assumption of the risks of common carriers, shows, that neither party could have considered the contract as of that nature. If this ground fails, the libellants must resort to the contract of mandate, and show, that the respondents were the mandatories, and that there was gross negligence. The respondents admit, that the contract was a mandate, but deny, that they were parties to it, and that there was such negligence.

All the elements of a mandate are here to be found. 1st. The thing to be done, to wit, the carriage, and delivery of the package: 2d, that the contract was gratuitous: 3d, that the parties to it, to wit, the libellants and the master of the boat, voluntarily entered into it. To prove these positions, and that the master was the mandatary, and the respondents were not parties to the contract, they offer proof of former transactions between the libellants and the present and former masters of the boat, and of the constant practice and usage at Nantucket, existing ever since its settlement, in relation to the carriage of similar packages. It is not attempted to show that the law or liability of carriers, or mandataries, is different at Nantucket from what it is elsewhere, but only to ascertain what was the nature and extent of the contract, and the meaning of the parties, from the prevailing usage, and their former dealings in the absence of an express contract; and for that purpose, evidence of usage is always admissible, The Paragon [Case No. 10,708]; The Reeside [supra]. If it can be shown, that the masters of this boat, and of vessels belonging to Nantucket, have been for many years in the constant practice of rendering such services gratuitously, and that this service was rendered in the usual manner, the presumption then arises, that this service was performed gratuitously, and not for hire. There can be no quantum meruit in such a case; for that arises by implication of law, where there is no contract; such a custom would make a contract. If the master had been in the habit of carrying such packages for hire, he might recover in a quantum meruit; but not if his practice were otherwise, and he had made no special contract for hire. The evidence shows that it has been the daily practice of merchants, banks, and persons generally, at Nantucket, to send packages of bills to the main land by the masters of boats and vessels for many years; and no compensation is ever demanded for this service; that frequently other services, such as the payment of notes or bills, the settlement of accounts, (certainly no part of the duties of common carriers,) are required; that no compensation is usually given; and when made, is given to the master, and intended, either to cover expenses incurred or as an acknowledgment to him personally for a favor rendered; that the owners of the vessel never received any compensation; and that this practice is universally known and understood at Nantucket; but that whenever a receipt was required, which was very unusual, and was imagined to impose an additional degree of responsibility, a commission was charged.

If this evidence shows the contract to have been a mandate, the next inquiry is, who was the mandatary? If the respondents, it is only because the master was for certain purposes their agent. The presumption arising from this fact may be rebutted by proof, that the agent, in making this contract, was not acting in the scope of his authority, or that the bailor contracted with him personally. This inquiry, as to the bailor, is equally material, whether the contract is to be considered as a bailment for hire, or as a mandate. If it was a mandate, it would seem to be a necessary conclusion, that the master was the bailee, and not the owners. For it would be unreasonable to suppose, that they employed and paid him to do friendly acts for his neighbors. The presumption, that he was acting in the scope of his business, which was to carry freight and passengers for hire, could not arise in relation to acts from which the owners derived no advantage. If it was a bailment for hire, the owners could not be responsible, if it appears, that they never authorized the master to carry packages of money for hire, and that the libellants knew so; or that they allowed him to retain whatever compensation was given to his own use, and that the libellants knew so; for then the contract was made with him and not with them.

1st. The charter of the respondents (St. Jan. 26, 1833, c. 11), gives them no authority to engage in the carriage of such packages either gratuitously or for hire. The charter is granted "for the convenience of public travel, and transportation of merchandise." Bank bills are in no sense merchandise. The custom of carrying bills gratuitously existed long before the charter was granted, was known to the corporators, and probably considered in framing the charter. It was known, that this custom was of great importance to the islanders; that such packages could not be carried as freight, except at rates, which would cover the risks of guaranty and insurance; and that the transportation of them on such terms would be of no public advantage. They, therefore, never intended to be carriers of

bank bills, and confined their powers to the carriage of merchandise. There is no proof of any authority to the master to carry such packages for the owners; and no presumption can arise of any, when their business is limited by law in such manner as not to permit of it. The presumption is, that they conformed to the law, and the charter is constructive notice to the public of the limitation of the powers and business of the corporation.

2d. If the proof be, that whatever compensation was given, was intended for and received by the master to his own use, it follows, that he was the bailee. If the contract were a bailment for hire, this conclusion is necessary, because the carrier is liable only in consequence of his reward: if a mandate, then the person to whom the gratification was made was the mandatary, conferring the obligation of which the gratification was the acknowledgment. That the obtaining of freight was not an inducement to carry these packages gratuitously, appears from the evidence, that they were carried indiscriminately for every one, whether likely to furnish freight, or not; that the freighting business is almost exclusively in the hands of the respondents, so that they are not in danger from competition; and that the withdrawal of their supposed liability as carriers, or as mandataries of these packages, could not affect their other business, is obvious, because all the witnesses, except Starbuck, say that it never was imagined that the respondents incurred any responsibility for them. The proof is conclusive that the respondents never received any advantage or pay for the carriage of such packages; that the compensation sometimes made to the master was so trifling, and so seldom given, that it could not affect the rates of wages required by him; and that it was always intended for him: and not one witness can be found to testify otherwise. It is not pretended, that the respondents were direct parties to this contract, and it is proved, that it was not in the scope of their business, and that they derived no benefit from it; therefore, they are not the bailees. It is proved, that compensation was made very infrequently, and for other services, as well as the carriage and delivery of the packages, and that when made it bore no proportion to the risks assumed by common carriers, and was intended as a gratuity to the master; and that when any additional liability was supposed to be assumed, as by giving a receipt, a commission was charged, which was never done otherwise; and that the carriage of these packages, in this way, was a matter of most frequent occurrence, and no instance is known in which a master had refused to carry one gratuitously. The contract was, therefore, not a bailment for hire, but a mandate, and the master the mandatary. The fact, that compensation was occasionally given does not affect the nature of the contract, if not given or claimed as a debt; nor would it be, if expected as a matter of course, if it could not be recovered at law.

The evidence as to the loss does not show such a case of gross negligence as to make a mandatary liable. Story, Bailm., passim; U. S. v. Duval [Case No. 15,015]; Davis v. New Brig [Id. 3,643]; The Rebecca [Id. 11,619]; Halsey v. Brown, 3 Day, 346; Story, Confl. Laws, 226; Trott v. Wood [Case No. 14,190]; Renner v. Bank of Columbia, 9 Wheat. [22 U. S.] 581; Allen v. Sewall, 2 Wend. 341; Id., 6 Wend. 350; King v. Lenox, 19 Johns. 235; Walter v. Brewer, 11 Mass. 99; Reynolds v. Toppan, 15 Mass. 370; Butler v. Basing, 2 Car. & P. 613; Tracy v. Wood [Case No. 14,130]; The Rendsberg, 6 C. Rob. Adm. 142; Foster v. Essex Bank, 17 Mass. 498.

STORY, Circuit Justice. This cause has come before the court under circumstances, involving some points of the first impression here, if not of entire novelty; and it has been elaborately argued by the counsel on each side on all the matters of law, as well as of fact, involved in the controversy. I have given them all the attention, both at the argument and since, which their importance has demanded, and shall now proceed to deliver my own judgment. The suit is in substance brought to recover from the steamboat company a sum of money, in bank bills and accounts, belonging to the Citizens' Bank, which was intrusted by the cashier of the bank to the master of the steamboat, to be carried in the steamboat from the island of Nantucket to the port of New Bedford, across the intermediate sea, which money has been lost, and never duly delivered by the master. The place where, and the circumstances under which it was lost, do not appear distinctly in the evidence; and are not otherwise ascertained than by the statement of the master, who has alleged that the money was lost by him after his arrival at New Bedford, or was stolen from him; but exactly how and at what time he does not know. The libel is not in rem, but in personam, against the steamboat company alone; and no question is made, (and in my judgment there is no just ground for any such question,) that the cause is a case of admiralty and maritime jurisdiction in the sense of the constitution of the United States, of which the district court had full jurisdiction; and, therefore, it is properly to be entertained by this court upon the appeal.

There are some preliminary considerations suggested at the argument, which it may be well to dispose of before we consider those which constitute the main points of the controversy. In the first place, there is no manner of doubt that steamboats, like other vessels, may be employed as common carriers; and when so employed, their owners are liable for all losses and damages to goods and other property intrusted to them as common carriers to the same extent and in the same

manner, as any other common carriers by sea. But whether they are so, depends entirely upon the nature and extent of the employment of the steamboat, either express or implied, which is authorized by the owners. A steamboat may be employed, although I presume it is rarely the case, solely in the transportation of passengers; and then the liability is incurred only to the extent of the common rights, duties and obligations of carrier vessels of passengers by sea, and carrier vehicles of passengers on land; or they may be employed solely in the transportation of goods and merchandise, and then, like other carriers of the like character at sea and on land, they are bound to the common duties, obligations and liabilities of common carriers. Or the employment may be limited to the mere carriage of particular kinds of property and goods; and when this is so, and the fact is known and avowed, the owners will not be liable as common carriers for any other goods or property intrusted to their agents without their consent. The transportation of passengers or of merchandise, or of both, does not necessarily imply, that the owners hold themselves out as common carriers of money or bank bills. It has never been imagined, I presume, that the owners of a ferry boat, whose ordinary employment is merely to carry passengers and their luggage, would be liable for the loss of money intrusted for carriage to the boatmen or other servants of the owners, where the latter had no knowledge thereof, and received no compensation therefor. In like manner the owners of stage-coaches, whose ordinary employment is limited to the transportation of passengers and their luggage, would not be liable for parcels of goods or merchandise intrusted to the boatman employed by them to be carried from one place to another on their route, where the owners receive no compensation therefor, and did not hold themselves out as common carriers of such parcels. A fortiori, they would not be liable for the carriage of parcels of money, or bank bills, under the like circumstances. So, if money should be intrusted to a common wagoner, not authorized to receive it by the ordinary business of his employers and owners, at their risk, I apprehend that they would not be liable for the loss thereof as common carriers, any more than they would be for an injury done by his negligence to a passenger, whom he had casually taken up on the road. In all these cases, the nature and extent of the employment or business, which is authorized by the owners on their own account and at their own risk, and which either expressly or impliedly they hold themselves out as undertaking, furnishes the true limits of their rights, obligations, duties, and liabilities. The question, therefore, in all cases of this sort is, what are the true nature and extent of the employment and business in which the owners hold themselves out to the public as engaged? They may undertake to be common carriers of passengers, and of goods and merchandise, and of money; or, they may limit their employment and business to the carriage of any one or more of these particular matters. Our steamboats are ordinarily employed, I believe, in the carriage, not merely of passengers, but of goods and merchandise, including specie, on freight; and in such cases the owners will incur the liabilities of common carriers as to all such matters within the scope of their employment and business. But in respect to the carriage of bank bills, perhaps very different usages do, or at least may, prevail in different routes, and different ports. But, at all events, I do not see how the court can judicially say, that steamboat owners are either necessarily or ordinarily to be deemed, in all cases, common carriers, not only of passengers, but of goods and merchandise and money, on the usual voyages and routes of their steamboats; but the nature and extent of the employment and business thereof must be established as a matter of fact by suitable proofs in each particular case. Such proofs have, therefore, been very properly resorted to upon the present occasion. In the next place, I take it to be exceedingly clear, that no person is a common carrier in the sense of the law, who is not a carrier for hire; that is, who does not receive, or is not entitled to receive, any recompense for his services. The known definition of a common carrier, in all our books, fully establishes this result. If no hire or recompense is payable ex debito justitiae, but something is bestowed as a mere gratuity or voluntary gift, then, although the party may transport either persons or property, he is not in the sense of the law a common carrier; but he is a mere mandatary, or gratuitous bailee; and of course his rights, duties and liabilities are of a very different nature and character from those of a common carrier. In the present case, therefore, it is a very important inquiry, whether in point of fact the respondents were carriers of money and bank notes and checks for hire or recompense, or not. I agree, that it is not necessary, that the compensation should be a fixed sum, or known as freight; for it will be sufficient if a hire or recompense is to be paid for the service, in the nature of a quantum meruit, to or for the benefit of the company. And I farther agree, that it is by no means necessary, that if a hire or freight is to be paid, the goods or merchandise or money or other property should be entered upon any freight list, or the contract be verified by any written memorandum. But the existence or non-existence of such circumstances may nevertheless be very important ingredients in ascertaining, what the true understanding of the parties is, as to the character of the bailment. In the next place, if it should turn out, that the steamboat company are not to be deemed common carriers of money and bank bills; still, if the master was authorized to receive money and bank bills as their agent, to be transported from one port of the route of the

steamboat to another at their risk, as gratuitous bailees, or mandataries, and he has been guilty of gross negligence in the performance of his duty, whereby the money or bank bills have been lost, the company are undoubtedly liable therefor, unless such transportation be beyond the scope of their charter; upon the plain ground, that they are responsible for the gross negligence of their agents within the scope of their employment.

Having stated these preliminary doctrines, which seem necessary to a just understanding of the case, we may now proceed to a direct consideration of the merits of the present controversy. And in my judgment, although there are several principles of law involved in it, yet it mainly turns upon a matter of fact, namely, whether the steamboat company were, or held themselves out to the public to be, common carriers of money and bank bills, as well as of passengers and goods and merchandise, in the strict sense of the latter terms; or the employment of the steamboat was, so far as the company are concerned, limited to the mere transportation of passengers and goods and merchandise on freight or for hire; and money and bank bills, although known to the company to be carried by the master, were treated by them as a mere personal trust in the master by the owners of the money and bank bills, as their private agents and for which the company never held themselves out to the public as responsible, or as being within the scope of their employment and business as carriers.

The question has been made at the bar, upon whom, in this case, the burden of proof lies to establish, that the company were common carriers of money or bank bills, or not. It does not appear to me to be of any great importance in the actual posture of the present case, how that matter is decided. But I have no doubt, that the onus probandi is upon the libellants to establish the affirmative; for, until that is done, no liability can attach to the respondents; and the libellants are bound to establish a prima facie case; and indeed it is scarcely within the rules of evidence to call upon the respondents to establish the negative. But it seems to me the less necessary to sift this matter, since the evidence on the part of the libellants is in my judgment sufficient to establish such a prima facie case, at least to the extent of a compliance with the exigency of the rule. It is abundantly proved, that the masters of the steamboat have been constantly and habitually employed in the transportation of money and bank bills for banks and private persons (as indeed common packet masters were likewise employed long before steamboats existed) upon this very route, and upon the common routes from Nantucket to other ports. This usage, or practice, or employment, (call it which we may), was so notorious, that it must be presumed to be known to the steamboat company; and indeed, that fact is not controverted. Under such circumstances the natural inference would be, that the transportation of money and bank bills was within the scope of the usual employment of the master in his official capacity, and on account and at the risk of the owners, unless the inference were repelled by other circumstances. The onus probandi then, of disproving this inference, may be deemed to be fairly shifted upon the respondents.

The ground of the defence of the company is, that in point of fact, although the transportation of money and bank bills by the master was well known to them, yet it constituted no part of their own business or employment; that they never were in fact common carriers of money or bank bills; that they never held themselves out to the public as such, and never received any compensation therefor; that the master in receiving and transporting money and bank bills acted as the mere private agent of the particular parties, who intrusted the same to him, and not as the agent of the company or by their authority; that in truth he acted as a mere gratuitous bailee or mandatary on all such occasions; and even if he stipulated for, or received, any hire or compensation for such services, he did so, not as the agent of or on account of the company, but on his own private account, as a matter of agency for the particular bailors or mandators. Now, certainly, if these matters are substantially made out by the evidence, they constitute a complete defence against the present suit. There are some facts in the case, which are beyond the reach of any just controversy. In the first place, there is no pretence to say, that the company have ever received any freight, hire, or compensation, for the carriage of money or bank bills transported in the steamboat, either from the master, or from the owners thereof, or have ever supposed themselves entitled thereto. No claim of that sort has ever been set up by them against the owners of such bank bills, or against the master, although the carriage of packages of money and bank bills by him has been constantly known and understood by them; nor has the master ever credited them with any such hire, freight, and compensation, although he has constantly credited them with the freight of goods and merchandise carried in the steamboat, whenever he has received it. This is a very significant circumstance to establish, on the part both of the master and the company, their mutual understanding of such transactions,—that they were mere private agencies of the master, and not agencies on behalf of the company, authorized by them, either as common carriers, or as mandataries. There is also a total absence of all evidence to establish that the company ever held themselves out to the public by advertisement or otherwise, through their directors, or the other regular officers of the corpora-

tion, as common carriers for such purposes; or that they ever entered into any contracts of this sort, for hire or compensation, directly with any person or persons for whose benefit the money or bank bills were transported. The most, that can be said, is, that the master might well be deemed their agent for such purposes. But that must proceed upon the ground, either that he had full authority, or that he was held out to the public as having full authority, or that his acts admit of no other reasonable interpretation. If his acts may just as fairly be attributed to a private personal agency for third persons, and, a fortiori, if taking all the circumstances, they naturally lead to the latter conclusion, then the presumption of the liability of the company therefor is completely repelled. In the next place, if the testimony of the persons, who have been successively masters of the steamboat is admissible, and is believed, they state facts and circumstances, which directly confirm the material grounds of the defence. They state in substance, that at the successive periods of their command of the steamboat, they have been accustomed to carry packages of bank bills for the banks at Nantucket, and for various private persons, to New Bedford, for several years, to the amount of hundreds of thousands of dollars; that they have always deemed themselves as acting therein as the private agents of the bailors; that they have never received any such packages for the account of the company or by their authority; that they have always done this business as gratuitous bailees, never charging any commission or requiring any compensation as a matter of right, except when requested to give a special receipt therefor, (which, however, was rarely done,) and then they charged on their own account a small commission; that they have occasionally received from the banks, as well as from private persons, a small compensation for these services, such as they chose to pay, as a mere gratuity, or voluntary recompense, but without any claim of its being due to them as a matter of right or duty; that such gratuities and recompenses have been rarely paid by private persons, and not even uniformly paid by the banks, which were in the constant habit of sending such packages; but it has been sometimes intermitted by them for a considerable length of time; and that such gratuities and recompenses were never accounted for by them to the company; but were always applied to their own private use and benefit.

Such is the substance of the facts and circumstances, either directly stated by the masters, or fairly deducible from their testimony. It is in no small degree corroborated in its general bearing by the testimony of common packet masters, who have been accustomed to carry like packages of bank bills for the last forty years, and who always treated such bailments as gratuitous, and as special agencies of their own, and never claimed any compensation therefor, on account of the owners of their vessels. It is also in no small measure sustained by the absence of any positive testimony on the part of the libellants of any instances except those stated by Mr. Starbuck, in which a compensation has been claimed of banks, or allowed by them, as a matter of right by the master, or of its having been paid by individuals at any time otherwise than as a gratuity to the master, or as a personal compensation to him for his services. There is this additional consideration of no small weight, that if these packages were within the scope of the business of the company, and were carried at their risk, and for compensation and hire, it is surprising that there should not have been a uniform course of dealing with all persons sending the packages, and a uniform price, or at least a reasonable recompense, always charged on one side, and paid on the other. Yet there is a total absence of all proof to this effect. It is not pretended that the company ever received any such price or recompense, or ever claimed an account therefor from the master; or ever made it an item of charge or credit in their dealings with the bailors. How are we to account for such a state of things, if in truth they were incurring on every trip such vast risks and responsibilities for uncounted sums? One should suppose, that such risks and responsibilities would naturally introduce a regular commission or charge therefor, such as is generally paid in other cases, in nature of a commission del credere or guaranty. It would seem strange, that the company should slumber over their own rights during so long a period, and should indiscriminately receive all such packages from all persons, and yet should not charge any fixed commission, or uniformly claim any from the bailors for such risks and responsibilities. On the other hand, if these were cases of gratuitous bailments, or of personal agencies on the part of the master unconnected with his official duties, or the common business of the company, the state of the facts is exactly what it ought to be; and there is nothing which either requires explanation, or solicits inquiry. On the opposite supposition, there would seem to be many circumstances admitting of no reasonable or satisfactory explanation. But the testimony of the masters has been denied to be competent; and the exception has been especially urged against that of Capt. Phinney. The latter was the master, who took the package of bank bills, for the loss of which the present suit is brought. In order to establish his competency, notwithstanding his relation to the cause, the respondents upon their direct interrogatories annexed to his deposition, asked him, if he had not received a release from them of all liability on account of the subject-matter of the suit? He answered, that he had, and produced the supposed re-

lease and annexed it to his answer. Now, it was first objected, that his answer upon the interrogatories of the respondents was no proper proof of the execution of the release, (whatever might have been the case, if the answer had come out upon the cross examination upon the interrogatories of the libellants) but the execution should be proved by the subscribing witness. I thought at the argument, that the objection was untenable, and that it was wholly immaterial, by which party the question was asked; because a witness, producing a release from his own possession, as a part of his testimony, in answer to a question put to him, need not prove the execution of the release by the subscribing witness; but it is to be taken as a part of his testimony. Indeed, when the question was asked by the respondents in order to establish the competency of the party, as their own witness, they would be estopped afterwards to deny it, and the witness having received the release, it would be and must be treated as between him and them as a true and valid release, without any other proof. The case of such a release, produced by a witness, is entirely different from that of a release produced by a party to a suit, to establish his own title. In the latter case, the party must prove its due execution by the subscribing witness. Several of the cases cited at the bar turned upon this distinction. Moises v. Thornton, 8 Term R. 303; Jackson v. Pratt, 10 Johns. 381, were cases where the party to the suit founded his title upon the deed or diploma. The case of Hall v. Connecticut Steamboat Co., 13 Conn. 319, stands upon a distinct ground; for there the witness did not produce the release, nor did it appear ever to have been delivered to him, and his interest was established by independent testimony, and not upon his own examination or cross-examination. Whether some of the dicta in the opinion of the court are maintainable, or not, in point of law, is a matter, therefore, which this court is not now called upon to consider. In all cases of this sort, where the question of comtency of a witness arises upon his deposition, and not otherwise, it is to be disposed of upon the interrogatories in the deposition, in the same manner as it would be upon an examination upon the voir dire; that is to say, the objection of incompetency may be removed in the same way and by the same evidence of the witness, by which it has been established. The doctrine is fully borne out by the language of Mr. Phillipps in the later editions of his work on Evidence, and by the cases there cited (Phil. Ev., Amos' 8th London Ed., 1838, pp. 149–151; S. P. 1 Phil. Ev., Cowen's 7th Am. Ed., 1839, p. 134); and especially by the case of Ingram v. Dada (before Lord Ellenborough, in 1817) 1 Car. & P. 235, note; and Goodhay v. Hendry, 1 Mood. & M. 319; and the case of Wandless v. Cawthorne, 1 Mood. & M. 320, 321, note; and Carlisle v. Eady, 1 Car. & P. 234. Indeed, the only point of difference among the learned judges upon any of these occasions has been, not, whether the release should be proved by other witnesses; but whether it should be produced at the trial by the witness.

Another objection of a more serious cast has been taken to Phinney; and that is, that the release cannot be operative at all to discharge the master from the damages, which may be recovered by the libellants in this case, because it is not a release of a present but of a future interest, not yet vested in the releasors; and for this position the dictum of the court in Francis v. Boston & R. Mill Corp., 4 Pick. 367, 368, is relied on, that a release cannot operate to extinguish or defeat future rights or claims; a dictum, which may be perfectly correct, when applied (as it there was) to a release of future damages for future acts; but which cannot be applied to a release of future damages for past acts, without shaking the well established doctrine. If the argument be well founded, then every person, who is sued as principal, for any act of negligence of his agent, or servant, such as a coachman, or a factor, or a master of a ship, could not by a release restore the competency of such person; and yet, as we all know, this is every-day practice. In the case of Green v. New River Co., 4 Term R. 589, which was an action against the principals for the negligence of their agent, the court held the agent incompetent without a release; and by necessary implication, therefore, held him competent with a release. The same doctrine is abundantly shown to be well established by Mr. Phillipps in his treatise on Evidence, and in the cases there cited. Phil. Ev. (Amos' 8th London Ed., 1838) pp. 84–104; Id. 152; S. P. 1 Phil. Ev. (Cowen's 7th Am. Ed. 1839) p. 56; Id. 134; Com. Dig. "Release," E. See, also, Trueman v. Loder, 11 Adol. & E. 589, 596. Indeed, it may be taken as a general principle, in cases of this sort, that a release of all actions and causes of actions, or of a particular cause of action, which has happened before the time of the release, will discharge the witness from all liability depending upon the event of the suit in which he is called as a witness, touching his conduct in the matter on which the suit is founded; for the cause of the liability then existing, the release will operate to discharge that, and incidentally the future damages recovered on account thereof. The cases of Scott v. Lifford, 1 Camp. 246, and Miller v. Falconer, Id. 251, and Cartwright v. Williams, 2 Starkie, 342, are directly in point. Another objection was taken to the language of the release; and certainly there was an accidental mistake in it, which might, perhaps, have brought its true construction into doubt, as a release of the present cause of action. But I should have had no difficulty, if this objection had not been waived, in deciding,

that time ought to be allowed to correct the mistake, as it was obviously a matter of entire surprise upon all the parties thereto. But it does not appear to me, that, upon a just survey of the whole evidence, any thing very material hinges upon the admissibility of any of the witnesses whose testimony has been objected to; for the main facts are abundantly supported by evidence aliunde; and presumptive inferences against its force are equally repelled by the offer, as they would be by the production of their testimony. Now, it is not a little remarkable, (as has been already suggested), that most of the witnesses, who have been examined on each side, agree, that they never supposed the owners responsible, but they have treated the case as one of a private personal agency of the master, either gratuitous, or as his personal and private perquisite. Most of them have deemed the service gratuitous; and not one of them pretends, that the company ever, to their knowledge, held themselves out as common carriers, for hire, of bank bills; or that they avowed any responsibility for the carriage thereof, or ever demanded any compensation therefor.

The main stress of the argument for the libellants is, indeed, founded upon the general proposition, that steamboat owners generally are common carriers not only of passengers, but of goods and merchandise of all sorts, including money and bank bills, for hire. Now, if this were clearly made out, there would, in my judgment, be great difficulty in maintaining, that any evidence would be admissible to prove any usage or custom in this particular business, to exempt them from the ordinary liabilities of common carriers, and to throw the responsibility exclusively upon the masters of the boat. I have in former cases had occasion to express my entire dissatisfaction, with the practice of introducing supposed usages and customs, to control the construction of contracts and the ordinary principles of law. Donnell v. Columbian Ins. Co. [Case No. 3,987]; The Reeside [Id. 11,657]. And I greatly rejoice to find, that my own doubts and difficulties have been fully borne out and confirmed by very recent decisions in England, and especially by the case of Trueman v. Loder, 11 Adol. & E. 589, 597–601, where the subject was very elaborately considered by Lord Denman, in delivering the opinion of the court. I am not unaware of the bearing of the cases of Halsey v. Brown, 3 Day, 346, and Renner v. Bank of Columbia, 9 Wheat. [22 U. S.] 582, 590, 591, in the opposite direction, but they are clearly distinguishable. They do not go to the extent of establishing that a local custom or usage will dispense with the principles of law; but merely to establish, in the one case, what the local custom, as to days of grace, was, and in the other case, what were properly to be deemed contracts on account of the owners of the ship, and what merely personal contracts of the master. That is the very question involved in the present case. It is, therefore, assuming the very point in controversy, to assert, that the company in the present case were common-carriers for all purposes for the carriage of bank bills, as well as for the carriage of passengers and goods and merchandise for hire; and that the master acted as their agent, and on their account, in the receipt of bank bills, as well as in the transportation of passengers and goods and merchandise. That is a matter to be made out by proofs, establishing that it was within the ordinary scope of their business, and adopted and sanctioned by them; or, at all events, that they held themselves out to the public as general carriers to such an extent. It is said, that the owners of a ship are bound by the contracts made by the master thereof, notwithstanding he may have violated his private orders; and this is true, where the act done is within the scope of the ordinary employment of the ship; for to that extent he is held out by the owners as having a general authority. But this doctrine leaves the question quite open and untouched, what is the ordinary employment of the ship; for the master cannot bind them beyond it. Lord Tenterden in his treatise on Shipping (see Johnston v. Usborne, 11 Adol. & E. 549, 557) lays down the rule of law on this subject in its true terms, that the owners are bound to the performance of every lawful contract of the master relative to the usual employment of the ship (Abb. Shipp. pt. 2, c. 2, §§ 2, 3, 6); and he adds in illustration of the rule, that if a ship were built for the purpose of conveying passengers only, or merchandise only, and employed in that particular trade, the owners are not answerable for a contract made by the master to employ the ship for a different purpose or in a different trade; for it does not relate to the usual employment of the ship. Abb. Shipp. pt. 2, c. 2, § 3; Id. § 6. The case of Boucher v. Lawson, Cas. temp. Hard. 85, Id. 194, turned mainly at the argument upon this consideration. The property (gold) there taken on board in Portugal was on freight, and shipped under a bill of lading; and the special verdict found that fact, as also that it was usual, when any gold is exported from Portugal to England, for the master of the vessel to take the whole freight to his own use, without accounting for any part of it to his owners, unless there be some special agreement between them to the contrary, which there was not in that case. The cause was several times argued, and finally went off upon another point. Lord Hardwicke however seems to have thought, that the special verdict was not as full as it should be. He said, that the property being shipped on freight, and freight, being the fruit and earnings of the ship, by the rule of law, belonged to the owners, and the master was only entitled to wages; and, therefore, upon the terms of the bill of lading, the freight would belong to the owners under such circumstances. The usage might

not make any difference; for then it might amount only to this, that the owners intended to make an allowance to the master of this part of the freight, in consideration of paying him less wages, or on some other consideration; so that it would be but an allowance of part of their own profits to the master; and they would, notwithstanding, be liable. And, therefore, if the finding on the usage was to be taken consistently with the bill of lading, and the reward for carrying the gold was freight, and consequently by the rule of law belonging to the owners, they would be liable for the loss. The whole of his lordship's reasoning turned upon the peculiar wording of the special verdict, as to the shipment being on freight and technically so called; and upon this, that the taking of goods on freight was within the scope of the ordinary employment of the ship. But it seemed to be understood on all sides, that if such was not the ordinary employment of the ship, or if the shipment was a mere personal contract of the master, on his own account, and he alone was entitled to the hire, and the owners had no title to the hire as owners, that then and under such circumstances, they were not liable for the loss. See Abb. Shipp. pt. 2, c. 2, §§ 6-9. The case of Dwight v. Brewster, 1 Pick. 50, 54, does no more than affirm that the owners are liable, where they are common carriers, and the profit made by the carriage of bank bills is within the scope of their business and for their account; and that of King v. Lenox, 19 Johns. 235, shows, that the owners are not bound for shipments not made in the course of the employment of the ship on their account, but on account of the privilege of the master. The case of Middleton v. Fowler, 1 Salk. 282, is, however, still more directly in point to the circumstances of the present case. There, the action was against the proprietors of a stage-coach for the loss of a trunk of the plaintiff; and Lord Chief Justice Holt was of opinion that the action did not lie, saying that a stage-coachman was not liable, within the custom, as a common carrier, unless such as take a distinct price for carriage of goods as well as persons; as wagons with coaches; and though money be given to the driver, yet that is a gratuity, and cannot bring the master within the custom, for no master is chargeable with the acts of his servant, but when he acts within the execution of the authority given by his master. See, also, Story, Bailm. §§ 500, 507, and cases there cited. The case of Allen v. Sewall, 2 Wend. 327, is not an authority the other way, for it was reversed upon error by the court of errors of New York. Sewall v. Allen, 6 Wend. 335. If I were compelled to choose between the relative authority of these decisions, upon the ground of the reasoning contained therein, I should certainly have deemed that of the court of errors the best founded in the principles of law. The reasoning of the court below in that case seems to me to have been founded mainly upon an assumption of the very point in dispute; that is, whether the owners of the steamboat were common carriers of money for hire; for no one can well doubt, that they were not liable therefor, if the ordinary employment of the steamboat, on account of the owners, was confined to passengers and common merchandise for hire, and that the carriage of money was a personal perquisite of the master upon his own sole account, and he received the same and pay therefor, not by their authority, or as a part of their business, or by their command, but simply at his own personal risk as special bailee. The knowledge of the owners, that he carried the money for hire, would not affect them, unless the hire was for their account, or the master held himself out as their agent in that business, as being within the scope of the usual employment and service of the steamboat. That is the true doctrine, and is fairly deducible from the case of Edwards v. Sherratt, 1 East, 604, although the circumstances of that case called for a somewhat modified statement of it. The case of Shelden v. Robinson, 7 N. H. 157, directly decided, that the driver of a stage-coach (the proprietors of which were common carriers of passengers, for hire), did not, by carrying packages of money and bank bills for hire, which he received for his own sole account, become himself responsible as a common carrier; but was merely a common bailee for hire, and subject only to the responsibilities thereof; which necessarily supposes, that he did not in such cases act as agent of the proprietors in their common stage-coach business; and that they were not responsible for his acts.

In short, in all cases of this sort, the true solution of every question of the liability of the owners of a steamboat must depend upon this, whether the master is acting within the scope of the ordinary employment of the owners of the boat, or not. If the master alone receives the hire for himself, and on his own sole account, and does it as a matter of favor and not of duty, and it constitutes no part of the business or employment in which the owners are engaged, and is not performed by their orders or authority, and they are entitled to no share of the profits, then the owners are not responsible, unless, indeed, the owners hold the master out to the public as acting in these respects for them, and as capable of binding them by his acts. And my judgment, therefore, is that the onus probandi is upon the libellants to establish, that the owners are common carriers to the full extent of incurring liability for the carriage of these bills before they are entitled to recover. If they leave the matter in doubt, that is decisive for the respondents. It is precisely in this view, that the evidence, as to the supposed usage or practice introduced into this case, is admissible, not to show, if the owners were common carriers of bank bills for hire, some usage or practice to treat

them as not liable for losses of bank bills intrusted to them, for I am not prepared to say that any such evidence would be admissible to control the well-established rules of law; but as evidence to show what was the ordinary employment or business of the company, and whether they ever held themselves out to the public as common carriers of bank bills for hire, or that the master was authorized as master to contract for the carriage thereof on their account. In this view it appears to me, that the evidence is exceedingly strong and cogent to establish that the public, at large, did not understand that the company ever held themselves out as common carriers of bank bills for hire, or even as gratuitous bailees; or that the masters of the steamboat ever held themselves out as capable or authorized to bind the company by any such contract, or that it was within the scope of the ordinary employment or business of the company. Most of the witnesses, as has been already suggested, treat it clearly as a case of personal agency of the master on his own personal account, either as a common bailee for hire, or as a gratuitous bailee. The weight of the evidence, indeed, seems to lead to the conclusion, that the master acted often, if not generally, as a gratuitous bailee, and that the reward sometimes paid him was either a mere gratuity, or at most a mere personal charge on his own account. If it was a mere gratuity, it would be difficult to show, how the company could be liable therefor, since it would be almost incredible, that they should be willing to incur said extraordinary risks without any compensation; and, indeed, since it might well be questioned, whether any such business was within the scope and objects of their charter. At all events, no presumption of this sort should be indulged, unless upon the most direct and positive proofs, that the company had expressly sanctioned and authorized it. And this leads me to say a few words upon the language of the charter of incorporation of the company, by the act of 1833, c. 11 (7 Mass. Sp. Laws, p. 283). That act incorporates the company, expressly for the purpose of running "a steamboat and two other vessels, not exceeding seventy-five tons each, for the convenience of the public travel, and the transportation of merchandise between Nantucket and New Bedford, and the intervening places." Now, certainly, it may be fairly presumed, that the public either knew, or were bound to know, what the powers and rights conferred by the charter upon the company were; and the company are to be presumed not to intend to transcend the powers and rights so conferred, or to usurp other functions. Unless then the word "merchandise" in that act, fairly interpreted in its common sense, includes the transportation of bank bills, it is certain that the company had no authority to engage in such business for hire, as common carriers; and the public had no right to contract with the company for the transportation thereof. The argument, therefore, has been addressed to the court, that bank bills are "merchandise" within the scope and objects and sense of the charter. I confess, that I am unable to accede to the argument. I agree, that the word "goods" may in some connections, (certainly not in all) include bank bills; for the term goods (bona) in the common law has a very extensive signification. So, the word "chattels" may; and a fortiori the word "property," which is of larger signification. Some of the cases cited at bar go to this effect. In Tisdale v. Harris, 20 Pick. 9, it was held, that under the word "goods," in the statute of frauds, the sale of the stock or shares of an incorporated company is included. But the same question has never yet been decided in England; and upon argument, at one time, before all the judges of England, they were divided in opinion upon the point. See Pickering v. Appleby, Comyn, 354; 2 P. Wms. 308; Mussell v. Cooke, Finch, Prec. 533; Long, Sales (Rand's Ed. 1839) pp. 90, 91; 2 Starkie, Ev. (4th Am. Ed.) 608; Id. (2d Eng. Ed. 1833) p. 352; Calye's Case, 8 Coke, 32, 33. In Whiton v. Old Colony Ins. Co., 2 Metc. [Mass.] 1, the same learned court held that "bank bills" were well insured under the word "property," in a policy on time in the coasting trade. In this case the court placed some reliance upon the nature of the business, the insured being the master, as well as the owner, and therefore contemplating various changes of the property from sales and purchases. But at the same time the court admitted that, ordinarily, bank bills are treated as money or cash. In Turner v. Fendall, 1 Cranch [5 U. S.] 117, 133, the supreme court of the United States held, that money (that is, coin or specie) might be taken in execution; and in Handy v. Dobbin, 12 Johns. 221, the supreme court of New York held, that "bank bills" were money, and might be taken in execution. On the other hand, it was held by Mr. Justice Dampier in Thomas v. Royal Exch. Assur. Co. [1 Price, 195] (Man. Dig. "Insurance," B. a, pls. 5, 6; 1 Phil. Ins., 2 Ed., p. 172, c. 5, § 2), that although a policy on goods and merchandise will cover specie dollars, yet it will not cover "bank bills." In Rex v. Beacall, 1 Car. & P. 310, 454, it was held, that an indictment for embezzlement of money, alleged to be the money of certain directors, who were by statute vested with "all goods, chattels, furniture in the house of industry, clothing, and debts," due to the corporation, established by the act, was not sustained by proof, that the money belonged to the corporation; for that the word "goods, chattels," &c. did not include money. Under a bequest in a will of "goods," bank bills and money will pass; and under a bequest of "money" bank bills will pass. But no case can be found, at least as far as my researches extend, in which it has been held, that a bequest of merchandise would include "bank bills." The term

"merchandise" is usually, if not universally, limited to things, that are ordinarily bought and sold, or are ordinarily the subjects of commerce and traffic; and is never applied to choses in action, as bank bills really are. In truth bank bills are ordinarily treated as money or currency, and the phrase "merchandise" is used in contradistinction thereto. The fact, that a thing is sometimes bought and sold is no proof, that it is merchandise. A bond, an annuity, a legacy, a debt due on account, may be bought and sold; but no one would assert any of these things to be merchandise. They would never pass by a grant of merchandise. A sale of all the goods and merchandise in a certain shop would never be presumed as intended to include the personal wearing apparel of the owner, although at the time it might be deposited there. It is said, that bank bills are often bought and sold; that is true; but it does not hence follow, that they cease to be currency and become merchandise. Their primary function, that of currency, gives them their common denomination, and they are, therefore, in the ordinary transactions of life, treated as money. They may, if not objected to, be a good tender in payment of a debt. But no person ever supposed that merchandise, in the ordinary acceptation of the word, could be a good tender. In short, the term "merchandise" is usually applied to specific articles, having a sensible, intrinsic value, bulk, weight, or measure in themselves; and not merely evidences of value, such as notes, bills of exchange, checks, policies of insurance, and bills of lading. In the case of Sewall v. Allen, 6 Wend. 335, the court of errors held that a steamboat charter, authorizing the company to transport "goods, wares, and merchandises," did not necessarily or naturally include the carriage of bank bills, so that, unless the company actually made that a part of their ordinary business of common carriers, they were not liable for any loss thereof. Upon that occasion two of the learned judges, constituting a part of the majority, were of opinion that "bank bills" did not fall within the denomination of goods, wares, or merchandises; and another judge held that although they might fall within the denomination of goods, under certain circumstances, yet that they ought not to be held so in that case, unless that was a part of the ordinary business of the company. My own judgment strongly inclines me to the same conclusion; and the reasoning of the judges of that high court, in support of it, appears to me very cogent and striking. But in the charter now under consideration, the word "goods" is not found. If it were, there might be a more distressing difficulty to be encountered in construing it. 2 Williams, Ex'rs (2d Ed. London, 1838) pt. 3, bk. 3, pp. 854, 855, 861, 862, c. 2, § 4. As it is, I have not been able to persuade myself, that either the corporation or the legislature, under the word "merchandise," meant to include "bank bills," as an object of regular transportation for hire. At all events, if they did, it seems to me, that the word merchandise, ordinarily, has a much more restricted meaning, and in this respect I adopt the doctrine of the court of errors of New York. It is incumbent upon those, who assert, that the charter includes such an expanded meaning, to show by some clear and determinate proofs, that the company have positively adopted and acted upon that meaning. If they had advertised, that they would transport merchandise or freight in their steamboat, it would hardly be pretended, that the public were misled, by supposing, that it included transporting bank bills for hire, unless some unequivocal act of the company established that interpretation beyond controversy. There is no evidence in the present case, that the company ever did intend to receive any bank bills for transportation for hire, or held out such an intention to the public, or ever gave any authority to the master, to receive it on their account. All his acts admit of a very different interpretation, whether the compensation received by him was a gratuity or a price for the service, and are of just such a character as must occur, if he was acting on his own personal account, and at his own personal risk, and for his own personal advantage, or his desire to oblige others. It is no sufficient answer, that the company did not give notice, that they would not be responsible for the acts or negligences of the master, in the carriage of bank bills. Such a notice could be required only in cases, where they had reason to believe, that the master held himself out to the public as entitled to contract on account of the company, or it was an act done within the ordinary scope of their business or employment.

In the view, which I have taken of the law applicable to the present case, and the evidence produced by the parties, it has been unnecessary for me nicely to compare and sift the relative credibility of those of the witnesses, whose testimony is in contradiction to each other, because the facts, which stand uncontradicted, or are supported by an unequivocal weight of evidence, in my judgment satisfactorily dispose of the whole merits. The result to which I have arrived upon a review of the evidence, is, that the company never intended to be common carriers of bank bills for hire; that they never held themselves out to the public in that character; that they never authorized the master to contract on their account for the carriage thereof; that he never intended to do so, or held out to the public that he had any authority; that all the contracts made by him for the carriage of bank bills, were designed by him to be his own personal contracts, and upon his own personal responsibility; that for the most part the services performed by him in the carriage of bank bills were gratuitous; and even when he received any compensation, it was commonly received by him as a gratuity, and not as

a matter of right, although there were some instances to the contrary. That the public generally, although not universally, seem to have understood these to be the mere personal contracts of the master, and not at the risk, or for the account of the company; or, at least, that this was a common impression among many of those who intrusted him with the carriage of bank bills; that the charter of the company does not seem to have contemplated the transportation of bank bills as an ordinary business or employment of the company, even if capable of being construed to include the right so to do, under the term "merchandise;" and, therefore, clear and unequivocal proofs ought to exist, to establish the broader construction on the part of the company, before they should be affected with liability therefor; and, finally, that in this case there are no such proofs. Under such circumstances, it seems to me that the decree of the court below, dismissing the libel, ought to be affirmed. In delivering this opinion, I have studiously abstained from deciding, whether the master in this case was guilty either of gross or of ordinary negligence, in the loss of this package of bank bills, because that question may yet arise, and be brought directly in judgment in a suit against the master. I feel, however, bound to say, that if I had been entirely satisfied, that the master was not guilty either of gross or of ordinary negligence, I should have been spared the many other laborious inquiries, to which this opinion has been addressed. It is the doubt on this head, brought to my mind, which has compelled me to go at large into all the other grounds, upon which I hold the company absolved, even if the master was guilty either of gross or of ordinary negligence.

In the course of the argument it was intimated, that in libels of this sort, the proceedings might be properly instituted both in rem against the steamboat, and in personam against the owners and master thereof. I ventured at that time to say, that I knew of no principle or authority, in the general jurisprudence of courts of admiralty, which would justify such a joinder of proceedings, so very different in their nature and character, and decretal effect. On the contrary, in this court, every practice of this sort has been constantly discountenanced, as irregular and improper. The case of The Triune, 3 Hagg. Adm. 114, was cited at the bar, in support of the right to join the proceedings. That case is very imperfectly reported. But it appears that the original proceeding was in rem against the ship, for a collision, and that Wardell, who was the master, and also the principal owner, and to whose negligence the libel attributed the collision, alone appeared in the suit. By the statute of 53 Geo. III. c. 159, the owners, when the loss has been without their fault or privity, are not liable beyond the value of their ship and freight; but the owners, who are in fault, and the master also, are liable to full damages to the extent of the injury done to the other party. No bail was given. The freight was brought into court, the ship was sold, and the proceeds falling short of the damages by £400, a monition issued against Wardell to pay that sum, which failing to do, he was imprisoned upon an attachment, moved for and granted by the court. Now, it is apparent, that there was a great peculiarity in this case, Wardell being the sole party, who intervened, and being by the statute liable for the full damages. A monition issued before the attachment was granted; and if that monition was preceded by a supplementary libel, or act on petition, stating the facts of the sale of the ship, and the deficiency to pay the damages, the proceeding was clearly regular and right. But if no preliminary proceeding was had, I confess that I do not well see how a proceeding, originally in rem, could be prosecuted in personam against a party, who in such proceeding intervened only for and to the extent of his interest. Probably there were other circumstances which varied the general rule. At all events, I am not prepared to accede to the authority of this case, if it is to stand nakedly, and only upon the circumstances above stated. In cases of collision, the injured party may proceed in rem, or in personam, or successively in each way, until he has full satisfaction. But I do not understand how the proceedings can be blended in the libel. The case of The Richmond, 3 Hagg. Adm. 431, is a case more conformable to my notion of the practice. But there the ship was not arrested; and the proceedings were in personam against the owners.

On the whole, I am of opinion that the decree of the district court ought to be affirmed; but as the appeal seems to me, under all the circumstances, in a case of such novelty and intricacy, to have been fully justifiable, I should have inclined to award that one half of the respondents' costs in this court should be borne by them, and the other half should be borne by the libellants, if it could have been done without breaking in upon the settled practice of the court. As it is, the respondents must take their full costs.

Case No. 2,731.

CITIZENS' BANK v. OBER.

[1 Woods, 80;[1] 13 N. B. R. 328.]

Circuit Court, D. Louisiana. Nov. Term, 1870.

SALE IN BANKRUPTCY—AGREEMENT AS TO BIDDING—PURCHASE BY SOLICITOR OF ASSIGNEE.

1. A person who intends to bid at a cash sale of a bankrupt's estate, may agree, in case he

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

becomes the purchaser, to sell to another person at a fixed price on terms of credit, when he has no notice that such second person has any purpose to bid at the sale, or has the means to make his bid good. Such an agreement will not avoid the sale.

2. A sale of a bankrupt's estate made to a solicitor of the assignee, retained generally in the bankruptcy, will be set aside as against public policy.

This was a petition addressed to the supervisory jurisdiction of the circuit court, under the second section of the bankrupt act. Certain property of York & Hoover, the bankrupts, having been sold and the sale confirmed by the district court, sitting in bankruptcy, this petition was filed to reverse the decree confirming the sale.

[A motion to dismiss this appeal was previously denied. See York's Case, Case No. 18,139, which case also contains a statement of the prior steps had in this proceeding.]

Wm. M. Randolph and H. M. Hyams, for petitioner.

John A. Campbell, for Ober.

WOODS, Circuit Judge. It appears from the record that on the 16th day of February, 1869, two plantations called respectively, "White Hall" and "Home," the property of the bankrupts, were sold at public sale by the assignee to Albert G. Ober, of the firm of Ober, Atwater & Co., said firm being among the mortgage creditors of the bankrupts. The motion to confirm the sale in the bankrupt court was resisted on the ground that the purchaser had used illegal and improper influences to deter other persons from bidding, and that the purchase was made by Ober for and in behalf of Norton, the assignee, and that Norton was in fact the purchaser. The district court referred the question of the fairness and validity of the sale to a commissioner, who reported in favor of the fairness and bona fides of the sale. The district court, after argument, confirmed the report of the commissioner, and it is to reverse this order that the present petition was filed.

The testimony taken by the commissioner establishes conclusively that the assignee was not a party directly or indirectly to the purchase, nor interested therein in any manner or degree; that so far as he was concerned, the sale was conducted fairly and according to law; and the objection that he was interested in the purchase appears to have been abandoned. Relative to the averment that Ober, Atwater & Co. had used illegal and improper influences to deter other persons from bidding, the following facts are established: John S. Scott, about an hour previous to the sale, proposed to Ober, Atwater & Co. that in case they became the purchasers of the "Home" place, he and his friends, whom he represented, would buy the place of them for the price of $35,000, of which $20,000 was to be paid in cash, and the residue, $15,000, in October following the sale. Ober, Atwater & Co. gave Scott the impression that they would sell to him at the price and upon the terms named; but Scott did not inform them that he intended to bid at the sale, nor that he was prepared to pay cash for the property. Scott, who made this arrangement, was ready to bid $35,000 and had the means of his friends at his command to make his bid good. He testifies that he refrained from bidding on account of the arrangement which he supposed he had made to purchase from Ober, Atwater & Co. It is further shown that H. D. Stone, Esq., was the solicitor of the assignee of York & Hoover in the matter of their bankruptcy. That about an hour before the sale, Ober, Atwater & Co., at the suggestion of Stone, made to him the following proposition in writing, the handwriting of the body of the paper being Stone's: "New Orleans, La., Feb. 16. H. D. Stone:—We will sell you White Hall plantation for $20,000 at any time after we purchase it. But you shall not be obliged to take it till our mortgage thereon is judicially determined to be valid as a first mortgage; or you may have one-half of White Hall and Home place for $22,500 at any time, but you shall not be obliged to take it until it is judicially determined that we have a first mortgage upon both places. For value received, we agree to carry out the above proposition in good faith. Ober, Atwater & Co." Ober, of the firm of Ober, Atwater & Co., became the purchaser at the sale of both places; of the Home at the price of $19,800, and of White Hall at $22,000. These are substantially the facts as shown by the evidence.

In regard to the arrangement with Scott, standing alone, I cannot go the length to say that it is sufficient to avoid the sale. In my opinion it is permitted to a party who expects to bid at a sale, when the terms are cash on the day of sale for the whole amount of the purchase price, to agree with another party that in case he becomes the purchaser, he will sell the property to him at a named price on terms of credit. This is clearly so when the person proposing to purchase has no knowledge or notice that the party proposing to buy is prepared to pay cash, and is ready to bid, and able to make his bid good. The proposition for a credit for a part of the purchase money is a strong indication that the party making the proposition is not able to buy at the sale and pay cash, and may well be taken by the person to whom the proposition is made as an admission to that effect. Phippen v. Stickney, 3 Metc. [Mass.] 384; Smull v. Jones, 1 Watts & S. 128. In regard to the proposition made to Stone, it is admitted by counsel for Ober, Atwater & Co., that the assignee could not purchase at his own sale, nor, under the bankrupt law and practice in England, could his solicitor, because, there, the solicitor of the assignee is chosen by the creditors. But,

under our law and practice, it is claimed the rule is different, because here the assignee is allowed to choose his own solicitor, without regard to the wishes of the creditors. I do not see how the method, by which the solicitor is selected, can change the rule. The assignee represents all the creditors. It is his duty so to administer the estate as to produce the best dividends, and so to distribute it as that each creditor shall receive his just rights. To enable him to discharge these duties, the law allows him the assistance of counsel and authorizes payment to his counsel out of the assets of the estate. The solicitor is not the personal counsel of the assignee, but of the assignee as the representative of the creditors. His fees are paid, not by the assignee, but in effect by the creditors. His first duty is to the estate. It is therefore his duty, when he is retained generally in the bankruptcy, to assist the assignee in the interest of all the creditors—to aid him in the collection and just and equitable distribution of the assets, and, if possible, to allow no creditor to obtain an unfair advantage over others. In re Mallory [Case No. 8,990]. With these obligations resting upon him, it is difficult to see why the solicitor should be allowed to purchase at an assignee's sale when the assignee is not. When he becomes a purchaser his interest is to buy at as low a price as he can; his duty as solicitor to the assignee is so to advise his client that the property sold may bring the highest price; so that if he is both purchaser and solicitor, his interest is in conflict with his duty.

Judicial and bankrupt sales ought to be protected by the application of such general rules as to insure the utmost fairness and good faith, and to remove far from those whose duty it is to conduct them or who are in any way officially connected with them, any temptation to fraudulent or unfair practices. If the sale was made to Stone, either directly or indirectly, or if the arrangement made with him was for the purpose of suppressing bidding at the sale, and had that effect; in either case, I should not hesitate to set the sale aside as void. It was not a direct sale to Stone. Was it an indirect one? It is not pretended that Ober, Atwater & Co. bid for Stone; they bid for themselves, expected to pay, and did pay their own money on their bid. They did not agree to let Stone have the property at what they bid for it. The arrangement was that he was to take it at a price fixed between them in advance, and without any reference to the amount at which they bought. It was nothing more than an agreement to sell to him at a fixed price, should they become the purchasers. It was not therefore an arrangement for an indirect purchase by Stone at the assignee's sale, but a contract to buy from a purchaser on an entirely different consideration. Did it have a tendency to suppress bidding at the sale? Stone swears that he had no intention of bidding, and in this he is uncontradicted. There is no evidence to show that Ober, Atwater & Co. had any suspicion that Stone's purpose was to bid. It did not have the effect to restrain bidding on the part of Ober, Atwater & Co., for it was their interest, with or without the bargain with Stone, to get the property at as low a price as possible. Norton, the assignee, was in utter ignorance of the contract. So was the auctioneer. Stone did not advise about or interfere with the sale. It was conducted fairly, according to law. The understanding with Stone did not have the effect to suppress competition; was, in all probability, not made for that purpose. Stone did not buy, directly or indirectly, at the assignee's sale. Ought the sale to be declared void by reason of his understanding with Ober, Atwater & Co. I think not. The case is in precisely the same plight as if Stone had made an illegal contract with Ober, Atwater & Co., about some matter entirely disconnected with the sale. After a careful consideration of this case, I am unable to say that the understanding of Ober, Atwater & Co., with either Scott or Stone was such as to render the sale fraudulent or against public policy. The district court was therefore right in confirming the sale. The petition to reverse its decree must therefore be dismissed at costs of petitioner.

CITIZENS' BANK v. OBER. See Case No. 18,139.

CITIZENS' BANK OF LOUISIANA (CASE v.). See Case No. 2,489.

CITIZENS' BANK OF TOPEKA (FIRST NAT. BANK OF MANHATTAN v.). See Case No. 4,802.

Case No. 2,732.

CITIZENS' NAT. BANK v. CASS et al.

[6 Reporter, 579; 18 N. B. R. 279; 6 Wkly. Notes Cas. 371; 19 Alb. Law J. 119; 26 Pittsb. Leg. J. 25.][1]

Circuit Court, W. D. Pennsylvania. Sept. 23, 1878.

BANKRUPTCY—BANKRUPT PARTNERSHIP—NONJOINDER OF PARTNERS—DEBTORS—CREDITORS—REMEDY OF CREDITORS—DISCHARGE.

1. Where a voluntary petition in bankruptcy has been filed, omitting the names of certain members of a firm, which it is asked shall be declared bankrupt, proceedings in invitum against the nonjoining partners can be had only on application of the petitioning debtors; a creditor cannot make such application.

2. The nonjoinder of any partner leaves the creditors in full possession of their remedies

[1] Reprinted from 6 Reporter, 579, by permission. 19 Alb. Law J. 119, contains only a partial report.]

against him, irrespective of the bankruptcy proceedings; and the omission of the names of partners in the petition may cause the court to refuse a discharge to the petitioners.

[Bill of review of the proceedings in the district court of the United States for the western district of Pennsylvania, in the matter of Harbaugh, Mathias, and Owens, bankrupts, upon the petition of the Citizens' National Bank, asking the joinder of additional alleged members of the firm as bankrupts. The facts are these: A petition in voluntary bankruptcy had been filed by Springer Harbaugh, David Mathias and Samuel T. Owens, claiming to constitute the partnership firm of Harbaugh, Mathias and Owens. A schedule of the assets and liabilities, as well of the individual members, as of the firm itself, was filed, and, in the ordinary course of proceedings, an adjudication was made, and an assignee appointed, to whom all the property, partnership and individual, of the petitioning debtors was conveyed.

[Nearly two years after the adjudication was made, a petition was filed by the Citizens' National Bank of Pittsburgh, alleging that they were creditors of the bankrupt firm, and had proved their claims against it to the amount of nearly $35,000; that the firm of Harbaugh, Mathias and Owens consisted in addition to the petitioning members, of George W. Cass, and the Cambria Iron Company; that all of the members of the firm, including Cass and the Iron Company, were general partners, though not ostensibly so, and that this general partnership existed, from about the first of January, 1870, until the filing of the petition in bankruptcy, which included the period during which the indebtedness to the petitioners was incurred. The petition further alleged that the indebtedness to them was allowed to be incurred upon the belief and representation that Cass and the Iron Company were general partners in the firm. It then set forth at length a number of transactions between Harbaugh, Mathias, Owens, the Iron Co., and Cass, as evidences of the existence of a general partnership between them, and prayed for an order directing Harbaugh, Mathias and Owens to amend their petition in bankruptcy, by including Cass and the Cambria Iron Company, as general partners in the firm, and directing the said Cass and the Cambria Iron Company to file their individual schedules in bankruptcy on or before a certain day, or, in default, that the assignees of the firm should file formal schedules in their respective names, unless, on or before a day certain, they should show cause to the contrary; all proceedings for the discharge of any of the said bankrupts in the mean while to be stayed. The district court refused the prayer of the petition, whereupon the petitioners filed the present bill of review.] [2]

S. Schoyer, Jr., and George P. Hamilton, for complainants.

[McKENNAN, Circuit Judge. Strongly impressed as I am with the equity of the petitioners' contention, I have endeavored to reach a conclusion which might give effect to what seems to me to be the ultimate merits of the case, resulting from the true relations of the parties to each other. But the desired result can only be accomplished by an exercise of the appropriate jurisdiction of the court, within the limits and in accordance with the spirit and object of the law which confers it.

[A voluntary petition was presented to the district court, for a discharge from their debts, by three persons, claiming to constitute a partnership, and as such to have contracted debts and acquired property. A schedule of these assets and debts, as well as of the individuals represented to compose the firm, was filed, an adjudication was made in due course, and an assignee duly appointed, to whom all the property of the petitioning debtors, partnership and separate, was conveyed. Nearly two years after this, the complainant in this bill, a creditor of the bankrupt firm, presented its petition to the district court, alleging that the firm consisted of the three petitioning debtors and the two respondents, and asking the court so to adjudge, and to order the joinder, in the bankruptcy proceeding, of the respondents with the other acknowledged members of the partnership. This the district court refused to do, and the question is whether this decision was right. I am of opinion that it was, and for the following reasons, which I am only able to state with great brevity.] [3]

The unquestionable effect of the assignment was to vest in the assignee all the joint property of the petitioning partners, and to make it available for the payment of the firm creditors, so that the plain object of this proceeding is to subject the individual property of the respondent to the payment of partnership liabilities. But two methods are provided by the bankrupt law by which this can be done: 1. Upon the petition of one or more partners in trade in which one or more of the alleged partners refuse to join. 2. Upon the petition of the required number of the firm creditors, representing the required proportion of the partnership indebtedness. In the first it is essential that the names of all the members of the firm should be stated in the petition, because notice is required to be served upon those who refuse to join, to the end that they may make any available defence against the application. Rev. St. § 5121; General Order 18.

The primary object of the first mode is to secure to the petitioning bankrupts a dis-

[2] [From 6 Wkly. Notes Cas. 371.]

[3] [From 18 N. B. R. 279.]

charge from their debts. To this end the law requires a surrender of all the property of the bankrupts, and an honest disclosure of every material fact within their knowledge touching the nature of their indebtedness, as necessary conditions of their discharge. If they withhold in their petition the names of any of their copartners, they may defeat their application for a discharge; but it is not incumbent upon any of their creditors to supply the omission, nor can they do so, because in voluntary bankruptcy the law provides for a proceeding in invitum against nonjoining parties, only upon the promotion of their petitioning associates. Nor will such omission affect the rights of creditors against partners who are not parties to the proceeding. The law leaves them in the possession of all the remedies against parties not joined which they had before, while it may, as the penalty of bad faith, deny the fundamental object of the application. And the bankrupt court will in its discretion so control the proceedings as to protect firm creditors from embarrassment in the pursuit of their lawful remedies against recalcitrant partners.

In its initial features the second mode of proceeding differs from the first. Its object is to supersede the control of the bankrupt over the property, and to secure its appropriation to the payment of his debts. Hence, it is adversary to him, and can only be instituted by creditors, a certain proportion of whom, representing a certain proportion of the debtor's liabilities, must unite in the application. [In both modes of procedure, then, essential conditions must exist.][3] In a voluntary application the initiative must be taken by the debtor, and, in case of a partnership, by one or more of its members, at whose instance alone can other members who refuse to join be brought in. If any are excluded who ought to be joined, the court will refuse the petitioners the benefit of the act, and leave them and their associates [who refuse to join them][3] subject to all the remedies to which their creditors might resort, irrespective of the bankruptcy proceedings. But the court cannot aid a creditor in accomplishing by indirection a result which could only be reached directly by the observance of indispensable conditions. Bill dismissed.

Case No. 2,733.

CITIZENS' NAT. BANK v. LEMING et al.

[This is a state case, and is reported in 8 Int. Rev. Rec. 132.]

CITIZENS OF CINCINNATI, In re. See Case No. 13,628.

[3][From 18 N. B. R. 279.]

Case No. 2,734.

CITIZENS' SAV. ASS'N v. TOPEKA.

[3 Dill. 376.][1]

Circuit Court, D. Kansas. 1874.[2]

CONSTITUTIONAL LAW—LIMITS OF TAXING POWER—AID TO PRIVATE ENTERPRISES.

1. Taxation can only be authorized for public as distinguished from private purposes.

[See note at end of case.]

2. A statute which authorizes a municipality to issue bonds, that can only be paid by taxation, for the benefit of a manufacturing enterprise of private persons, is void, because it violates the fundamental rights of property, since the purpose is essentially private in its nature, although the public may be incidentally benefited.

[Cited in Jarrott v. Moberly, Case No. 7,223.]

[See note at end of case.]

Action upon interest coupons to bonds issued by the city of Topeka. Demurrer to petition.

A. Ennis, for plaintiff.

A. L. Williams, for defendant.

DILLON, Circuit Judge. The city of Topeka issued one hundred bonds of $1,000 each, as a donation to the King Wrought Iron Bridge Manufacturing and Iron Works Company, of that place, to aid it in establishing therein its manufactory of iron bridges. The bonds are payable to that company and purport to be issued in pursuance of section 76, of an act of the legislature of Kansas, to incorporate cities of the second class, approved February 29, 1872 (Laws 1872, p. 192), and of an act approved March 2, 1872, to authorize cities and counties to issue bonds to build bridges, aid railroads, water-powers, and other works of internal improvement (Laws 1872, p. 110). The purpose for which these bonds were issued appears on their face, and is stated in the petition. It is alleged that the city has paid one year's interest thereon out of funds raised by taxation, and that it was after such payment that the plaintiff became the owner of the bonds and the coupons in suit, for value.

I concede that the legislative provision is broad enough to warrant the issue of these bonds by the city of Topeka, and the demurrer must be overruled if the authority to this end conferred upon the city is one which the legislature had the rightful power to grant. This question I have already decided in the case of the Commercial Bank of Cleveland v. City of Iola [Case No. 3,061]. I have given at some length the reasons for the conclusion that bonds like those in suit are absolutely void. That opinion was deliberately formed; and I am still satisfied with it and adhere to it. The payment of interest can-

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

[2][Affirmed in Loan Association v. Topeka, 20 Wall. (87 U. S.) 655.]

not cure the absolute want of power. It is not sufficient to distinguish this case from the one cited. Following that case, the demurrer will be sustained and judgment entered for the city. Judgment accordingly.

NOTE [from original report]. Before the decision in the Iola Case [Case No. 3,061], it is estimated that over $2,000,000 of bonds had been issued in Kansas to aid private enterprises, such as hotels, manufactories, etc., and at the time that decision was given, preparations to issue large amounts of similar bonds were making. To the judgment in that case and the Topeka Case, writs of error were prosecuted and both were affirmed by the supreme court in February, 1874. The opinion of the court was given in the Topeka Case, which was very carefully prepared by Mr. Justice Miller, and contains the sanction of that high tribunal to sound principles of constitutional law, which have been too often overlooked or disregarded in this country.

[NOTE. The judgment entered in accordance with this opinion was affirmed by the supreme court on a writ of error prosecuted by the plaintiff, Mr. Justice Miller delivering the opinion of the majority of the court. The reasons of the affirmance were that the statute authorizing the town to issue the bonds in aid of a private manufacturing enterprise was void, because the taxes necessary to pay the bonds would, if collected, be the transfer of property of individuals to aid in the projects of gain and profit of others, and not for a public use, in the proper sense of that term, and also because the legislature had no power to pass the statute in question. Loan Association v. Topeka, 20 Wall. (87 U. S.) 655.]

Case No. 2,735.

In re CITIZENS' SAV. BANK.

[9 N. B. R. 152.] [1]

Circuit Court, D. South Carolina. Dec., 1873.

BANKRUPTCY—RESTRAINING PROCEEDING IN STATE COURT.

A depositor in savings bank filed a bill to have the bank wound up under the state laws. The bank was soon after adjudicated bankrupt. *Held*, the bankrupt court had jurisdiction to restrain the prosecution of the depositor's bill in the state court, though commenced prior to the filing of the petition in bankruptcy.

Watson, treasurer of York county, filed a complaint in the state court of South Carolina, alleging that the Citizens' Savings Bank was insolvent and had refused to pay its checks, and prayed that the bank should be compelled to render an account of its funds and be restrained from the exercise of its corporate rights, and that a receiver be appointed to administer its assets for the benefit of its creditors. An order was issued to show cause why the injunction should not issue and a receiver be appointed as prayed for. While these proceedings were pending in the state court, the Citizens' Savings Bank filed a petition in bankruptcy [November 29, 1873]. Bryan, J., issued an order compelling the surrender of all the property and assets of the bank to E. M. Seabrook, register in bankruptcy, to keep until the appointment of an assignee [December 1, 1873]. A return to the order of the state court denying the jurisdiction of the state court, and averring that the bank had been adjudged a bankrupt in the United States district court was then filed. Upon hearing this return the judge decided that its jurisdiction was not ousted by the decree of bankruptcy. The injunction was made permanent. The bank then filed a petition in the United States district court, asking an injunction against Watson and all other persons, restraining them from prosecuting any action in the state court. [Case not reported.] This injunction was granted upon an ex parte hearing [December 10, 1873]. The plaintiffs thereupon filed their petition in the United States circuit court, claiming that the jurisdiction in the case properly belonged to the state circuit court, and asking the court to review the decision made by the United States district judge, and to set aside the order made by him.

Mr. Trescot, for petitioners, contended that the bankrupt court had no authority to issue an injunction, except up to the time of the adjudication in bankruptcy; that suit having been commenced in the state court previous to the commencement of the proceedings in bankruptcy, under the amendment of 1873 [17 Stat. 436] of the bankrupt law, the case should remain in the state court.

C. D. Melton, on the same side, contended that while the United States courts had frequently enjoined proceedings in the state court, yet in all these cases the injunctions had been issued to restrain creditors from establishing separate liens or judgments, exclusive of and without regard to the rights of the other creditors. In this case, however, the creditor had no such object or view. He only desired under the state laws to procure an equitable administration of the assets of the insolvent debtor.

James H. Rion, for defendants, claimed the suit in the state court was actually a proceeding in involuntary bankruptcy, and the administration of bankruptcy property belongs to the United States court. In this case no receiver had been appointed by the state court yet, and the United States district court could, therefore, with perfect propriety, assert its jurisdiction, without being reduced to the necessity of dispossessing a receiver appointed by another court. The object and intent of the bankrupt law was to place the administration of the assets of a bankrupt's estate within the control of the bankrupt court, and the passage of the law superseded or suspended all state insolvent laws. The action of the state court must yield to the paramount authority of the United States court. It was clearly laid down in all the authorities that the United States court had full power to suspend or control all proceedings in a state court against a bankrupt or his estate. This suspension or

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control could properly be effected by an injunction, as had been done in this case.

A. G. Magrath, in reply, urged that the order of Judge Bryan was in direct violation of the order of the state court, and was granted without notice to the petitioners, who had instituted the proceeding in the state court. If the circuit court of the state had jurisdiction in this case in limine, the jurisdiction continued to the end of the suit.

BOND, Circuit Judge. The order granted by the district judge must be affirmed, but I have not time to write out any opinion in the matter.

[NOTE. For the opinion subsequently delivered by Bond, Circuit Judge, see Watson v. Citizens' Savings Bank, Case No. 17,279.]

CITY BANK (JAUDON v.). See Case No. 7,230.

CITY BANK (UNITED STATES v.). See Case No. 14,796.

CITY BANK (WILSON v.). See Case No. 17,797.

CITY BANK OF NEW YORK v. YONGE. See Case No. 2,739.

Case No. 2,736.

CITY BANK OF COLUMBUS v. BEACH et al.

[1 Blatchf. 425.][1]

Circuit Court, N. D. New York. Oct. Term, 1849.

POWERS OF BANKING CORPORATION—RESTRICTION AS TO LOCATION AND BUSINESS.

1. Where a banking corporation, whose location and place of business was at Columbus, Ohio, had power by its charter to deal in bills of exchange, without restriction as to place: *Held*, that it could purchase such bills at Cleveland, Ohio, for the purpose of remitting to New-York the proceeds of paper belonging to the bank, collected at Cleveland.

2. And it could even deal generally in exchange at Cleveland, through an agent there, with the funds thus collected and remitted.

3. The cases of Bank of Augusta v. Earle, 13 Per. [38 U. S.] 519, and of Tombigbee R. Co. v. Kneeland, 4 How. [45 U. S.] 16, quoted and approved.

4. The City Bank of Columbus, under the acts of Ohio incorporating it, passed March 17, 1838, and March 6, 1845, and under the general banking law of Ohio, passed February 24, 1845, is restricted to Columbus as its location and place of business. (Per Conkling, J.)

Assumpsit, tried before Mr. Justice Nelson and Judge Conkling, in October, 1847, at Albany. The action was against the acceptors, on two bills of exchange, each for $1000, drawn by one Haskell, at Cleveland, Ohio, on the defendants, William Beach & Co., at Auburn, New-York, and accepted by them, payable at the office of H. Dwight, Jr., in New-York, to the order of and endorsed by Haskell; one dated October 27th, 1845, and payable 63 days after date; the other dated November 12th, 1845, and payable 45 days days after date. The plaintiffs were a banking corporation incorporated by the state of Ohio, and having their banking-house and place of business at Columbus in that state. They became a corporation under three several acts of the legislature of Ohio: 1st. "An act to incorporate the Mechanics' Saving Institution of Columbus, Ohio," passed March 17th, 1838; 2d. "An act to incorporate the State Bank of Ohio, and other banking companies," passed February 24th, 1845; 3d. "An act to amend the act entitled 'An act to incorporate the Mechanics' Saving Institution of Columbus, Ohio,' passed March 17th, 1838," passed March 6th, 1845. The first act contained nothing fixing, in terms, the location of the corporation; but the first section of it incorporated certain persons "by the name and style of the 'Mechanics' Saving Institution of Columbus.'" The third act converted the "Mechanics' Saving Institution of Columbus," incorporated by the first, into a banking company, under the name of the "City Bank of Columbus." The first section of that act enacted: "That the Mechanics' Saving Institution of Columbus shall be held and adjudged a banking company within the meaning of the act entitled 'An act to incorporate the State Bank of Ohio and other banking companies,' passed February 24, A. D. 1845, and as such shall be entitled to receive from the treasurer of state circulating notes, and issue the same, and to transact banking business during the term, under the conditions, and subject to the limitations, restrictions and liabilities prescribed by said act relating to independent banking companies;" and, by the third section, the governor, upon being satisfied that the new corporation had complied with certain conditions, was, by proclamation, to declare the company to be "entitled to receive and issue notes for circulation, and to transact business as an independent banking company, subject in all respects to the provisions of the act incorporating the State Bank of Ohio and other banking companies." The capital of the new bank was fixed at not less than $75,000, nor more than $150,000. Among the powers granted expressly to independent banking companies by the act of February 24th, 1845, was the power to "buy, sell and discount bills of exchange." Section 51. That act provided prospectively for the voluntary formation of banking companies; divided the state, by counties, into twelve districts; limited the number of companies that might be formed in each district and in each county, and the aggregate capital of those formed in each district; prescribed the maximum capital for each bank; and fixed the aggregate capital of all the banks authorized by the act to be formed, at the maximum of $6,150,000, but that sum was not to be "construed to in-

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clude the capital stock of such companies as, by name, shall be authorized to continue or to resume the business of banking, subject to the provisions of this act;" all which provisions were to apply to the new banks, whether organized as independent banking companies, or as branches of the State Bank of Ohio. Sections 1–4. By sections 68 and 69, certain banks therein named were authorized to re-commence and continue the business of banking subject to the provisions of the act. The certificate of association of each bank was to specify, among other things, "the name of the city, village, or town, in which its banking operations shall be carried on," and the companies were "authorized to commence and carry on the business of banking at the places severally designated in their certificates of association." Sections 7, 11. On the trial, the defendants proved, by one Morrison, that he received the two bills of exchange in question from Haskell, the drawer, in Cleveland, about the times they respectively bore date; that he discounted them both as the agent of and for the plaintiffs, and paid the proceeds to Haskell, in Cleveland; that the proceeds so paid were funds in his hands, belonging to the plaintiffs; that he, (the witness,) was the agent of the plaintiffs in Cleveland, and kept an office in Cleveland in which he conducted the business of such agency, for the purpose of collecting bills; that the nature of that business was, that the plaintiffs sent to him, for collection, their business paper discounted by them, and when he collected it he invested the proceeds, as their agent, in bills of exchange on New-York and elsewhere; that he bought bills to remit the funds; that sometimes the plaintiffs sent him mutilated circulating notes issued by other banks, for him to procure their redemption by those banks, and to invest the proceeds, as their agent, in the purchase of bills on New-York, which he had done; that they had also sent him, not more than once or twice, their own circulating notes, with which he had purchased bills of exchange on New-York; that he also sold, at Cleveland, as the plaintiffs' agent, bills of exchange on New-York and elsewhere, such bills being drawn by him as the plaintiffs' agent, on their funds; that he did anything with the funds of the plaintiffs in his hands that they thought proper; that he sent to New-York for collection the bills purchased by him, and kept an account in New-York as such agent; that, when he sold exchange on New-York, he re-invested the proceeds in other bills payable there; that he kept, at his agency in Cleveland and as such agent, separate books of account, in which the business of his agency was entered, and in which collections made and monies received for the plaintiffs were entered; that his standing orders from the plaintiffs' cashier were, to purchase bills, for the purpose of remitting to New-York all the funds he had of theirs in his hands; that he would not say, but he thought he paid Haskell the amount of the proceeds of the two bills, out of the proceeds of paper collected for the plaintiffs; that he did not know as he had, at the time he purchased the two bills, any funds of the plaintiffs in his hands, other than the proceeds of collections; and that the average amount of funds of the plaintiffs in his hands, to be employed in purchasing exchange on New-York, was about $30,000. It also appeared that Columbus was in Franklin county, in the 5th district as established by the act of February 24th, 1845, and that Cleveland was in Cuyahoga county, in the 12th district. The defendants' counsel requested the court to charge the jury, that the plaintiffs were not entitled to recover on the two bills so purchased by them, as testified to by Morrison, in the general course of his business as their agent; that the plaintiffs had no right, under the laws of Ohio before recited, to establish an agency in Cleveland, and to carry on, through such agency, the kind of business conducted by Morrison as their agent, and that the purchase by Morrison of the two bills, with the funds of the plaintiffs, and for them, and under the circumstances testified to by him, was unlawful and in violation of the said laws of Ohio, and against their policy. The court refused so to charge, but charged the jury that the plaintiffs had acquired a valid title to the bills in question, and had not in such acquisition violated any public law of Ohio, and were therefore entitled to recover. The defendants' counsel excepted to the refusal and charge, and the jury found for the plaintiffs. The defendants now moved for a new trial, on a bill of exceptions.

Alvah Worden, for defendants.

I. Under the act creating the plaintiffs a banking company, and the act incorporating the Mechanics' Saving Institution, the plaintiffs are a corporation located, for the purpose of doing business, in the city of Columbus. Ang. & A. Corp. (2d Ed.) c. 13, 368; 2 Inst. 703, index "Inhabitant;" People v. Trustees of Geneva College, 5 Wend. 219. II. The plaintiffs, being a banking company located and established in Columbus, within the 5th banking district of Ohio, could not, under the laws of Ohio, conduct or carry on any kind of banking business in Cleveland, in the 12th district. Pennington v. Coxe, 2 Cranch [6 U. S.] 33; Griswold v. National Ins. Co., 3 Cow. 96; Crocker v. Crane, 1 Wend. 211. III. If the plaintiffs had no power to discount the bills in Cleveland, they acquired no title to them by the act of discounting them there. State v. Granville Alex. Society, 11 Ohio, 1; Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 587; Runyan v. Lessee of Coster, 14 Pet. [39 U. S.] 122; Lessee of Knowles v. Beaty [Case No. 7,896]; New York Firemen Ins. Co. v. Ely, 2 Cow. 678, and 5 Conn. 560; Life & Fire Ins.

Co. v. Mechanic Fire Ins. Co., 7 Wend. 31; Perkins v. Savage, 15 Wend. 414; New Hope & D. Bridge Co. v. Poughkeepsie Silk Co., 25 Wend. 650; North River Ins. Co. v. Lawrence, 3 Wend. 482; Head v. Providence Ins. Co., 2 Cranch [6 U. S.] 127; Beaty v. Lessee of Knowler, 4 Pet. [29 U. S.] 152; Beatty v. Marine Ins. Co., 2 Johns. 109; People v. Utica Ins. Co., 15 Johns. 358; De Groot v. Van Duzer, 17 Wend. 170, and 20 Wend. 390; New York Firemen Ins. Co. v. Sturges, 2 Cow. 675; Goszler v. Corporation of Georgetown, 6 Wheat. [19 U. S.] 597; Slark v. Highgate Archway Co., 5 Taunt. 792; Broughton v. Salford Water-Works, 3 Barn. & Ald. 1. IV. Nor did they acquire any title to the bills, if by the laws of Ohio they were prohibited from establishing an agency and discounting the bills at Cleveland. Holman v. Johnson, Cowp. 341; Parsons v. Thompson, 1 H. Bl. 322; Armstrong v. Toler, 11 Wheat. [24 U. S.] 258; Langton v. Hughes, 1 Maule & S. 593; Biggs v. Lawrence, 3 Term. R. 454; Pennington v. Townsend, 7 Wend. 281; Bank of U. S. v. Owens, 2 Pet. [27 U. S.] 527; Thalimer v. Brinkerhoff, 20 Johns. 397. V. The plaintiffs transferred a portion of their capital to Cleveland, and employed it there in the business of banking. They thus violated the laws of Ohio, and the bills were discounted without authority. People v. Utica Ins. Co., 15 Johns. 386; King v. Nicholson, 1 Strange, 299; Sharp v. Speir, 4 Hill, 83. VI. The court erred in instructing the jury that the plaintiffs were entitled to recover, and had not, in acquiring title to the bills, violated the law of Ohio. VII. Even if the case did not authorize the court to charge the jury as requested by the defendants' counsel, it presented a question for the jury, and it should have been left to them to say, under proper instructions, whether the plaintiffs had transferred their capital or any portion of it to Cleveland, to be employed in the business of banking, and, if so, whether, in the prosecution of such business, they had discounted the paper in question.

William H. Seward and Stephen A. Goodwin, for plaintiffs.

I. The purchase of the bills in question, by Morrison, as the plaintiffs' agent and at Cleveland, was a valid and legal transaction. 1. No place of business or location was prescribed for the plaintiffs by the laws of Ohio which have been cited, and they were not restricted to any particular place for doing their business. 2. Even though the plaintiffs may have been required to keep at Columbus their office for the redemption of their notes and the transaction of their ordinary banking business, yet they had a right to purchase bills of exchange, without restriction as to place, and to employ agents for the purpose. 3. The purchase of bills of exchange was no part of their banking business strictly. Swan's St. Ohio, 136; Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 563. 4. The transaction in question must be judged by itself, as an individual one, and, in this view, it is abundantly sustained upon authority. Bank of Augusta v. Earle, Id. 519; Tombigbee R. Co. v. Kneeland, 4 How. [45 U. S.] 16; People v. Brewster, 4 Wend. 498; Potter v. Bank of Ithaca, 5 Hill, 490, and 7 Hill, 530; Suydam v. Morris Canal & Banking Co., 5 Hill, 491, note a, and 6 Hill, 217. II. The legal title to the bills is in the plaintiffs, and they show a legal right to recover upon them, which the defendants cannot defeat by showing that they have forfeited their charter, even if that were true. 1. The paper is on its face business paper, accepted by the defendants, and, by legal inference, upon funds of the drawer in their hands. 2. The defence is not that the paper was void in its concoction, and the defendants being ex aequo et bono liable to pay it, it does not lie in their mouths to say that they will not pay their just debts on the ground that the plaintiffs had no power to buy exchange at Cleveland. That is a question between the plaintiffs and the government only. Little v. O'Brien, 9 Mass. 422. 3. The paper being negotiable paper, which they are liable to pay at all events to some one, it is immaterial who sues it. Mauran v. Lamb, 7 Cow. 174; Gage v. Kendall, 15 Wend. 640; Watervliet Bank v. White, 1 Denio, 613. III. The defendants' counsel, at the trial, presented the whole question to the court as a question of law, and did not ask to have it put to the jury as a question of fact, whether the plaintiffs had transferred their capital to Cleveland.

NELSON, Circuit Justice. The acts under which the bank became a corporation, conferred upon it the power to deal in exchange, without restriction, and hence the purchase of bills at the city of Cleveland, for the purpose of remitting the proceeds of paper belonging to the bank collected at that place, or even the dealing generally in exchange at that place by an agent, with the funds thus collected and remitted, was not in contravention of the charter of the bank, or of any law of the state of Ohio. I think this case falls within the principle of the cases of Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 519, and of Tombigbee R. Co. v. Kneeland, 4 How. [45 U. S.] 16, and that a new trial ought not to be granted.

CONKLING, District Judge. If, according to the true interpretation of the plaintiffs' charter, it in fact conferred on them no power to purchase bills of exchange at the place and in the manner stated in the bill of exceptions, then it follows that no title was in this instance acquired in virtue of such purpose, which can be enforced in a court of justice. It was from their charter that the plaintiffs, as a body corporate, derived their existence and their capacity to make contracts of any kind, and it is to this, therefore, that recourse must be had to ascertain the limits of their

capacity, and thus to determine whether or not it extended to the contracts in question.

It is conceded that the plaintiffs had the power, granted to them by their charter, of buying and selling bills of exchange. But it is insisted by the defendants' counsel that, under this general grant of authority, the plaintiffs had no right to establish an agency for the purpose of dealing in bills of exchange, and by that means to carry on that business elsewhere than at Columbus, in the manner they are described by the witness Morrison to have done at Cleveland.

In answer to this objection it is argued in behalf of the plaintiffs, in the first place, that they are not by their charter restricted to Columbus as the place at which their franchise is to be exercised; but that they are at liberty to establish their bank at any place in the state of Ohio. This proposition, I think, cannot be maintained. It is essential to the convenience and security of the public that every bank should have a fixed, known and permanent place of business, where it is bound to fulfil all its engagements, and where those who have dealings with it may safely resort for the purpose of fulfilling theirs. Bank charters, moreover, are not granted for the benefit of stockholders, but for the sake of those engaged in the productive and in mercantile pursuits; and, though a bank may be wanted at one place, it may be unnecessary at another. Persons who apply to the legislature for a banking charter always deem it necessary, therefore, to designate the place at which it is proposed to establish their bank, and to set forth the need of banking facilities at that place; and a charter is granted or withheld according to the opinion of the legislature, respecting the truth or sufficiency of such representations. It may, I imagine, be safely added also, that bank charters are never intentionally granted with power to the corporators to select, ad libitum, their place of business. The legislature of Ohio, by the act of February 24th, 1845, evinced a strong degree of solicitude on this very point. The design of that act was to supersede the necessity of special legislation for the purpose of establishing banks from time to time, at places where they might be required, by providing prospectively for the voluntary formation of banking associations. But in order, as far as possible, to secure a proper distribution of these institutions, the act divides the state into twelve districts, and prescribes the maximum amount of banking capital which may be employed in each, and the maximum number of banks which may be established, not only in each of these districts, but also in each of the counties of which they are composed. It is true that the City Bank of Columbus was not formed under this act, nor did the act restrain the legislature of Ohio from disregarding its policy, by incorporating a bank ten days afterwards without a local habitation. But it is very improbable that this was intended to be done. A saving institution had already for several years been in being, carrying on its business, it is presumed, as its name indicates, at the city of Columbus. This institution, by the act of March 6th, 1845, was converted into a bank, under the name of the City Bank of Columbus, and unquestionably, without any intention of authorizing a change of location. But, in reality, this question is of little importance, for the bank was in fact established at Columbus, and it would be idle to assert that the corporation had a right at the same time to set up another bank at Cleveland. It is equally clear, also, that the legislature intended to place this bank, when organized, on the same footing in all respects as the "independent" (in contradistinction to the "branch") banks to be found under the act of February 24th, 1845. This design, indeed, appears to be sufficiently declared in the first and third sections, above recited, of the act of March 6th, 1845. It is very unlikely, moreover, that it should have been intended so soon to innovate upon a system so elaborately devised as that established by the preceding general act. The contrary presumption derives additional strength from the solicitude manifested in the 68th and 69th sections, by the inducements they hold out to bring the existing banks therein named under the provisions of the act.

It follows, therefore, that the question before the court depends upon the same principles that would govern it, if it concerned a bank formed under the general banking act of Ohio, instead of one owing its existence to a separate statute. This point, however, appears to me to be less important than it seemed to be considered by the counsel at the argument. It is true, the act of February 24th, 1845, evinces an anxious desire to secure a proper distribution of banking capital among the several districts and counties of the state; and it requires the several associations which may be formed under it, to designate beforehand the particular place at which they propose to establish their bank, and, having done so, limits them thenceforth to the place selected. But, it is to be recollected, that the act provides for the establishment from time to time of a great number of banks, without any further exercise of legislative discretion; and I am unable to discern in the scheme of distribution adopted, anything more than an attempt to do at once, prospectively, what the legislature would otherwise have been required to do by successive acts—that is to say, to adapt the supply of bank facilities in different parts of the state, to the exigencies of each, as far as they could be foreseen. Viewed in this light, those provisions of the act upon which so much stress was laid, ought to have no influence on the decision of the question before the court; for they impose no restrictions with respect to locality,

not usually imposed by separate acts of incorporation, and import no state policy affecting the rights of the plaintiffs.

The question, then, is resolved into the simple inquiry whether a state bank, having power by its charter to deal in bills of exchange, without any express restriction as to place, can lawfully establish an agency, for the purpose of buying and selling bills of exchange, in a part of the state other than that of its location. It was argued, indeed, by the plaintiffs' counsel, that the purchases of these two bills of exchange, coming as they do separately before the court, are to be regarded as isolated acts, and, as such, free from objection, whatever might be thought of the right of plaintiffs to establish an agency at Cleveland for the purpose of dealing in exchange. But these purchases were shown by the witness Morrison to constitute parts of a series of similar acts, performed by him as the agent of the plaintiffs, by them constituted for this express purpose; and to adjudge all these acts to be severally lawful, and admit them at the same time to have been collectively contrary to law, would seem to be inconsistent. But, whether they are to be considered individually or collectively, unless it can be shown that a bank may lawfully do without, what it cannot lawfully do within the limits of the state whence it derived its corporate existence, the question before the court has already been authoritatively answered by the supreme court of the United States, in the cases of Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 519, and of Tombigbee R. Co. v. Kneeland, 4 How. [45 U. S.] 16. In the first of these cases the question was, whether a bank incorporated by the legislature of the state of Georgia, and established at Augusta in that state, having power conferred upon it in general terms by its charter to deal in bills of exchange, could lawfully buy bills of exchange in the state of Alabama, through an agent employed there for that purpose. The court decided that it could. The case was in all respects essentially like the present, except that in that case the bill of exchange on which the suit was founded, was purchased by the Georgia bank in another state, instead of a different place in the same state. The case decides, therefore, that if the City Bank of Columbus had employed its agent and purchased these bills at Mobile, instead of Cleveland, its title would have been indisputable. Is its title then to be held invalid, because the purchases were made within the limits of the state of Ohio?

A corporation is a legal entity, endowed with those faculties only with which the legislature have seen fit to invest it. The power to purchase bills of exchange is, by the statutes of Ohio, conferred on the plaintiffs, as it was by the statute of Georgia on the Bank of Augusta, in general terms, without restriction as to place. If this grant imports a capacity to deal in exchange, through an agent appointed for that purpose, in other states, by what sound principle of construction can it be maintained, that the grant confers no power to do the same thing in any part of the state of Ohio? If, indeed, the statute, while conferring the power, had also, in terms, forbidden its exercise within the state of Ohio, elsewhere than at Columbus, it may be conceded that this action could not be maintained; and it would then be impertinent to inquire, whether, notwithstanding this restriction, the plaintiffs might not, according to the doctrine of the case of Bank of Augusta v. Earle [supra], lawfully send an agent into another state to purchase bills of exchange. But, in the absence of any such restriction, I am unable to distinguish the present case from that. Indeed the principal question in that case was, not whether the bank possessed a more extensive power to make contracts out of the state of Georgia than within it, but whether it had the capacity to contract beyond the limits of that state at all. The question turned upon the comity of nations, supposed to be recognized by the laws of the several states with respect to each other, and upon certain provisions contained in the constitution of Alabama. It was, however, deemed necessary, before proceeding to the consideration of these points, to determine first the extent of the power to deal in bills of exchange, conferred on the bank by its charter; for, said the chief justice, in pronouncing the judgment of the court, "it may be safely assumed that a corporation can make no contracts, and do no acts, either within or without the state which creates it, except such as are authorized by its charter; and those acts must also be done by such officers or agents, and in such manner as the charter authorizes." After laying down this fundamental principle, the court proceeded to observe: "The charter of the Bank of Augusta authorizes it, in general terms, to deal in bills of exchange, and consequently gives it the power to purchase foreign bills as well as inland—in other words, to purchase bills payable in another state; and the general power to purchase bills, without any restriction as to place, by its fair and natural import authorized the bank to make such purchases wherever it was found most convenient and profitable to the institution, and also to employ suitable agents for that purpose. The purchase of the bill in question was, therefore, the exercise of one of the powers which the bank possessed under its charter, and was sanctioned by the law of Georgia creating the corporation, so far as that state could authorize a corporation to exercise its powers beyond the limits of its own jurisdiction." Now, it seems quite clear from this language, that the general grant of power to deal in exchange, contained in the charter of the bank

of Augusta, was considered by the court sufficient to warrant the exercise of this power at any place within the state of Georgia, and that, if this had been found to be otherwise, all further inquiry would have been deemed unnecessary. But it is needless to dwell longer upon this point. All that was urged at the argument, to prove that the plaintiffs had unlawfully assumed to exercise their banking franchise through their agency at Cleveland, is fully answered by the case of Bank of Augusta v. Earle, and the other cases embraced in the same report; and especially by the subsequent case of Tombigbee R. Co. v. Kneeland, in which the doctrines of the former case were reasserted and more strongly applied.

My opinion, therefore, is, that the motion for a new trial ought to be denied.

Case No. 2,737.

CITY BANK OF COLUMBUS v. BEACH.

[1 Blatchf. 438.] [1]

Circuit Court, N. D. New York. Oct. Term, 1849.

ACCOMMODATION PAPER—APPLICATION TO PRE-EXISTING DEBT—ACTION ON ACCEPTANCE—PLEADING.

1. H. drew a bill of exchange on "B. & Co.," which B., one of the firm, accepted, for the accommodation of H., without restriction, and without the knowledge or consent of his copartners, and not in the course of the partnership business. The acceptance was made by B.'s writing the name of the firm on the bill. The bill, with the acceptance upon it, was discounted by the plaintiffs for H., and the proceeds applied in payment of paper then held by the plaintiffs on which H. was liable, the plaintiffs knowing at the time that the bill was accommodation paper: *Held*, that H. had a right to use the bill in payment of an existing indebtedness of his, as well as for the purpose of raising money, and that, although the plaintiffs were chargeable with knowledge of the character of the bill, they were bona fide holders of it for value.

2. The plaintiffs were entitled to recover on the bill against B. as sole acceptor; and that such recovery could be had under a count in the declaration stating the bill to have been drawn on "B. & Co.," and to have been accepted by B. by the name and style of "B. & Co.," by writing the name of "B. & Co.," thereon.

At law. Assumpsit, tried before Mr. Justice Nelson and Judge Conkling, in October, 1847, at Albany. The action was on two bills of exchange, each for $1,000, drawn by one Haskell, at Cleveland, Ohio, on "Messrs. Wm. Beach & Co., Auburn, N. Y.," payable at the Bank of Commerce in New-York, to the order of and endorsed by Haskell; one dated February 2d, 1846, and payable four months after date, and the other dated February 10th, 1846, and payable three months after date. The action was against William Beach as sole acceptor of the bills. In the first four special counts of the declaration the bills were stated to have been drawn on the defendant by the style and description of "Wm. Beach & Co.," Auburn, N. Y., requesting him by that name and style to pay the sums therein specified, and it was averred that he accepted the bills according to the usage and custom of merchants. In the last four special counts the bills were stated to have been drawn on Wm. Beach & Co., Auburn, N. Y., and to have been accepted by the defendant by the name and style of Wm. Beach & Co., and by writing the name of "William Beach & Co." thereon. At the trial, the corporate existence of the plaintiffs, (they being a banking corporation at Columbus, Ohio.) and the endorsements of the bills by Haskell, were admitted, and it was also admitted that the signatures, "William Beach & Co.," to the acceptances of the bills were in the handwriting of the defendant. The bills having been read in evidence, the plaintiffs claimed a verdict on them. The defendant insisted that the evidence did not support any one of the eight special counts, as the bills appeared on their face to have been drawn on the firm of William Beach & Co., and to have been accepted by the firm, whereas in the first four counts they were stated to have been drawn on the defendant, and in all the counts to have been accepted by him. On this ground the defendant moved for a nonsuit, but the court denied the motion. It was then admitted by the plaintiffs, that there was a firm of William Beach & Co., consisting of the defendant, of John C. Beach, and of Ebenezer S. Beach; and by the defendant, that the bills in question were accepted by the defendant individually, by writing thereon the name "William Beach & Co.," and that such acceptances were without the knowledge or consent of the other members of said firm, for the accommodation of Haskell, the drawer, and not in the course of any partnership dealings of the firm. The defendant then renewed his motion for a nonsuit, on the same grounds as before, and insisted further, that the plaintiffs could not recover under the common counts in their declaration, because the acceptance of a firm was not evidence, under the common counts, against one of the members of the firm; while the plaintiffs contended that the objection taken by the defendant should have been pleaded in abatement, and that, under the proof, the acceptances were the individual acts of the defendant. The court again overruled the motion. The defendant then proved by one Morrison, that, as agent for the plaintiffs, at Cleveland, Ohio, he discounted the bills in question, receiving them from Haskell, the drawer, and crediting him with the proceeds in payment of paper then held by the plaintiffs on which Haskell was liable; that Haskell then said that the two bills in question were to be paid by him; and that the acceptances were then upon the bills. On this evidence, the defendant requested the court to charge the jury, that if the bills in question were accepted

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without value for the accommodation of Haskell, and the plaintiffs or their agent had notice thereof when the bills were received from Haskell, the plaintiffs could not recover upon the proof in the case, although they paid full value for the bills. The court refused so to charge, but instructed the jury that it appeared from the evidence that the plaintiffs had acquired a valid title to the two bills in suit, to which refusal and charge the defendant excepted. The jury found for the plaintiffs, and the defendant now moved for a new trial, on a case.

William H. Seward and Stephen A. Goodwin, for plaintiffs.

I. The defendant's motions for a nonsuit were correctly refused. 1. The defence that there were other joint contractors, which was the substance of the objection, could only be set up by plea in abatement. Burgess v. Abbott, 6 Hill, 138; Gilman v. Rives, 10 Pet. [35 U. S.] 298; Gow, Partn. 180; 1 Chit. Pl. 52, 53. 2. The defendant, having accepted the bills as accommodation paper, without the authority of his copartners, was individually liable on them. Laverty v. Burr, 1 Wend. 529; Green v. Beals, 2 Caines, 254; St. John v. Holmes, 20 Wend. 609; Tombeckbee Bank v. Dumell [Case No. 14,081]. 3. The bills were evidence under the common counts. Pierce v. Crafts, 12 Johns. 90; Cruger v. Armstrong, 3 Johns. Cas. 5; Mack v. Spencer, 4 Wend. 412; Barry v. Foyles, 1 Pet. [26 U. S.] 311. II. The court was correct in its refusal to charge the jury, that if the bills were accepted without value, for the accommodation of Haskell, and the plaintiffs or their agent had notice thereof when the bills were received from Haskell, the plaintiffs could not recover upon the proof in the case, although they paid full value for the bills. A contrary rule to that contended for by the defendant has been established in the courts of the United States. Townsley v. Sumrall, 2 Pet. [27 U. S.] 170; U. S. v. Bank of the Metropolis, 15 Pet. [40 U. S.] 393; Swift v. Tyson, 16 Pet. [41 U. S.] 1. In New-York. Brown v. Mott, 7 Johns. 361; Grant v. Ellicott, 7 Wend. 227. In Massachusetts. Cole v. Cushing, 8 Pick. 48; Munroe v. Cooper, 5 Pick. 412; Fall River Union Bank v. Willard, 5 Metc. [Mass.] 221; Chickopee Bank v. Chapin, 8 Metc. [Mass.] 42; Pacific Bank v. Mitchell, 9 Metc. [Mass.] 301. In Pennsylvania. Knight v. Pugh, 4 Watts & S. 445; White v. Hopkins, 3 Watts & S. 99. And in England. Charles v. Marsden, 1 Taunt. 224; Collins v. Martin, 1 Bos. & P. 651, per Eyre, C. J.; Bank of Ireland v. Beresford, 6 Dow, 237, per Lord Eldon; Fentum v. Pocock, 5 Taunt. 192; Haly v. Lane, 2 Atk. 181; Morris v. Lee, 1 Strange, 629; Edwards v. Dick, 4 Barn. & Ald. 212; Bowyer v. Bampton, 2 Strange, 1155; O'Keefe v. Dunn, 6 Taunt. 305; Ex parte Marshal, 1 Atk. 131; Arden v. Watkins, 3 East, 325; Darnell v. Williams, 2 Starkie, 166; Atwood v. Crowdie, 1 Starkie, 483; Bosanquet v. Dudman, Id. 1; Watkins v. Maule, 2 Jac. & W. 237; Millis v. Barber, 1 Mees. & W. 425. And the same rule is laid down by elementary writers. Chit. Bills (9th Am. Ed.) 90, 245, 334; Bayley, Bills (5th Ed. 1830) 223, notes 16, 523, 524; 3 Kent, Comm. 86; Story, Bills, § 191, note 3, § 253.

Alvah Worden, for defendant.

I. The court should have ordered a nonsuit. 1. The averments in the first four counts, that the bills were drawn on the defendant by the style and description of Wm. Beach & Co., requesting him by that name and style to pay, were not proved, nor was it proved that the defendant accepted the bills. They were drawn upon and accepted by the firm. Mitchell v. Ostrom, 2 Hill, 520; Pope v. Barrett [Case No. 11,273]; Pease v. Morgan, 7 Johns. 468. 2. It is true, as stated in the last four counts, that the bills were drawn on Wm. Beach & Co., requesting them to pay, but it was not proved, as alleged in those accounts, that the defendant, by the name and style of Wm. Beach & Co., accepted the bills. Mason v. Rumsey, 1 Camp. 384; Wells v. Masterman, 2 Esp. 731; Dolman v. Orchard, 2 Car. & P. 104; Colly. Partn. (Last Ed.) § 410. 3. There was no necessity in this case, of pleading in abatement the non-joinder of the other members of the firm, because on such a plea the same issue would have been tendered that was made on the declaration. Id. § 401, note; Barry v. Foyles, 1 Pet. [26 U. S.] 315; Cabell v. Vaughan, 1 Saund. 291b. II. Morrison, as the agent of the plaintiffs, received the bills from Haskell with full notice of their accommodation character, and under such circumstances as to take away from the transaction the character of a bona fide transfer. Grant v. Ellicott, 7 Wend. 227; Swift v. Tyson, 16 Pet. [41 U. S.] 1; Chit. Bills (Ed. 1842) 80; Brown v. Taber, 5 Wend. 566; Bank v. Irvine, 3 Pa. St. 250; Grandin v. Le Roy, 2 Paige, 510; Griffith v. Reed, 21 Wend. 505; Charles v. Marsden, 1 Taunt. 224; Chit. Bills (Ed. 1842) 218, note r; Bayley, Bills (5th Ed.) 500, note 17; Martin v. Morgan, 1 Brod. & B. 289, 3 Moore, 635; Riley v. Johnson, 8 Hammond [Ohio] 526; Carlisle v. Wishart, 11 Ohio, 172; Cone v. Baldwin, 12 Pick. 545.

NELSON, Circuit Justice. Inasmuch as the acceptances of the defendant were without restriction, the drawer had a right to use them in payment of an existing indebtedness, as well as for the purpose of raising money; and, although the plaintiffs were chargeable with knowledge of the character of the paper, they were bona fide holders for value, and entitled to recover upon the bills.

The acceptances were made by the defendant without the privity or authority of the other members of the firm of William Beach & Co., and the plaintiffs were, therefore, entitled to recover against the defendant upon the bills, notwithstanding they were drawn

upon the firm, and accepted in the name of the firm. There was, also, no variance, in contemplation of law, between the declaration and the proof, especially as it respected the last four special counts.

CONKLING, District Judge. A new trial is asked for by the defendant, on account of the refusal of the court, first, to grant a nonsuit, and secondly, to instruct the jury as requested by the defendant.

The principles of law which are to govern the decision of the court upon the facts of this case as they appear from the evidence and the admissions of the parties, are well established and obvious. The bills having been accepted by the defendant in the name of the firm of William Beach & Co., which is proved to have consisted of three persons, of whom the defendant was one, the plaintiffs had a right prima facie to sue those persons jointly; but, the acceptance having been given by the defendant without the knowledge and consent of his copartners, and purely for the accommodation of the drawer, they were entitled to repudiate the act, and would have had it in their power, by so doing, to defend themselves successfully against a joint action, unless it should appear that the plaintiffs took the bills without notice of the defendant's want of authority to use the partnership name. On the other hand, the defendant having, by his own act, made himself absolutely liable, the plaintiffs had a right also to proceed against him individually, at the hazard only, with a declaration properly framed, of being met with a plea in abatement of the non-joinder of the other partners. They have chosen to adopt this latter alternative, and no plea in abatement has been interposed. It is argued, indeed, that when, in an action ex contractu, it appears on the face of the declaration that there were other joint contracting parties who have been omitted, a plea in abatement is unnecessary, and it seems to be assumed by the counsel for the defendant that the mere form of the acceptance in the present case was sufficient to bring it within the operation of this rule. Conceding both the assumption and the asserted rule of pleading, it would follow, not that the defendant can avail himself, under the plea of the general issue, of the non-joinder of the other two partners, but only that it furnishes ground for a demurrer, or may be made the foundation of a motion in arrest of judgment. But the assumption cannot be admitted. No person except the defendant being named as constituting the firm of William Beach & Co., for aught that appears on the face of the declaration, the defendant alone may have chosen to transact his mercantile business under that name, or his acceptance, in point of law, (as in reality appears to have been the case,) might have been his own individual act, for want of authority to bind his copartners.

It is, however, further argued, that there is a fatal variance between the declaration and the proof. Admitting this to be so with respect to the first four counts, in which the bills are represented to have been directed to the defendant under the name and style of Wm. Beach & Co., I think it is otherwise with respect to the next four succeeding counts. The averment in these latter counts, that the bills were directed to Wm. Beach & Co., and were accepted by the defendant under that name, is according both to the facts, and to the legal effect of the transaction as disclosed at the trial. I am unable, therefore, to discern any variance between the four last special counts and the evidence adduced to support them; nor have I been able to find any precedent for a form of pleading, better adapted to the case than that which the plaintiffs have adopted.

It follows, therefore, to say nothing of the indisputable want of power in the courts of the United States to grant a nonsuit in any case against the will of the plaintiff, that the denial of the motions made at the trial for a nonsuit, and also the refusal of the court to give the instruction prayed for, were perfectly proper.

Case No. 2,738.

CITY BANK OF COLUMBUS v. FARMERS' & PLANTERS' BANK OF BALTIMORE.

[Taney, 119.][1]

Circuit Court, D. Maryland. Nov. Term, 1847.

RIGHTS OF HOLDER OF BANK-NOTE.

1. Where a bank-note is taken in the usual course of business, bona fide, and under circumstances which would not have excited the suspicion of a person of ordinary prudence and care in business, that it was lost by, or stolen from, the rightful owner, and was not the property of the person who then held it, the fact of its having been lost or stolen from the rightful owner, will be no defence to an action on the note brought by the person so taking it.

2. But such defence will be a good one, if the note were taken under circumstances which ought to have excited the suspicion of a person of ordinary prudence and caution, and led him to make inquiry before the note was taken by him.

Plaintiff's prayer: If the jury shall believe, from the evidence, that the plaintiff took the bank-note which is the subject of this action, for a valuable consideration, in the usual course of the plaintiff's business as a bank, fairly and bona fide, without notice or knowledge that said bank-note had been lost or stolen, or that any former holder had been illegally dispossessed of it, then the plaintiff is entitled to recover.

Defendant's prayer: Where a bank-note is lost or stolen, a party who seeks to make title to it against the owner, must show, not only that he has given value for it, but also that

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he took it under circumstances which were not calculated to excite the suspicions, in regard to it, of a prudent and careful man.

J. Meredith, for plaintiff.
J. Mason Campbell, for defendant.

TANEY, Circuit Justice. The City Bank of Columbus is entitled to recover in this action, if the bank-note in question was taken for a valuable consideration, in the usual course of its business as a bank, bona fide, and under circumstances which would not have excited the suspicion of a person of ordinary prudence and care in business, that the note had been lost by, or stolen from, the rightful owner, and was not the property of the person who then held it. But if it was taken under circumstances which ought to have excited the suspicion of a person of ordinary prudence and caution, and led him to make further inquiry, before the note was taken, then the bank took it at its peril, and is not entitled to recover.

Verdict for the plaintiff.

Case No. 2,739.

CITY BANK OF NEW-YORK v. SKELTON et al.

[2 Blatchf. 14.][1]

Circuit Court, S. D. New York. March 2, 1846.

INTERPLEADER BY BANK — ENJOINING SUIT IN STATE COURT—ENJOINING PROSECUTION IN FEDERAL COURT.

1. Upon the general principles of equity jurisprudence, a bank may, in a proper case, have relief by bill of interpleader against separate and adversary parties who claim title to moneys therein deposited.

[Cited in Foss v. First Nat. Bank of Denver, 3 Fed. 190.]

2. This court has no power to restrain or interfere with a suit prosecuted and pending in a state court, by enjoining the further prosecution of such suit.

[Cited in Fisk v. Union Pac. R. Co., Case No. 4,827; Reinach v. Atlantic & G. W. R. Co., 58 Fed. 44.]

3. But this court, in executing a jurisdiction vested in it, may, in a case of which it has cognizance, act upon parties who are suitors in a state court in relation to the same subject matter, so far at least as to compel their submission to such judgment as this court may render in the case.

4. Where funds were deposited in a bank, and afterwards S., claiming the funds as his property, commenced a suit for their recovery in a state court against the bank and Y., the depositor of the funds, and, while that suit was pending, Y. commenced two suits in this court against the bank, to recover the funds and damages for their detention, the bank having no interest in the funds: *Held*, on a bill filed in this court by the bank against S. and Y., that although this court would not decree an interpleader in the case, or enjoin the suit in the state court, yet it would enjoin the prosecution by Y. of his suits in this court, until the final decision of the suit in the state court.

[Cited in Foss v. First Nat. Bank of Denver, 3 Fed. 190; Harrison Wire Co. v. Wheeler, 11 Fed. 207.]

5. This court would give the parties the option to consent by stipulation to interplead in this court on the subject matter, and, in case they did so, would allow the bank to pay the funds into court, first deducting such costs and expenses as the court should allow.

In equity. This was a bill in equity filed in December, 1845, by the plaintiffs, a banking corporation in the city of New-York, against Elizabeth Skelton and Mary Ann Frazer, citizens of the west coast of Africa, and Philip R. Yonge, a citizen and resident of Georgia. The facts were these: At the instance of Lot Clark, the plaintiffs, on the 5th of July, 1844, agreed to receive on deposit for safe keeping, for a short time, and until some conflicting claims in respect to them should be adjusted, certain bonds and moneys and a promissory note. Accordingly, the said Clark, Samuel L. Burritt and Erastus C. Benedict, (the latter acting, as was alleged, on behalf of the defendant Yonge,) deposited with the plaintiffs sixteen six per cent. bonds of the United States, amounting in the whole to $52,000, with coupons attached for the payment of interest, and a promissory note of one Gibbs for $1,000, and $2,490 in cash, said to be interest previously collected on the bonds. The plaintiffs' teller, who received the deposit, delivered to Benedict, with the knowledge and concurrence of Clark and Burritt, a bank book, commonly called a dealer's book, containing this entry. "City Bank, New York, in ac. with Philip R. Yonge. Bonds deposited for collection of the interest alone, no part of the said deposit, principal or interest, to be withdrawn before the first day of September next, unless Samuel L. Burritt, of E. Florida, shall in writing request said Yonge or his attorney to withdraw the same, or some portion thereof;" and then the particulars of the deposit were stated. About the 1st of August, 1844, three of the bonds, for $3,000 each, and the note of Gibbs, were withdrawn from the bank pursuant to the above condition; and the bank subsequently received, for interest on the remaining thirteen bonds, $2,580 in cash. The bill alleged that the plaintiffs continued to hold the said assets under such deposit, without making any claim to any part of them, and had always been and were ready and desirous to deliver the same to whosoever might be entitled to them.

In August, 1844, the defendants Skelton and Frazer, by the said Clark as their solicitor, filed a bill in the court of chancery of the state of New York, against the plaintiffs and the defendant Yonge, claiming the said assets and funds as their property, as legatees and heirs at law of John Frazer, deceased, representing that the said assets belonged to and were derived solely from his estate, of which the defendant Yonge was one of the

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executors, and that the executors had received other and sufficient assets to satisfy all the debts and specific legacies of the estate, and setting forth various other facts to show that the assets so deposited belonged to them and ought not to be paid over to the defendant Yonge, and praying an injunction against the plaintiffs and Yonge, and other appropriate relief. An injunction was issued by the state court, on the bill, and served on the plaintiffs, restraining them from parting with the bonds and money. They appeared in the suit and filed their answer in January, 1845, disclaiming all title to or interest in the assets, and offering to pay over the same as the court might direct. Yonge also appeared in that suit and answered the bill. The injunction was subsequently dissolved by the chancellor, leaving the subject-matter of the suit to be prosecuted between the parties as they might be advised; and the suit was still pending, undetermined, when this bill was filed. On the 3d of November, 1845, after the dissolution of the injunction, a notice in writing was served on the plaintiffs on behalf of the said heirs, to the effect that the said assets belonged to the said heirs, and that, if the plaintiffs should deliver them to Yonge, they would do so at their peril. On the 25th of November, 1845, Yonge commenced two suits at law in this court against the plaintiffs, one in trover and the other in assumpsit. In the former, he sought to recover the value of the said remaining thirteen bonds, with coupons attached; and, in the latter, damages for not delivering to him the said bonds, and for not paying to him the interest so collected thereon. Those suits, also, were pending, undetermined, when this bill was filed. The bill contained other averments usual in bills of interpleader, and prayed that the defendants might be decreed to interplead and settle their rights to the said bonds and moneys, or might proceed and determine them, if possible, in said suit in the state court of chancery; or that, on the discontinuance of the latter suit, the plaintiffs might be at liberty to pay over the assets to the parties on being indemnified by this court in so doing, or to pay the same into this court, to be disposed of as it might direct, on the discontinuance of said suit in chancery; that Yonge might be enjoined from prosecuting his suits at law, and Skelton and Frazer from prosecuting their suit in chancery; and that the plaintiffs, on paying the assets into court, might be discharged from all liability to the defendants in the premises, and have allowed to them all their costs and counsel fees in all the suits. A motion was now made, upon the bill, for provisional injunctions.

George William Wright, for plaintiffs.
Samuel Sherwood, for Skelton and Frazer.
Erastus C. Benedict, for Yonge.

BETTS, District Judge. Two questions have been discussed on this motion: (1.) Whether the facts establish a case for a decree of interpleader. (2.) Whether this court has jurisdiction to make such a decree.

The strong objection taken to the right of interpleader in this case is, that the plaintiffs received the deposit as bailees of Yonge, and became absolutely bound to him to return it at his call; and that the qualification in the deposit, that the written concurrence of Burritt should be necessary to a withdrawal of the deposit, operated only for a limited period, and ceased to have any effect after the 1st of September, 1844. Eminent judges speak of the doctrines respecting bills of interpleader as perplexing and not well defined. 2 Story, Eq. Jur. § 814, and notes. The fundamental principle upon which relief by bill of interpleader is founded is, that two or more persons are claiming the same thing by different or separate interests, of a person who does not claim any interest therein himself, and does not know to whom he ought of right to surrender it, and that one or both have brought, or threaten to bring, actions against him. In such case, he may appeal to a court of equity to protect him from the vexation attending such suits, and also from being compelled to respond to several parties for the same thing. Id. § 806; 2 Kent, Comm. 567, 568; Jeremy, Eq. Jur. 347; Eden, Inj. (1st Am. Ed.) 242; Crawshay v. Thornton, 2 Mylne & C. 1; Atkinson v. Manks, 1 Cow. 691. The defendant Yonge insists that the rule does not apply to bailees or to bankers, but that they are bound by the general principles of law to restore to the bailor the deposit made with them. 2 Story, Eq. Jur. §§ 816, 817; Story, Bailm. § 110. But the cases which seemingly support that objection are counterbalanced by a weightier array of authorities, both English and American, to the contrary. 2 Kent, Comm. 566–568; Atkinson v. Manks, 1 Cow. 691; Schuyler v. Pelissier, 3 Edw. Ch. 191; Birch v. Corbin, 1 Cox, Ch. Cas. 144; Jeremy, Eq. Jur. 348. The rule has been directly sanctioned in the cases of funds deposit in a bank (Birch v. Corbin, 1 Cox, Ch. Cas. 144), and with a stakeholder (Id. 145); and it has been applied in behalf of a captain of a vessel, against whom there were adverse claims upon bills of lading (Lowe v. Richardson, 3 Madd. 277). Each of these cases is strong in analogy to the present one, and I should feel no difficulty in declaring, upon the general principles of equity jurisprudence, that a bank may be entitled to relief by bill of interpleader against separate and adversary parties who claim title to moneys therein deposited.

But there is an impediment to the enforcement of that principle by this court in the case now before it. One of the suits pending, against which the plaintiffs ask relief, is prosecuted in the state court of chancery, and this court is clothed with no power to restrain or interfere with a suit so situated. A court of the United States, in executing

a jurisdiction vested in it, may undoubtedly act upon parties who are suitors in a state court in relation to the same subject matter, so far at least as to compel their submission to such judgment as the United States court may render in a case of which it has cognizance. But, even then, it cannot interdict their prosecuting their suit in the state court, much less control any action pending in such court. It is understood that the state courts uniformly adopt the same doctrine in respect to courts of the United States. Here it is to be assumed that the state court is competently possessed of the case before it, and a decree of this court compelling the plaintiffs and one of the defendants in that court to interplead here, would be an exercise of that authority and control over the state court itself which can only be allowed to a tribunal of general jurisdiction under the same government.

But the plaintiffs have made out a case of the most stringent equity against allowing Yonge to proceed in his suits in this court against them, while the suit brought by Skelton and Frazer is pending in the state court for the same subject-matter, and to which he is a party defendant. The conflicting rights of these two prosecuting parties are directly at issue in the suit in the state court, and that forum has full capacity to decide the right between them. There the controversy should be continued so far as these plaintiffs are to be affected, and, with the determination of that case, they should legally know to whom they can rightfully deliver over the funds in their possession.

I think the cases of Mallow v. Hinde, 12 Wheat. [25 U. S.] 193, and Dunn v. Clarke, 8 Pet. [33 U. S.] 1, furnish a guide to the order proper to be made in this case. The former was a case similarly circumstanced to the present one, and is an authority that this court may, in its discretion, restrain the prosecution of the suits brought by Yonge, until he has had an opportunity to settle his controversy with Skelton and Frazer in the suit in the state court of chancery. I shall accordingly order an injunction to that effect, giving to the parties the option to consent, by stipulation, to interplead in this court on the subject-matter, and thus place it wholly under the control of this court.

NOTE [from original report]. Order. The bill in this case having been read, and counsel for the respective parties having been heard, and the premises being fully considered, and it appearing to the court that the plaintiffs hold the assets and funds in the bill mentioned for the true owner, without having or claiming any right or interest therein, and that they are ready and willing to deliver the same over to whosoever may have right thereto; and it appearing to the court that the defendants Elizabeth Skelton and Mary Ann Frazer have heretofore filed their bill in the court of chancery of the state of New-York against the plaintiffs and the defendant Philip R. Yonge, alleging the full right and title to the said funds and assets to be vested in and to belong to the said Skelton and Frazer; and it appearing to the court that the plaintiffs and the said Yonge entered their respective appearances in said suit in said court of chancery, and that said suit is still pending and undetermined; and it further appearing to the court that after such suit was instituted the said Yonge commenced in this court, in his own name, two separate actions at law against the plaintiffs, one in trover, in which he seeks to recover the value of the said funds and assets, and the other in assumpsit, in which damages are demanded for the detention of the said assets, and that the plaintiffs have appeared in the said actions, and the same are yet pending and undetermined in this court: It is, therefore, considered by the court that the plaintiffs are entitled to relief in this court in the premises; but, inasmuch as the suit instituted against the plaintiffs by the said Skelton and Frazer is prosecuted in the court of chancery of the state of New-York, and the proceedings before that tribunal are not within the cognizance of this court, or subject to its control, it is considered by the court, that so much of the prayer of the said bill as seeks an interpleader in the premises, and prays the same to be decreed by this court against the above named defendants, ought not to be granted, and it is, therefore, ordered, that the same be denied. It is further ordered, that an injunction issue, according to the prayer of the bill, against the said Yonge, restraining him from further prosecuting his said actions at law, or either of them, instituted in this court against the plaintiffs, until the final decision of the said suit pending in the court of chancery of the state of New-York, unless the said Yonge and Skelton and Frazer shall, within twenty days from the date of this order, file their stipulation in writing in this court, electing to interplead between themselves in this court, in respect to the subject matter aforesaid; and, in case of such interpleader between the said parties, it is ordered that the said plaintiffs thereupon pay into this court the funds and assets aforesaid, first deducting therefrom such their costs and expenses as shall be allowed them by the court.

[NOTE. For denial of a motion to dissolve the injunction granted by the foregoing order, see Case No. 2,740.]

Case No. 2,740.

CITY BANK OF NEW YORK v. SKELTON et al.

[2 Blatchf. 26.][1]

Circuit Court, S. D. New York. July 31, 1846.

JURISDICTION—ENJOINING SUITS—RIGHTS OF SUITORS IN FEDERAL COURTS.

1. This court has power, in a proper case, to prohibit a non-resident plaintiff from prosecuting an action against a defendant residing within this state.

2. A party entitled to sue in this court by reason of a constitutional qualification, acquires no right to any standing here different from what he would have in any other tribunal competent to take cognizance of his case.

3. Whenever, therefore, jurisdiction over his case has attached, this court will proceed with it conformably to the general principles of law, and to the usage and practice of the court.

4. The circuit courts of the United States have power to control and stay actions pending before them, either by order on the common law side of the court, or by injunction on the equity side.

5. But they will not exercise such authority over actions pending in a state court, nor will

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a state court interfere with actions pending in the federal courts.

6. The decision in this same case [Case No. 2,739], that this is a proper case for this court to stay by injunction an action at law pending here, reviewed and affirmed.

In equity. After the injunction in this case was granted [Case No. 2,739], the defendant Yonge answered the bill, and now moved for a dissolution of the injunction.

Erastus C. Benedict, for Yonge.
George William Wright, for plaintiffs.

Before NELSON, Circuit Justice, and BETTS, District Judge.

BETTS, District Judge. This motion is urged principally upon the ground that this court has no constitutional power to inhibit a non-resident plaintiff from prosecuting an action against a defendant residing within this state. The constitution, in designating the parties and subjects over which the courts of the United States shall take jurisdiction, does not prescribe the manner in which such jurisdiction is to be exercised. It of course devolves upon congress to regulate the mode of procedure by which the functions of the judiciary are to be executed. This is sometimes done by a specific direction to the courts, but most commonly by very general provisions, such as are embodied in the process acts, or in section 34 of the judiciary act of 1789 (1 Stat. 92). The equity powers of this court, and the practice by means of which such powers are enforced, are, by act of congress, made substantially the same as those of the high court of chancery in England. Act May 8, 1792, § 2 (1 Stat. 276); Robinson v. Campbell, 3 Wheat. [16 U. S.] 212, 223. Whenever, therefore, jurisdiction over a case attaches by virtue of the constitution, the court proceeds with it conformably to the general principles of law prescribed by the statute, or established under authority derived from it; and, in this respect, the courts of the United States stand upon the same footing as those of this state or of Great Britain having general jurisdiction. A party entitled to sue by reason of a constitutional qualification, acquires no right to any standing in this court different from what he would have in any other tribunal competent to take cognizance of his case. Wherever he is entitled to resort for relief, he must take his remedy, not upon the footing of his capacity to sue, but conformably to the law and usage of the court. A suitor in this court must accordingly be subject to such regulation and control as the court, under authority of law, may deem proper to apply to his particular case, or such as may exist in the form of general rules of practice or decision.

This power of circuit courts to control and stay actions pending before them is distinctly recognized by the supreme court. Mallow v. Hinde, 12 Wheat. [25 U. S.] 193; Dunn v. Clarke, 8 Pet. [33 U. S.] 1. In both of those cases, the suits at law stayed by injunction were pending on the law side of the circuit court; and, in the latter case, although the supreme court held that the injunction bill could not be maintained for the want of proper parties, yet they ordered a stay of the suit at law in the circuit court until the parties should have had time to seek relief from a state court. The stay of proceedings in the present case might, therefore, have been rightfully made by order on the common law side of the court, or the court may, on a proper bill, act on the equity side, and effect the stay by injunction.

The supreme court of the state of New York exercises a broad equitable power over suits and suitors, in staying proceedings on mere motion, when the justice of the case demands such interference. 3 Grah. Pr. c. 2. It is also a common head of equity to restrain suits at law by injunction from chancery whenever the relief at law is inadequate or imperfect, or whenever the court of chancery has cognizance of the case already, and is competent to give the parties full relief. Thompson v. Brown, 4 Johns. Ch. 619, 643; Denton v. Graves, Hopk. Ch. 306. And no doubt, if Yonge had instituted his actions in a state court of law, the chancellor would have enjoined their prosecution. But the courts of the United States will not exercise such authority over the state court (Diggs v. Wolcott, 4 Cranch [8 U. S.] 179), nor will the state court of chancery interfere with actions pending in the federal courts.

The case of Dunn v. Clarke, before cited, is full authority for staying proceedings in the actions at law in this court, to await the decision upon the subject-matter in the state court, the case here being clothed also with the additional feature, that the suit in the state court was first brought and is at issue there between the same persons who are parties to the suits here.

The power of this court thus to interfere being possessed in ample plenitude, we are satisfied that the facts of this case will warrant and indeed demand the exercise of that power. The motion to dissolve the injunction must, therefore, be denied.

Case No. 2,741.

CITY BANK OF RACINE v. BABCOCK.

[Holmes, 180.] [1]

Circuit Court, D. Rhode Island. Nov., 1872.

POWER OF SALE BY PLEDGEE — CONDITION PRECEDENT — WAIVER BY ACT OF PLEDGOR.

1. Where the giving of a certain notice is made the condition precedent of the execution of a power of sale, and performance of the condition has been rendered impossible by the act of the party for whose benefit it was made, the power may be executed without the giving of the notice.

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

2. Certain bonds were pledged by a bank as security for the performance of an agreement between the bank and the pledgee, and the pledgee was empowered to sell the bonds in case of breach of the agreement by the bank, on thirty days' notice to it of the intended sale, and credit the proceeds on a debt due from the bank. The bank afterwards failed, closed its place of business, and thereafter transacted no business, and had no office nor acting officers; and did not perform the agreement. About three years afterwards, the pledgee sold the bonds in good faith at their market value, without notice to the bank. *Held*, that the giving of the notice had been rendered impossible by the act of the bank, and that neither the pledgee nor its agent in the sale was liable for a conversion of the bonds.

C. Hart, for plaintiff.

B. R. Curtis and S. Curry, for defendant.

SHEPLEY, Circuit Judge. This is an action of trover, commenced by the plaintiff corporation, as trustee of Alfred W. Davison, for the alleged conversion of thirty-five bonds, each for the sum of one thousand dollars, with the interest coupons unpaid thereon, issued by the Racine and Mississippi Railroad Company; and for five bonds of the town of Rockton, in the state of Illinois, of one thousand dollars each; and a certain real-estate mortgage, specially described in the declaration. The conversion is alleged to have taken place on the thirty-first day of October, 1862. Defendant pleads nul tiel corporation, and also the general issue; and issue is joined upon both pleas.

The bonds of the town of Rockton, and the real-estate mortgage which was sold under a decree of court, need not be considered in this case, the conversion relied upon by the plaintiff being of the thirty-five bonds of the Racine and Mississippi Railroad Company.

It appears from the evidence that these bonds were pledged by the City Bank of Racine to the Phenix Band of Westerly, R. I., to secure the performance of a certain contract between the parties, and the payment of a note given by the City Bank to the Phenix Bank, for the sum of twenty thousand dollars, dated Oct. 1, 1856.

This contract was subsequently modified by a supplemental agreement, dated the third day of October, 1859, extending the payment of the principal sum to the third day of June, 1861, with interest to be paid semi-annually on the first days of October and April in each year. By the terms of the agreement, upon the failure of the City Bank of Racine to perform the conditions of the contract, or to pay the note or interest at maturity, the Phenix Bank had the right, upon giving thirty days' notice to the City Bank, to sell the securities at the Merchants' Exchange in the city of New York, or elsewhere, and credit the proceeds thereof, after the payment of all expenses thereon, to the indebtedness of the City Bank of Racine.

The City Bank of Racine failed, and closed its doors in the fall of 1859. Previous to its failure it had its office and place of business in the city of Racine. After its failure it had no office or place of business, and since that time has not transacted any business as a bank in any public manner.

On the 1st of October, 1859, a draft given to the Phenix Bank for the semi-annual interest due on that day was duly protested, and since that time no payment has been made of principal or interest by the bank.

On the 31st of October, 1862, the defendant, as president and agent of the Phenix Bank, sold the bonds of the Racine and Mississippi Railroad in the city of New York to Richard Irvin & Co., for the sum of $13,948.34, being twenty-five per cent. of the amount due on the bonds and interest coupons to that date.

No notice was given to the City Bank of the time and place of sale. The sale in other respects appears from the evidence in the case to have been made in good faith. The bonds were sold for their full market value at the date of sale. The purchasers of the bonds, representing a large amount of the other outstanding bonds of the road, purchased the balance, and subsequently, by the expenditure of large amounts of their own funds, extended and completed the unfinished and unproductive and insolvent railway which was mortgaged to secure the bonds, and thereby made that available as a security which had comparatively little value before, and thus greatly advanced the value of the bonds. But the evidence entirely fails to show that there was any collusion or unfairness or want of good faith at the time of sale, or that there was any sacrifice of the securities at a rate below their then market value.

The proceeds of the sale were duly credited on the indebtedness of the City Bank of Racine. After applying the proceeds of this sale, and of a subsequent sale made under a decree of court of the other securities, there still remained a large balance due to the Phenix Bank.

No tender has ever been made of payment of the debt, nor any action taken of any kind until after the lapse of many years, and after the additional value had been given to the bonds by the expenditures made by the purchasers.

The claim of the City Bank of Racine was subsequently transferred to Davison. The present action is brought in the name of the bank, for his benefit, against the president of the Phenix Bank. Plaintiff claims that by effecting the transfer and sale of the bonds as agent of the Phenix Bank, without notice to the City Bank of Racine, the defendant was liable for a conversion of the bonds, and for the highest price at which the bonds could have been sold prior to the commencement of the action, and that he is not entitled to offset the claim of the Phenix Bank against the City Bank of Racine.

On the plea of nul tiel corporation, the defendant contends that by the provisions of

the statutes of Wisconsin, in force at the time of the failure of the plaintiff corporation, that corporation, by continuing insolvent for one year after its failure, and by suspending for three years thereafter its ordinary and lawful business as a banking corporation under the laws of Wisconsin, had thereby surrendered its rights and privileges as a corporation before the commencement of this action, and was and is incapable of prosecuting this suit. The provisions relied upon in the statutes of Wisconsin are not now in force, and during their existence do not appear to have ever received any judicial construction by the supreme court of the state of Wisconsin. In the view taken by the court, it becomes unnecessary to decide this question. In the opinion of the court, the defendant cannot be held to have converted the bonds by reason merely of the omission to give notice of the time and place of sale, under the state of facts proved in this case.

The Phenix Bank held the bonds in pledge, with a power to sell in case of failure to perform the contract. There was coupled with the power of sale a condition for the benefit of the pledgor, that the pledgee should give thirty days' notice before the sale. The performance of this condition became impossible by the act of the party for whose benefit it was made. For years before the sale (if the bank had any corporate existence, which is at least doubtful), it certainly had no place where, or acting officers upon whom, notice could have been served.

"It is a rule common to all conditions of obligations, that they be taken to be accomplished when the debtor who is obliged under such condition has prevented its accomplishment. 'Quicunque sub conditione obligatus curaverit ne conditio existeret, nihilominus obligatur.'" 1 Evans, Poth. 212; 2 Evans, Poth. 38; Hotham v. East India Co., 1 Term R. 638.

Mr. Justice Washington, in the case of Williams v. Bank of the United States, 2 Pet. [27 U. S.] 102, states the rule thus: "If a party to a contract, who is entitled to the benefit of a condition upon the performance of which his responsibility is to arise, dispense with, or by any act of his own prevent, the performance, the opposite party is excused from proving a strict compliance with the condition."

The rule is one of general application. Wherever a precedent act is to be performed at a particular time or place, if the precedent act be a notice, and the party to whom the notice should be given has, by his absence, prevented it, if he be absent from the state, and has no known agent to receive it, and has no place of residence or business which reasonable diligence could discover, the law dispenses with the necessity of giving regular notice, and will not permit him to set up the non-performance of the condition as a bar to the liability imposed upon him by the contract.

The question whether the agent who acted merely as agent between the bank and the purchasers in effecting the transfers, and had no possession except as agent without any claim of title, should be held liable for a conversion, is one upon which there was great difference of opinion in the minds of the learned judges in the case of Fowler v. Hollins, L. R. 7 Q. B. 616; but we are not called upon to decide that question in this case, for we are clearly of opinion that the sale of the bonds upon the facts of this case did not constitute a conversion for which the Phenix Bank would have been liable, if the action had been brought directly against the bank.

Judgment for defendant.

CITY BANK OF ST. PAUL (VANDERHOOF v.). See Case No. 16,842.

Case No. 2,742.

In re CITY BANK OF SAVINGS, LOAN & DISCOUNT.

[6 N. B. R. (1873) 71;[1] 4 Chi. Leg. News, 81; 6 West. Jur. 65.]

District Court, D. California.

ASSIGNMENT OF DEBT BY CREDITOR OF INSOLVENT TO DEBTOR OF SAME—OFFSET.

A creditor of an insolvent who has reasonable ground to believe him to be such, can assign his demand to a debtor of the insolvent whose debt is not yet payable, so as to enable the latter to offset the demand so assigned to him against the debt due from him to the insolvent, the latter debt having become due and payable at the time the offset is claimed.

[Cited in Hitchcock v. Rollo, Case No. 6,535; Hovey v. Home Ins. Co., Id. 6,743; Lloyd v. Turner, Id. 8,436; Mattocks v. Lovering, 3 Fed. 213.]

HOFFMAN, District Judge. The question presented on the facts as developed by the evidence taken by the register, is whether a creditor of an insolvent who has reasonable ground to believe him to be such, can assign his demand to a debtor of the insolvent, whose debt is not yet payable, so as to enable the latter to offset the demand so assigned to him against the debt due from him to the insolvent, the latter debt having become due and payable at the time the offset is claimed. The register was of opinion that the debts and credits which it sought to offset against each other were not "mutual" within the meaning of the statute, inasmuch as at the time of the bankruptcy the debt owed by the bank was due and payable, while the debt to it was not.

The question whether a debt payable in futuro could be set off against a debt payable in praesenti was one of the earliest which

[1] [Reprinted from 6 N. B. R. 71, by permission.]

arose under the English bankrupt act. It was decided in the affirmative on the ground that though there might not be debts mutually payable between the parties, there were mutual credits, and that the case came within the equity of the statute. Ex parte Prescot, 1 Atk. 230; Dobson v. Lockhart, 5 Term R. 133; Alsager v. Currie, 12 Mees. & W. 751; Ex parte Wagstaff, 13 Ves. 65; Sheldon v. Rothschild, 8 Taunt. 156; Atkinson v. Elliott, 7 Term R. 378; Robs. Bankr. 265. The same question has received a similar solution in the United States, under both the former and the present bankrupt acts. In Marks v. Barker [Case No. 9,096], it was held by Washington, J., that the acceptor or endorser of a bill of exchange who has paid the bill after the bankruptcy of the drawer, may offset the same against the bankrupt's assignees, the case being one of mutual credits given before the bankruptcy, although the money was not paid until after. In the case of Catlin v. Foster [Id. 2,519], Deady, J., after a careful consideration of the whole subject, held that a party who has acted under a deed of trust declared void, as being contrary to the provisions of the bankrupt act, may set off the value of the services rendered by him under the deed, against the claim of the assignees for property of the bankrupt received by him. In Fort v. McCully, 59 Barb. 87, cited in A. L. Reg., it was held that deposits made with a private banker, subject to the call of the depositor, are not to be deemed due until demand, and, therefore, if the banker transfers the depositor's notes before demand, the latter it seems, cannot enforce a set-off against the holder, either at law or in equity. But that where the banker being insolvent, made a general assignment, including the notes of the depositor whose deposit was not yet due, and directed his assignee to pay his debts in the same order and manner in which the estate of a bankrupt is required to be used and applied for the payment of debts proved and allowed under the provisions of the bankrupt act, the depositor was entitled to his set-off, and the assignee could only recover the balance after deducting the set-off.

These decisions seem not only the unavoidable result of the express terms of the bankrupt act, but necessarily required by considerations of reason and justice. By the nineteenth section, all debts existing, but not payable until a future day, may be proved against the estate (a rebate of interest being made when no interest is payable), and by the twentieth section, mutual debts and credits are required to be set-off against each other whenever the claim sought to be used as a set-off is "in its nature a debt not provable against the estate and has been purchased or transferred after the filing of the petition." A claim, therefore, for a debt provable against the estate, and transferred before the filing of the petition, falls within the very terms of the section. The rule thus established seems indispensable to the attainment of justice. "Natural equity," says Lord Mansfield, in Green v. Farmer, 4 Burrows, 2214–2220, "requires that cross demands should compensate each other by deducting the less sum from the greater, and that the difference only is the sum which can be justly due. But positive law, for the sake of the forms of proceeding and convenience, has said that each must sue and recover separately in separate actions." The civil law followed what Lord Mansfield declares to be the dictate of natural equity. 2 Evans, Poth. 98. And in England and most of the states of the Union, statutes of set-off have been enacted, allowing cross demands to be used as set-offs in specified cases; and even courts of common law have long been in the habit of allowing judgment to be set-off against each other. But even in those where the counter claim cannot be set up as a defence pro tanto to the action, the party holding it can sue and recover judgment upon it. The refusal to allow him to use it as a set-off leaves his right to enforce his demand unimpaired. But when a bankruptcy has occurred, the creditors' right of action is suspended. The whole estate of the debtor is taken possession of by the court, and the holder of an unsecured claim against it is entitled merely to his pro rata share of the assets. It would therefore be the height of injustice to compel a debtor of the bankrupt to pay to the assignee the full amount of his debt, while for a demand of equal or greater amount against the bankrupt he can only receive such dividends as the assets may afford. A similar injustice would be done to the estate of the bankrupt, (if offsets were not allowed,) where the creditor has also become bankrupt. For the estate of the creditor might receive dividends on the debt due him, while it might be insufficient to pay dividends of a like amount on the debts due by him. To avoid these results, liberal and comprehensive provisions for the allowance of offsets have been made in the bankrupt acts of England and America; but their object would be in a great measure defeated, if their operation were restricted to those debts only, which, at the time of the bankruptcy, were not only due but payable. The objection therefore that the debt of the debtor who seeks the benefit of the set-off was not payable until after the filing of the petition, must be overruled.

The second objection urged has more force. It is contended that the transaction was in its nature a fraud upon the bankrupt act; that its object and effect was to hinder or defeat its operation and to evade its provisions, by preventing assets from coming into the hands of the assignee, and by indirectly enabling a creditor to obtain full satisfaction of his demand by selling to a debtor of the bankrupt a claim to be used by him as a set-off. That such may be the effect of this transaction, if this set-off be

allowed, I am not prepared to deny. But I am unable to see what authority this court has to prevent it. By the terms of the act, all mutual debts and credits must be set off against each other, and the balance only allowed or paid subject to two conditions: first, that the claim is in its nature provable against the estate; and second, that it has not been transferred or purchased by the debtor claiming the benefit of it, after the filing of the petition. This latter proviso contains an obvious negative pregnant, and implies a declaration that the claim may be used as a set-off, if acquired even by purchase, at any time before the commencement of the proceedings. Had congress seen fit to prohibit the acquisition of such claims, for the purpose of using them as set-offs by a debtor of a bankrupt who has reasonable cause to believe that the latter is insolvent, it would have been easy so to provide. But there is no such provision. And even if such a limitation upon the right to acquire or use a demand as a set-off had been imposed, it is reasonable to suppose that some period of time would have been fixed after which the transaction could no longer be questioned. By the thirty-fifth section, certain transfers intended to give a preference, or to hinder or delay the operation of the act, or to prevent the property of the bankrupt from coming into the hands of the assignee, are declared void, provided they have been made within four months and six months respectively before the filing of the petition. But if the court should declare in this case the transfer of the demand against the bankrupt void, and unavailable to the debtor as a set-off, for the reason that it would have the effect to give a creditor a preference, and to hinder and defeat the operation of the act, what period of time is it to assign within which the transfer can be avoided? Is it to adopt the period of four months, or six months, or some other arbitrary limitation? That some period of time should be fixed after which transfers analogous to this, and which the act pronounces void cannot be assailed, congress has clearly indicated.

It seems an unavoidable inference that if it had been intended to prohibit transfers like that in the case at bar, or rather to render them unavailable for the object intended, the act would not only have so declared in explicit terms, but a definite period would have been fixed within which its provisions should operate upon them; and that the court in the absence of any such provision, has no right to assume the legislative function by first declaring the transfer ineffectual, and then fixing an arbitrary period, after which it shall be held valid. The bankrupt act, moreover, being a special statute, and to a certain extent in derogation of rights existing at common law, or under state legislation, its provisions ought not to be construed under suggestions of its probable object, policy or spirit, to embrace cases not provided for by its terms. By the law of this state, and I presume of that of the most of the states, the claim set up in this case could be used by the debtor as a set-off in action brought against him by the bank. He who contends that it is made unavailable by the bankrupt act should point to some clear and unmistakable provision to that effect in the act.

It is also to be observed that by the amended insolvent law of Massachusetts, from which the provisions of the bankrupt act are in great part derived, the benefit of offsets acquired under circumstances like those of the case at bar was withheld. Congress, therefore, in omitting to incorporate that provision into the bankrupt act may justly be deemed to have intentionally declined to adopt it. It would seem, on the contrary, as if it had been designed in this particular to follow the English bankrupt act. The proviso in that act is as follows: "Provided that the party claiming the benefit of the set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed." Under this proviso it was held, in an action brought by the assignees of certain bankers, that a party had a right to set-off notes of such bankers, taken by him after he knew they had stopped payment, but before he knew they had committed an act of bankruptcy. Hawkins v. Whitten, 10 Barn. & C. 217; Dickinson v. Cass, 1 Barn. & Adol. 343. And the act of bankruptcy must have been that on which the adjudication was founded, or one capable of sustaining it. Ex parte Birkett, 2 Rose, 71; Ex parte Sharp, 3 Mont., D. & D. 490; 8 Jur. 1012; Robs. Bankr. 272. But a debtor of this bankrupt will not be allowed to set-off a debt transferred to him after the bankruptcy, for the debt is to a third person, and the creditor cannot, after the bankruptcy, by a transaction with a third person, vary the relation in which he stood to the bankrupt at the time of the bankruptcy. Dickson v. Evans, 6 Term R. 57; Marsh v. Chambers, 2 Strange, 1234.

The rule established by these cases seems to have been adopted by congress in framing the provisions of the bankrupt act with regard to offsets. A debtor of the bankrupt is allowed to set-off a debt due to him from the bankrupt, provided it has been purchased by or transferred to him before the filing of the petition, i. e. before the bankruptcy. I think that these provisions must receive a similar construction to that given by the English courts to the closely analogous provisions of the English law. The objection is therefore overruled. It is also objected that the transfer of the debt sought to be set-off was not absolute, but conditional on the debtor's being allowed to avail himself of it. But I see no ground for this suggestion in the evidence. The claim of the depositor seems to have been regularly and formally

assigned to the debtor of the bankrupt, and the latter appears to be the legal owner and holder of it. My opinion is that the offset claimed should be allowed.

CITY FIRE INS. CO. (SEMMES v.). See Case No. 12,651.

CITY INS. CO. (ROTH v.). See Case No. 12,084.

CITY INS. CO. (TROTT v.). See Case No. 14,189.

Case No. 2,743.

CITY NAT. BANK v. PADUCAH.

[2 Flip. 61;[1] 5 Cent. Law J. 347; 1 Thomp. Nat. Bank Cas. 300.]

Circuit Court, D. Kentucky. June 1, 1877.

TAXATION OF SHARES OF NATIONAL BANK ENJOINED — BANK A PROPER PARTY, WHEN — GROUNDS OF INJUNCTION IN SUCH CASES—RATE OF TAXATION OF NATIONAL BANK SHARES—DIFFERENCE OF TAXATION—RATES — DOUBLE TAXATION.

1. To a bill in equity a bank is a proper party complainant when it is sought to enjoin the collection of a tax upon its shares assessed against its stockholders, if it appear that the bank would be subjected to a multiplicity of suits and its business be interfered with, its stock be depreciated and its credit impaired.

2. An injunction may be had to stay the collection of a tax on personal property, if the enforcement of the tax would lead to a multiplicity of suits, or where the law authorizing the tax is invalid.

3. Where different rates of taxation are imposed under the laws of a state or municipal government upon different classes of moneyed capital, it is not lawful to tax the shares of national banks at the highest rate imposed upon any class, regardless of the proportion which that class bears to other classes; nor is it confined to the lowest rate upon any class. And where different rates of taxation are imposed upon different classes of moneyed capital the rate of taxation on national bank shares should not exceed the rate imposed upon shares in state banks.

4. The banking capital of Kentucky paid only fifty cents per share as a tax. One of the state banks was located in Paducah whose capital exceeded that of all the national banks there: *Held*, that an ordinance which imposed a tax of $1.05 per share nominally on all banks, but, from the payment of which the state banks had been adjudged exempt, was an unlawful discrimination against the national bank, and invalid.

5. Where other moneyed capital was also taxed $1.05, but a reduction of the whole amount of the owner's indebtedness was to be made before the assessment, and no such deduction was allowed where the capital consisted of national bank shares, the tax upon such shares was declared invalid.

6. It was further *held* that as the value of the real estate held by the bank was not deducted, it was subjected to double taxation, and the tax was invalid.

Bill filed against the city and tax collector of Paducah to enjoin the collection of a tax upon national bank shares. The legislature in 1867 passed an act to tax the shares of national banks, but provided that the same should not exceed that upon state bank shares. The amount so assessed under the state law was fifty cents per share. This amount complainant had paid for years to the state on its shares.

The city of Paducah in 1871 levied a tax of $1.05 on all bank shares. This was under the provisions of an ordinance passed by its common council, deriving its authority from the amended charter. The tax applied to state as well as national banks, but the courts of Kentucky decided that as to the state banks the tax was invalid. This tax was assessed for the year 1875, and the books were in the collector's hands when this bill was filed.

C. S. Marshall, L. D. Husbands, J. W. Bloomfield, and Henry Burnett, for complainant.

J. Q. A. King, J. C. Gilbert, James Campbell, Jr., W. D. Greer, and E. W. Bagby, for defendants.

BROWN, Circuit Justice. Upon the threshold of this case, we are confronted with the objection that, inasmuch as the tax in question is laid upon the individual shareholders, the bill cannot be maintained in the name of the bank; that the suit is one which concerns the stockholders only, and that they are the only proper parties complainant. Though this question has been raised before the supreme court several times, it has never been directly passed upon. In Dows v. City of Chicago, 11 Wall. [78 U. S.] 108, the bill was filed by a stockholder simply upon the ground of the illegality of the tax. The bank itself filed a cross-bill, also alleging the illegality of the tax assessed on various grounds; and averring that if the share were permitted to be sold, irreparable injury would not only be done the shareholders, but also to the bank, which would be thereby subjected to great loss of standing, and other injury, for the redress of which the law afforded no remedy; and that such also would be the result if the bank paid the taxes, and was subject to suits by each of the shareholders by reason of so doing; and that in either event a multiplicity of suits would be rendered necessary to adjust the rights of the parties. A demurrer was interposed to both bills, and both were dismissed; the original bill because it was based solely upon the ground that the tax was illegal, and the cross-bill because it must share the fate of the original. The court intimated, however, that if the cross-bill had been an original bill, with like averment, it might have been sustained, to avoid a multiplicity of suits. The question appears to have been fully argued in Tappan v. Merchants' Nat. Bank, 19 Wall. [86 U. S.] 490, under an allegation in the bill similar to the one under consideration, and to have been ruled by the circuit court of northern Illinois in favor of

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the jurisdiction. Union Nat. Bank v. Chicago [Case No. 14,374]. In the supreme court, the case went off on another point, and the court expressly declined to pass upon this question. The only case I have found in which the jurisdiction was denied is that of the First Nat. Bank of Hannibal v. Meredith, 44 Mo. 500, where, notwithstanding the taxes were assessed against the bank and sought to be collected by seizing and selling all the shares comprising the capital stock, the court declined to interfere on the ground that an injunction to restrain the collection of the tax was not the proper remedy, unless the sale of the property was accompanied by irreparable damage. Incidentally, the court remarked, that the plaintiff had no equity, for the reason that its property was not in jeopardy; that the bank, as a corporation, would lose nothing if the shares of its stockholders were sold, and that its shareholders, if any one, were entitled to relief. The point, however, does not seem to have been maturely considered, and, indeed, it is doubtful whether the petition in that case, charging as it did, not an impending multiplicity of suits, but that the sale of the shares, would greatly damage the bank, by impairing its credit and stability, and injuring the owners of the stock, by casting a cloud over the title and destroying its convertibility, made out a case for relief.

The bill under consideration alleges, and the evidence meets, substantially, the averment, that the city is threatening to sue the bank and each of its stockholders, in separate suits, and will, unless restrained, sue out attachments garnishing the bank and attaching the stock of the shareholders, involving the plaintiff in a great many petty suits; breaking down the business of the bank, depreciating its stock, bringing endless confusion on the ownership of the same, injuring the credit of the bank, putting a cloud upon the same, and doing it an irreparable injury. That if the bank pays these taxes, the stockholders will sue it, and in either event, a multiplicity of suits will result. Upon the whole, I think the bank is so far the trustee of the stockholders, and the custodian of the dividends that it is entitled to maintain the bill. It might be subjected to great annoyance by stockholders, who denied the legality of the tax, and gave the bank notice that it would pay it at the peril of being sued by them. It is certainly no hardship to permit the whole question to be litigated in a single action.

We assume in this connection that all the stockholders in this bank, each having the same ground for relief, and the same defense being applicable to all, might have united in a single bill without multifariousness. Cooley, Tax'n, 545. This being so, we see no objection to the bank maintaining a like bill as trustee for the entire body of stockholders. We should feel inclined to go to the limit of the law in sustaining a practice so convenient, and, so far as we can see, so unobjectionable.

It is also insisted that a remedy by injunction cannot be invoked in this case. While it is freely conceded that a court of equity has no general power to restrain the collection of taxes for any irregularity of assessment, or for overvaluation or unjust discrimination, and that to sustain a bill the case must be brought within some acknowledged head of equity jurisdiction, we think this exigency is met in either of the two following cases:

1. Where the enforcement of the tax would lead to a multiplicity of suits; or

2. Where the law authorizing the tax is itself invalid.

Upon the first ground the interference of a court of equity was held proper in Heywood v. City of Buffalo, 14 N. Y. 534, and in Dows v. City of Chicago, 11 Wall. [78 U. S.] 108, 111. The opinion in that case received the sanction of the supreme court of the United States. The second ground of interference was also recognized by the supreme court in the same case, approving Cook Co. v. Chicago, B. & Q. R. Co., 35 Ill. 465. In the case of Chicago, B. & Q. R. Co. v. Frary, 22 Ill. 34, speaking of exceptions to the general rule, that a court of equity will not interfere, it is observed, "Those exceptions are confined almost, if not entirely, to cases where the tax is unauthorized, or it is assessed upon property which is not subject to the tax. The case of Illinois Cent. R. Co. v. McLean Co., 17 Ill. 291, fell within the latter exception. The same rule is practically affirmed in Munson v. Minor, 22 Ill. 601, and Center & Warren Gravel Road Co. v. Black, 32 Ind. 471. In Warden v. Board of Sup'rs, 14 Wis. 618, an exception is mentioned of objections which go to the very groundwork of the tax assessed, so as to affect materially its principle and to show it must necessarily be illegal. "Where it appears that the established principle of taxation has been violated, and that actual injustice will ensue, or that the tax is levied for an unauthorized purpose, of course equity will interfere in proper cases, to prevent the wrong." See High, Inj. 195–200. Both of the reasons above given for the exercise of equity jurisdiction, are apparent in this case, and we think the complainant has not mischosen its remedy. While in a case of over-valuation, or unjust discrimination an appeal to the supervising officers might correct the error, they would have no power in a case like this to question the validity of the ordinance by virtue of which the tax was assessed.

Coming now to the vital point in this case, viz.: The validity of the legislation by which the tax in question was imposed, we find the general proposition firmly established, that banks organized under acts of congress are regarded as fiscal agents of the government and exempt from taxation, except as

congress may specially authorize it. McCulloch v. Maryland, 4 Wheat. [17 U. S.] 416; Weston v. City of Charleston, 2 Pet. [27 U. S.] 448; Farmers' Bank v. Dearing, 91 U. S. 34.

In the organization of national banks, congress has given a qualified authority for state taxation in the following section of the Revised Statutes:

Sec. 5219. "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations, located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state; and that the shares of any national banking association, owned by nonresidents of any state shall be taxed in the city or town where the bank is located and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county or municipal taxes to the same extent, according to its value, as other real property is taxed."

While the section in question would not be open to construction if the entire moneyed capital of the state, in the hands of individuals, were taxed at a uniform rate, the interpretation to be put upon it, where different rates of taxation are imposed upon different classes of moneyed capital, is not free from doubt. Has the state a right to tax the shares of national banks at the highest rate imposed upon any class of moneyed capital, regardless of the proportion which that class bears to other classes? On the other hand, is it confined to the lowest rate imposed upon any class of moneyed capital, with like disregard of the relative amount of the different classes? The last question is answered directly, in the case of Hepburn v. School Directors, 23 Wall. [90 U. S.] 480, in which it was proved that mortgages, judgments, recognizances and moneys owing upon articles of agreement for the sale of real estate were exempt from taxation in a certain district, except for state purposes. This was held a partial exemption, and it is said it cannot be the intention of congress to exempt bank shares from taxation, because some moneyed capital was exempt. Suppose, however, there were in a certain district a very small amount of moneyed capital of one species and a very large amount of another; that the former was heavily taxed and the latter exempt altogether, would the municipality be authorized to tax the shares of national banks at the rate imposed upon the former? Suppose, for example, that state banks, exempted from taxation, absorbed three-fourths of the "other moneyed capital" of a certain city, and the remaining one-fourth was heavily taxed, would it not be not only an unjust discrimination but a mere evasion, to tax the shares of national banks at the rate imposed upon the taxed quarter? These questions have never been definitely settled, but bearing in mind that the obvious intention of congress was to permit taxation, but to inhibit unjust discrimination, it would seem the answer would be easy. I regard the true construction to be this: That when by local legislation different rates are prescribed for different classes of moneyed capital, the rate imposed upon shares in national banks should approximate as closely as may be to the rate imposed upon other moneyed capital of the same or similar class, viz., shares of state banks. While this rule might be subject to qualifications in localities where the capital of state banks bore a very small proportion to other moneyed capital, and the exemption was intended as a bounty, I think it furnishes, as a general rule, a safe guide to the validity of the tax.

It is urged, however, that the course of legislation upon this subject repels the inference here drawn from the language of the section, and shows, affirmatively, that congress intended to permit the states to discriminate in favor of their own banks, by repealing a proviso inhibiting such discrimination, originally annexed to the section in question. The 41st section of the original act of 1864 (13 Stat. 112) provides that "nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate from being included in the valuation of personal property of said person or corporation, in the assessment of taxes imposed by or under state authority, at the place where such bank is located, and not elsewhere; but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state: provided, that the tax so imposed under the laws of any state, upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the state where such association is located: provided, also, that nothing in this act shall exempt the real estate of associations from either state, county or municipal taxes, to the same extent, according to its value, as other real estate is taxed." In 1868 a short act was passed (15 Stat. 34) not amending, but explanatory of the 41st section, entitled, "An act in relation to taxing shares in national banks." The language is as follows: "That the words 'place where such bank is located, and not elsewhere,' in section 41, etc., shall be construed and held to mean the state within which the bank is located, and the legislature of each state may determine and direct the manner and place

of taxing all the shares of national banks located within said state, subject to the restriction that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state: and provided always, that the shares of any national bank owned by non-residents of any state, shall be taxed in the city or town where said bank is located, and not elsewhere." The intent of congress was manifest. A difference of opinion had arisen with regard to the meaning of the words "place where the bank is located," and in some states the assessing officers were taxing the shares in the town or city where the bank was located, notwithstanding that the owner lived in a different town or city in the same state. To define the meaning of these words was the sole object of the act of 1868. This is evident, not only from the language of the act itself, but is an actual fact—(though possibly it is not a legitimate argument here)—as appears from the remarks of the chairman of the committee which reported the bill. See Cong. Globe, 2d Sess., 40th Cong. p. 921. The two provisions in the original act were neither of them alluded to in the act of 1868, although out of abundant caution the words "the taxation shall not be at a greater rate than is assessed upon other moneyed capital" were repeated, and an entirely new proviso added, that the shares of non-residents should be taxed in the city where the bank was located. There is certainly no express repeal of the two provisos in the original act, and nothing from which an implication of repeal can arise. Were it not for the Revised Statutes, I should hold both the provisos in the act of 1864 to be still in force. I am aware that in the case of Lyonberger v. Rouse, 9 Wall. [76 U. S.] 468, Mr. Justice Davis indicates an opinion that under the act of 1868 the power of state taxation was subject only to the restriction that "the taxation shall not be at a greater rate than is assessed upon other moneyed capital;" but the point does not seem to have been argued, and was unnecessary to the decision of the case. In the revision, the second proviso, that the real estate of the bank should remain subject to taxation, is retained; while the first, limiting the tax expressly to the rate imposed upon the shares of state banks, was omitted. If there were anything in the act of 1868 which could be construed as a repeal of the first proviso, I see no reason why it should not operate also as a repeal of the second; but, as observed before, I think the two acts should have been construed harmoniously, and the restriction in the act of 1868 should not have been regarded as exclusive as those in the former act, while the omission of the first proviso in the Revised Statutes undoubtedly operates, under section 5596, as a repeal of such proviso; yet considering the manner in which the repeal was affected, I think no intent can be inferred on the part of congress, thereby affirmatively to permit states to subject the shares of national banks to a greater rate of taxation than they impose upon state banks, if any such intent could ever arise from the repeal of a prohibitory clause. So far as the question arising in this case is concerned, section 5219 should be construed precisely as if no prior legislation on the same subject had been had.

The ordinance of Paducah nominally imposed a tax of $1.05 upon all banks within its limits, state as well as national, but as there is but one state bank in the city, viz., the Commercial Bank, which is exempt from taxation beyond fifty cents per share, and a possible tax of fifty cents on each hundred dollars of its contingent fund, which seems never to have been collected, the tax is really applicable only to the three national banks, the aggregate capital of which is less than the capital of the Commercial Bank. It is true an attempt was made to assess the same tax upon the Commercial Bank, but an injunction against its collection appears to have been granted and perpetuated by the state court. I feel authorized then, to treat it as exempt from this tax. That the Commercial Bank is not exceptionally favored in this particular, is shown by the certificate of the auditor of public accounts of the state, which is in evidence and exhibits a complete list of all banks doing business under the laws of Kentucky. They are fifty-three in number, having an aggregate capital of $12,473,641.50, and each pays the state a tax of fifty cents on every hundred dollars of its capital, in lieu of all other taxes, though there are slight variations in the different charters. If there are any state banks, the taxation of which is not regulated by their charters, they fall within the general provision of chapter 92, article 2, section 1, "on bank stock, or stock in any moneyed corporation of loan or discount, fifty cents on each share thereof, equal to one hundred dollars." The result is the same in either case, a few apparent exceptions being set forth in the answer; but practically the entire banking capital of the state is subject to a tax of fifty cents per share on one hundred dollars, in lieu of all other taxes. If the city of Paducah may tax national banks at $1.05 per share for the year 1875, it may increase the tax at any time to $2.50, the amount authorized by the legislature, and to as much greater an amount as the legislature may hereafter see fit to authorize. It was conceded upon the argument that the tax for 1877 had been increased to $1.40. Indeed, the legislature may authorize like taxation by every municipality in the state, while the state banks under their special charter will escape the burden altogether. Certainly here is a large discrimination in favor of state banks. I am not unmindful in this connection of the case of Lyonberger v. Rouse, above cited, nor of the case of Hepburn v.

School Directors, 23 Wall. [90 U. S.] 480, in which it was held that the exemption of small amounts of moneyed capital, in particular cases, would not invalidate the tax, if the great body of moneyed capital was subjected to it. In both these cases, however, the amount exempted was small in proportion to the aggregate amount of moneyed capital, and the great mass of moneyed property was subjected to the same tax levied upon the shares of national banks. It is true that the fifty-three state banks in Kentucky are not chartered by general law, but by special acts in each case; but this seems to me to make no difference. The fact remains that practically the entire banking capital of the state pays a tax of fifty cents in lieu of all other taxes, even upon its real estate. The law will look, not at the manner in which the tax is imposed, but at the result of the system. A like answer may be made to the argument that many of these state charters have expired, and that in renewing them the power to increase the taxation is reserved. This power never seems to have been exercised.

It is insisted, however, that although the legislation in question may discriminate in favor of state banks, there is no discrimination against national banks, inasmuch as "all other moneyed capital, in the hands of individuals," except shares in state banks, pays the same tax. Under the general laws of Kentucky (and the charter of Paducah adopts the same rule of assessment) property subject to taxation is listed in five classes:

1. Real estate; 2, horses, mules and the like; 3, cattle; 4, watches, plate, clocks, pianos, vehicles and harnesses; 5, "the assessor after having taken the lists of all property required to be taken listed as above, shall require each person on oath to fix the amount he or she is worth from all other sources on the day to which said list relates, after taking out his or her indebtedness from said amount; and the said assessor shall take from the said amount the sum of one hundred dollars, and list the balance for taxation." This section includes all property not exempt or previously mentioned, such as spirituous liquors, the produce of mines, farms, forests, manufactures, notes, accounts, bonds, bills of exchange and choses in action, debts and demands of every kind, but does not include bank stock. The whole amount of this fifth class, in which "other moneyed capital" is included, in the city of Paducah, is shown by the assessor's books to be in all $303,865. From this must be deducted all which is not moneyed capital. The residue, consisting of money on deposit, notes, bonds, mortgages, judgments and other choses in action, is the only "other moneyed capital," and the amount of this it is impossible to ascertain, as it is nowhere listed or taxed as such. A liberal estimate would probably not place it over $200,000. Upon this the tax of $1.05 is imposed, subject, however, to a deduction of all the indebtedness of the tax-payer. If, then, the property of the tax-payer consists of national bank stocks, purchased by him and for which he has given his note for the full amount, he pays, notwithstanding, the tax of $1.05 per share; but if his property consists of any other moneyed capital, and his debts are equal to the value of the capital, he pays nothing. It is true, exact uniformity can never be attained, but the law requires at least an approximation to it, else the proviso in the Revised Statutes is useless. While the tax is legal, if laid at the same "rate" as other moneyed capital is taxed, (and it may be said to be uniform if the rate is uniform,) yet uniformity of rate presupposes uniformity of valuation. If, for instance, state bank stocks were appraised at their par value and national bank stocks at their cash value, there would be no real uniformity of rates, though the percentage might be the same in both cases, since the cash value might be half or double the par value. This principle is recognized in Railroad Tax Cases, 92 U. S. 611, where the tax was sustained upon the ground that the rate imposed on railroad property was no greater than that upon other property, and the valuation was assessed upon the same principle which was applied to the property of individuals. Although by the term "moneyed capital" in section 2519, is meant taxable moneyed capital, yet this must be understood only as distinguishing a class of capital which is taxable from another, which, from motives of public policy, is exempt. All moneyed capital listed under the fifth subdivision of the equalization law belongs to the class of taxable moneyed capital, made the basis of comparison in section 2519; but if in the hands of "A." this capital is taxed, and in the hands of "B." it is not taxed, because he is in debt to its full value, like discrimination should be made if this capital consists of national bank stock, or the tax is not uniform. The legislature may discriminate among different classes of capital without violating the requirements of uniformity, yet as between individuals of the same class the burden must be laid equally. It cannot tax A. and exempt B., if the property is of the same class. Now the act of congress classifies national bank stock with other taxable moneyed capital, and inhibits discrimination against it and in favor of other moneyed capital. If a deduction of debts is allowed in one case, it should be in the other, or there is no uniformity.

Nor is this discrimination likely to work a hardship only in rare instances. Most business men, among whom bank stock is principally owned, are more or less indebted, and the system which permits the debts of one to be deducted and not those of another can hardly be said to be uniform. It is true the deduction of this indebtedness may be prac-

tically impossible so long as the shares of banks are listed under the equalization law above quoted; but this is an argument to show, not that the tax is uniform with that levied upon other moneyed capital; but that the rule announced earlier in this opinion, that the taxation of national banks should conform to that of state banks, is the only one under which taxation can be practically and uniformly imposed.

Another want of uniformity exists in the fact that no provision is made for the deduction of the value of real estate from the aggregate value of the shares. The laws of Ohio, and it is believed of other states, require the appraised value of the real estate to be deducted from the actual total value of the shares before they are listed for taxation. Without such provision, a double tax is paid upon the value of the real estate, from which other moneyed capital is exempt.

I lay no stress upon the deduction of one hundred dollars allowed by the equalization law, or upon the fact that shares owned by colored people may be taxed for the support of common schools in violation of the law applicable to other moneyed capital. These exemptions fall within the rule laid down in Hepburn v. School Directors, supra, and Everitt's Appeal, 71 Pa. St. 216, and do very little to disturb the practical uniformity of the law. De minimis non curat lex.

But from whatever point of view this case is considered, the fact is apparent, that by the ordinance of Paducah a large tax is imposed upon the shares of national banks, from which the banking capital of the state is wholly exempt; and though the percentage is nominally the same, the tax is far more onerous than that laid upon other moneyed capital in the city. For these reasons, it seems to me the legislation is in conflict with the act of congress, and therefore invalid.

A decree will be entered perpetuating the injunction.

CITY OF.

[Note. Cases cited under this title will be found arranged alphabetically under the names of the cities; e. g. "City of Brownsville v. Cavazos. See Brownsville v. Cavazos."]

Case No. 2,744.

The CITY OF BALTIMORE.

[5 Ben. 474;[1] 5 Amer. Law T. 25.]

District Court, S. D. New York. Jan., 1872.

MARINE TORT—RUNNING OVER A SEINE—NEGLIGENCE.

1. A steamship, coming into New York, in charge of a pilot, ran over a seine, in which had been inclosed a quantity of fish which are caught for the manufacture of fish oil and guano. A libel was filed against her, to recover damages: *Held*, that, inasmuch as it appeared that the steamship was in a regular course of navigation, and that the seine was in such a part of the channel that, if the steamship had deviated to go around it, she would have been in danger of grounding, the seine was an obstruction to navigation;

2. As the seine was put in the way while the ship was in sight, coming in, and as no negligence was shown on the part of the ship, the libel must be dismissed.

In admiralty.

Smith & Cole, for libellants.

J. W. Gerard, Jr., for claimants.

BLATCHFORD, District Judge. The libel alleges, that, on the 21st of October, 1869, the libellants were the owners of a vessel, fitted up as a manufactory of fish oil and guano, at Sandy Hook, and employed constantly in said business about forty-five laborers, and were also the owners of a large seine, employed by them, in taking the fish used in the factory; that, on that day, while the laborers were employed with the seine in the ocean, opposite Sandy Hook, and after they had secured a large number of fish in the seine, and were taking them out, the steamship City of Baltimore, negligently and wilfully and wantonly, came upon them, ran over the seine, tore it in pieces and let out the fish; that this occurred in the day time, and on the open sea; that the seine was in no channel where it was necessary for the steamship to go; that there was no negligence on the part of the laborers; that the damage to the seine was $200, the number of fish secured at the time, and thus lost, was 50,000, and their value $300, and there was a further loss of $500, in the suspension of the libellants' business, while the seine was being mended.

The answer avers, that the steamship was at the time completing a voyage from Liverpool to New York, and pursuing the regular and ordinary channel from Sandy Hook to the city of New York, in charge of a duly licensed pilot, and, if she came in contact with the seine, it was owing to its being in the channel, in an unlawful and improper place, and any loss occasioned to the libellants proceeded from negligence on the part of their laborers, in placing, anchoring or hauling the seine.

The burden of proof is on the libellants, to make out the negligence alleged. I am not satisfied that they have done so. On the evidence, it is not established that the ship could have gone further to the westward than she did, without danger to herself. She drew eighteen feet of water, and was in a narrow channel, where, with the tide running, she was obliged to keep under headway. Under the circumstances, the seine was an obstruction to navigation, if the ship, in deviating to avoid it, would have been in danger of grounding. The weight of the evidence tends to this conclusion.

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

Besides, the seine was put in the way while the ship was in sight, coming in. She was pursuing her regular course of navigation, and I do not think any negligence on her part is established. The libel is dismissed, with costs.

Case No. 2,745.

The CITY OF BRUSSELS.

[6 Ben. 370.][1]

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

NEGLIGENCE—DEATH OF INFANT PASSENGER.

A child, which was a passenger on a steamship from Liverpool to New York, was poisoned on the passage, and died, as was alleged, in consequence of negligence on the part of the officers of the ship. The father, having been appointed administrator of the child, filed a libel against the vessel to recover damages, to which libel exceptions were filed by the claimants of the vessel: *Held*, that the cause of action arose on contract, and survived to the administrator, and might be sued for in rem.

[Cited in The Charles Morgan, Case No. 2,618; Hollyday v. The David Reeves, Id. 6,625; The Columbia, 27 Fed. 720; The Harrisburg, 119 U. S. 207, 7 Sup. Ct. 143.]

This was a libel by John Ryall, administrator, &c., of John Ryall, Jr., alleging, that, in 1871, John Ryall, Jr., who was a child of five years of age, took passage on the steamship City of Brussels, with his mother, at Liverpool, to be carried to New York, for a good consideration, that, while on the voyage, the child was poisoned by carelessness on the part of the officers of the vessel, and died on board, and that the libellant had been appointed administrator; and it claimed damages against the steamer. The claimants excepted to the libel.

Salter & Cowing, for libellant.
Platt, Gerard & Buckley, for claimants.

BLATCHFORD, District Judge. I think that the libel is one for breach of contract, and that the cause of action survived to the administrator, and may be sued for in rem, in like manner as if the deceased had sustained an injury short of death, through the negligence of those in charge of the vessel, and in breach of the contract of carriage, and had sued in rem therefor. Chamberlain v. Chandler [Case No. 2,575]; Crapo v. Allen [Id. 3,360]; The New World v. King, 16 How. [57 U. S.] 469; The Washington, 9 Wall. [76 U. S.] 513; The Aberfoyle [Case No. 17]; The Pacific [Id. 10,643]. The breach is alleged to have occurred during the running of the contract, and before the end of the voyage. The exceptions to the libel are disallowed.

CITY OF DUBLIN, The (ROWE v.). See Case No. 12,094.

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

Case No. 2,746.

The CITY OF FREMONT.

[2 Biss. 415;[1] 13 Int. Rev. Rec. 149; 3 Chi. Leg. News, 233.]

District Court, E. D. Wisconsin. Jan. Term, 1871.

SEAMEN'S WAGES—MASTER'S DUTY AS TO SHIPPING ARTICLES.

1. A seaman on a lake vessel, having shipped under a verbal agreement without signing shipping articles, may leave the vessel at any time.

[Cited in Graham v. The Exporter, Case No. 5,667; The Pacific, 23 Fed. 155.]

2. If he draws the wages promised, not demanding more, he cannot recover a larger amount under the act of July 20, 1840 [5 Stat. 394].

3. Duty of master as to shipping articles stated.

In admiralty. This was a libel by Robert Brittain, a seaman, for additional wages. The vessel libelled was employed in trade between the port of Sarnia, in Canada, and the city of Chicago, in connection with the Grand Trunk Railroad. On the twenty-fourth day of May, 1870, at Chicago, the libellant shipped on board as first mate on verbal contract with the master, at seventy dollars per month, no shipping articles being signed. Libellant continued in service on board, drawing his wages from time to time as he wanted money, until the thirty-first day of October following, when he left the vessel at Milwaukee, having drawn his full wages at the rate of seventy dollars per month, and not making demand for any larger sum. The vessel was on a trip from Sarnia to Chicago when libellant left, having notice to return on board, as the vessel was ready to put out; he declined or neglected to appear, and the vessel had to be navigated to Chicago without a first mate, where the master procured another in his place.

Emmons & Hamilton, for libellant.
James MacAlister, for respondent.

MILLER, District Judge. It is contended on behalf of the libellant that not having signed shipping articles in a printed or written contract, he was at liberty under the law to leave the vessel at pleasure, and demand the highest rate of wages.

By the act for the government and regulation of seamen in the merchant service, approved July 20, 1790 (1 Stat. 131), every master of "any ship or vessel of the burthen of fifty tons or upwards, bound from a port in one state to a port in any other than an adjoining state, shall, before he proceed on such voyage, make an agreement in writing or in print with every seaman or mariner on board such ship or vessel," etc. By the tenth article of the act approved July 20, 1840 (5 Stat. 394), in addition to the several acts regulating the shipment and discharge of seamen, "All

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shipments of seamen made contrary to the provisions of this and other acts of congress shall be void, and any seaman so shipped may leave the service at any time and demand the highest rate of wages paid to any seaman shipped for the voyage, or the sum agreed to be given him at his shipment." The general scope of this act relates to vessels bound on a foreign voyage, but the tenth article above quoted extends to and includes all shipments of seamen. Even if these statutory provisions did not embrace seamen shipped on vessels employed in the lake trade, they should be enforced by the courts as correct principles of maritime law. This vessel, at the time of the shipment and service of the libellant, was employed in trade with a foreign port. Libellant had drawn his full wages promised him at the time of his shipment, and left at his pleasure. He took advantage of the right extended to him under the act of 1840. Before leaving the service he had not demanded or given notice that he claimed a larger amount. Libellant had a lawful right to leave the service at Milwaukee, and having received the full wages up to that time, as promised him at his shipment, he should not maintain this libel for a larger amount, if he had proven himself entitled to it, which he did not. If the master was put to inconvenience by libellant's leaving the service, it was his own fault in not complying with the law. It is the duty of every master navigating the lakes to have his seamen sign shipping articles, specifying the ports or places to which his vessel trades, and the trip or season for which they are shipped, and the wages to be paid. In cases of such neglect, every legal intendment will be taken against the master and owners. It is not the fault of the seaman that shipping articles are not signed, but of the master.

It does not appear that libellant is legally entitled to any larger amount of wages than he received before leaving the service; and this libel must be dismissed.

Case No. 2,747.

The CITY OF GUATEMALA.

[7 Ben. 521.][1]

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

COLLISION AT SEA—STEAMER AND SCHOONER—FOG—SPEED—DAMAGES.

1. A schooner was sailing about south half west, the wind being about east south-east. The night was foggy. The green light of an approaching steamer was seen about two points on her starboard bow, and the schooner kept on without changing her course till the collision which ensued. The steamer was going between eight and nine knots an hour. The light of the schooner was seen about a quarter of a mile distant, on the steamer's starboard bow. Her engine was stopped and reversed, and, being a propeller, she turned her head to starboard at right angles, and her stem struck the schooner on her starboard side. Two of the schooner's crew, when the vessels were together, jumped aboard the steamer. The schooner also received damage by chafing, while the vessels were together, and the steamer charged negligence upon her, in not adopting proper and speedy measures to free herself: *Held*, that the collision was caused by the too great speed of the steamer in the fog.

[Cited in The City of Panama, Case No. 2,764.

2. The loss of men by the schooner under the circumstances, if crippling her, was chargeable to the steamer, she being in fault for the collision.

3. The steamer was also responsible for any injury caused to the schooner by chafing while the vessels were together.

In admiralty.

R. D. Benedict, for libellant.

E. Pierrepont and H. S. Bennett, for claimants.

BLATCHFORD, District Judge. The libellant, as owner of the schooner Benjamin T. Biggs, files this libel against the steamship City of Guatemala, to recover for the damages sustained by him through a collision which took place between the two vessels on the 16th of May, 1874, shortly after midnight, in a fog, in the Atlantic ocean, about east of Chincoteague. The schooner was bound from New York to Newbern, N. C., and was heading about south half west, the wind being about east southeast. The steamer was bound to the northward. The stem of the steamer and the starboard side of the schooner, aft of the after hatch, came together, and the schooner was cut down nearly to the water's edge.

The libel alleges, that when the steamer was first seen, she was about two points on the starboard bow of the schooner, showing her green light, steering about north, and on a course which, had she continued it, would have carried her far to the west of the schooner; that, after sailing on that course till she was about five points on the starboard bow of the schooner, she suddenly changed her course and headed to the east, showing her red light and hiding her green one, and headed directly across the course of the schooner, and continued on that course till she struck the schooner; that the schooner did not change her course; and that the collision was caused solely through the fault and negligence of those on board of and in charge of the steamer, in that, among other things, she had no lookout, and improperly and wrongfully changed her course, and did not stop and back in time to avoid the schooner, and proceeded at too high a rate of speed.

The answer avers, that the steamer was moving backward and directly away from the schooner, and was run into by the schooner; that, at the time of the collision, and for an hour previous thereto, the steamer and the schooner were surrounded by and enveloped in a fog so dense as to render it impossible

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

for lights to be discerned at a greater distance than one quarter of a mile; that, even at that distance, the color of the lights could not be distinguished; that the steamer was constantly sounding steam whistles, and had three lookouts and the master on deck watching; that the schooner's light was discovered by the lookout on the steamer the moment it was possible to distinguish it; that, at that moment, the steamer was moving at between eight and nine knots an hour; that, by reason of the respective courses on which each vessel was then sailing, and the character of the sea, and their close proximity, it was impossible, when the schooner's light was first descried, to divert the steamer's course by the helm, in time to avoid a collision, but the proper orders were instantaneously given to the helmsman, and obeyed by him, and at the same time the master struck the engine bell, and the engines were immediately reversed, and before the contact the steamer had lost her headway, and was going back, and had swung broadside to her previous course; that, from the moment the schooner's light was first visible, or could possibly be seen on board of the steamer, until the moment of collision, was an interval of but two minutes and a half, during which period all that human skill or ability, promptly exercised, could do to avoid a collision, was done on board of the steamer; that the collision might have been avoided by those on board of the schooner with perfect ease, certainty and safety, by luffing, yet they pertinaciously and wrongfully held on, and thereby ran into the steamer; and that the steamer was a propeller, and, at the time of the collision, having reversed her engine and moving backward, unavoidably and naturally swung broadside to her previous course, and necessarily showed her red light to the schooner, which approached her without changing her course, or any means being used to change it, while the steamer, having lost her headway, could not be controlled by her helm.

The answer, reduced to a few words, makes out this case: There was a fog so dense that lights could not be seen at a greater distance than a quarter of a mile. The steamer was going at a speed of between eight and nine knots an hour. She discovered the schooner's light as soon as it was possible to do so, but too late to enable her, by the use of her helm or of her reversing power, to avoid the collision. The interval between seeing the schooner's light and the collision was two and a half minutes. The steamer, by reversing, turned herself at right angles to her former course, and, having also lost her headway, would not mind her helm. The schooner did not change her course, and failed to luff, and ran into the steamer, and is responsible for the collision.

The facts set up in the answer, so far from exonerating the steamer, establish her fault and acquit the schooner. The steamer was bound to avoid the schooner, and the schooner was bound to keep her course. The only fault charged in the answer against the schooner, as causing the collision, is, that the schooner did keep her course and did not luff. The schooner was sailing as close to the wind as she could. She had an adequate crew and a proper lookout and proper lights. The steamer made the schooner's green light nearly ahead, and immediately stopped and backed. The schooner made the steamer's green light a little on the starboard bow. The schooner held her course. The green light of the steamer got to be more on the starboard bow of the schooner. Then the steamer's green light was shut in and her red light came in view, and she struck the schooner. This accords with the evidence showing that, when the steamer backs, the effect is to throw her head to starboard, so that, on this occasion, she turned, by backing, six points to starboard.

Two of the schooner's crew jumped on board of the steamer while the vessels were afoul. This was because there was good reason to fear the schooner would sink. Any loss of men, in this way, if crippling the force on the schooner and rendering her less manageable after the collision, cannot be charged as a fault against the schooner, but is something for which the steamer, if in fault for the collision, is responsible. So, too, any injury sustained by the schooner, while the vessels were afoul, by the chafing of the two together, is injury for which the steamer is responsible.

It is evident that this collision was caused by the too great speed of the steamer in the fog. She was sailing at a rate of speed such that, because of the difficulty of seeing lights in the fog, she could not avoid this collision, although, at the moment when she saw the danger, she took all possible measures to avoid it. This was a fault, especially in a locality so frequented by vessels. The Pennsylvania, 19 Wall. [86 U. S.] 125.

There must be a decree for the libellant, with costs, with a reference to a commissioner to ascertain the damages sustained by the libellant.

Case No. 2,748.

The CITY OF HARTFORD.

[4 Ben. 568.] [1]

District Court, S. D. New York. Feb., 1871.[2]

COLLISION IN EAST RIVER — STEAMBOAT AND TUG CROSSING — WHISTLES.

1. A collision occurred in daylight in the East river, between a steamboat and a schooner, which, with another schooner, was in tow alongside of a tug, by which the schooner was sunk. The tow was bound up the East river, and the steamboat was bound down, and their courses were crossing, the tug having the steamboat on her starboard side. When the steamboat saw

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

[2] [Modified in Case No. 2,752.]

the tug, she blew one whistle, and without waiting for a reply, ported her helm, and got a sheer to starboard, but this whistle was not heard on the tug. The tug then blew two whistles, and the steamboat replied to them by also blowing two whistles. Both vessels then starboarded. The tug, seeing that a collision was impending, stopped and reversed, which turned the head of the tow to starboard, and the steamboat, which had also stopped and reversed, struck the port bow of the schooner which was lashed on the port side of the tug. Both vessels were running much nearer the Brooklyn side of the river: *Held*, that, as the vessels were crossing, it was the duty of the steamboat to have kept her course.

2. As the tug had not heard the single whistle of the steamboat, she had the right to give the signal of two whistles, as she did, and was not then called on to stop. When the steamboat heard the two whistles of the tug, there was to her a confusion of signals, calling upon her at once to stop and reverse, unless she were certain that she could, by starboarding, avoid the tug. The tug, on hearing the two answering whistles from the steamboat, had the right to assume that a collision would be avoided by acting in accordance with them.

3. The stopping and backing of the tug was proper, and the steamboat was responsible for the effect which it produced on the tow, because a collision had then become inevitable, by reason of the previous action of the steamboat.

4. The tug was not in fault in not slowing and stopping sooner, but the steamboat was in fault in not slowing and stopping sooner.

5. The position of the vessels near the Brooklyn shore did not contribute to the collision.

6. The steamboat was responsible for the collision, and the tug was not in fault.

In admiralty. These were two libels filed by [Hudson S. Rideout and others and Charles Robinson, respectively] the owners of the schooner Alice S. Oakes and her cargo, against the City of Hartford and the Unit, to recover for the loss of the schooner and her cargo, by a collision with the City of Hartford, in the East river, on the morning of the 27th of March, 1869. The schooner was in tow of the Unit, lashed on her port side, another schooner being lashed on the starboard side of the tug, and was bound up the East river towards Hell Gate, while the steamboat was bound down the river to her berth. The facts sufficiently appear in the opinion of the court.

Joseph H. Choate and James C. Carter, for libellants.

Beebe, Donohue & Cooke, for the Unit.

R. H. Huntley, for the City of Hartford.

BLATCHFORD, District Judge. I have no difficulty, in this case, in holding that the City of Hartford was wholly in fault, and that the Unit was free from fault. When the City of Hartford first saw the Unit and her tows, she saw, or ought to have seen, that the Unit had the City of Hartford on the starboard side, and that, therefore, the Unit was bound to keep out of the way of the City of Hartford, and that the City of Hartford was bound to keep her course. Instead of obeying this rule of navigation, the City of Hartford, on seeing the Unit and her tows, blew one whistle, and, without waiting for a reply, ported her helm, and got a sheer to starboard. It does not appear that this whistle was heard on board of the Unit. The Unit, seeing that she had the City of Hartford on her starboard side, and that their courses were crossing, so as to involve risk of collision, and that it was the duty of the Unit to keep out of the way, blew a signal of two whistles, indicating that she intended to starboard, and pass to the left. She had a right to give this signal. She had heard no signal from the City of Hartford, and could not see that the City of Hartford was porting. There was, to the Unit, no confusion of signals, calling upon her to stop. The City of Hartford heard the signal of two whistles from the Unit, and replied to it by a signal of two whistles, indicating her assent, not only that the Unit and the City of Hartford should both of them starboard, but that there was time and room for the City of Hartford, by their starboarding, to pass safely between the Unit and her tows and the Brooklyn shore. As the City of Hartford had blown one whistle and been answered by a signal of two whistles, there was then to her a confusion of signals, because of which she should have instantly stopped and reversed, unless she were certain she could, by starboarding, avoid a collision. The Unit had on her port hand, when she blew her signal of two whistles, a wide space of river. The City of Hartford had then on her port hand a narrow space of river. If, on receiving that signal, the City of Hartford was not certain that she would, by complying with it, go clear, she should have refused to respond to it by a signal of two whistles, and have responded by some signal showing confusion of signals or danger. Then she would have imposed on the Unit the necessity of desisting from her starboarding, and the further necessity of instantly stopping and reversing. As it was, the City of Hartford understood that the Unit was starboarding, directed the Unit to keep on starboarding, and announced that she herself would starboard, and that she had room and time to starboard and go clear, if the Unit should keep on starboarding. But, whatever starboarding there was on the part of the City of Hartford was ineffectual, either from the sheer to starboard she had previously got by porting, or from the effect of the flood tide on her port bow, or some other cause. The Unit proceeded with her tows, keeping her starboard helm, until she saw that the City of Hartford was likely to collide with her, or with one or the other of her tows, and then she stopped and reversed. The effect of this was to turn her head, and the heads of her tows towards the Brooklyn shore, so that the City of Hartford struck the port bow of the schooner on her port side. But the City of Hartford must be held responsible for this effect. The stopping and reversing was proper. It was certain that the City of Hartford would strike some one

of the vessels. Besides the effect mentioned, another effect was produced by the stopping and reversing of the Unit, and that was, that she got sternway through the water, and lessened the force of the blow, and, perhaps, confined the damage to the sinking of one vessel, instead of the sinking of three. The City of Hartford had no right to maintain so high and dangerous a rate of speed up to so near a point to the Unit and her tows, and, even if the stopping and reversing by the Unit, at the time, were not the most proper manoeuvre, it was one forced upon her, in the jaws of peril, by the fault of the City of Hartford.

Nor do I see that the Unit was in fault in not slowing or stopping and reversing sooner. Receiving the answering signal of two whistles from the City of Hartford, and having a clear space to pass to her own left, she had a right to suppose that the City of Hartford would starboard, and could starboard effectually, and she also had a right to keep on until the necessity arose for her slowing, stopping and reversing. She did stop and reverse as soon as that necessity arose.

The City of Hartford was in gross fault, irrespective of any other question in the case, in not slowing sooner than she did, and in not stopping and reversing sooner than she did. I do not think that the fact that both vessels were running much nearer to the Brooklyn piers than to the New York piers, can, in this case be taken into account, so as to charge either of them with fault in that respect. Their positions in that regard did not contribute to the collision, for each vessel saw the other in abundant season for the collision to have been avoided by proper manoeuvres thereafter.

There must be a decree in each case against the City of Hartford, with costs to the libellants, and a reference to a commissioner to ascertain the damages. The libel in each case must be dismissed, as to the Unit, with costs.

[NOTE. From this decree an appeal was taken to the circuit court, which modified the decree herein, entered a decree against both steamboat and tug, and ordered a division of the damages. See Cases Nos. 2,752, 2,753.

[For a synopsis of the opinion of the supreme court, rendered on a decision affirming the circuit court decree in part and reversing it in part, see Case No. 2,753.]

Case No. 2,749.

The CITY OF HARTFORD.

[7 Ben. 350.][1]

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

COLLISION IN HELL GATE—STEAMER AND SCHOONER—KEEPING COURSE—CHOICE OF COURSES.

1. A steamboat going eastward against an ebb tide, through Hell Gate, at night, as she approached the bend in the channel at Hallett's Point, saw the red light of a schooner coming through the Gate. The wind was about north northwest. The light was seen on the starboard bow of the steamboat. The latter went on and ported her wheel, so as to go around the Point and meet the tide head on. Just before she reached the tide, the schooner, being then about two or three hundred feet from the steamboat, and on the steamboat's port bow, starboarded her helm, and let go her sheet, to turn around the Point into the channel in which the steamboat was. This movement brought the green light of the schooner into view from the steamboat, and shut in her red light, whereupon the engine of the steamboat was stopped, and her helm was put amidships, but the vessels came into collision, the stem of the steamboat striking the starboard side of the schooner aft of the main rigging. *Held*, that, in that difficult and dangerous channel, the steamboat was in fault in not waiting, before turning Hallett's Point, until she knew whether the schooner was intending to turn into the channel in which the steamboat was, or not.

[Cited in The City of Springfield, 26 Fed. 161; The Dasori, 47 Fed. 331.]

2. Although the schooner intended all the time to take the east channel, and took the necessary and proper steps to turn into it, and in that sense kept her course, yet, seeing the steamboat as she did, and knowing that the latter had but one course to take if she kept on, while she herself had the choice of turning into the east channel or taking either one of two other channels, she was in fault in not holding herself up to the wind, and refraining from starboarding and letting her sheet go, until she had gone by the steamboat.

[Cited in The Iron Chief, 53 Fed. 512.]

3. Both vessels were in fault, and the damages must be apportioned.

In admiralty.

W. R. Darling, for libellants.

E. H. Owen, for claimants.

BLATCHFORD, District Judge. On the 2d of May, 1872, at about midnight, the schooner William R. Knapp, owned by the libellants, and loaded with a cargo of sand, collided with the steamboat City of Hartford, off Hallett's Point, in Hell Gate, and she and her cargo were thereby sunk and totally lost. The schooner was proceeding towards New York, and the City of Hartford was on a trip from New York to New Haven. The starboard side of the schooner was struck by the stem of the steamboat. The schooner, just before the collision, had starboarded her helm and let her main sheet run off so as to go around Hallett's Point, and down the east channel, which was the same channel the steamboat was in. The wind was about north northwest, a fresh breeze, and the tide was ebb. The answer alleges, that the schooner improperly and unexpectedly changed her course, and did not have a competent lookout, properly stationed and faithfully attending to his duties; that, if the schooner had continued the course upon which she was heading when first discovered, the steamboat could and would have passed her on her port side, at a safe distance; and that, in so changing her course, the schooner so baffled the navigation of the steamboat, as to prevent her keeping away

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from the schooner, and as to render a collision inevitable.

The steamboat had her proper lights set and burning. She was a large vessel, 270 feet long. She had gone up on the east side of Blackwell's Island. Her master, her pilot and two wheelsmen were in her pilot-house. She had a lookout at her bow. When she had reached a point two or three lengths below Flood Rock, her master and her pilot saw the red light of the schooner bearing about three points on the starboard bow of the steamboat. At that time the steamboat was heading about northeast. The schooner was then some distance to the eastward of Hallett's Point, and below Negro Point. At Flood Rock, the steamboat, as it was necessary and proper for her to do, to go around Hallett's Point, and meet the ebb tide there stem on, ported her wheel, and swung gradually to starboard on a swing which, by the time she met the tide at the Point, would amount to a change of her heading so that she would head east, being a change of four points. Just before the steamboat reached the tide at the Point, and when the two vessels were not more than the length of the steamboat apart, the green light of the schooner came into the view of those in the pilot-house of the steamboat, and immediately afterwards the red light of the schooner went out of their view, and the collision ensued. The green light of the schooner, when it so appeared, appeared a little on the port bow of the steamboat, and the red light of the schooner, when it disappeared, was a little on the port bow of the steamboat. Notwithstanding the swinging of the steamboat to starboard at the time, the green light of the schooner crossed the bow of the steamboat, from her port to her starboard, so that the schooner was struck just aft of her main rigging. As soon as the green light of the schooner came into view, the engine of the steamboat was stopped, and her wheel was let go to midships. She was in a rapid and dangerous tide, the schooner was sailing at the rate of seven miles an hour, and the collision came so soon after the green light of the schooner appeared, that it is quite evident that nothing which the steamboat could have done, after she saw the green light of the schooner, would have avoided the collision.

To those on the schooner, the green and white lights alone of the steamboat were visible, until just before the collision, when the steamboat's red light also came into their view.

The channel at the place of collision is narrow, the tide strong, and the navigation intricate and dangerous. The entire bend around the Point is six points, from northeast to east southeast, or from west northwest to southwest. The tide was favorable for the schooner; and the steamboat, seeing the red light of the schooner a considerable distance above Hallett's Point, when the steamboat was below Flood Rock, could not tell whether the schooner was intending to go through the east channel, the middle channel, or the main ship channel, for the schooner was at a point where she might still have elected to go through either one of the three channels, and she was free to do so. It was the duty of the steamer to avoid the schooner, and it was the duty of the schooner to keep her course, and not to embarrass the movements of the steamboat. It would have been very easy for the steamboat, seeing the red light of the schooner, and uncertain whether the schooner was, or was not, intending to go through the east channel, to stop and reverse, before porting, at Flood Rock, so as, by the aid of the adverse tide, to check her speed, until the movements of the schooner should be developed. In such case, the steamboat being necessarily to the westward, with a view to go, by porting, around Hallett's Point, the schooner, coming down the east channel, would have passed to the eastward of the steamboat. Even if there had been no collision in this case, the steamboat was going on with unabated speed, with the certainty of meeting the coming sailing vessel in the most dangerous part of the strait. I cannot but regard the steamboat as in fault, in not waiting to see which channel the schooner would take.

Was the schooner, also, in fault? Did she keep her course, or did she embarrass the steamboat? In one sense, the schooner kept her course, for she intended, all the time, to go down the east channel, and she took the necessary and proper steps to do so, and she turned into the east channel. But she saw, all the time, that the steamboat, if continuing to move forward, had but one channel to go in, to round Hallett's Point. If the steamboat continued to advance, she must swing around to her own starboard. With the wind north northwest, and the channel from Negro Point to Hallett's Point running about east southeast and north northwest, and the tide as it was, the schooner, before she starboarded and let her sheet run off, must have been going substantially with the tide, without much aid from the wind; and, if not shaking, was hauled very close to the wind; and it ought to have been seen by the schooner, that, if the steamboat should come on, and the schooner should starboard to go down the east channel, the courses of the two vessels would be likely to cross each other, and in such proximity as to involve danger of collision. As it was apparent, therefore, that the steamboat was not in the main ship channel, or in the middle channel, and as the schooner could equally well have gone down either one of those two channels, I think the schooner must be held in fault for not holding herself up to the wind, and refraining from starboarding and letting her sheet go, until she had gone by the steamboat. As it was, she, in fact, crossed the

bows of the steamboat, as the steamboat was moving in the only course, and the only channel, which the steamboat could take. This manoeuvre of the schooner contributed to the collision, and for it the schooner must be held in fault.

A decree will be entered dividing the damages between the two vessels.

[NOTE. A subsequent decree awarded costs to libellants. See Case No. 2,750.]

Case No. 2,750.

The CITY OF HARTFORD.

[7 Ben. 510.] [1]

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

COLLISION—COSTS—APPORTIONMENT OF DAMAGES.

In a collision case, both vessels were held to have been in fault, and an apportionment of the damages was decreed. No cross-libel had been filed, and the libellant recovered half his damages. He now applied for costs: *Held*, that the general rule in this district, in such cases, is that costs will be allowed to the party who recovers.

[Cited in Vanderbilt v. Reynolds, Case No. 16,839; The Hercules, 20 Fed. 205.]

[In admiralty. Libel by the owners of the schooner William R. Knapp against the steamboat City of Hartford for damages caused by collision. There was a decree dividing the damages between the two vessels (Case No. 2,749), and libellants now ask that costs be awarded to them.]

W. R. Darling, for libellants.

E. L. Owen, for claimants.

BLATCHFORD, District Judge. This is a libel for a collision. The court held that both vessels were in fault, and directed the damages to be apportioned. The libellants' damages are fixed at $2,209.89, and, as the claimants' vessel sustained no damage, the libellants are entitled to recover the one-half of the above amount. The libellants ask that they may have costs in the cause.

In Hay v. Le Neve, 2 Shaw, App. Cas. 395, both vessels were held in fault, and the house of lords decreed that, as both vessels were in fault, the loss should be borne equally by both parties, and that each party should pay their own costs. The same rule was followed in The Monarch, 1 W. Rob. Adm. 21. In The Rival [Case No. 11,867], the court held that both vessels were in fault; that the whole damage should be equally divided between them; and that one of the vessels, which the court held to be most in fault, should bear all the costs. But in Lenox v. Winisimmet Co. [Id. 8,248], the same court held both vessels in fault, and divided equally between them the aggregate damage to both, and decreed that each party pay one-half of the costs. In Foster v. The Miranda [Id. 4,977], the loss was equally divided, and costs were allowed to neither party, each being left to pay his own. In The Favorita [Id. 4,694], both vessels were held to be in fault, and the damages were divided. As to costs, the district court says: "The case is one of mutual fault, and although I entertain no doubt as to the propriety, in a proper case, of mitigating the effect of the rule of equal division of loss, in cases of mutual faults, by awarding full costs to either party, I do not consider that the present case called for any deviation from the practice, which is to refuse costs to both parties, when both are equally in fault."

In this district the practice has been to allow costs, in a case of this kind, to the party who recovered, even though the amount he recovered was diminished by the application of the doctrine of apportionment because of mutual fault. I consider this practice to be sustained by the recent decision of the supreme court in the case of The Sapphire, 18 Wall. [85 U. S.] 51. The Euryale sued the Sapphire for a collision, claiming $15,000 damages. There was no cross-libel, nor did the Sapphire set up, in the answer, that she had been damaged. The Euryale had a decree in the district court for $15,000 damages. The circuit court affirmed it. On appeal, the supreme court held that "both parties were in fault, and that the damages ought to be equally divided between them," and directed that a decree should be entered "in conformity with this opinion." The circuit court thereupon entered a decree in favor of the Euryale for $7,500, and for her costs in the district and circuit courts, less the costs of the appeal by the Sapphire to the supreme court. The Sapphire appealed again to the supreme court, alleging, as errors, that no damage to the Sapphire was taken into consideration, and that costs in the courts below were allowed to the Euryale. For the Sapphire it was contended, that, in collision cases, where both parties were in fault, each should pay his own costs. The supreme court held that the only damages which could be divided in that particular case were those sustained by the Euryale. As to the costs the court say: "The appellants further complain that it was erroneous to allow the libellant his costs in the district and circuit courts, deducting therefrom the costs allowed them by this court—i. e., the costs of the reversal of the former decree. We do not perceive, however, in this, any such error as requires our interposition. Costs in admiralty are entirely under the control of the court. They are sometimes, from equitable considerations, denied to the party who recovers his demand, and they are sometimes given to a libellant who fails to recover anything, when he was misled to commence the suit by the act of the other party. Doubtless, they generally follow the decree, but circumstances of equity, of hardship, of oppression, or of negligence, induce

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the court to depart from that rule in a great variety of cases. In the present case, the costs allowed to the libellant were incurred by him in his effort to recover what has been proved to be a just demand, and a denial of them under the circumstances of the case, would, we think, be inequitable."

The libellants must have a decree for their costs.

Case No. 2,751.

The CITY OF HARTFORD.

[10 Ben. 150.] [1]

District Court, E. D. New York. Oct., 1878.

RATE OF WHARFAGE AT BULKHEAD—COSTS.

A steamboat, 272 feet long, occupied a berth at a bulkhead in the city of New York for 28 days. The bulkhead was owned by three parties. B. owned one hundred feet of it, all of which was occupied by the steamboat or by lines which ran from her bow forward to a spile at the corner of the bulkhead. F. owned the hundred feet next, all of which was occupied, and K. owned one hundred and fifty feet next, seventy-five feet of which was occupied. The rate of wharfage which, by the statute of the state of New York, the steamboat would be called on to pay for a single berth was $9.50 a day. B. filed a libel, claiming to recover of her for wharfage $9.50 a day. The owners of the steamboat claimed that he was only entitled to his proportionate share of the $9.50 a day and tendered and paid into court $89.22: *Held*, that the libellant was not entitled to recover $9.50 a day, but only his proportionate share of that sum, viz., 100-275 of it, and without costs.

[Cited in The William H. Brinsfield, 39 Fed. 219.]

In admiralty.

Gale & Chalmers, for libellant.

D. & T. McMahon, for claimant.

BENEDICT, District Judge. This is an action to recover wharfage. The material facts are not in dispute and are as follows: For a period of twenty-eight days in November, 1877, the steamboat City of Hartford occupied a berth at the bulkhead between Bank and Bethune streets, in the North river, while undergoing some repairs.

The rate of wharfage to be paid by vessels using wharves and piers in the cities of New York and Brooklyn, is regulated by a statute of the state of New York, which provides: "It shall be lawful to charge and receive, within the cities of New York and Brooklyn and Long Island City, wharfage and dockage at the following rates, namely: From every vessel that uses or makes fast to any pier, wharf, or bulkhead, within said cities, or makes fast to any vessel lying at such pier, wharf or bulkhead, or to any other vessel lying outside of such vessel, for every day or part of a day, as follows: From every vessel of 200 tons burden and under, two cents per ton, and for every vessel over 200 tons burden, two cents per ton for each of the first 200 tons and one-half of one cent per ton for every additional ton, except canal-boats, etc., * * * but every other vessel making fast to a vessel lying at any pier, wharf or bulkhead, within said cities, or to another vessel lying outside of such vessel, or at anchor within any slip or basin when not receiving or discharging cargo or ballast, one-half the first above rates; and from every vessel or floating structure, other than those above named or used for transportation of freight or passengers, double the first above rates, except that floating grain elevators shall pay one-half the first above rates; and every vessel that shall leave a pier, wharf, bulkhead, slip or basin without first paying the wharfage or dockage due thereon, after being demanded of the owner, consignee, or person in charge of the vessel, shall be liable to pay double the rates established by this act." At the rate fixed by this statute $9.50 per day would be the sum the City of Hartford would be liable to pay for an inside berth.

There were three different persons each of whom owned a portion of the bulkhead at which the steamboat lay. The length of the water-front thus occupied which belonged to Brainard the libellant was 100 feet. The whole of this portion of the bulkhead may properly be considered as having been used by the steamboat, the lines from her bow extending to a spile at the corner of the libellant's portion, for although there was a small space between the bow of the steamboat and the adjoining pier, that space was not only covered by the lines so as to prevent its use by any other vessel, but was also too small to be used by any other craft.

Next south of the libellant's portion of the bulkhead for a distance of 100 feet, one Fagan owned the bulkhead. The steamboat was 272 feet long, and, of course, she covered all of Fagan's portion, so as to prevent its being used as a berth for any other vessel. Lines ran from the steamboat to Fagan's portion as well as to the libellant's portion. Next south of Fagan's portion for the space of 150 feet, the bulkhead was owned by one Keenan. Keenan has been paid for the use of 75 feet of his bulkhead by this boat, and the evidence shows that, at least for that distance, the bulkhead of Keenan was substantially used. To this part as well as to the libellant's part, ingress and egress was had by those on the boat, and lines ran from the boat to spiles thereon.

Upon these facts the libellant claims to be entitled to $9.50 per day for the use of his portion of the bulkhead; while the claimant insists that $9.50 per day is the whole sum chargeable upon the boat for the whole berth, and that the libellant is entitled to a part of that sum proportionate to the extent of his bulkhead which was opposite to the hull of the steamboat as she lay in the berth.

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

I cannot agree with either of these positions. As to the claim of the libellant to be paid $9.50 per day for use of his bulkhead, I have no difficulty. It is impossible to suppose that the statute intended to allow every owner of a part of a bulkhead to charge for the use of his water-front the full amount of wharfage prescribed by the statute for a full berth, without any regard to the amount of water-front used. Such a construction of the statute would compel a vessel to pay full wharfage to several different persons whenever the frontage used belonged to different persons; and this boat would be compelled in this instance to pay three wharfages, that is $28.50 per day, and if the owners of this bulkhead had happened to number thirty, instead of three, according to such an understanding of the law the liability would be $285.00 per day. Such can not have been the intention. The meaning of the statute is that a boat shall pay the amount provided by the act and no more for her berth. This charge for a berth being required to be calculated by the tonnage, of course the amount of wharfage increases with the size of the boat; but it is a single charge for a single berth. It follows that when the berth used is owned by different persons, the statutory charge must be justly apportioned among the several owners. The claim made by the libellant to be entitled to $9.50 for each day this boat lay at his pier is therefore rejected.

The remaining question is how to apportion the wharfage chargeable by the statute for the berth among the various owners. The claimant's view is that only that part of the bulkhead against which the boat actually lay was used by the boat, and in accordance with this view he has tendered and paid into court the sum of $89.22. But upon the evidence the boat substantially appropriated to her own use for her berth at this bulkhead an extent of water-front exceeding her own length by some few feet. She required for her berth, and substantially appropriated, 275 feet of the bulkhead, of which 100 feet belonged to the libellant. A just division of the legal wharfage allowed for the whole berth would therefore be to give to the libellant 100-275 of the gross sum. This would be equity.

According to this mode of division the libellant is entitled to the sum of $95.66. The claimant has tendered only the sum of $89.22, and the libellant must, therefore, have a decree for the sum of $6.44. But I give no costs, because the question is novel, and the evidence shows a desire on the part of the claimant to pay without suit all that was legally chargeable.

It has been contended that the decision in the case of The Virginia Rulon [Case No. 16,974] is adverse to the foregoing conclusion and in favor of the claim made by the libellant. But the distinction between the two cases is this: The Virginia Rulon occupied and used two berths, one at the pier and one on the bulkhead, and discharged cargo on both the pier and the bulkhead at the same time. In such a case—and others might be imagined—the vessel is considered as using two berths and for that reason chargeable with lawful wharfage for each. The present is a different case, because here the vessel occupied only the space necessary to give her a berth, and that space was along the water-front of a continuous bulkhead: She used no more than was necessary, if she was to have a berth at all, and therefore occupied but a single berth.

The view I have taken of this case disposes of the claim for double wharfage based on the provision of the statute, that when the vessel leaves the wharf without paying her wharfage after demand made, she is liable to double wharfage; because the only demand ever made by the libellant was at the rate of $9.50 per day. As he was only entitled to $3.07 per day, such a demand was properly refused and does not entitle the wharfinger to double wharfage.

Let a decree be entered in accordance with this opinion.

Case No. 2,752.

The CITY OF HARTFORD.

[11 Blatchf. 72;[1] 17 Int. Rev. Rec. 125.]

Circuit Court, S. D. New York. April 7, 1873.[2]

COLLISION—STEAMBOAT AND TUG CROSSING—WHISTLES—SPEED—MUTUAL FAULT.

1. A steamtug, either meeting a steamboat end on, or crossing her course, having the steamboat on her starboard side, and, in the latter case, bound to keep out of the way, held in fault for starboarding, instead of porting, and thus contributing to a collision between a vessel in tow of her and such steamboat.

[Cited in The Fanwood, 28 Fed. 375; The Baltimore, 34 Fed. 662.]

2. The steamtug blew two whistles, on starboarding. The steamboat responded by two whistles, and, although then on a port helm, starboarded herself: *Held*, that, although the steamboat was in fault for assenting, by her two whistles, yet that fact did not absolve the steamtug from the fault she so committed.

[Cited in The Nereus, 23 Fed. 455; Conover v. The City of Chester, 24 Fed. 92; The Galileo, Id. 392; The Greenpoint, 31 Fed. 232; The St. Johns, 34 Fed. 766; The Sammie, 37 Fed. 909.]

3. The steamboat was also in fault for too great speed, and for not stopping or porting. The steamtug was also in fault for not stopping sooner than she did.

4. The damages were apportioned. The value of the steamtug being less than one-half of the damages, whether recourse can be had to the steamboat, to make up the rest of such one-half, in addition to her own one-half, quere.

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

[In admiralty. Libels by Hudson S. Ride-

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

[2] [Modifying the decree in Case No. 2,748. Affirmed in The City of Hartford and The Unit, 97 U. S. 323.]

out, owner of the schooner Alice S. Oakes, and by Charles Robinson, owner of her cargo, against the steamboat City of Hartford and the steamtug Unit, to recover for a loss sustained by collision. The district court decreed in favor of libelants against the City of Hartford, ordered a reference to ascertain the damages, and dismissed the libels as to the Unit. See Case No. 2,748. From this decree an appeal was taken to this court.]

Joseph H. Choate and James C. Carter, for libellants.

Richard H. Huntley, for the City of Hartford.

Charles Donohue, for the Unit.

WOODRUFF, Circuit Judge. I concur fully with the conclusion of the judge of the district court that the City of Hartford [Case No. 2,748] was in fault, and that her fault contributed to the collision which caused the loss sustained by the respective libellants. But I am unable to find that the Unit was without fault therein. Her navigators saw the City of Hartford coming down the river, at such a distance that there was time for whatever manoeuvre, by either or both vessels, was necessary to avoid collision. The direction of the two courses was such, that one of two situations was involved—that is to say, first, they were approaching so nearly end on, as to involve danger of collision; or, second, they were crossing each other's course, so as to involve risk of collision. Doubtless, the latter best describes their situation; but, either situation leads to the same conclusion.

(1st.) If regarded as approaching nearly end on, then it was the duty of each to port the helm, and go to the right, and so pass port to port. This the City of Hartford attempted to do, (being, in fact, already on a sheer to starboard.) The Unit, in plain violation of the rule, attempted the opposite manoeuvre, and starboarded, with intent to go to the left, and pass starboard to starboard. This was wrong. She had no right to make such an attempt, without, at the same time, assuming the risk of its successful accomplishment, unless defeated in her endeavor by an unwarranted counter movement of the other vessel.

(2d.) If the vessels be regarded as crossing, so as to involve risk of collision, then it was the clear duty of the Unit, having the City of Hartford on her starboard side, to keep out of the way of the City of Hartford, and the like clear duty of the latter to keep her course, unless the conduct of the Unit created a duty to depart from such course, or to stop. The City of Hartford was keeping her course, and, in fact, attempted to indicate to the Unit her purpose to do so, and even give the Unit a wider berth, by increasing her own swing to westward, when she was admonished that the Unit proposed to go to the left instead of the right, and to cross her bows. The primary fault was on the part of the Unit, in making this attempt.

Upon the evidence, I cannot doubt, that, if the City of Hartford had continued on her port helm, as she was when she came in sight, and the Unit had even done nothing, no collision would have happened. Indeed, the witnesses whom the Unit herself called, to charge fault on the City of Hartford, make her fault, not that she ought to have starboarded, but that she did so, when they say she should have ported and swung towards New York, which, in fact, she was doing when arrested by the manoeuvres of the Unit. This fault of the Unit is the more striking, when it is considered that the pilot of the Unit knew and recognized the City of Hartford, which was a regular passenger and freight boat between Hartford, Connecticut, and the city of New York, and knew where was her regular landing place, near Peck slip, on the New York side, and, therefore, that her regular course would take her to the westward, across the river. To attempt, then, to take the Unit to the westward, across her bows, was not only a violation of the first rule above referred to, calling upon the Unit to keep to the right, but it was choosing the course which, (under the rule requiring the Unit to keep out of the way,) was least likely to avoid the other vessel, and most likely to embarrass her in proceeding to her destination.

Thus far, I have said nothing of the signals given by either. On that subject, I observe, that the City of Hartford, rightly and, in all respects, properly, intended to go to starboard, (to the port of the Unit,) and was doing so, and blew one whistle, the proper signal to indicate to the Unit her intention. Let it be conceded that her signal was not heard, that did not justify an attempt by the Unit to cross her bows, if that was not a safe attempt. That it was not a safe endeavor is conclusively proved by the fact, that, although, in compliance with the request of the Unit, the City of Hartford cooperated with her, to enable her to do so, a collision was the result, and, as I think, this also shows what I have before stated, that, had not the City of Hartford been diverted from her course by this attempt of the Unit, no collision would have occurred. But, it is said, that, when the Unit blew two whistles, to indicate her design to go to the westward, the City of Hartford assented to her proposition, as a safe and proper one. I concur with the court below, that the City of Hartford ought not to have assented. She ought either to have kept off towards New York, or to have stopped. But, I cannot concede that this excuses the Unit for making the unwise endeavor. It comes with ill grace from her to say, that the fault is solely due to the City of Hartford, for causing a collision, by doing what she (the Unit) expressly requested her to do. The manoeuvre was fatal. It was an unskilful and improper one, under the circumstances. In the most favorable view for the Unit, it was an error in which

both concurred. Observations pertinent to the case of an erroneous manoeuvre, proposed by one vessel and assented to by the other, resulting in collision, and held to involve mutual or concurring fault, were made in The Albermarle [Case No. 135]. I feel great doubt, whether those who navigated the Unit acted upon the signal which was given by herself, and whether, in fact, there was not great incompetency, and even mistake, in giving the signal at all. Certainly, the City of Hartford, by assenting to the manoeuvre proposed by the Unit, no more guaranteed its safety and propriety than the Unit did in making the proposition. The City of Hartford had, surely, as clear a right to accept the two whistles as an assurance by the Unit, that, with her co-operation, the Unit could and would pass to the west, as the Unit had to infer from the response, that the City of Hartford could and would pass to the east.

The conclusion seems to me inevitable, that both were in fault. The City of Hartford ought not to have come down at such speed, she ought not to have accepted the proposal of the Unit, and she ought either to have stopped or to have kept off to the westward. The Unit ought not to have made the attempt to go to the west, and she too, in view of her mistaken signal, ought, (after the signal was given,) to have kept off, or stopped entirely much sooner than she did. It is doubtful whether, after she had called the City of Hartford from her course, she did not herself see her error, and neglect to go to the westward at all, as her signal promised. But if she found she could not, in that way, escape the consequences of her own mistake, she should have instantly given signals of alarm, and stopped. Although those signals might have been ineffectual, they might have disclosed the error to the City of Hartford, and induced her sooner to stop and back, increasing the chances of safety. The decree should, therefore, direct contribution; and, as the counsel expressed a desire to be heard on the question whether, as the value of the Unit is less than one-half the damages, the libellants should have recourse to the City of Hartford for the deficiency, I will hear them on that subject, on the settlement of the decree. I ought to add, that I find no sufficient reason for disturbing the report of the commissioner upon the amount of the damages.

[NOTE. On the settlement of the decree the court denied the contention of libelants as to their right of recourse to the steamboat in the event that the tug was not of sufficient value to pay the moiety of the damages awarded. See Case No. 2,753.

[An appeal was taken to the supreme court from the final decree herein, which was affirmed in so far as it declared both steamer and tug in fault, and awarded damages against both, and a division thereof, but sustained the contention of libelants as to the deficiency. See note to Case No. 2,753, next following. The City of Hartford and The Unit, 97 U. S. 323.]

Case No. 2,753.

The CITY OF HARTFORD.

[11 Blatchf. 290.] [1]

Circuit Court, S. D. New York. Aug. 20, 1873.[2]

DECREE DIVIDING DAMAGES—INSUFFICIENT VALUE OF ONE VESSEL — RIGHT OF INJURED PARTY TO DEFICIENCY.

The C. and the U., two steam vessels, were held liable for the damages caused to the owners of a schooner, and also for the damages caused to the owners of the cargo on board of such schooner, by a collision between the C. and the schooner, the schooner being, at the time, in tow of the U., and the collision being due to the fault of both the C. and the U. The U., on her arrest, was discharged from custody, on a stipulation for her value, which was in an amount less than one-half of the damages awarded to the libellants: *Held*, that the libellants could recover against the C. only the one-half of the damages, and that they could not recover against her any deficiency in the value of the U. to make up the other half of such damages.

[Followed in The Alabama, Case No. 123. Cited in The Hudson, 15 Fed. 164.]

[See note at end of case.]

In admiralty. In this case a libel was filed, in the district court, by the owners of the schooner Alice S. Oakes against the steamboat City of Hartford, and the steam-tug Unit, and a separate libel by the owners of the cargo of said schooner, against the same two vessels, to recover for the loss of the schooner and of her cargo, by a collision between the schooner and the steamboat, the schooner being, at the time, in tow of the steam-tug. The district court decreed against the steamboat, in each case, and dismissed the libels as against the steam-tug [Case No. 2,748]. On appeal [Id. 2,752], the circuit court held the steamboat and the steam-tug to have been, both of them, in fault, for the collision, and decreed a contribution, by each, of one-half of the amount of the loss, but directed further argument on the question whether, as the value of the steam-tug was less than one-half of the damages sustained by the libellants, in the two cases, the libellants could have recourse to the steamboat, for the deficiency, in addition to recovering against the steamboat the one-half of such damages.

Joseph H. Choate and James C. Carter, for libellants.

Richard H. Huntley, for the City of Hartford.

Charles Donohue, for the Unit.

WOODRUFF, Circuit Judge. These cases having been heard upon the merits, and an opinion filed directing contribution by the steamboat City of Hartford and the steam-tug Unit, they are again heard, agreeably to the suggestion in that opinion [Case No. 2,-

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

[2] [Reversed in The City of Hartford and The Unit, 97 U. S. 323.]

752], for the purpose of determining whether, in case the libellants shall be unable to collect so much as one-half of their loss from the steam-tug, (which appears to have been discharged from custody upon filing a stipulation for her value, which is less than one-half of such loss,) the steamboat City of Hartford shall be held liable for the deficiency.

It is suggested in behalf of the City of Hartford, that the Unit was discharged upon an appraisal to which the owners of the City of Hartford were not parties, and of which they had no notice; that, if the effect of a valuation of the Unit at less than one-half of the loss claimed by the libellants is permitted to prejudice the City of Hartford, a most unfair and dangerous precedent will be established; that, in cases of collision in which a third party claims to recover for an injury, there will be opportunity for collusion, and a temptation thereto; and that owners of cargo on board of one vessel, and owners of the tow, where, as in this case, one of the colliding vessels is a tug having vessels or barges in tow, are almost universally in sympathy with the tug or the vessel bearing their cargo, and they and their witnesses are usually found struggling to cast the whole responsibility upon the other colliding vessel, and may be expected to collude with the former against the latter. Observation and experience, no doubt, give some foundation for this apprehension; and, were there any evidence in this case that the tug Unit was of greater value than that for which the stipulation was given, it would be entitled to grave consideration. The rule in admiralty being well settled, that, where both of the colliding vessels are in fault each shall contribute one-half to make up the loss, it is clear that neither should, by appraisal and bond for value, to which the other is not a party, be permitted to evade payment of, or condemnation for, her full share. My conclusion, however, upon the principal question does not require that I should dwell further upon this point.

It is also suggested, that the property of the libellants in this case having been voluntarily placed in charge of the tug, for transportation, the libellants, in a legal sense, took the risk of the care and good management of the tug; that, in the admiralty, the fault of the tug placed the owners of such cargo, and of such tow, in the same relation to the City of Hartford as the tug was herself; that the rule in the admiralty requiring contribution in cases of mutual fault, is not, and ought not to be, affected by any inquiry into the ownership or title to the property on board of either vessel; that this view of the subject works no hardship, because, the owners of cargo on a vessel towed, and the owners of such vessel, may protect themselves by proper contracts, so that, if their property is lost by negligence on the part of the tug, they will have full indemnity, even though they may not obtain it through the contribution ordered; that such right to full indemnity was clear, without any special contract, before the passage of the act of congress of March 3, 1851 (9 Stat. 635) for the relief of ship owners; that that act was intended to leave them to bear the loss over and above the value of the vessel employed by them, and was not intended to cast a further or additional burthen upon the City of Hartford, in a case like the present, or to make it necessary that she pay any greater sum, as contribution to the loss, than if that act had not passed; that this is illustrated by supposing the libels had been filed against the owners of the Unit in personam, and against the City of Hartford in rem; that, the fault of both being proved, and contribution being ordered, it was not the intention of the act of congress to relieve the owners of the Unit in part, and thereby to cast the greater burthen on the owners of the City of Hartford, who, by the rules of the admiralty, ought to be compelled to pay one-half only; and that there is no hardship to the libellants, because they have their remedy against the master of the Unit for his negligence in this case, for any deficiency which contribution should leave unsatisfied, as his liability is not relieved by the act of congress.

The question whether, in case of collision between two vessels, caused by the faulty navigation or negligence of each, the rule that each shall bear one-half of the loss is an absolute measure and limit of the liability of each, does not appear to have been raised or decided in the supreme court of the United States, and I am advised of but one opinion upon the question in any court of admiralty in the United States. In the case of The Atlas [Case No. 633], in the district court for the eastern district of New York, the question is discussed, and the liability of the respective vessels was held to be, in admiralty, definitely limited to one-half the loss. In the affirmance of the decision in that case [Id. 634], it was only necessary to say, that a libellant could not, by proceeding against one of the offending vessels alone, deprive her owners of the right to such contribution from the other vessel, and of the means of enforcing it. The case of The Gregory and The Washington, in the supreme court, 9 Wall. [76 U. S.] 513, went no further than to hold it a decree of which a libellant could not complain, when he was required to exhaust his remedy by process of execution against each for one-half, before collecting more than half from either. There was, in that decree, an implied affirmance, that either would be liable for a deficiency, if one-half should not be collected from the other. But, as, in that case, both were abundantly adequate, and more than adequate, to the payment of the half charged on each respectively, the point made in the present case was wholly immaterial, and

does not appear to have been at all considered.

In this state of the adjudications here, I am disposed to follow the English court of admiralty, as authority on the question. It is important that such a question should be settled, and I am much impressed by the reasonableness of the rule as stated and commented upon by Dr. Lushington, in The Milan, 1 Lush. 388, which largely influenced the opinion of the district judge in the case of The Atlas, before referred to. If the rule in this country is to be settled contrary to the rule in England, it is fitting that it should be so declared by the court of last resort. It is not manifest that the owners of cargo, or of a tow, employing a vessel for carriage or towage, which is found guilty of fault producing a collision, ought, in equity, to stand in any better position, as against a colliding vessel, than the owners of the vessel conveying their cargo or towing their property. To require them to look solely to the vessel which they employ for their more complete indemnity, is recognizing their right to a full recovery, but entitling them to recover from each what each ought to contribute, while, as said by Dr. Lushington, it is not clear that justice requires that they be permitted to recover from one the whole amount of the damages occasioned by the act of both.

Let the decree be settled in conformity with these views.

[NOTE. From the final decree herein, appeals were taken by the Hartford & New York Steamboat Company, claimant of the steamboat, in both cases, and by Charles Robinson, the owner of the cargo, in the suit brought by him, and the decree was affirmed as to the finding of mutual fault by the steam vessels, and as to the award of damages and the division thereof, but as to the denial of the right of the libellant to recover more than a moiety against the steamboat, in the event of the inability of the tug to pay her share, the supreme court held, by Mr. Justice Clifford, that the libellant was entitled to be fully compensated for his loss, if the offending vessels were of sufficient value, and that, if the value of either vessel was insufficient to pay its share of the damages, then he might recover the deficiency from the other. The City of Hartford and The Unit, 97 U. S. 323.]

Case No. 2,754.

The CITY OF HOUSTON.

[Cited in The E. B. Ward, 16 Fed. 258. Nowhere reported; opinion not now accessible.]

Case No. 2,755.

The CITY OF HOUSTON.

[Cited in Acosta v. The Halcyon, Case No. 32. Nowhere reported. The records of the court having been destroyed by fire, the opinion cannot now be obtained.]

Case No. 2,756.

The CITY OF MEXICO.

[7 Ben. 31.][1]

District Court, E. D. New York. Oct., 1873.[2]

SEAMEN—ARTICLES—REPEAL — SHIPPING COMMISSIONER'S ACT.

1. By the maritime law, as well as by the act of 20th July, 1790 (1 Stat. 131; Rev. St. § 4520), a written contract is required to be made on the shipment of seamen. That requirement of the act of 20th July, 1790, was not repealed by Act June 7, 1872 (17 Stat. 262).

2. In the year 1873, a steamship bound from New York to the West Indies and Mexico, caused a crew to be shipped for that voyage by written shipping articles executed on board the ship before a notary public, and not before a shipping commissioner. *Held*, that this was in violation of the 13th section of the act of June 7, 1872, and that the ship had incurred the penalty provided by the 14th section. See sections 4512, 4513, Rev. St.

In admiralty.

G. W. Hoxie, Asst. U. S. Dist. Atty., and Benedict, Taft & Benedict, for the United States.

Salter & Cowing and John A. Parsons, for claimants.

BENEDICT, District Judge. The present is a proceeding to condemn the steamship City of Mexico in a penalty for an alleged shipment of seamen, contrary to the provisions of the act of June 7, 1872 [17 Stat. 262], entitled "An act to authorize the appointment of shipping commissioners by the several circuit courts of the United States to superintend the shipping and discharge of seamen engaged in merchant ships belonging to the United States, and for the further protection of seamen."

The facts are conceded to be, that the owners of the steamship City of Mexico caused a crew to be shipped on board that vessel, for a voyage from the port of New York to the West Indies and the republic of Mexico, by written shipping articles, executed by the crew on board their vessel, before a notary public, and not before the shipping commissioner. Such a shipment of a crew the government contends is in violation of the 13th section of the act referred to above, and renders the ship liable to a penalty of $200, as prescribed in the 14th section of that act.

The argument on the part of the vessel is, that the original act of 1790 [1 Stat. 131], which requires an agreement in writing or in print, in a certain form, with any mariner on any vessel bound from a port of the United States to any foreign port, is, as to vessels engaged in voyages like that of the City of Mexico, repealed by the passage of the ship-

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

[2] [Affirmed in Case No. 14,797.]

ping commissioner's act of June 7th, 1872—the latter act being intended to be a substitute in such cases for the act of 1790; and that, by the amendment of the shipping commissioner's act of January 10th, 1873, vessels in voyages like that of the City of Mexico are excepted from the effect of the substitute. Consequently, it is claimed, all vessels bound to the West Indies and the republic of Mexico are exempted from any legal obligation to have any shipping articles; and, therefore, are not liable to any penalty for a shipment in violation of the act of 1872.

Upon this question my opinion is, that, in the present condition of the statutes, no such effect can justly be given to the shipping commissioner's act of 1872 as to work a repeal, by implication, of the original act of 1790. It is difficult to suppose that it was the intention of congress, by any provision in the act of 1872—an act declared to be intended "for the further protection of seamen"—to depart from the uniform practice of this government from its foundation, as of all maritime nations, in the regulation of the shipment of seamen, and to leave all seamen engaged in the extensive commerce included within the language of section 12 of the act, without any statutory protection as to the mode of hiring them. Such has not been the construction given to the act, in the practice of the merchants, nor was such the construction put upon it by the claimants in the present instance, for they caused the crew to be shipped in accordance with the act of 1790. The act of 1872, as also the act of 1790, recognizes and should be construed as in harmony with the rule of the general maritime law upon this subject. "The maritime law, as a general principle, requires seamen's contracts to be evidenced by writing." Ware, J., in The Crusader [Case No. 3,456]. By the general maritime law, then, as well as by the act of 1790, a written contract with this crew was doubtless required. Certainly such an agreement was not forbidden. But by section 13 of the act of 1872, certain rules are prescribed which are to be observed in respect to all written agreements procured to be executed by seamen, one of which is, that the agreement shall be signed by each seaman in presence of a shipping commissioner. There is much reason for the application of this rule in all cases, for seamen are children. They sign anything placed before them, and such a rule is calculated to prevent the obtaining of their signatures as evidence of their agreement, except in the presence of a duly authorized officer charged with the duty of protecting them against imposition and fraud. It was for this reason, no doubt, that the 13th section of the act, which forbids the execution of a written contract with a seaman, except in the presence of the shipping commissioner, was made generally applicable to all written agreements with seamen. No words in the section indicate an intention to limit its effect to the cases of agreements provided for in section 12, and I consider it applicable to every agreement made in writing by a sailor for his services on any vessel.

This provision of the law was disregarded in the shipment of the crew of this steamer; and by virtue of the 14th section of the act of 1872, which provides a penalty of $200 for receiving or accepting on board any merchant ship any seaman who has been "engaged or supplied contrary to the provisions of this act," the steamer became liable to that penalty. A decree must, accordingly, be entered condemning the steamer in the sum of $200 and costs.

[NOTE. The claimants appealed to the circuit court, where the decree of the district court was affirmed. See Case No. 14,797.]

CITY OF MEXICO, The (UNITED STATES v.). See Case No. 14,797.

Case No. 2,757.

The CITY OF NEW BEDFORD.

[10 Ben. 17.][1]

District Court, S. D. New York. June, 1878.

COLLISION ON THE SOUND—STEAMER AND SCHOONER—LOOKOUT.

1. A schooner bound east and a steamer bound west came in collision in Long Island Sound in the night. Both vessels had proper lights set. The schooner averred that she was heading east half north; that the steamer was seen ahead a little on her port bow; that the schooner was kept on her course, and the steamer changed her course to the southward across the schooner's bows, and thus caused the collision. The steamer averred that she was heading due west, and that the schooner was seen ahead a little on the steamer's starboard bow, and that the schooner changed her course to the southward and ran into the steamer. *Held*, that, on the evidence, the story averred on behalf of the schooner was correct, and that, she having kept her course, it was the duty of the steamer to have avoided her, and that the steamer, having failed to do this, was liable for the collision.

2. Although the schooner had no lookout except her master, who was on her quarter-deck, yet, as the steamer was seasonably seen and kept in view and the schooner was kept on her course, there was no fault in reference to the lookout, which either charged the schooner with the collision or relieved the steamer from her responsibility for it.

In admiralty.

R. D. Benedict, for libellants.
H. J. Scudder, for claimants.

CHOATE, District Judge. This is a libel by Driscoll Brothers and others, the owners of the schooner J. W. Scott, against the steamer City of New Bedford, for damages caused by a collision between said vessels

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

about one o'clock in the morning of the 24th of November, 1876, in Long Island Sound. The schooner was bound from New York for St. John, New Brunswick, with a general cargo of merchandise. The steamer was bound on her regular trip from New Bedford for New York. The collision took place about five miles northerly from Horton's Point light. The night was dark, but lights could be seen a long distance. The libel avers that the schooner was heading east half north; that the steamer was seen at a long distance nearly ahead, but a little on the schooner's port bow; that the steamer did not make any change in her course till within about one hundred and fifty feet of the schooner, when she suddenly changed her course, sheering suddenly to port, directly across the bows of the schooner, too late to pass her, and striking her side against the bowsprit of the schooner; that, from the time when the steamer was first seen till the collision, the schooner headed on her course east half north, and the steamer was heading about west by south until she changed her course to cross the schooner's bows; that the collision was caused by the negligence of the steamer in not keeping a proper lookout, in not avoiding the schooner, as she might have done by sheering, or slowing and stopping, and in unnecessarily crossing the bows of the schooner.

The answer avers that the steamer's course was due west; that those in charge of her made a green light about one point on her starboard bow, and a few minutes afterwards a red light about one point on her port bow; that she kept her course due west for a few minutes longer, when the vessel on her starboard bow suddenly showed both her green and red lights, and appeared to be bearing directly down upon the steamer; that the steamer's wheel was immediately thrown hard to starboard, and she was slowed to half speed, and at once began to fall off, and when she had fallen off about a point the vessel on her port bow also kept off sufficiently to keep out of her way, and the vessel on her starboard bow (the J. W. Scott) ran into her, the bowsprit striking on the starboard side on the first stateroom and breaking off, and the schooner striking the steamer again about amidships; that the collision was caused wholly by the carelessness of the schooner in changing her course instead of keeping her course, and in not having a proper lookout and in not being properly manned and equipped. The wind is stated in the libel to have been northwest by west, and in the answer about north northwest.

The witnesses on the schooner—her master who was on the lookout, and the man at the wheel—testify, that they saw the bright light of the steamer about a mile or more away; that they kept on their course east half north; that when they first saw the steamer's light it bore a little on their port bow; that as she neared them it drew a little further open; that they then saw the green light of the steamer, and soon after the steamer swung to the southward across their bows, but before she could get across their course the vessels came together.

The witnesses on the steamer testify that she was running due west, when she made the green light of the schooner about one point on her starboard bow, and soon after a red light on her port bow; that as the green light approached, the vessel bearing it suddenly showed both her lights, bearing then about two points on her starboard bow; that the wheel of the steamer was immediately thrown hard a-starboard, and she was slowed, and the schooner struck her as they came together, the courses of the vessels being nearly at a right angle.

It is obvious that the two accounts cannot be in any way reconciled. If the steamer kept on her course due west and made the green light of the schooner on her starboard bow, and while she was so keeping on her course the schooner showed her both lights, the schooner must have changed her course. On the other hand, if the schooner kept her course east half north, and made the steamer's green light on her port bow, the steamer must have been heading considerably more to the southward than she claims to have been. The schooner was bound to keep her course, and the decisive question in the case is whether she did so. Upon a careful examination of all the testimony, I am satisfied that the schooner's account of the collision is correct, and that given by the steamer's witnesses is a mistake.

The witnesses on both vessels agree that they came together at about a right angle. Now to bring them into this position at the instant of collision, if the steamer was, as she says, heading due west before she starboarded, and then fell off a point and a half, as she says, the schooner must have headed at the time of the collision six points to the southward of an east course. With the wind as it was, somewhere from west northwest, as the libellant's witnesses say, to northwest by north, as the steamer's witnesses say, and they agree that it was a fresh breeze, the wind would very probably have been on the schooner's starboard quarter before the vessels came together, and in that case she would have jibed over before she struck. It is testified by the schooner's witnesses, and not contradicted by the steamer's witnesses, that, after she struck, her head was hauled round by the collision to the southward, and she then jibed over.

But without relying too much on this circumstance, which depends, perhaps, upon greater exactness as to the direction of the wind and the course of the schooner than can be with certainty arrived at, it is difficult to understand why the schooner should have made a course so far to the south as it is necessary to put her on to find the steamer's account substantially true.

The claimants called two witnesses from the schooner Merwin, and rely upon their testimony as corroborating that of the steamer's witnesses. Their testimony, however, tends strongly to confirm the case of the schooner, that she was not before the collision heading at all to the southward. If they are not mistaken in the identity of the vessel that came into collision with the steamer, she passed the Merwin on the starboard side, being a faster sailer, and, having got by, she luffed across the Merwin's bows, and when she got a very short distance to windward of the Merwin, stood on her course about east until the collision, which took place, as they say, about a quarter of a mile from them on their port bow.

This evidence is relied on by the steamer as accounting for the steamer's first seeing the green light of the schooner, which she would show when luffing up across the bows of the Merwin, and then both her lights, when afterwards she changed her course. But the testimony does not bear out the theory of the case, which is essential to the corroboration of the account given by the steamer, which requires the schooner to have been standing at least on an east southeast course when the steamer starboarded, and still further to the southward when she struck. This testimony does not show that, when the schooner stood on her course to the eastward after crossing the bows of the Merwin, she was so near to the steamer as to make it improper for her to stand to the eastward, but rather the contrary; and although the Merwin had made the steamer's light before the other schooner passed her, the Scott may upon the testimony of the Merwin's witnesses have been three-quarters of a mile or more from the steamer when she headed east on her course again, and if she then made the steamer's light and kept on her course, this evidence is all consistent with that of the libellants' witnesses, And if, as the witnesses from the Merwin say, they kept the Scott in view till the collision, seeing her binnacle light, they could hardly have failed to observe it if she had headed southeast, thus crossing the bows of the Merwin again. Indeed, no conceivable motive is suggested for the schooner's taking a southeasterly course, especially just after luffing up to get further to windward. It is not shown that anything was in her way. She cannot have sheered to the south to avoid the steamer. Such a movement was not called for by the account which either party gives of the relative positions of the two vessels. Her proper course was easterly. The wind was fair. To head south of east would be going out of her proper course. On the other hand, although the proper course of the steamer was due west, yet she was bound to vary from that course as should be found necessary to avoid sailing vessels, of which her witnesses admit there were very many in that part of the Sound at that time. She was going through them at full speed, twelve miles an hour. That she should be off of her course for this reason is no ways improbable; and it is much more probable that the witnesses on her deck should be mistaken as to the precise course she was on when she made the two lights of the schooner, and that they should fail in remembering a departure more or less from that course to the southward for the purpose of avoiding some vessel, than that the schooner without any reason should have made a southeasterly course, and that the witnesses from her and from the Merwin should all be mistaken. There is really only one witness from the steamer who testifies that the vessel whose green light was seen on the starboard bow was the same vessel whose two lights were afterwards seen, and which ran into the steamer; and he was looking out for the lights of other vessels in sight. It is not very improbable, as claimed by the libellant's counsel, that it was not the same vessel. The lookout on the steamer having reported the green light on the starboard bow, paid no further attention to her till both lights appeared close by. But if the vessel was the same, and the green light of the schooner was seen as she luffed across the bows of the Merwin, the evidence is satisfactory that her movements were not properly attended to by the steamer; that she again stood east at a perfectly safe distance from the steamer, and that the steamer afterwards took a more southerly course across her bows, thus bringing on the collision. The steamer was in fault in not keeping a good lookout, and in not avoiding the schooner, as she was bound to do.

The counsel for the claimants insists that the schooner was at fault in having no lookout forward, the master having acted as lookout, and being stationed on the quarter-deck. If this management had led to the schooner's not observing the steamer, and from not observing her she had changed her course, and thus brought on the collision, the collision might be attributed to this cause; but as she saw the steamer seasonably and kept her in view, and kept on her course, as she was bound to do, it is impossible to attribute to the schooner any fault in respect to the lookout, which either charges her with the collision or relieves the steamer from the responsibility for it.

The claimants' counsel also insists that the schooner had an incompetent wheelsman, and attributes the erratic course which is charged upon the schooner to his wild steering; but the evidence shows that he had sufficient experience to hold the schooner to her course, and there is no ground in the testimony for this theory.

There must be a decree for the libellants, with a reference to compute the damages.

Case No. 2,758.

The CITY OF NEW YORK.

[3 Blatchf. 187;[1] 12 N. Y. Leg. Obs. 300.]

Circuit Court, S. D. New York. Sept., 1854.

SUPPLIES IN FOREIGN PORT—CHARTERED VESSEL.

1. Under a charter of a steam vessel, by which the charterer becomes her owner for the voyage and charged with her navigation, the agent of the charterer can bind the vessel for coal necessarily supplied to her in a foreign port, although the person furnishing the coal knew of the charter, and knew that, according to its terms, the charterer was bound to furnish coal for the voyage.

[Cited in The Lucia B. Ives, Case No. 8,590; The Columbus, Id. 3,044; The William Cook, 12 Fed. 920; The India, 16 Fed. 263; The Bombay, 38 Fed. 513; The Stroma, 53 Fed. 283. Distinguished in Stephenson v. The Francis, 21 Fed. 725; The Pirate, 32 Fed. 488.]

2. Where the charterer merely hires the use of the vessel, and her navigation remains with the general owner, if the master, on the credit of the vessel, procures coal for her, in a foreign port, when she has none, the vessel is chargeable for the price of the coal.

[Cited in The Washington Irving, Case No. 17,244; The Metropolis, Id. 9,503; The India, 14 Fed. 479; The Sydney L. Wright, Case No. 6,082a; Stephenson v. The Francis, 21 Fed. 723; The Cumberland, 30 Fed. 451.]

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

In admiralty. This was a libel in rem, filed by Pennell Churchman and others, in the district court, against the steam-propeller City of New York, to recover the price of 130 tons of coal, furnished to that vessel at Porto Cabello, on the isthmus of Darien. The propeller, at the time the coal was furnished to her, was under charter to the firm of Haight & Palmer, of New York. The purchase price of the coal was $2,080. Captain Thompson, the agent of the libellants, who sold the coal, received from the purser of the propeller, on the sale, $1,000 in cash, and a draft on Haight & Palmer, for $1,080. The draft not being paid, this libel was filed, to recover the $1,080. The district court held that the sale was not made on the credit of the vessel, and dismissed the libel. [Case not reported.] From that decree the libellants appealed to this court.

Francis F. Marbury, for libellants.

George F. Betts and Charles Donohue, for claimants.

NELSON, Circuit Justice. 1. I am strongly inclined to think that Haight & Palmer, the charterers of the vessel in this case, are to be deemed owners of her for the voyage. If so, the purser of the vessel, who was their agent, was competent to bind her for the necessary supply of coal at Porto Cabello; and this, although the person furnishing it knew of the charter, and knew that, according to its terms, the charterers were bound to furnish coal for the voyage. Upon any other rule, the master or agent of a vessel in distress, in a foreign port, would oftentimes find himself unable to procure the necessaries essential for his relief. The voyage might be broken up, for want of supplies, or the vessel might go to decay in port, for want of proper repairs. I have found no case where it has been held that this knowledge on the part of the person furnishing the supplies or making the repairs, under the circumstances stated, affects the right to charge the vessel as security for the payment. The right to charge the general owner personally, is a very different question.

2. But, admitting that the charterers were not owners for the voyage, and were but hirers of the use of the vessel to carry passengers and freight, and that the general owners and the possession and navigation of her, the charter party resting in covenant, and not in a letting of the vessel, the result must, in my judgment, be the same. The proof shows that the vessel was out of coal, and went to Porto Cabello, it may be properly said, in distress for supplies, without which she could not have performed her voyage. I cannot doubt that the coal, if procured by the master under such circumstances, is a charge upon the vessel, according to the settled maritime law. The claimants, it is true, seek to exonerate her upon the testimony of the purser, who was the agent of the charterers, that he, and not the master, contracted for the supply of the coal, and that the master, for himself and the vessel, repudiated the purchase. The master has not been examined, the defence in this respect being allowed to rest upon the evidence of the purser. He is contradicted by Captain Thompson, who made the sale. According to his evidence, all parties were given to understand, expressly, that the vessel would be looked to, in case the draft drawn on Haight & Palmer should not be paid. The purser contradicts himself in several parts of his evidence, and, in other respects, it is not calculated to inspire confidence. He testifies, in the first place, that Captain Thompson did not tell him, at the time he consented to take the draft, that he should look to the vessel if it was not paid; but afterwards he is obliged to admit that Captain Thompson did tell him so. He also testifies that he had sufficient funds on board to pay for the coal and for the other expenses of the voyage, but he afterwards shows that in this he was mistaken.

I think the evidence of Thompson entitled to the most credit; and, according to that, the master of the steamer participated, or should be regarded as participating, in the purchase. He was present when the contract was made for the coal, and when the draft for the balance of the purchase money was accepted; and Captain Thompson, according to his own evidence, agreed to accept

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

the draft only on condition that the ship should be liable if the draft was not paid at maturity. It is true, the master was silent, but the inference naturally drawn, under the circumstances, must have been, that he acquiesced in the condition.

3. The proofs show, that the sale was made and the draft taken under the expectation, on the part of Captain Thompson, that the vessel would be liable for the unpaid balance, if the draft was not paid at maturity. This is not contradicted by the evidence of the purser. That evidence seeks to establish the fact, that the master gave notice, at the time, that the vessel would not be considered as liable. On this point, in the absence of the testimony of the master, I think that of Captain Thompson entitled to the most weight, for the reasons already stated; and, according to that, the credit was given to the vessel.

I must, therefore, reverse the decree below, and decree that the vessel is chargeable for the balance due for the coal, with a reference to the clerk, if necessary, to ascertain the amount.

Case No. 2,759.

The CITY OF NEW YORK.

[8 Blatchf. 194.] [1]

Circuit Court, S. D. New York. Feb. 6, 1871.

COLLISION—STEAMER AND VESSEL AT ANCHOR—FOG—LOOKOUT—SPEED—LIGHTS.

1. A steamboat, under way, colliding with a schooner at anchor in a customary anchorage place, *held* to be presumptively in fault and bound to excuse herself, by showing either that the schooner was in fault or that the accident was inevitable.

[Cited in The Florence P. Hall, 14 Fed. 417; The Rockaway, 19 Fed. 451; The Echo, Id. 454.]

2. There being a fog, the steamboat was also *held* to be in fault for not having a lookout on her bow.

3. The steamboat was also *held* in fault for being out of her proper track and for running at too great a rate of speed.

4. The schooner was *held* in fault for having her light in such a position that it was hidden from view by her sails, which were set.

In admiralty.

James C. Carter, for libellants.

Edward H. Owen and Charles Donohue, for claimants.

WOODRUFF, Circuit Judge. The schooner Mary Mankin was anchored on the usual anchorage ground for vessels of her class, in the harbor of New London, in the night of the 3d of May, 1862. The steamboat City of New York was one of a line of steamboats running between New London and the city of New York, entering or departing daily from the harbor of New London, and her officers must be taken to have known that the place where the Mary Mankin lay was customarily used for the anchorage of vessels. The place was on the west side or edge of the channel, and, to the eastward thereof, the width of the channel was abundantly sufficient for vessels entering and departing to do so without any inconvenience. The usual track of steamboats entering and departing was very considerably to the eastward of the place where the Mary Mankin lay, and she had lain anchored at that place since the previous Thursday afternoon. The City of New York had, during that time, passed her more than once. At about half-past eleven o'clock in the night, the steamboat ran into the schooner, striking on her starboard side, and cutting her down on that side, so that she sank within a very few minutes. These facts raise a presumption of fault in the navigation of the steamboat, which casts upon her the burthen of excusing herself; and this would require proof either that the schooner was in fault or that the accident was inevitable.

The steamboat has, I think, failed to show herself without fault. The night was very foggy, the fog so dense as at times to shut out lights from view. It was not so dense near the water or for some feet above the water, but was so dense a little higher up, that a vessel entering the harbor shortly before the collision could not, when passing it, see the light of the light-house a short distance below where the Mary Mankin lay, and yet she could see a light on shore and on the schooner and on another vessel lying near, when she came near to them. The steamboat, coming from her wharf, did also see lights on shore and on some other vessels which she passed, but she saw no light on the Mary Mankin. A vessel was lying a short distance above the Mary Mankin and another a short distance below. The light of the first was seen from the City of New York a few moments, and but a few moments, before the collision, and the light of the other was not seen until after the collision.

The first fault I impute to the City of New York is, that she had no look-out on her bow. She relied solely upon observations made from her pilot house and made by her master and pilots, her master declaring that he was himself on look-out, and at the time engaged in nothing else. Without saying that, under any possible circumstances, the master cannot divest himself of other cares and assume and discharge the duty of a look-out, so as to satisfy the rules of navigation, it is clear, that, in general, one to whom belongs the responsibility of controlling and directing the conduct of all the affairs on board, is not a proper look-out; and it is clear that, on such a night especially, the duty could not be performed so as to comply with the rules of prudence or the law, without a look-out in his proper place. Indeed, I think that this case well illustrates the importance of a rigid enforcement of the rule, that a look-out must

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

be stationed forward, and for two reasons: (1.) If the fog was of uniform density, a man on the bow could penetrate it further, and see an object ahead sooner, than one who stood back at the pilot house; (2.) On such a night as this, when the fog was lighter nearer the water, he would see much further than the master or pilot, whose position was some eighteen or twenty feet above the water.

Again, I think the proof quite conclusive, that the steamboat was not, at the time of the collision, in her proper track down the channel. The general declaration of her master and pilots is, I think, overcome by the other testimony to the location of the schooner. One fact testified to by her own witnesses seems to me to render it certain that she was more to the westward than she should have been, and not only so, but that she was headed too far to the west. That fact is, that if she had not collided with the schooner, she would have gone between the two vessels between which the schooner lay. This is testified to by her own pilots. The proof touching the actual locations of those vessels, suggests that, if she had not struck the schooner, and had persisted in her course, she would probably have soon reached the shore.

I am not satisfied that the steamboat was running at a prudent rate of speed. The testimony of her master and pilots, confirming that of other witnesses, shows, that she did not, and probably could not, see the lights of the two vessels between which the schooner lay, until she was very near to them. In such a fog, with knowledge of the customary anchorage ground for vessels, and, especially, if she be taken to have known that the schooner was there at anchor, the highest degree of caution was required, either to keep her course well to the eastward, or to proceed so slowly as not to strike with power sufficient to cut a vessel nearly in two; or, else, if the fog was so dense as not to make these precautions practicable, not to attempt to go out. While the master, pilot and engineer describe her movement as slow, and as involving barely the motion of the engine, I think all the proof warrants the conclusion that her speed, at the time of the collision, was from six to eight miles an hour. True, this was in part due to the current setting out; but the alternative here again recurs—if the circumstances of danger called for a more moderate speed, she must observe it, or, if the current was such that she could not do so, and at the same time keep under control of her helm, she should not attempt it in so critical a situation.

I am, however, not satisfied that the accident is solely due to the fault of the steamboat. The proof does, indeed, abundantly show that the schooner had a light, and it also shows, to my entire satisfaction, not only that it was not seen from the steamboat, but that it was not visible to that or any other vessel coming down the channel. That channel was, according to the claim of the libellants, and by the concurring testimony of their witnesses, to the eastward of the place where the schooner lay. Indeed, one of their witnesses locates her on the very edge of what he calls the bank. She was headed, as the libellants allege and claim, and as their witnesses testify, north or but little to the west of north, meeting, head on, the current setting out of the harbor, and presenting her starboard side to the channel and to all vessels passing therein. This would be her natural position, and would be her permanent position, unless a wind should arise, violent enough to force her around against the current. Instead of having a light at her foremast, so elevated and open to view that it could be seen on either hand and however the wind might change her position, as, I think, she should have had, and instead of having the light on her starboard side, which might be permissible while she lay headed northerly, as the libellants allege she was, her light was placed in her port rigging. Heading northerly, the more clearly the libellants prove that she was on the westerly edge of the channel, the more conclusively they show that she placed her light where it was least likely to be seen by any to whom it was important to give notice of her presence. Whether persons on shore were so notified or not was of no importance. But, to make this error more certainly effectual to prevent vessels in the channel seeing her light, she had her foresail and mainsail set. Even if it were conceded, that, under ordinary circumstances, with sails all furled, a light in the port rigging might be sufficient and might be seen from starboard, she was bound to notice the effect of setting her sails, and, if there was adequate reason for setting them, to take care that her light was shifted or so set that the sails would not hide it; and she was bound, also, in reference to this precise point, to notice the direction of the wind and the position of these sails. On this occasion, the wind was southerly, blowing a little on her port quarter; and, of course, the sails, while hanging, would be in a line to receive the wind edgewise, and nearly fore-and-aft the schooner—a position well adapted to hide the light from view. That, if the light continued to burn brightly till the time of the collision, it was so hidden, is, I think, fully established. Now, although the steamboat was in fault, she was entitled to all the chances of avoiding collision, which a proper light in a proper place would give her.

It is strenuously insisted, that, before the collision, the schooner had, by force of the south-westerly wind acting upon her sails, been forced around to the eastward, so that her stern was much further out in the channel than the place where, after the collision, she was found. The claimants' witnesses describe her as lying crosswise the channel, when struck by the steamboat; and the length of her chain, 35 fathoms, is claimed

to have been too great and to have permitted such a result, from the action of the wind on her sails. It is quite clear, that, if this be true, the light was most effectually hidden from view; and that fault becomes more obvious. It is not shown, however, by express testimony, that the length of chain was unusual or greater than prudence required, though I am myself wholly unable to perceive the propriety of giving a vessel anchored on one side of the channel so great a length of chain that, if the wind arose sufficiently to swing her outward towards the channel, she would project from two to three hundred feet from her anchor into that channel. Upon all the proofs, I think that this effect had been but partially produced, and that the direction of the blow and the course of the steamboat indicate that, while this fact may have contributed to the result, it is not sufficient to exonerate the steamboat from responsibility.

A decree for contribution by each vessel to the loss should be entered, each party bearing their own costs.

CITY OF NEW YORK, The (BAKER v.). See Case No. 765.

Case No. 2,760.

The CITY OF NORWICH.

[3 Ben. 575.] [1]

District Court, E. D. New York. Dec., 1869.

COMMON CARRIER—LOSS BY COLLISION—FIRE—BILL OF LADING.

1. A steamer and a schooner collided on Long Island Sound, in the night. The steamer was bound from New York to New Haven, and the schooner was closehauled, on a course nearly at right angles with the steamer's course, and kept that course unchanged. The steamer also kept her course unchanged, until close upon the schooner, which she did not see, as she claimed, until it was too late to avoid her. The schooner struck the steamer on her starboard side, making a large hole in her, into which the water rushed. When it reached the lower furnaces, flames burst out, and soon enveloped the boat. As the fire burnt off her upper works, and as she filled, she slowly sank, rolling over as she filled. Libels were filed against her, by several owners of the cargo on board. Some of the cargo was shipped on simple receipts, and some on bills of lading containing the following clause: "Dangers of the seas, fire, water, breakage, leakage, and all other accidents excepted—the risk of all which, it is stipulated, shall be borne by the owner." *Held*, that, if the schooner was not seen, as claimed by the steamer, until it was too late to allow of any change of her course, there was negligence on the part of those in charge of the steamer, in not seeing her sooner.

2. The restriction in the bills of lading could not relieve the vessel from loss occasioned by such negligence.

[Cited in The Montana, 17 Fed. 379.]

3. The fire must be considered as an incident of the collision. If it were true, as claimed, that, but for the fire, the vessel would not have sunk, and could have been towed in, such a consideration would not have the effect to screen the carrier, whatever might have been its weight in a question between insurers and insured; moreover, it was not proved that these particular goods were burned, or sunk in the boat.

4. There was no defence, under the act of March 3, 1851 [9 Stat. 635]. The vessel was liable, therefore, to all the libellants.

[Cited in Re Norwich & N. Y. Transp. Co., Case No. 10,362.]

BENEDICT, District Judge. These actions (fourteen in all) were separate proceedings in rem, instituted against the steamboat City of Norwich, by various shippers of cargo, to recover the value of certain goods, which were received on board the steamer, for transportation to New York, but were never delivered. After the seizure of the vessel, under processes issued upon several of the libels, it being made to appear that the claims likely to be brought against her, arising out of the same disaster, would exceed her value, she was bonded in her full value, the stipulation to be for the benefit of all parties who might come into this court and file libels against her, for damages caused by the same disaster.[2] After the discharge of the vessel under such a stipulation, one or two other libellants commenced proceedings in this court, and were, on motion, declared to be entitled to the benefit of the stipulation given for the vessel, and all the cases have been heard together upon their respective pleadings and proofs, and are now to be disposed of.

The various actions may be divided into two classes—one, where the goods sued for were shipped under a bare receipt, without any limitation of liability on the part of the carrier; the other, where there was a bill of lading containing the following clause: "Dangers of the seas, fire, water, breakage, leakage and all other accidents excepted—the risk of all which it is stipulated shall be borne by the owner." In other respects all the cases are alike.

The proofs showed the loss of the goods to have occurred as follows:—

The steamer, while proceeding from New Haven to New York in the night, and when in the Sound, some seven or eight miles north easterly of Eaton's Neck, came in collision with the schooner General Van Vliet, which was sailing close hauled, on a course nearly at right angles with that of the steamer. The steamer was seen from the schooner at some distance, and the course of the schooner was held unchanged. The steamer also held her course unchanged, until close upon the schooner, when it was too late to alter her course or materially check her speed, and the vessels came in violent contact, at nearly right angles with each other. The steamer received the blow on her larboard side, about sixty feet abaft the stem, where her hull was

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

[2] For this stipulation, and the decision under which it was given, see 1 Ben. 89 [Place v. City of Norwich, Case No. 11,202].

stove by the schooner's bow, a large hole being made, through which the water at once poured in large volume. In a very few moments after the blow, the water in the steamer reached the lower furnaces, and at once flames burst out, which shortly enveloped the boat. As the fire burned off her upper works, and as she filled, the steamer sank slowly, rolling over as she filled, and finally resting at the bottom, upside down. Much evidence was introduced on both sides tending to show the cause of the collision, which I have carefully considered, and as to which I deem it sufficient to say, that, if it be true, as claimed by the steamer, that the schooner was not seen from the steamer, until the vessels were too close together to admit of any change of course on the part of the steamer, there was, in my opinion, negligence, on the part of those in charge of the steamer, in not seeing the schooner as soon as they might have done, and in time to have avoided her.

The collision which is claimed to have caused the loss of the goods being thus found to have arisen from the negligence of the carrier, it follows that the libellants are entitled to recover, as well those having bills of lading as those having simple receipts, for it must be considered to have been settled that, while a carrier may restrict his liability by contract, such restrictions as appear in these bills of lading do not relieve from losses caused by the negligent navigation of his master and crew. 1 Pars. Mar. Law, p. 171–191.

But it is said that the goods in question were lost by the fire, and not by the collision, and that the fire was accidental, and not the result of negligence. My opinion, however, is, that the fire must be considered to have been simply an incident of the collision, a natural result, almost sure to follow such a blow inflicted in certain places upon such a vessel as this steamer—a result which, in this instance, did follow the blow almost immediately and directly—and, as between the shippers and the ship, in law, a result of the negligence which brought the steamer in contact with the schooner.

Indeed, the answer in the fourth article describes the fire as caused by the collision, and supposes it to be properly chargeable to the bad navigation of those on board the schooner.

I have not overlooked the argument which has been drawn from a line of proof, tending to show, from the specific gravity of the steamer, that, in the absence of the fire, the vessel would not have sunk below her promenade deck, and could then have been towed ashore, and her cargo saved; and, were this an action upon a policy of insurance against fire, it might be held, upon such proof, that, as between the insurers and insured, the sinking of the vessel was caused by fire; for fire, which was insured against, was one cause of the loss. But here the actions are against the carrier, who undertook to carry with care, and is shown guilty of a negligence which set in motion a train of circumstances, not necessarily indeed, but naturally, leading to the loss which occurred. The distinction between such actions and actions upon policies of insurance will be found stated in Grill v. General Iron Screw Collier Co., L. R. 1 C. P. 600.

And besides, the burden of proof being upon the carrier, it is not here shown that the particular goods sued for were burned by the fire or sunk in the boat. The evidence shows that some of the cargo was burned, and some sunk in the boat, and that some floated off, and was either picked up or lost in the water. But there is no evidence disclosing what became of these particular goods. All that is shown in regard to them is, that they were received by the carrier and never delivered, and that all the cargo was involved in the disaster of the 17th of April.

The proofs, therefore, fail to make out a foundation for the argument derived from the effect of the fire upon the specific gravity of the steamer and cargo.

These views dispose of the argument, which was based upon the act of March 3, 1851. Assuming that this steamer was not excluded from the effect of the act by the seventh section—a question which has not been raised upon this argument—and assuming, also, that the act, although confined, in terms, to the owners, can be construed as applying also to the vessel—neither of which questions I here decide—it appears to be clear, that the first section of the act can have no application in a case where fire is but an incident of a collision. Losses by collision are provided for in a subsequent section, where, by the terms of the statute, the owners are made liable for such losses, to the extent of their interest in the vessel.

My conclusion, accordingly, is, that these respective libellants are entitled to recover, of this steamer, the amount of the damages by them sustained by reason of the non-delivery of their goods. A decree will be, accordingly, entered, with orders of reference to ascertain and report the amount of such damages.

[NOTE. For a history of the subsequent proceedings in this case, see Case No. 2,762, and note.]

Case No. 2,761.

The CITY OF NORWICH.

[4 Ben. 271.][1]

District Court, S. D. New York. June, 1870.

COLLISION—CARRIER—LIMITATION OF LIABILITY BY NOTICE—NEGLIGENCE.

Where a receipt by a common carrier for property entrusted to him, stated that no package, if lost, damaged or stolen, should be deemed of greater value than $100, unless specifically receipted for, and it appeared that the property

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in question was lost by negligence of the carrier, *held*, that the limitation of liability was ineffective, against a loss arising from negligence, as being against public policy.

[Cited in Hart v. Pennsylvania R. Co., 112 U. S. 342, 5 Sup. Ct. 156.]

This case came up on exceptions to the report of a commissioner, to whom it was referred to ascertain the libellant's damages. The action was by a shipper of cargo on board the steamer, which was sunk in a collision with a schooner, occasioned by negligence on the part of the steamer. [See Place v. The City of Norwich, Case No. 11,202; and, also, The City of Norwich, Id. 2,760, next preceding.]

BENEDICT, District Judge. The only one of the questions, sought to be raised by the exceptions in this cause, which is now open in the court, is, whether the portion of the receipt, given by the carrier upon the shipment of the goods lost, and put in evidence by the libellants, which states "no package, if lost, damaged or stolen, to be deemed of greater value than $100, unless specifically receipted for at a greater valuation," can be effective to limit the amount of the recovery in this action. My opinion is that the words referred to cannot be effective to limit the recovery of the libellants, in a case like this. It has been decided, that the loss of these goods arose from actual negligence on the part of the carriers, and the reasons, which lead to the determination that the receipt is not effective to exempt from liability caused by actual negligence, apply to the portion of the receipt in question, as well as to any other part. To permit carriers to fix a limitation to the amount of their liabilities for their own negligence, is, in effect, to permit them to exempt themselves from such liability. Every consideration of public policy, which applies in the one case, seems equally applicable in the other. The exceptions must therefore be overruled, and the report confirmed.

[NOTE. For a history of the subsequent proceedings in this case, see Case No. 2,762, and note.]

Case No. 2,762.

The CITY OF NORWICH.

[6 Ben. 330.] [1]

District Court, E. D. New York. Jan., 1873.

LIMITING LIABILITY OF SHIP OWNERS—COLLISION—PRACTICE.

1. A collision occurred between a steamboat and a schooner, by which both vessels were sunk. The steamboat was raised by her owners and repaired, after which various suits were brought against her in this court in admiralty, to recover damages for such collision. Those suits were consolidated, and, by order of the court, one stipulation for the value of the steamboat was given in all. Subsequently her owners filed this petition, for the purpose of obtaining the benefit of the act of March 3, 1851 (9 Stat. 635), limiting the liability of ship owners, praying an appraisement of the value of the petitioners' interest in the steamboat and her freight, for that purpose. Objection was made on behalf of the parties who had claims against her: *Held*, that it was not necessary to the jurisdiction of the court over this matter, that the court should have possession of the vessel or her proceeds, or of a fund representing the proceeds, over which the court had already obtained control, through the exercise of its ordinary jurisdiction.

2. The pendency of the suits against the vessel, and the existence of the stipulation for value given in those suits, afforded no reason why this proceeding should not be taken, and that the petitioners were entitled to the order directing the appraisement as prayed for.

[Cited in Thomassen v. Whitwell, Case No. 13,930; Re Norwich & N. Y. Transp. Co., Id. 10,362.]

3. A proceeding, to obtain the benefit of the act in question, is not an action in rem, but is a proceeding sui generis, which partakes rather of the character of a suit in personam.

[See note at end of case.]

[In admiralty. Libel by George Place and Charles Place against the steamboat City of Norwich to recover damages for loss of cargo by reason of a collision between the libelled vessel and the schooner General Van Vliet, April 18, 1866. The Norwich & New York Transportation Company, owner of the steamboat, filed an answer and petition to have the benefit of the act of 1851 for a limitation of its liability. The court denied the prayer of the petition, but a stipulation was entered into, between the libellants and other shippers and the claimant, whereby the vessel was bonded for her full value, the stipulation to be for the benefit of all parties who might come in to recover damages for the same disaster. See Place v. The City of Norwich, Case No. 11,202. The vessel was discharged under the stipulation, and the cases of all the parties who came in were heard together, a decree entered for the respective libellants, and a reference ordered to ascertain and report the amount of the damages. See Id. 2,760. Exceptions were taken to the report of the master, which were overruled. See Id. 2,761.

[On March 4, 1872, the supreme court rendered a decision in the case of Norwich & N. Y. Transp. Co. v. Wright, 13 Wall. (80 U. S.) 104, on an appeal from the circuit court for the district of Connecticut. See Wright v. Norwich & N. Y. Transp. Co., Case No. 18,087, affirming same case in the district court, Id. 18,086. In that case the claimant of the steamboat had filed a petition setting forth the filing of the libel in the eastern district of New York, and praying for relief under the limited liability act of 1851. The district court denied the relief, and on appeal the decree of the district court was affirmed. The claimant then appealed to the supreme court, which, in the opinion before referred to, held that the limited liability act of 1851 adopted the general maritime law in reference to limited liability, as

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contradistinguished from the English law measuring the liability by the value of the ship and freight after, instead of before, the collision; that the act embraced cases of damage received by collision, as well as cases of injury to the cargo of the offending ship; that the district courts, as courts of admiralty, have jurisdiction to administer the law; and that the proper court to hear and determine the question is the court which has possession of the fund, i. e. the ship and freight, or the proceeds and value thereof.

[By leave of the court, and in view of the decision of the supreme court before referred to, the Norwich & New York Transportation Company commenced the present proceeding.]

J. W. C. Leveridge, for petitioners.

Martin & Smith and H. C. Place, in opposition.

BENEDICT, District Judge. This is a cause of limitation of liability promoted by the owners of the City of Norwich to exempt them from liability for the loss and damage resulting from a collision between that steamboat and the schooner General Van Vliet, which occurred in the Sound on the 18th of April, 1866.

The cause has been commenced by a petition which prays, among other things, that this court would direct an appraisement of the value of the interest of the petitioners in the said steamboat and her freight pending, to the end that a sum of money equal to the said value be paid into court by the petitioners, or secured to be so paid by them, and they declared exempt from further liability, and that a monition issue against all persons claiming damages from any loss occasioned by said collision, citing them to appear before this court and make due proof of their respective claims. Upon the presentation of this petition, notice of a time when the application for the order prayed would be made, was directed to be given by publication, at which time many persons, having demands arising out of said collision, appeared, but only for the purpose of calling the attention of the court to certain aspects of the case, as it stands.

In behalf of these parties, the first proposition urged upon me is, that the jurisdiction of a court of admiralty over a cause of limitation of liability is dependent upon a prior possession of the vessel's proceeds, or a fund representing such proceeds over which the admiralty court has already obtained control through the exercise of its ordinary jurisdiction. This is claimed to have been decided by the supreme court in the case of Wright v. Norwich & N. Y. Transp. Co., 13 Wall. [80 U. S.] 104.

I do not so understand that decision, and the law must be otherwise. As I read the opinion of the supreme court in the case referred to, the jurisdiction of the admiralty over a cause of limitation of liability is there maintained, upon the ground that the subject-matter of such a cause makes it a cause of admiralty and maritime jurisdiction within the meaning of the constitution. It is the nature of the relief to the owner of a ship which determines the jurisdiction. The supreme court declares that a court of admiralty is better adapted to administer that relief than any other. "The district courts, as courts of admiralty and maritime jurisdiction, have jurisdiction of the matter." The matter involved is the ascertaining of the extent of the liability of the owner of a ship, by reason of some occurrence in the course of the employment of the ship, and, unless that liability is proved to have been terminated by the total destruction of the ship without freight earned, apportioning among the creditors entitled thereto a sum equal to that liability, to which fund alone when paid into the registry the creditors can resort, and upon the payment of which or the surrender of his interest in his ship and her freight, the ship owner is entitled to be decreed exempt from all liability, in pursuance of the act of 1851. The nature of the relief being sufficient to bring the cause within the jurisdiction of the admiralty, it is not necessary that there should be prior suits in the admiralty to recover such demands, nor a prior possession of the vessel or of any fund by the admiralty court under the ordinary process in rem of the admiralty, or otherwise.

In England this jurisdiction is exercised by the court of chancery, and it there attaches upon the mere existence of claims against the owner of a ship, against which he is entitled to relief under the limited liability acts. The English admiralty also has jurisdiction, but only by virtue of a statute which confers the jurisdiction when "the ship or her proceeds are under the arrest of the admiralty." An actual possession of the ship or her proceeds, or "a state of things amounting to an equivalent for the arrest of the vessel," is, therefore, necessary to enable the English admiralty to entertain a cause of limitation of liability. But we have no such statute in the United States, and the jurisdiction of the American admiralty over such a cause is held by the supreme court to be conferred by the act which, in creating the district courts, gave them cognizance of all causes of admiralty and maritime jurisdiction. The power so acquired, to be effectual, must be as ample as that exercised by the English chancery in similar cases, and so the supreme court appear to intend.

It may well be, and indeed must be, in order to proceed to the final accomplishment of the result aimed at by the act of 1851 that, in cases where there is any subsisting liability on the part of the ship owner by reason of an interest in a ship in existence, the court must have the possession of the fund representing the value of that inter-

est, upon the surrender of which the act of 1851 transfers thereto all the rights of the creditors; but the jurisdiction of the court cannot be dependent upon the possession of such a fund, otherwise it would follow that, when the ship is wholly lost and no freight earned, and consequently no fund to distribute, notwithstanding the act exempts the ship owner in such a case, no court of admiralty could give effect to the act; and, as the supreme court has decided the state courts and the national courts of law and equity to be without jurisdiction, the precise result would follow which the supreme court has sought to avoid—namely, a failure of the act for want of a court to give it effect.

It may not be amiss, in this connection, to notice that the relief given by the act of 1851 may be sought under a variety of circumstances. There may be a ship left by the disaster in existence, which her owner has ready to be surrendered, free from all liens or demands other than those against which the act gives relief. She may be in his possession ready to be surrendered, but encumbered with liens, arising prior to the accident against the result of which the ship owner asks to be protected. She may be in existence, but in the custody of a state court under an attachment against the property of the owner, on one of the demands against which he is entitled to be relieved by her surrender. She may be in existence, but at the bottom of the sea, whence she cannot be raised except by an expenditure equal to her value, or at the bottom of a river whence she could be raised by a small expenditure, but one larger than her owner can make. Her freight may be in the hands of the ship owner ready to be surrendered, but it may also be in the hands of an irresponsible master; it may be still due from the freighter, and the right to it disputed by him in some other tribunal, or it may be in some foreign land. It will often occur, therefore, that there is no vessel in custody which will afford foundation for a proceeding in rem, and no fund to be paid into the registry of the court; and yet the act of 1851 intends that in all cases the ship owner shall obtain the relief afforded by the act, when the value of his property put at the hazard of the voyage, proves insufficient to discharge the liability arising out of the voyage. While, then, in most cases, doubtless, the possession of a fund for distribution will give to the cause of limited liability the aspect of a proceeding in rem, it is not such a proceeding, but rather partakes of the character of an action in personam. It is a proceeding sui generis, quite analogous, in respect to the maritime adventure involved, and the liability which arises therein, to a proceeding in bankruptcy—a proceeding limited, of course, to the maritime capital involved, and resulting in a discharge of the owner from certain classes of demands to which he has become liable in the use of that capital. It is taken in the admiralty by reason of the subject-matter, and is there to be conducted as the necessities of such a cause may require, in order to accomplish the result intended by the act of 1851.

But, if the presence of a fund within the control of the court of admiralty were necessary to give that court jurisdiction of a cause of limitation of liability, it is going far to say that it is also necessary that the court should have acquired the prior possession of the fund by virtue of its ordinary admiralty process. Even in England, where an arrest of the ship is by statute made necessary to give jurisdiction to the admiralty, it has been held that "a state of things amounting to an equivalent for the arrest of the ship," is sufficient to support the jurisdiction; and the deposit by the ship owner of a sum equal to the extent of his liability has been considered such an equivalent. James v. London & S. W. R. Co., 26 Law T. 195; The Northumbria, 21 Law T. 683. Certainly then, in this country, where there is no such restriction as in England, the deposit of such a fund in the court of admiralty will support the jurisdiction of that court to administer it. In this case there is such a fund tendered by the petitioner, and ready to be paid into court when so directed.

Nor does the proposition that the possession of a vessel or her proceeds is necessary to give jurisdiction of a cause of limitation of liability derive any support from the admiralty rules of 1872. On the contrary, rule 57 provides for the conduct of such a cause when the vessel has never been libelled, nor any suit brought in any court of admiralty, but only a suit against the owner in a court of law.

But it is further urged, that these petitioners are already in court, because their vessel has been libelled in this court, in an ordinary proceeding in rem, which is still pending. There is pending in this court a proceeding in rem brought against the steamboat City of Norwich by some of the creditors, against whom the petitioners are asking now to be protected; but that proceeding is no obstacle in the way of this proceeding. The only effect of the suit in rem is to fix this district as the one in which the cause of limitation of liability is to be taken by virtue of rule 58. The act of 1851, does not take away the right to institute a proceeding in rem, nor does it in any way interfere with the discharge of a vessel on bail in such suit, but it does permit the ship's owner thereafter to institute his cause of limitation of liability, and, upon complying with the statute, thereby to obtain a stay of all proceedings in the suit in rem, and thus in effect be released from any stipulation given in that suit. It is doubtless true, that if this vessel was still in custody, in the suit in rem pending against her, a transfer of her to a trustee appointed by this court, in pursuance of the act of 1851,

would secure a transfer of the possession from that of the marshal to that of the trustee; and it is no less true, that if a sum of money, representing the proceeds of a sale of this vessel in the suit in rem, was in the registry of the court, that fund, or so much thereof as should be necessary, could be transferred to the credit of this cause to save trouble and expense; and the probability that some such action would often be found convenient or necessary to prevent injustice, may have been one of the reasons for causing the pendency of a suit in rem to determine the district in which the cause of limitation of liability is to be taken; but the two causes should not be considered as connected or in any sense dependent one upon the other. I think it would prove detrimental to all interests, if any effect be given to the act of 1851, calculated to impair either the right of a lien creditor to seize the vessel by a proceeding in rem taken in time, or the right of the owner to obtain the discharge of his vessel from such seizure, by giving the ordinary stipulation for value, with a knowledge that by proper proceedings taken in a cause of limitation of liability, he can be relieved therefrom, when it shall appear that he is exempt from liability, either because the disaster which caused the loss resulted in the total destruction of his vessel without freight earned, or because he has in such cause surrendered all his interest in the ship and freight, and thereby transferred to such fund, all liability for the demand, to secure which until such time his stipulation for value was given. So, as I conceive, the supreme court have intended to be understood. It cannot well be supposed, that it has been intended to decide that the value of this steamboat, when seized in the suit in rem after she had been raised and repaired, is the limit of the liability of her owners, by reason of a disaster which occurred some time before. No such question appears to have been involved in the case before the court.

These remarks dispose also of the further objection made, that the petitioners do not afford the court of admiralty, any case for the exercise of its jurisdiction, because they do not offer to bring in their vessel, nor pay into the registry the sum, at which her value was fixed in the suit in rem, nor do they admit that the stipulation for value given in the suit in rem may be subjected to the claims of those who are to be cited to appear in this cause. There is no fund in this court, in the suit in rem, nor any stipulation there, such as is to be given in this cause, nor any necessity for any resort to the stipulation that was there given, to create a fund which might be transferable to this cause, nor was the value of the petitioners' interest in the vessel and her freight ever ascertained in that suit. An application was made to have that value ascertained in that suit, and to be permitted therein to give a stipulation for the amount of the owners' liability, and to pay in the freight; but the application was denied, on the ground that the proceeding to obtain relief under the act of 1851 was a separate proceeding, and could not be taken as a part of the proceeding in rem. The stipulation which was afterwards taken in that suit does not purport to represent the amounts of the owners' liability, under the act of 1851, and was not taken with any reference to the provisions of that act. The action of this court, in denying the application made in the suit in rem—see 1 Ben. 89 [Place v. The City of Norwich, Case No. 11,202]—seems to be confirmed by the decision of the supreme court in the Case of Wright, and accordingly this cause is now instituted. It is the first institution of such a cause by these petitioners, and it is to be conducted as a cause by itself, in which the petitioners, if they succeed, may obtain a decree exempting them from liability, and restraining any further action in the suit in rem, pending in this court, as well as in the other actions pending against them elsewhere.

I am unable, therefore, to see why, as this cause now stands, the petitioners are not entitled to an order directing an appraisement of the value of their interest in the City of Norwich, and her freight, pending the proceedings, and it is accordingly referred to a commissioner of this court to hold such appraisement, and report to this court the said value and amount. Notice of the time and place of such appraisement will, of course, be given to any parties who may duly enter their appearance in this cause.

[NOTE. On the coming in of the commissioner's report, exceptions were taken thereto, which were overruled, and the court made a decree authorizing the payment of the appraised value of the steamer into court, and appointed a commissioner to take proof of claims, etc. On a subsequent report of the commissioner, a final decree was entered (January, 1879), distributing the fund in court and discharging the petitioners from further demands. Case unreported.

[The case was then appealed to the circuit court, which affirmed the decree of the district court (October, 1879; decree entered July 3, 1882, case unreported), and from this decree the claimant of the schooner, and Place and others of the libellants, appealed to the supreme court.

[The decree of the circuit court was affirmed by the supreme court, the grounds of which affirmance are set forth in the syllabus to the case, by Mr. Justice Bradley, reported in 118 U. S., at pages 468, 526, 6 Sup. Ct. 1150, under the title of The City of Norwich. So much of the grounds of affirmance as bear upon the specific questions involved in the case are here given:

[The owner of the City of Hartford was entitled to a limitation of liability to the value of its interest in ship and freight, under the act of 1851. Rev. St. §§ 4282–4287.

[The point of time at which the amount or value of the owner's interest in ship and freight is to be taken for fixing its liability is the termination of the voyage on which the loss or damage occurs.

[In the present case, the voyage was terminated when the ship had sunk, and her value at that time was the limit of the owner's liability; and the subsequent raising of the wreck and repair of the ship, giving her an increased

value, had nothing to do with the liability of the owner.

[No freight except what is earned is to be estimated in fixing the amount of the owner's liability.

[Insurance is no part of the owner's interest in the ship or freight, within the meaning of the law, and does not enter into the amount for which the owner is held liable.

[The limitation of liability is applicable to proceedings in rem against the ship, as well as to proceedings in personam against the owner; the limitation extends to the owner's property as well as to his person.

[The right to proceed for a limitation of liability is not lost or waived by a surrender of the ship to underwriters.

[The district court had jurisdiction to receive the new petition and to proceed thereunder.]

Case No. 2,763.

The CITY OF NORWICH et al.

[8 Ben. 206.] [1]

District Court, E. D. New York. July, 1875.

COLLISION IN EAST RIVER — STEAMBOAT AND TUG —CROSSING COURSES.

1. The brig T. Z., while being towed down the East river by the tug F. W., at the end of a hawser, came in collision with the steamboat C., and her owner filed a libel against the C. and the F. W. to recover the damages. The case was heard on a single deposition, that of the captain of the T. Z., examined as a witness in behalf of the libellants. The tide was ebb and the day was fair, and the vessels came in sight of each other at a good distance apart, the C. having come round the Battery from the North river into the East river. The C. claimed that it was the duty of the F. W., because she had the C. on her starboard hand, to keep out of her way, and that instead of doing so she sheered in towards the New York shore across the bows of the C., and thus brought the brig in collision with her. The F. W. claimed that the C. was on her port hand as she came down the river, and instead of keeping on the port hand starboarded her helm and ran across the hawser, and thus came in collision with the brig. *Held*, that the claim made by the C. was not taken in the libel, nor was it sustained by the witness, his evidence showing that the C., in coming round from the North river, had reached to the middle of the East river, on the port hand of the tug and tow, and after that had so neared the New York shore as to be within 400 feet of the piers when she struck the hawser.

2. No reason being shown for her changing her course so as to approach the New York side of the river, she must be *held* to have caused the collision by such movement, and to be solely in fault.

In admiralty.

Goodrich & Wheeler, for libellant.

J. W. C. Leveridge and W. R. Beebe, for the City of Norwich.

R. D. Benedict and Andrew Stewart, for the Woodruff.

BENEDICT, District Judge. This action is brought by Henry Thackray, the owner of the brig Torrid Zone, to recover of the Sound steamer City of Norwich, and the steamtug F. Woodruff, for damages arising from a collision which occurred in the East river, on the 18th day of June, 1874.

While the pleadings interposed by the respective vessels are at issue upon most, if not all, material points, the case has been submitted to me for determination upon the deposition of a single witness, the master of the brig, produced by the libellants. The right of parties to ask a decision of the court upon the written deposition of a single witness from one of the colliding vessels, out of many at hand, cannot be denied; and still I must say that I dislike to be compelled to determine the rights of parties in this way, when those rights are made to depend in great measure upon the construction to be put upon the expressions of the witness. From this deposition and the admission of the pleadings, it appears that the brig Torrid Zone was being towed down the East river upon a hawser by the tug Franklin Woodruff. The City of Norwich was bound up the East river, having come around the Battery and into the East river upon a starboard helm. The weather was fair, the tide ebb, and all vessels could be easily seen. When in the East river the City of Norwich ran across the hawser by which the brig was being towed by the Woodruff, and so came in contact with the brig, causing the damage sued for. It appears that the vessels saw each other as they approached, and that the collision arose from the attempt of both the steamer and the tug to take the New York side in passing.

On the part of the City of Norwich, it is contended that the tug, having the City of Norwich on her starboard hand as she approached, ported, and ran across the steamer's bow, thus causing the collision.

But this position is not taken by the libellant upon the argument, does not appear in the libel, and is not supported by the witness. On the contrary, the deposition shows that the course of the tow was down the New York side of the river, bearing towards the New York side, while that of the City of Norwich was outside of the course of the tow, and bearing towards the middle of the river until she reached the middle of the river, and that afterwards she neared the New York side, so that when she struck the hawser of the tow she was only about 400 feet from the New York side. The channel of the East river curves sharply between the points at which these vessels sighted each other and the point of collision; and the course pursued by the City of Norwich, as described by the only witness called, was a course which crossed the course of the tug from the middle towards the New York side of the channel. No cause is shown for taking this course. For all that appears, she might have kept in the middle of the river, which the witness swears she had once reached. Had she done this no collision would have occurred.

Upon this evidence, therefore, I cannot do otherwise than hold the City of Norwich in

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

fault for thus crossing towards the New York side before a tow, seen by her to be intending to pass down on that side.

Let a decree be entered condemning the City of Norwich to pay the damages, and dismissing the libel against the Woodruff.

CITY OF NORWICH, The (PLACE v.). See Case No. 11,202.

Case No. 2,764.

The CITY OF PANAMA.

[5 Sawy. 63;[1] 1 San Fran. Law J. 329.]

District Court, D. California. Jan. 15, 1878.

COLLISION—MODERATE SPEED.

When a steamer was being navigated at the rate of at least eight miles an hour, in a dense fog, and in the usual track of vessels approaching this harbor, from ports to the northward: *Held*, that she was not going at a moderate speed, as required by section 4233, rule 21, Rev. St. U. S.

[Cited in The Pennsylvania, 12 Fed. 917.]

In admiralty.

Milton Andros, for libellant.

Delos Lake and H. P. McKoon, for claimant.

HOFFMAN, District Judge. On the night of the thirtieth of June, 1876, during a dense fog, the steamer City of Panama came in collision with the schooner Bill the Butcher. The collision occurred at some distance from the shore, but in the usual and frequented track of vessels entering this harbor from ports to the northward. No fault appears to be attributable to either vessel in respect to lights, lookouts, sounding the steam-whistle, or blowing the fog-horn. The only question is, whether the steamer was going at the "moderate speed" required by the statute.

In the very numerous cases which have arisen in this country and in England with regard to the meaning of this term it has been uniformly held that it admits of no precise definition. What under some circumstances would be a moderate speed would under others be considered excessive. Mr. Justice Lowell observes that the decisions only prove that there is scarcely any rate of speed that has not been held to be too great upon some state of facts. The Blackstone [Case No. 1,473]. The general rule seems to be that steamers, in a fog, must go at such a rate of speed as will enable them to avoid a collision by slowing, stopping, or reversing, within the distance at which, under the particular circumstances of each case, an approaching vessel can be discovered.

In the case of The Europa, 1 Pritch. Adm. Dig. 187, the privy council is reported to have decided that if the steamer was navigated at a rate which made it impossible for her to avoid collision with a ship, "discovering it only at the distance at which alone it could be discovered, that it followed as an inevitable consequence that she was going at a rate of speed at which it was not lawful for her to navigate." "This," as Mr. Justice Lowell remarks, "makes the fact of collision the conclusive test of negligence in all cases in which the sailing vessel is in no fault," to which may be added the qualification "where some overruling necessity does not deprive the steamer of liberty of action." The diligence of counsel has collected a long list of cases in which the general rule above laid down is applied, under a great variety of circumstances, to steamers going at rates of speed, in some instances, far less than that (eight miles per hour) at which the City of Panama was navigated.[2]

The cases also disclose the inflexibility with which the courts of this country and of England reject the various and sometimes plausible excuses set up by steamers for what is in fact a violation of the law. Some of these are: That in inland navigation it is necessary to maintain, in a fog, the usual rate of speed, in order that the vessel's position may be known; that by running rapidly through a fog the vessel is sooner out of it, and thus the danger of collision is diminished; that the vessel was under contract with the government, or was carrying the mails; that in Atlantic voyages, to diminish the speed would paralyze mercantile transactions and interfere with business and trade; that a vessel is more easily and quickly checked if going at a considerable speed and with a high pressure of steam than if going at a slower rate and with low pressure of steam, and therefore that a high speed conduces to safety. To all these excuses it is answered that the law requires steamers to go in a fog at a moderate speed, and it is not for their managers to violate or for the courts to disregard the provisions of the law.

In the case at bar the steamer's rate of speed was at least eight miles an hour. A very dense fog prevailed. The schooner was not discovered until about half a minute before the collision. At the steamer's rate of speed a collision was then inevitable. The evidence shows that at a speed of eight miles

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

[2] The Pennsylvania [Case No. 10,947]; Id., 19 Wall. [86 U. S.] 125; The Westphalia [Case No. 17,460]; The City of Guatemala [Id. 2,747]; The Hansa [Id. 6,037]; The D. S. Gregory [Id. 4,099]; The Franconia [Id. 5,049]; The Western Metropolis [Id. 17,441]; The Colorado [Id. 3,028]; The Magna Charta, 4 Marit. Law Cas. 153; Dolner v. The Monticello [Case No. 3,971]; The Java [Id. 7,232]; Jane v. The Great Eastern, Holt, Adm. Cas. 167, 180; The Pennsylvania, 3 Marit. Law Cas. 477; The Virgil, 2 W. Rob. Adm. 202; Macready v. Goldsmith, 18 How. [59 U. S.] 91; The Batavier, 1 Spinks, 378; The James Adger [Case No. 7,188]; The Blackstone [Id. 1,473]; Rogers v. The St. Charles, 19 How. [60 U. S.] 108; The Europa, 1 Pritch. Adm. Dig. pp. 186, 187, §§ 550, 551.

an hour she would go about four times her length if shut off and reversed. This would be more than three times the distance between the vessels when the schooner was discovered. The steamer's course lay on the track of vessels entering the harbor from the north, and this was made known to her not only by the usual course of trade but by the fog-horns which she heard at intervals during the night. The quartermaster testifies that he heard a fog-horn about six or eight seconds before the collision. This witness, who was called by the claimant, states the speed of the steamer to have been eight or nine miles per hour, and that at the time of the collision the vessel had gone off only about a point and a half, notwithstanding that her helm was put hard a-starboard the moment the schooner was discovered. I think there can be no doubt, under these circumstances, that the steamer was going at too great a speed, or else that her lookouts were inefficient.

Decree for the libellants and reference to the commissioner to ascertain and report damages.

Case No. 2,765.

The CITY OF PARIS.

[1 Ben. 174.][1]

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

COLLISION IN NEW YORK HARBOR — STEAMER AND SCHOONER — LOOKOUT — CHANGE OF COURSE IN EXTREMIS.

1. Where a steamer going to sea through a crowded harbor, chose a passage between two vessels at anchor, and seeing a schooner crossing the passage, at once starboarded her helm to go under the schooner's stern if possible, and slowed and stopped her engine, and the schooner, which had not kept a good lookout, on seeing the steamer as she passed by the vessel which was anchored off the steamer's port bow, luffed a little, and then kept off immediately, and the steamer struck the schooner near her foremast and sunk her, *held*, that the steamer had no right of way out to sea through the passage in question.

2. Though the steamer did all she could after undertaking the passage, she was in fault for not stopping sooner. Having kept on and placed herself in a position involving danger of collision, and well calculated to excite alarm, she must be *held* responsible for the consequences.

3. The schooner's luff did not appear to have prevented her from passing the steamer's track, but if it did, being a movement made in extremis, and under the alarm caused by the near approach of the steamer, it was no ground for holding her chargeable.

[Cited in The Havilah, 33 Fed. 877.]

4. If the court could see that the careless watch on the schooner had contributed to the collision, she would have been held in fault; but with a good lookout she would have been bound to hold the course she did till the luff, and the luff, if it was a false manoeuvre, was not caused by the want of a lookout, but by the dangerous attitude of the steamer.

[See note at end of case.]

In admiralty. This action was brought [by Henry P. Simmons and others] to recover the sum of $7,200, being the alleged value of the schooner Percy Heilner, which vessel, while proceeding across the North river to Jersey City, was sunk by a collision with the steamer City of Paris, at the time proceeding down the river bound to sea. The place of the collision was below the Battery, and to the east of Ellis' Island,—the time, about nine o'clock in the morning,—the tide, ebb,—the weather clear, and the wind blowing freshly from the E. N. E. The river below the Battery was quite full of vessels, riding athwart the river, tailing to the west, so that the passage of vessels down the river was much obstructed. Just to port of the direction of the Narrows, and east of Ellis' Island, there was an opening between the stern of the brig Hermania and one or two vessels lying to west of and a little below her. This opening formed a passage, which, although of sufficient width to permit the steamer to pass through, was too narrow to allow her to change her direction more than a point or two, when once her course was laid for it; and, as the wind and tide were, when once in the passage, she could not stop, without danger of being driven upon the vessels to the west and below. The schooner was sailing before the wind, upon a course which would carry her across this passage, passing from east to west, a short distance below the brig, and her rate of speed was such as to bring her to the passage at about the same time with the steamer. Some doubt appears to have existed in the minds of those in charge of the steamer as to where they should pass through the fleet of vessels which lay before them, and after consultation the opening described to the west of the brig was selected. When the schooner was first seen by those in charge of the steamer, the steamer was heading for the middle of the passage in question, and the schooner was in range of the brig off the steamer's port bow. As soon as the schooner was seen, the wheel of the steamer was put hard-a-starboard, and the engine slowed. When she had swung a point and a half to the east, and as far as it was safe to swing, for fear of the brig, her course was steadied, and the engines stopped, but her headway continuing, she passed the brig and came in contact with the starboard side of the schooner. Being then in danger of getting on the vessels to the west, she started her engine again, and pushed through the passage with the schooner hanging to her bow, and when through, backed off from the schooner which at once sank.

Owen, Gray & Owen, for libellants, argued: 1. That the steamer was in fault upon the facts, (a) in that she was running at too high

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[2] [Affirmed by the circuit court (case not reported). Decree of circuit court affirmed by supreme court in The City of Paris, 9 Wall. (76 U. S.) 634.]

a rate of speed for a crowded harbor, (b) in that she was not slowed down before coming up to the narrow passage between the vessels, (c) in that she did not have a proper lookout, and (d) in that she was not stopped soon enough.

2. That it was the statutory duty of the steamer to "keep out of the way" of the schooner, and not having done so, she is responsible for the consequences of the collision, unless she has succeeded in showing that she was prevented from so doing by the schooner not keeping her course. 13 Stat. 60; The Fairbanks [9 Wall. 420], Judge Betts; 13 Eng. Adm. R.

3. That the claimants had failed to show that the schooner did not keep her course, as the law required her to do, but that the weight of the testimony was that she did keep her course.

4. That if the schooner did luff, and then immediately kept off, as claimed by the steamer, still that furnished no excuse for the steamer. Even in such case she might and could have, with due and proper precautions, avoided the schooner. (a.) Such luffing and then keeping off did not embarrass the movements of the steamer. Her wheel had been put to starboard, and there it was kept, as was testified, until the collision. There was no changing of the wheel in consequence of such alleged luffing. All that was done by the steamer after the luffing was to stop and back. This was what ought to have been done before coming into such dangerous proximity. (b.) But the weight of testimony shows that by the alleged luffing the schooner did not materially change her course or lose time.

5. That even if the schooner had committed an error by luffing as alleged, still she was not responsible for any of the consequences that accrued therefrom. She did not voluntarily bring herself into the danger in which she found herself. She had not previously committed any fault in her navigation, but she was brought into such danger by the improper navigation of the steamer, in coming down at great speed, and in attempting to pass through the narrow opening between the bow and the stern of the vessels at anchor. This comes clearly within the rule upon this subject. The Genesee Chief, 12 How. [53 U. S.] 450; The Pacific, 21 How. [62 U. S.] 372. A change of course "in extremis" is not held to be a fault.

T. C. T. Buckley and R. D. Benedict, in behalf of the steamer, argued the following points:

1. In this, as in all other cases of collision, no presumption of liability arises from the fact of collision. The John Frazier, 21 How. [62 U. S.] 194; The Morning Light, 2 Wall. [69 U. S.] 557. Before the loss occasioned by a collision can be fastened on a party, it must be established by preponderating evidence that the loss has been occasioned by his culpable neglect. The Ligo, 2 Hagg. Adm. 356, 360.

2. It is urged that the rules of navigation established by the act of 1864 establish that in all cases of collision occurring between a sailing vessel and a steamer, proof of the mere fact of collision is sufficient, and the fifteenth article is invoked in support of the claim. Such latitude of construction would not only be subversive of the purposes for which it is presumed the rules were adopted, but it is opposed to the language of the nineteenth and twentieth articles of the same code, which preserve in their full integrity all rules which have heretofore formed part of the general maritime code regulating the duty of sailing vessels and steamers approaching on opposite courses.

3. One of the most elementary of those rules requires that there should be a proper lookout. By that is clearly meant a person engaged in observing the movements of approaching vessels; and where such a duty is not discharged at all, or defectively discharged, to say the least, the burden is cast on the side where such fault is shown to exist, of clearly satisfying the court that absence of a lookout in no wise contributed to cause the collision. The Saxonia [1 Lush. 410]. The schooner had an absolutely free wind, and was crossing a thoroughfare which was the legitimate track of outward-bound steamers, and if the law imposes on such steamers the obligation to give way to her, the correlative obligation also exists that the schooner shall observe the movement, and do nothing to thwart or impede it.

4. Another rule of equal force has also been established by numerous decisions,—Parker v. The Scotia [Case No. 12,512]; Caldwell v. The State of Maine [Id. 2,304],—to wit: that a sailing vessel approaching a steamer shall keep her course, and the steamer has the right to regulate her movements on the supposition that such a rule will be fully complied with. The law in relation to collisions between steamers and sailing vessels is laid down very fully by Judge Betts, in the case of The New Jersey [Case No. 10,161]. It is just as good law now as it was before the adoption of the regulations for the prevention of collisions. They merely made statutory what was previously the law of the sea in such cases. And from the law, as laid down by Judge Betts, it is clear that the libellants cannot recover in this action in either of the three following cases: (1.) If the schooner had no competent and careful lookout, unless she establishes that the want of it in no way contributed to the collision. (2.) If she changed her course so as to throw herself across the steamer's track. (3.) If she could have avoided the collision by any manoeuvre, when she saw or could have seen that the steamer could not avoid her without it.

5. The schooner had no proper lookout, as was shown by the testimony.

6. She altered her course, and was in fault in so doing, and the case does not come within the rule of a change "in extremis," because if it was made in fright by those on the schooner, that fright was not caused by any movement on the steamer's part, but because she had not been seen as she should have been, owing to the negligence of the schooner's lookout.

7. After changing her course she should have kept on instead of shifting her helm again.

8. As to the faults charged against the steamer, it would have been very imprudent for the steamer to stop as she approached the passage, for she would have lost steerage way, and would have been carried down on the vessels at anchor. But she had as good a right of way out to sea, as the schooner had across to Jersey City, and all that could be reasonably required of her was that she should pursue her course at a moderate rate of speed, and keep a sharp lookout; and both of these things she did.

9. The steamer has shown that she could not have avoided the collision; while the burden of proof is thrown upon the schooner in consequence of her want of a lookout, to establish that she could not avoid it, and this she has failed to do.

BENEDICT, District Judge. It is manifest that this steamer, having run down a sailing vessel, in broad daylight, must be held responsible for the loss unless it appears that the accident was caused by some false manoeuvre on the part of the sailing vessel.

Such a manoeuvre is charged here, and it is insisted that the cause of the collision was a sudden luff made by the schooner after she had passed the range of the brig's stern, which threw her under the bows of the steamer.

The evidence shows, that some such movement did take place at the time indicated. What the movement was is best shown by the testimony of a pilot who was watching the two vessels from the deck of the brig, who says that when the schooner was abreast of the brig's stern "she came to, luffed a little, and then kept off immediately after she luffed."

It is not claimed that this movement on the part of the schooner had any effect to change the course, or speed, of the steamer; but it is insisted that it caused unnecessary and unexpected delay on the part of the schooner in crossing the passage; and several witnesses from the steamer express a confident opinion that the time thus lost was sufficient to have enabled the schooner to pass the steamer's bows in safety.

The schooner was, however, moving rapidly before the wind. She did not come to till abreast of the brig's stern, and filled away again instantly. The point of first contact was her foremast, and when struck, her position was some one hundred or one hundred and fifty yards to the west of the range of the brig's stern. The delay caused by the luff must therefore have been very slight, and to determine positively that it was the cause of the collision, would involve a nicer calculation than could be safely based upon the facts proved here.

But if the delay was the cause of the collision, it cannot be charged upon the schooner as a fault, for the luff was made in extremis, and was caused by the close proximity of a large steamer, made more dangerous from the fact, that owing to the position in which the steamer had placed herself, she could neither stop her way, nor sheer further to the east.

As I view this case, the collision was caused by the fault of the steamer in attempting to pass through a narrow passage across which she saw, or ought to have seen, that a sailing vessel must pass at the same time. It is indeed true, as claimed on behalf of the steamer, that she did all that she could after she had undertaken the passage; but she should have stopped sooner, and had she done so, no collision would have occurred. I do not assent to the claim set up here on behalf of the steamer, that "she had as good a right of way out to sea, as the schooner had across to Jersey City, and all that could be reasonably expected of her was, that she should pursue her course at a moderate rate of speed, and keep a sharp lookout."

The sailing vessel having taken a course which lay across the passage in question, in plain sight, had a right to continue upon it, and the steamer should have stopped before she came to the passage. She had no right of way out through the passage, when the course and speed of the schooner was such as to make it dangerous to attempt to pass through it; having kept on, although at moderate speed, and placed herself in a position involving danger of collision, and well calculated to cause alarm, she must be held responsible for the consequences.

In arriving at this conclusion, I have not overlooked the fact that the schooner was not keeping such a lookout as is required of a sailing vessel when moving across a crowded harbor. If I could see that the careless watch kept on the schooner contributed in a material way to the accident, I should hold her in fault. But with ever so bright a lookout, the schooner would have been bound to hold the course she did up to the luff, and the luff if a false manoeuvre, was not caused by want of lookout, but by the dangerous attitude which the steamer was seen to present.

Decree for libellant, with order of reference to ascertain the amount of damage.

[NOTE. Pending the reference the Delaware and Mutual Safety Insurance Companies petitioned to be joined as colibellants, on the ground that they had paid to the owners of the cargo the amount of the insurance for a total loss, and thereby became substituted in the place of the owners, and to their right of recovery against the libelled vessel, and the

court granted the prayer of the petition. See Case No. 2,766.

[There was a final decree in favor of libellants, which was affirmed by the circuit court (case unreported), and from this decree of affirmance the claimant, The Liverpool, New York & Philadelphia Steamship Company, appealed.

[The supreme court affirmed the decree below for the reasons stated by Mr. Justice Swayne, i. e. that the steamer was in fault for maintaining a rate of speed higher than was consistent with the safety of other vessels in so crowded a thoroughfare; that the acts of the schooner, complained of as contributing to the disaster, were done in extremis and in the excitement of the moment; that their wisdom could not be inquired into; and that the evidence failed to show any ground for holding the schooner responsible in any degree for the casualty. The City of Paris, 9 Wall. (76 U. S.) 634.]

Case No. 2,766.

The CITY OF PARIS.

[1 Ben. 529.] [1]

District Court, E. D. New York. Nov., 1867.

COLLISION—APPLICATION BY INSURERS TO BE MADE CO-LIBELANTS.

1. Where a libel was filed by the owners of a schooner, which was sunk in a collision, to recover for her loss, and contained the allegation that it was filed "in behalf of the libellants and all parties having a common right of action arising out of the collision, who may intervene as co-libellants, or otherwise;" and, after a decree for libellants, and while the reference to ascertain the damages was pending, insurers, who had paid a loss on the cargo, applied to the court on petition to be made co-libellants; *Held*, that, as no injustice would be caused to the claimants, the application would be granted, although the court saw no necessity for, or advantage in, the proceeding.

2. That a special reference must be had, to take and report to the court the evidence produced by the petitioners to show their right to participate in the decree, and any evidence in opposition.

[Cited in The City of New York, 25 Fed. 153.]

This case came before the court upon a petition presented under the following circumstances: The libel was filed by Henry P. Simmons and other owners of the schooner Percy Heilner, to recover of the owners of the steamer City of Paris the damages arising out of a collision which occurred in the harbor of New York, on the 14th day of April, 1866, and averred that it was filed "in behalf of the libellants and all parties having a common right of action arising out of the collision hereinafter mentioned, who may intervene as co-libellants or otherwise." It also set out the amount and value of the cargo on board the schooner, and averred that the same was being transported by the schooner as a common carrier, and prayed that the libellants might recover the value of the cargo, freight, and vessel, as the damages sustained by reason of the collision. Upon this libel, and an answer denying these averments, the cause went to a hearing upon the merits, no other person having applied to be allowed to intervene as co-libellant or otherwise. Upon the hearing, an interlocutory decree was made in favor of the libellants, and a reference ordered to ascertain and report the amount of damages sustained by the libellants in the collision in question. [Case No. 2,765.] Pending the reference, the Delaware and Mutual Safety Insurance Companies appeared before the court, and petitioned to be joined as co-libellants in the action, upon the ground that they were the insurers of the cargo on board the schooner, and, as such, paid to the owners of the cargo the amount of their insurance upon said coal as for a total loss, whereby they claimed to have become substituted in the place of said owners of the cargo, and entitled to recover of the City of Paris the value thereof.

BENEDICT, District Judge. In actions of damage, where there are claims for injury to both vessel and cargo, the more usual, and, as heretofore generally considered, the better practice, has been to bring separate actions in behalf of the various parties entitled to recover, which actions are directed to be heard together upon the question of liability for the collision, separate decrees being rendered, and, in case of recovery, separate references ordered. Such is also the practice in the English admiralty, although there it is usual to formally consolidate the actions for the purpose of the main hearing, and to dissever them before proceeding with the reference. Lown. Col. p. 209; Coote, Adm. p. 26. A single action in the name of the owners of the vessel, as owners and as carriers of the cargo, is, in this country, also of frequent occurrence, and I know of no case where injustice or inconvenience has followed either of the methods referred to. The practice now proposed in this case seems to be considered to be now necessary, by reason of the decision of the supreme court in the case of The Commander in Chief, 1 Wall. [68 U. S.] 43, but I do not understand that decision to compel any change in the practice. That case decides that, in causes of damage, when timely objection is not taken to the parties libellants, the owners of the injured ship will be allowed to recover for injury both to the ship and her cargo; and that when such an action has been carried to a decree in rem, for the injury to cargo as well as vessel, upon a seizure of the vessel proceeded against, and due notice thereof, according to the course of the admiralty, a court of admiralty will not entertain a second action in behalf of the owners of the cargo; but, if necessary for the purpose of justice, will protect the interests of such owners in the distribution of the proceeds of the decree, rendered in the suit of the owners of the ship. This seems to me the extent of the decision, and, so construed, its correctness cannot well be doubted. See, also, The Ilos, Swab. 100. But while I do not understand the effect of this decision to

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

be to compel a joinder of all parties injured by a collision, as parties libellants in one action, the remarks of the court clearly indicate an opinion that such a joinder may well be made, and it will therefore be permitted in the present case, though I confess that I do not see the necessity or advantage of the proceeding. According to the opinion in the case of The Commander in Chief, the interests of the petitioner, in any amount which may be recovered by the owners of the schooner for cargo on board, can be protected in the distribution of the proceeds on the stipulation given; or, inasmuch as the action of the owners of the schooner has been conducted without publication of the usual notice of seizure, and has proceeded no further than an interlocutory decree, a second action for the loss to the cargo might, at this stage, be instituted in the names of the petitioners. There may, however, be reasons which are not disclosed, which render the practice proposed desirable in this case, and, as no injustice will be caused to the claimants by allowing it, an order may be entered to join the petitioners as co-libellants, according to their prayer; but it must be accompanied by a special order of reference, directing the commissioner, before whom the reference is pending, to take and report to the court, with his opinion thereon, such lawful evidence as the petitioners shall produce, to establish their right to participate in the decree, together with any evidence which the claimants may produce by way of defence to the demand.

Case No. 2,767.

The CITY OF PARIS.

[14 Blatchf. 531.] [1]

Circuit Court, S. D. New York. June 21, 1878.

COLLISION IN SLIP—MUTUAL FAULT — INTERVENTION BY INSURER — INNOCENT OWNERSHIP OF CARGO — LACHES — COMMISSIONER'S REPORT OF DAMAGES—MEASURE OF RECOVERY.

1. A., the master and owner of the canal boat M., filed a libel in rem, in admiralty, in the district court, against the screw steamer C., for himself and for an insurance company, alleging that the company was the insurer of the cargo of the M., and that the M., and her cargo had been damaged by a collision between the M. and the C., through the fault of the C. The libel did not allege that the cargo was owned by an innocent party, nor that the insurance company had paid the loss. The collision occurred in a slip, as the C. was moving out. The district court held that the C. was in fault for allowing herself to be drawn over toward the M., by a stern line fastened to the opposite pier, which was not cast off in time; and that the M. was in fault for being insufficiently fastened, so that she was drawn over towards the C. by the suction caused by the screw of the C. On appeal by both parties, this court *held*, for the same reasons, that both vessels were in fault, and made a decree holding the C. liable for only one-half of the damages sustained by both the M. and her cargo. After the decision of this court was announced, the insurance company moved (1) that it might be allowed to prosecute the suit for its own interest; (2) that it might be made a party libellant, and allowed to prove that the cargo on board the M. was owned by an innocent party, that it was insured against loss by the company, and that the loss had been paid in full; (3) that the record brought up on appeal might be amended by inserting in the apostles the minutes of the commissioner, on the reference in the district court to ascertain the amount of damages; and (4) that a decree might be entered against the C., and in favor of the insurance company, for the full amount of the damages to the cargo: *Held*, that the company might, if necessary, be admitted as a party, in order to settle its rights to its share of the recovery, as against the libellant, but only to that extent.

[Distinguished in The Martino Cilento, 22 Fed. 861. Cited in The Iniziativa, 50 Fed. 231.]

2. As the M. was sold three times between the time of the collision and the time of the decree of the district court, and as the remedy over against the M., in favor of the C., had been lost by the delay, the company could not now be allowed to make proof of the innocent ownership of the cargo, so as to charge the C. with the entire damage to the cargo, under the rule established in The Atlas, 93 U. S. 302, although the decision in The Atlas was not made until after the libellant had appealed.

[Cited in The City of New York, 25 Fed. 153.]

3. As the report of the commissioner was not excepted to, it was not necessary that his minutes of testimony should be brought up.

4. There could not be a decree against the C. for the full amount of the damages to the cargo.

[Cited in The Nevada, Case No. 10,131; The Gulf Stream, 58 Fed. 606.]

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

In this case, there were appeals by both parties from a decree of the district court [case not reported], in a suit in rem, in admiralty, in a cause of collision, finding both vessels to have been in fault, and dividing the damages.

Robert D. Benedict, for libellant.

James W. Gerard, for claimants.

WAITE, Circuit Justice. The libellant was, at the time of the occurrence hereinafter mentioned, the master and owner of the canal boat Montana, having on board a cargo of wheat, taken in at Oswego, New York, to be transported to New York City, and there delivered to Tompkins & Co., consignees. Between 2 and 3 o'clock in the afternoon of November 11th, 1871, the boat, with her cargo, was moved into the slip between piers 44 and 45 North river, in New York City, for the purpose of having her cargo transferred to the steamship Erin, then moored along the north side of pier 44. The Erin was a seagoing steamer, 370 feet long and 41 feet wide, lying with her bow towards the river, and her stern near to an L, on pier 44, 47 feet wide, and extending 130 feet from the bulkhead of the slip at the street. The Montana was 96 feet long and 17 feet 6 inches wide. Soon after her arrival in the slip, she was

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

moored along side of the lighter Fret, 23 feet wide, and from 60 to 70 feet long, which lighter was made fast to the Erin, opposite the after hatch of that vessel, with her bow towards the bulkhead, by lines leading from her deck, bow and stern, to the deck of the Erin. The deck of the Erin was much higher out of water than that of the Fret. The Montana, with her bow also toward the bulkhead, was made fast to the Fret by lines from her stern and middle cleats, which latter cleat was about her midships, to the bow and stern of the Fret. The decks of these two boats were about equal distances above the water. The bow of the Montana extended from 25 to 30 feet beyond that of the Fret, and there was no line from it either to the Erin or the pier. A floating elevator, 24 feet wide, and 100 feet long, was made fast to the Erin at her middle hatch, between the Montana and the river. Outside of, and made fast to, this elevator, was a grain barge 17 feet 6 inches wide, and 100 feet long. The slip was 160 feet wide at the river, and varied from that to 163 feet, until it reached the L. From there to the bulkhead, it was 115 or 116 feet wide, and, alongside the L, in the narrow part of the slip, two coal barges were moored side by side. The depth of the water in the part of the slip where the steamer laid varied from 18 to 22 feet. The steamship City of Paris, 416 feet long, and 40 feet 6 inches wide, was lying in the slip along side of pier 45, when the Montana came in. Her bow was towards the river, and her stern was on a line nearly at right angles with the end of the L, on pier 44. She was an ocean steamer, and one of a line of packets plying between New York and Liverpool, and leaving that slip on regular sailing days. When the Montana came in, the steamer had her steam up, and there was every indication that she was about to leave upon her voyage. This was observed and understood by the libellant. Some time before she left, she got out lines from her bow and stern, took them across the slip, and made that from the bow fast to pier 44, and that from the stern to the L. By these lines she was worked off from pier 45, 10 or 12 feet, so as to avoid collision with her own dock and the sheds upon it, as she moved out of the slip. A short time before starting, the usual whistle was blown. The captain, being on the bridge of his vessel, sent aft to inquire whether all was clear, and, receiving an affirmative answer, blew the last whistle and gave orders to go ahead. The lines leading to pier 45 were let go, but both of those leading across the slip, and made fast upon pier 44 and the L, were held on. No special notice was given from the steamer to the boats in the slip, that she was about to leave, but the libellant, standing upon the deck of his boat, saw what was being done, and knew what it meant. He took no additional precautions to protect his boat against injury by the movement of the steamer, supposing what he had done was sufficient. The officers and men on the steamer were in a situation to see how the Montana was moored and fastened, and did see her when the orders were given to go ahead. The movement of a large steamer like the City of Paris out of her slip necessarily causes a displacement of the water, and the revolution of her propeller has a tendency to suck in under her stern, with great force, everything which comes within its influence. This is a fact well understood by all engaged in that business. The stern line leading from the steamer to the L was not let go until she had gone some distance ahead. This caused her stern to swing over towards the Montana. The suction created by the revolution of the propeller drew the bow of the Montana toward the steamer, and, when the propeller passed by the Montana, one of its flanges struck her under water about 20 feet from her bow, causing a leak and damaging the cargo. The boat herself suffered but slight injury. The second officer of the steamer noticed the Montana moving toward the steamer, and called out to stop the engine, but no attention was paid to him, and the steamer proceeded to sea without any knowledge, on the part of her officers, of what had occurred. Usually, when a steamer goes out under the circumstances which existed at this time, the stern line is let go before she is started ahead. No notice was given to the Montana, that any other than the usual course was to be taken in this case. The swinging of the steamer on her stern line contributed directly to the collision which occurred, but still there would have been no collision if the bow of the Montana had not been drawn toward the steamer.

While it is the duty of a large steamer, in leaving her dock, to take care that no unnecessary damage is done to other vessels lying in proximity to her, it is equally the duty of the other vessels to take all reasonable precautions to protect themselves from the dangers to which they will be exposed by her movements. The libellant, in this case, had ample notice that the steamer was about leaving. He saw or could have seen her lines passing across the slip. He knew, or ought to have known, that, unless his boat was securely fastened, she would be drawn in under the stern of the steamer and exposed to being struck by the propeller as it passed. He also knew, or ought to have known, that, with the Fret lying close to the Erin, fastened only by lines leading up to the deck of that vessel, she could be moved to some extent outwards into the slip. With his own boat fastened only by lines at her stern and midships, it must have been evident to him that her bow could be swung some distance outwards. He also could and did see that the space between him and the steamer was not more than 20 or 25 feet. It needed, therefore, but a slight movement of the two vessels toward each other to bring them together. Under such circum-

stances, it was clearly his duty to be specially careful that the bow of his boat, which was the first to be exposed to the action of the propeller, was held fast in its position. It is evident that a line from his bow to the Erin, properly fastened, would have prevented the accident. This simple precaution he failed to take. It matters not that neither of the lines by which he was made fast to the Fret was broken. His boat was left so that she could swing to some extent upon her line amidships, and she did do so. This, added to the swing of the stern of the steamer, caused the loss. The libellant was, therefore, clearly in fault.

But the steamer was equally in fault. If her stern line had been cast off before she started, there is no reason to believe that her stern would have gone over toward the Montana, as it could not but do with the line fast. Thus the injury was caused by the combined fault of the two vessels. That of neither was sufficient alone to produce it. The damages of the parties in fault must, therefore, be divided between them.

It is contended, however, that, under the rule as established in the case of The Atlas, 93 U. S. 302, the owners of the cargo are entitled to their damages in full, as they are innocent parties. The libel is filed by the master and owner of one of the faulty vessels, for himself and the Pacific Mutual Insurance Company, of New York, and there has been no intervention by any owner of the cargo. It is averred that the insurance company was the insurer of the cargo, but it is nowhere averred or proved that the owner of the boat was not the owner of the cargo, or that the insurance company has paid the loss. There is nothing in the case, therefore, as it stands, to relieve the cargo from the fault of the Montana. The decree of the district court is affirmed, and a decree to that effect may be prepared.

Subsequently, the Pacific Mutual Insurance Company moved the court, (1) that it might be allowed to prosecute the suit for its own interest; (2) that it might be made a party libellant, and allowed to prove that the cargo on board the Montana was owned by an innocent party; that it was insured against loss by the company, and that the loss had been paid in full; (3) that the record brought up on appeal might be amended, by inserting in the apostles the minutes of the commissioner, on the reference in the district court, to ascertain the amount of damages; and (4) that a decree might be entered against the City of Paris, and in favor of the insurance company, for the full amount of the damages to the cargo.

WAITE, Circuit Justice. The original libel was filed by the master and owner of the Montana, "for himself and for the Pacific Mutual Insurance Company of New York." In it the libellant avers, on information and belief, that "the said Pacific Mutual Insurance Company were insurers of about 7,405 bushels of wheat, constituting the cargo," and "that the damage done to the cargo by reason of the said collision, and the flooding of the cargo with sea-water, was so great as to cause an almost total loss of the said cargo to the owners thereof, and that, by reason of the damage done to said canal boat, the libellant herein, and the insurers of the cargo, have suffered loss," &c. Under these averments there will be no difficulty in framing the decree, if it is desired, so as to separate the amount of the recovery on account of the insurer of the cargo from that on account of the owner of the boat. Unless there is a dispute between these parties as to their respective interests, there can be no necessity for the actual intervention of the company. The court will, upon its own motion, make the necessary separation, if the parties intimate such a desire. But, if the division is not agreed upon, and a controversy arises as to the amount each is entitled to, the insurance company will be allowed to appear and prosecute the suit to that extent, for its own interest. The libellant, having admitted that he sued for the company as well as himself, and having succeeded in recovering something for his beneficiary, cannot now object to a separation, in the decree, of that which he recovers in trust from that which he recovers as actual owner. If, therefore, it is necessary that the insurance company should be admitted as a party in order to a full and complete settlement of its rights in the action, as against the libellant, an order to that effect may be entered. In this question the City of Paris is not interested.

Upon the other branches of the motion, an entirely different question arises. The collision occurred November 11th, 1871. The libel was filed December 13th, 1871. At that time the Montana was owned by the libellant, and could have been proceeded against by the owner of the cargo or the insurance company, as well as by the City of Paris. The libel made no claim of any innocent ownership of the cargo. The hearing was had in the district court without any proof whatever of the interest of the insurance company, and a decision was rendered, June 10th, 1874, finding both vessels in fault, directing a division of the damages, and ordering a reference to ascertain the amount of damages. The commissioner filed his report February 6th, 1875. No exceptions were taken to this report, and a decree was accordingly entered, February 23d, 1875, dividing the damages as found and stated by the commissioner. The appeal of the libellant was taken March 1st, 1875, and perfected soon after. Between the time of the collision and the decree below, the Montana was sold and conveyed three times—once July 31st, 1872, again April 29th, 1873, and again June 29th, 1874. To allow the insur-

ance company to make proof now of the innocent ownership of the cargo, would be to allow it to make a new case against the City of Paris, not specifically stated in the libel, after all remedy over against the Montana had been lost by delay. An owner of cargo injured by a collision between two vessels, both of which are at fault, may sue either one or both of the vessels, as he chooses, and recover the full amount of his loss. The Atlas, 93 U. S. 302. Without doubt, too, the master or owner of the carrying vessel may sue in his own name for the benefit of the owner of his cargo; but if, in such case, a recovery is sought for the full amount of the loss, notwithstanding the fault of the party in whose name the suit is brought, the facts which give the right to such a recovery and the claim should be clearly stated, or otherwise made to appear upon the record. This is because the prosecuted vessel may, in such a case, by some appropriate form of proceeding, call upon the other vessel to respond in the action for its share of the loss. Unless this is so, it would be in the power of the carrying vessel, by commencing suit in the name of its owner, for the benefit of the shipper, to relieve itself from all liability for a loss to its cargo, resulting in part from its own fault.

If the owner of the cargo adopts as his own a suit commenced by the owner of the carrying vessel for his benefit, he is bound by the case which is made on his account. If that case does not disclose his innocence, or his right to claim for his whole loss, even though it happened in part through the negligence of his carrier, he must suffer the consequences of that omission. When this suit was commenced, the Montana could have been sued by the insurance company jointly with the City of Paris, and, if that had been done, each would have been decreed to pay one-half the loss. If the case had been so stated, in the libel actually filed, as to relieve the cargo from the consequences of the fault of the Montana, the City of Paris might have brought the Montana into the suit, to answer for the consequences of her own wrongful acts. This was not done, and, down to the time of the decision below and the reference to ascertain the amount of damages, nothing had been done in the case, or stated in the pleadings, which called upon the owners of the City of Paris to take affirmative action for the purpose of relieving themselves from liability for more than one-half the loss, in case the Montana was shown to have been in any respect in fault. Previous to the decision the right of action against the Montana had been lost by laches and delay. At that time, it is conceded that neither the insurance company nor the City of Paris could have proceeded against her. The laches which barred the action is chargeable solely to the insurance company. To allow the company now to make a new case against the City of Paris, and recover for the whole loss, after, by its own neglect, the Montana had been relieved from liability for its share, would be grossly inequitable. If the difficulty rested upon the failure of proof alone, the case would be different. As it is, neither the proof nor the libel, at the time of the decision below, would have justified any other decree than the one which was given.

I am aware, that, until the case of The Atlas, which was after this appeal, the supreme court had never decided that any innocent party could recover from one of two faulty colliding vessels the full amount of his loss, and that, possibly, until that time it may not have been considered necessary to state or prove the fact of innocent ownership, in a case like this. If the rights of the parties had not been changed by the delay, this would be a good reason for allowing the original defects in these pleadings and proofs to be supplied now. In admiralty, amendments are liberally allowed, and opportunities to supply omissions in proof are freely afforded, when the equity of a case is plain, but care is always taken to see that wrong is not done in that way. Here, as has been seen, the rights of the parties have been changed by the delay, and wrong would be done to the City of Paris if the insurance company is permitted to make its new case. For that reason, I am clear that this part of the motion should be overruled.

It only remains to consider the application to amend the record by inserting in the apostles the minutes of the commissioner on the reference in the district court to ascertain the amount of damages. The commissioner made his report February 6th, 1875, stating his findings from the evidence submitted to him, but making no reference to any return of the evidence. It is now said, that the minutes of the testimony were put on file below, February 9th, 1875. In the order of reference the court did not direct a return of the evidence. No exceptions were taken to the report, and it nowhere appears that the commissioner was requested by either party to report the evidence. If actually filed, it was never considered or acted upon in the court below. No question raised below required the court to examine it. No question is raised here upon the report. All parties appear to be satisfied with the result reached by the commissioner. Under such circumstances I do not think the minutes of the commissioner are at all necessary for the proper consideration of the case here. If sent up, they can only be considered in connection with questions raised upon the report. As no such question has as yet been made here, the motion to amend must be denied. If, in any adjustment of the amounts payable to the owner of the boat and the insurance company, respectively, an examination of this evidence shall become important, nothing now decided will be permitted to have the effect of preventing another application to bring it into the record, from

the court below. The practice in admiralty in respect to the disposition and use of testimony taken before a commissioner upon a reference to state an account, is not different from that in equity upon a reference to a master for a like purpose. The rule in equity is clearly and correctly stated by Mr. Justice Clifford, in Union Sugar Refinery v. Mathiesson [Case No. 14,398].

The motions are all overruled, except that which relates to the allowance of leave to the insurance company to prosecute the suit in its own interest. As to that, an order may be entered permitting the company to appear and prosecute the suit, as between itself and the libellant, to the extent that may be necessary for the purpose of ascertaining its share of the recovery from the City of Paris, upon the principle of an equal division of the damages resulting from the collision, between the Montana and the City of Paris. For the purposes of any further prosecution against the City of Paris, the motion is overruled.

Case No. 2,768.

The CITY OF PHILADELPHIA.

[The case reported under above title in 37 Hunt, Mer. Mag. 449, is the same as Case No. 1,152.]

Case No. 2,769.

The CITY OF TROY.

[9 Ben. 466.] [1]

District Court, E. D. New York. April, 1878.

COLLISION IN NORTH RIVER—TUG AND TOW—LIGHTS.

1. Where a tug coming up the North river with a barge in tow encountered below West Point a passenger steamer coming down, and a collision ensued between the steamboat and the barge; *Held*, that the failure of the tug to display the lights required by law as indicating that she had a tow was not a fault conducing to the collision, it appearing from the evidence that there was no darkness sufficient to prevent an approaching vessel from seeing the vessel in tow of the tug.

2. Whether the display by a tug-boat of two lights, substantially vertical, hung abaft the pilot-house and not at the bow, is a compliance with rule 4 of the navigation rules (Rev. St. § 4233) quaere.

3. The decision in the case of The Blanche Page [Case No. 1,522] questioned.

In admiralty.

Butler, Stillman & Hubbard, for libellant.

S. B. Caldwell and C. Van Santvoord, for claimant of steamboat.

James McKeen, for claimant of tug.

BENEDICT, District Judge. This action is instituted by the owners of the barge Republic, to recover the damages caused by the sinking of that barge in a collision that occurred on the morning of July 13th, 1877, just above Limestone Point, in the Hudson river. The barge was bound up the river, and was being towed astern of the tug Atlas. The City of Troy was bound down the river.

The questions in the case are, whether the collision arose from the omission of the barge to exhibit a light, or from the omission of the tug to display lights indicating that she had a tow, or from failure on the part of the Troy to maintain a proper lookout, or from an attempt on the part of the Troy to pass to west of the tow when she should have passed to east.

The testimony shows that the Troy, having seen the Atlas and being near to her, stopped her engine and hove her wheel aport, with the intention of passing down to west. This sheer carried the Troy clear of the Atlas to the west, and there is no room to doubt that, if the sheer had been maintained, it would also have carried the Troy clear of the barge which the Atlas had in tow. But the sheer was not maintained; after a sheer sufficient to clear the Atlas had been obtained, the wheel was allowed to run and the engine was permitted to remain still until the two steamboats were fairly abreast of each other. When so abreast of the Atlas, a signal was given on the Troy to start the engine again, which was countermanded before the engine had fairly begun to move, and the collision immediately followed, the Troy striking the port bow of the barge in tow of the Atlas. The blow was given nearly head on, and at that time the Atlas and the barge were bearing to east under a port helm.

The course of action pursued by those in charge of the Troy, after the engine was stopped and the boat given a sheer to west, was the immediate cause of the collision that ensued. The manner in which the two boats came together and the position of the respective vessels conclusively show that, if the Troy's engine had been put in motion as soon as the sheer had been given to the Troy, and if the wheel had been kept aport, the Troy would have cleared the barge, as she did the Atlas. It is equally certain that there was nothing to prevent the Troy from keeping her sheer and from starting her engines as soon as she had got headed to west of the course of the Atlas. Under the circumstances it was imperative on the Troy, if collision was to be avoided, to get further to the west as soon as she could. This course was plainly demanded by the position of the respective vessels, and I cannot doubt that it would have been pursued had the pilot of the Troy known of the presence of the barge in tow of the Atlas. Instead of pursuing this course, the pilot of the Troy allowed the speed of his vessel to diminish and broke his sheer, with the intention of passing as close as possible under the stern of

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

the Atlas. This he did upon the assumption that there was nothing in tow of the Atlas.

The decisive question of the case, then, as I view it, is whether the pilot of the Troy was justified by the circumstances in assuming at that time that there was no tow astern of the Atlas. He claims to be justified in so assuming, by the fact that it was dark, and the Atlas failed to display the lights required by law to give notice that she had a tow. This justification consists of two elements: darkness such as to render signal lights necessary to show that a boat was in tow of the Atlas, and absence of such lights. If either element be wanting, the justification is not made out. It is clear, upon the evidence, that there was no darkness sufficient to prevent the barge in tow of the Atlas from being seen by those in charge of the Troy at the time when the wheel was let run and even when the boat was slowed. Disinterested witnesses, called by the Troy, prove that the night was not so dark but that, shortly before the collision, the hull of the barge in tow of the Atlas had been seen at a distance much greater than was required to enable the Troy to avoid the barge. The collision occurred on a clear July morning, when the dawn was already breaking, and the weight of evidence is, that the barge was carrying a light at her bow that could have been seen at a considerable distance. Nevertheless, the barge, although plainly visible, was not seen by those on the Troy, and the reason why is disclosed by the evidence. The lookout of the Troy, instead of attending to his duty, had betaken himself to the pilot-house, and with the pilot was engaged in heaving the wheel hard over in the effort to clear the Atlas. The attention of both the pilot and the lookout was engrossed in endeavoring to clear the Atlas, whose presence, moreover, the evidence gives room to contend, had suddenly become known to them. Beyond all question, if the lookout had been at his station, and diligently observing what was ahead of him, he would have warned the pilot, and the barge in tow of the Atlas would have been avoided, for the sheer that carried the Troy to west of the Atlas, if maintained, would certainly have carried her to west of a vessel that was following the Atlas at the length of a hawser. I am, therefore, forced to the conclusion, that the collision in question was caused by the fault of the Troy in not maintaining a proper lookout.

Having arrived at this conclusion, it is unnecessary to determine whether the lights proved to have been carried by the Atlas were such as are required by law to indicate the presence of a tow. There is abundant proof that the Atlas did display two lights substantially vertical, that could be seen at a distance, and it would seem hardly possible that any pilot, seeing those lights, would have failed to infer that he was meeting a tow; but this pilot did not so infer, indeed he says he saw but one of the high lights on the Atlas. The point is therefore made, that the statute requires the high lights to be hung at the stem of the boat, and inasmuch as on the Atlas they were hung abaft the pilot-house—twenty-two feet abaft the stem—they were not such lights as will in law charge the pilot with notice that the Atlas had a tow.

If it were not that a contrary opinion had been expressed by Judge Blatchford (The Blanche Page [Case No. 1,522]), I should have thought that rule 4 of the navigation rules, which by its terms certainly only requires two high lights, carried vertically, without saying whether forward or aft, as the signal for a tow, was complied with by displaying two high vertical lights aft. Such I had supposed was the general understanding of that rule, it having been considered that rule 7, which contains the requirement in respect to those important lights, the range lights, and which directs that an after range light shall be carried at least fifteen feet above the light at the bow, indicates that the vertical lights required by rule 4 are not to be at the bow, because it would be impracticable to carry an after range light fifteen feet higher than lights carried at mast-head on the bow. I may add that I recollect two cases—The Atlas [Case No. 634]; The Tillie [Id. 14,049]—which have proceeded, not only in this court, but in the appellate court, upon the assumption that high vertical lights aft are proper lights to indicate a towing vessel. In both these cases the question of lights was raised, and in both cases the vertical lights were hung aft. The opinion delivered in these cases by the circuit court could hardly have failed to notice the fact if lights so hung had been considered as improperly located. Indeed, in the former case, where the tug engaged in towing carried two high lights aft on the flag-staff, and also two lights on her bow (not mast-head), the opinion declares that "she had her own proper lights set and burning and bright."

But as I look at this case it is unnecessary to decide whether the Atlas complied with the statute in regard to vertical lights, for the reason that, whether she was so equipped or not, there was no difficulty in those on the Troy seeing the barge behind her at the time when they committed the mistake that brought them in collision with the barge, nor to determine whether the failure of the pilot of the Troy to see but one of the two high lights displayed by the Atlas can be supposed to have arisen from the circumstance that the two lights were placed twenty-two feet abaft the stem instead of at the stem. It is equally unnecessary in this view of the case to determine whether, as has been contended, it was a fault of the Troy that she kept a course so nearly approaching the course of the Atlas, and brought herself so close to the Atlas before she changed, instead of passing to east at a safe distance. If the Troy was faulty in this regard that was not the fault

which caused the collision. As already shown, the fault that caused the collision was committed after the Troy began to sheer to the west, and consisted in not seeing the barge when she might have been seen, and in not sheering sufficiently far to the west to avoid her.

No fault contributing to the accident appears in either the Atlas or the barge. The Atlas did not stop or break her sheer but passed as far and as rapidly to east as it was possible to do after receiving the Troy's signal. The barge behind her had a light displayed and she too was as far to east as it was possible for her to get under the circumstances.

According to these views the Troy alone must be held responsible for the collision.

There must therefore be a decree directing that the libellant recover of the City of Troy the amount of damages sustained by the libellant, and that, as against the Atlas, the libel be dismissed with costs.

Case No. 2,770.

The CITY OF WASHINGTON.

[6 Ben. 138.][1]

District Court, E. D. New York. June, 1872.[2]

COLLISION AT SEA — STEAMER AND PILOT BOAT—LIGHTS—BURDEN OF PROOF.

1. A steamer, bound to the westward, discovered the flash lights of a pilot boat to the northward, about abeam. She replied to them, indicating that she wanted a pilot, and changed her course to N. W. by N. The pilot boat changed her course to the southward and westward to meet the steamer, showing her torches as she proceeded. The wind was fresh. When the vessels were four or five lengths apart, the courses of the vessels were crossing, and the starboard side of the steamer was the lee side. She showed a light on that side to guide the pilot to his place, and a pilot left the pilot boat in a yawl, having with him a light, to board the steamer. The steamer was kept in motion, and starboarded her helm, and, before the yawl boat reached her, she ran into the pilot boat and sank her. The pilot boat had no masthead light, but the light, which the pilot carried as he went into the yawl, was seen by those in charge of the steamer: *Held*, that the steamer was in fault, in not stopping still before she reached the pilot boat, and also in starboarding her helm.

[Cited in The Columbia, 27 Fed. 708; The La Champagne, 43 Fed. 447.]

2. The burden was on the pilot boat of proving that the absence of the masthead light, which she should have carried, did not contribute to the collision.

3. As the exact position of the pilot boat was known to those in charge of the steamer, and as the absence of the masthead light was not set up in the answer of the steamer as an act of negligence, the absence of the masthead light did not contribute to the collision, and the steamer must be *held* solely liable.

Scudder & Carter, for libellants.

Platt, Gerard & Buckley, for respondent.

BENEDICT, District Judge. This action is brought by Peter A. Baillie and others, owners of the pilot boat John D. Jones, to recover of the steamship City of Washington some twenty thousand dollars, for the sinking of the pilot boat, in a collision which occurred between those two vessels on the night of March 28th, at sea, and about 200 miles from Sandy Hook.

The steamer, bound to the westward, at about 11 p. m. discovered the flash lights of a pilot boat to northward, about abeam, and some four or five miles distant. She replied to the signals, indicating that she wished to receive a pilot from the boat, and altered her course to about N. W. by N., to meet the boat. The boat, on her part, kept away to the southward and westward to meet the steamer, showing her torches as she proceeded. The courses of the two vessels were thereafter crossing each other, with a fresh breeze of wind.

When the two vessels had approached within four or five lengths of each other, the steamship had hauled up sufficiently to make her starboard side the lee side, and she showed a light on her lee side to guide the pilot to his place to board the steamer; and a pilot left the pilot boat in the yawl, having with him a light, to pull to the light on the starboard side of the steamship. Before the pilot had time to reach the steamer in the yawl, the pilot boat was under the steamer's bows, and was struck by the steamer on her port side, causing her to sink and be lost. The negligence charged upon the steamer as the cause of this loss, is, that she starboarded her helm, whereby the pilot boat was brought under her bows, and that she did not back in time to stop her way before she struck the pilot boat.

The starboarding is admitted in the answer, and, under the circumstances disclosed by the evidence, I consider it negligence. The course of the pilot boat was known to be crossing that of the steamship, the breeze was fresh, and it was known to the steamship that at her request the pilot boat was endeavoring to place a pilot on board her. This manoeuvre the pilot boat was entitled to be permitted to accomplish without embarrassment from the steamer. Certainly the steamer, by starboarding and giving herself a course across the course of the pilot boat, while the yawl, which was to be picked up by the boat after the pilot was placed on the steamer, was in the act of passing to the steamer, attempted a manoeuvre which cast upon her the risk of its success.

I think, also, that it was the duty of the steamship to stop still before she reached the pilot boat, instead of which she was kept moving ahead—slowly it is true, but yet with a momentum which, with the starboarding, brought her upon the pilot boat and sank her. I must, therefore, hold the steamer responsible in this action, by reason of these faults.

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

[2] [Affirmed in Case No. 2,771.]

The only remaining question is, whether the pilot boat must not also be held in fault for not having the masthead light, which the law requires. It is conceded, that the pilot boat had no such light, and the burden is, therefore, on the pilot boat to show that the absence of such a light did not contribute to the collision. This is made to appear by the clear proof given by the witnesses for the steamship, that the other lights of the pilot boat were seen by them. Her exact position was known by those on the steamship, as appears from the fact, that they saw the light which the pilot carried when he went into the yawl. I consider, therefore, that the evidence shows, beyond dispute, that the absence of the masthead light in no way contributed to the accident. Furthermore, the absence of the masthead light is not set up in the answer as an act of negligence, nor is its absence alluded to therein. I, therefore, cannot hold that the fault of the pilot boat, in not having a masthead light, renders her chargeable with any part of the loss. The decree will accordingly be in favor of the libellants, with an order of reference.

[NOTE. The Liverpool, New York & Philadelphia Steamship Company, claimant, appealed from the decree herein to the circuit court, where the decree was affirmed. See Case No. 2,771.]

Case No. 2,771.

The CITY OF WASHINGTON.

[11 Blatchf. 487.] [1]

Circuit Court, E. D. New York. Feb. 19, 1874.[2]

COLLISION — STEAMER AND PILOT BOAT — LIGHTS — CUSTOM.

1. A pilot-boat, at night, by her flash light, was seen from a steamer at a distance of several miles, and the officer of the steamer saw her movements, and saw that her course was such as would cross the course of the steamer. The pilot-boat came to a position nearly ahead of the steamer, and lowered a boat, with a lantern on board, to take a pilot to the steamer. This was seen from the steamer. The pilot-boat was crossing from starboard to port of the steamer, and kept her course. The pilot-boat showed no mast-head light. The steamer did not stop, but starboarded, and collided with the pilot-boat: *Held*, that the collision was not due to the want of a mast-head light on the pilot-boat.

[See note at end of case.]

2. The steamer was in fault in starboarding, and in not stopping to receive the pilot.

[Cited in The Columbia, 27 Fed. 708.]

[See note at end of case.]

3. It being shown to be the custom, it was not a fault in the pilot-boat to put herself into the path of the steamer, and there lower her yawl, to put a pilot on board of the steamer.

[Cited in The La Champagne, 43 Fed. 447.]

[See note at end of case.]

[In admiralty. Libel by Peter R. Baillie and others, owners of the pilot-boat John D. Jones, against the steamship City of Washington, to recover for the loss of the pilot-boat by collision. The district court decreed in favor of the libellants (Case No. 2,770), and the Liverpool, New York & Philadelphia Steamship Company, claimant of the steamship, appeals.]

Townsend Scudder, for libellants.

James W. Gerard, Jr., for claimant.

WOODRUFF, Circuit Judge. The preponderance of the evidence is, I think, clearly in support of the decree made in the court below. The pilot-boat, by her flash light, was seen from the City of Washington at a distance of several miles, and the testimony of the second officer and of the wheelsman of the steamship both show that they saw her movements, and saw that her course was such as would cross the course of the steamship. Other testimony from the pilot-boat shows that the repeated exhibition of the flash light must have apprized those on the steamer of her movement in that direction; and even the master of the steamer must have observed her near approach in that direction, when he saw the letting down of her yawl, to bring a pilot to the steamer, with a lantern on board. From that moment his attention was diverted to watching the approach of the yawl; and, even according to his testimony, the pilot-boat was then nearly ahead. He seems to have trusted to his own supposition, that, so soon as the yawl left her, she would put up her helm and fall off to leeward, (as he thinks she should have done,) and, therefore, paid no attention to her. But she in fact, continued her course, and the weight of the testimony is that she was in the act of crossing the course of the steamer when her yawl left her, if, in truth, she had not crossed it, so as to bring the steamer's port light into view. Under these circumstances, and with the knowledge of the course of the pilot-boat, most decisively established by the testimony of the second officer and wheelsman, and implied in that of the master of the steamer, it is impossible to say that the collision was in any degree due to the want of a mast-head light on the pilot-boat.

It is equally clear, that the collision was due to fault in the navigation of the steamer. If, as the witnesses from the pilot-boat testify, the pilot-boat had crossed the course of the steamer, so as to bring the port light of the latter into view, before the steamer starboarded, then the fault of such starboarding is manifest. If the pilot-boat was only ahead at that moment, still, as her course was to the port of the steamer, such starboarding was improper. In any event, it seems to me that the steamer was in fault, in not slowing, and, if necessary, stopping, at an earlier moment, and before coming into such dangerous proximity to the sailing vessel. Indeed,

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

[2] [Affirming Case No. 2,770. Affirmed in The City of Washington, 92 U. S. 31.]

upon the proofs, it was the duty of the steamer to stop to receive the pilot, attempting to board her in the night season.

Left to my own unaided judgment, I should have deemed it an improper risk assumed by the pilot-boat, when approaching to place a pilot on board a steamer, to put herself voluntarily and deliberately in the path of the steamer, to there lower her yawl for putting the pilot aboard. It would have seemed to me that taking such a position was unnecessary and greatly dangerous; but, the proof is, without contradiction, that this is the custom, and reasons are given for it which, to the witnesses, seem satisfactory. Doubtless, this custom proceeds upon an assumption that the steamer will stop to receive her pilot. Upon the proofs, as they stand, I am not able to find it a fault in the pilot-boat that she acted in conformity with this custom; and yet, I do not feel quite satisfied that it would not be wiser to take some other position. The libellants must have a decree for their damages found in the court below, with costs.

[NOTE. Claimant appealed to the supreme court. The grounds of the affirmance are thus summarized by Mr. Justice Clifford: "The court here concurs with the circuit court that it is impossible to say that the collision was in any degree due to the want of a mast-head light on the schooner, or to negligence on the part of those in charge of her navigation; on the contrary, it is clear that the steamship is guilty of both charges preferred against her by the libellants. She improperly starboarded her helm after the yawl was launched, and she continued to advance, whereas she should have stopped and backed, if it was necessary to back, to prevent any forward movement." The City of Washington, 92 U. S. 31.]

Case No. 2,772.

The CITY OF WASHINGTON.

[13 Blatchf. 410.] [1]

Circuit Court, E. D. New York. June 13, 1876.

MARSHAL'S FEES—SETTLEMENT OF CLAIM.

1. Under section 829 of the Revised Statutes, which provides, that, "when the debt or claim in admiralty is settled by the parties without a sale of the property, the marshal shall be entitled to a commission," the marshal is entitled to such commission, in a suit in rem, against a vessel, if process is issued, and a bond to the marshal is given under the act of March 3, 1847 (9 Stat. 181), (now section 941 of the Revised Statutes), although the service of the process is waived and the vessel is not actually seized under the process.

[Cited in The Acadia, Case No. 23; The Clintonia, 11 Fed. 741; Smith v. The Morgan City, 39 Fed. 572.]

2. Under said section 829, where the amount of a final decree is paid before execution, the debt or claim is "settled."

[Cited in Robinson v. Fifteen Thousand Five Hundred and Sixteen Bags of Sugar, 35 Fed. 603.]

In admiralty.

John J. Allen, for marshal.

Platt & Gerard, for claimants.

BENEDICT, District Judge. This is an appeal from the clerk's taxation of the marshal's costs. It appears that a libel was filed against the City of Washington, and process in rem issued against that vessel, on April 3d. On April 4th, before the process was served, service of the process was waived, and the claimants gave a bond, under the provisions of the act of March 3, 1847 (9 Stat. 181). Such bond was given and filed on April 4th. Thereafter the case proceeded to a final decree, the amount of which having been paid, the marshal now claims his commission thereon, according to the provisions of section 829 of the Revised Statutes, which provides, that, "when the debt or claim in admiralty is settled by the parties without a sale of the property, the marshal shall be entitled to a commission." To this it is objected, that there can be no allowance to the marshal, because he made no seizure of the vessel.

The provision of the statute which gives to the marshal a commission is applicable to all cases where the debt is settled by the parties without a sale. There are no other terms of limitation. Nevertheless, I cannot think it was intended to apply where no service is performed, or responsibility assumed, by the marshal. If, therefore, this were a case where process against the vessel had never been issued, and a stipulation for value had been given under the rules, I should have little hesitation in determining that the marshal would not be entitled to his commission, upon the ground that, in such a case, the marshal would perform no service and incur no responsibility, to afford foundation for a claim to compensation. But, in this case, process was issued, and thereafter a bond to the marshal was given, in which it is recited that the marshal has possession of the vessel. The recital is inaccurate, as the marshal never in fact had possession of the vessel. The statute makes it the duty of the marshal to stay the execution of the process upon receiving the statutory bond, and compels him to receive a bond when tendered in pursuance of the act, in lieu of a seizure of the vessel; which bond he is to return to the court. Where such a bond is given, the marshal must, therefore, exercise some judgment, and he is compelled to take some risk in respect to the form of the bond, &c., and he must make a return. Some service is, therefore, in such a case, performed, and some risk encountered, by the marshal, for which he is entitled to compensation. The provision for paying the marshal a commission on the amount is without any words limiting the allowance to cases where the vessel has been actually seized, and the intent appears to be to give the marshal a commission in all cases where he performs any service which affords the basis for a claim to

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

compensation. I am of the opinion that he is entitled to his commission, when a bond under the act of 1847 is received, although service of the process by seizure of the vessel is stayed, and that this right is not affected by the circumstance that, in practice, the bond under the act of 1847 is ordinarily filed in the clerk's office by the claimant. Although filed in the clerk's office after approval, it is still a bond to the marshal, as obligee, and is deemed to be taken and returned by the marshal, who, upon his own responsibility, stays the execution of the process. The marshal is, therefore, in this case, entitled to his commission, provided the case is one where the debt or claim has been settled by the parties, within the meaning of the section. It has been heretofore held by Judge Blatchford, that, when the amount of a final decree is paid before execution, the debt or claim is settled, within the meaning of section 829. The Russia [Case No. 12,170]; and such is also my opinion.

For the reasons above given, I am, therefore, of the opinion that the marshal is entitled to his commission in this case, and the taxation is affirmed.

CITY SCHOOLS (BERTONNEAU v.). See Case No. 1,361.

Case No. 2,773.

CIVIL RIGHTS ACT.

[21 Int. Rev. Rec. 173; 7 Leg. Gaz. 165.]

[See Append. Fed. Cas.]

Case No. 2,774.

CIVIL RIGHTS BILL.

[1 Hughes, 541.]

[See Append. Fed. Cas.]

Case No. 2,775.

The CIVILTA.

[6 Ben. 309.][1]

District Court, S. D. New York. Jan., 1873.[2]

COLLISION IN THE SOUND—STEAMER AND SCHOONER—TOW-BOAT AND TOW.

1. A schooner was sunk, in Long Island Sound, by a collision with a ship which was at the time being towed at the end of a hawser, by a tug. The night was bright moonlight. The wind was light, from a little west of south, and the schooner was heading about northeast, and going at the rate of from two to three knots an hour. The ship and tug were heading about southwest. The schooner saw the ship and tug a little on her port bow at first, but the tug crossed to her starboard bow when a short distance ahead, and the schooner, keeping on her course, came against the hawser by which the tug was towing the ship, and was then struck on her port side by the ship's stem. The tug was towing the ship at the rate of about seven miles an hour. The ship and tug claimed that the course of the schooner was parallel to theirs, and that, just as she passed the stern of the tug, she ported her helm and so came across the hawser and between the tug and ship, and thus caused the collision. The ship was under the charge of a pilot, who was on board of the ship, but he gave no order to the tug. The hawser by which the ship was towed was about two hundred and fifty feet long. *Held*, that the ship must be regarded as a ship under steam at the place of collision, because she was moving by steam alone, and her steam power, though two hundred and fifty feet away, was so by her option.

2. It was, therefore, the duty of the schooner to keep her course, and the duty of the ship to keep out of her way.

[Cited in The U. S. Grant, Case No. 16,803; The Jesse Williamson, Jr., Id. 7,296.]

3. On the evidence, the courses of the vessels were nearly end on, and yet drawing across each other, the tug and ship drawing across the course of the schooner from port to starboard.

4. The burden was on the ship to establish that the schooner changed her course. On the evidence, the schooner did not change her course.

5. In the absence of any special instructions from the pilot who was in charge of the ship, to the tug, as to what was to be done on the approach of the schooner, it was the duty of the master of the tug to take care so to navigate the tug and the ship as to avoid a collision between either and the schooner.

6. Both ship and tug were, therefore, liable.

[See note at end of case.]

[In admiralty. Libel by Augustus B. Perry and others, owners of the schooner Magellan, against the ship Civilta and the steamtug Restless, to recover damages for the sinking of the schooner by collision.]

R. B. Benedict, for libellants.

Beebe, Donohue & Cooke, for the tug and the ship.

BLATCHFORD, District Judge. This is a libel to recover for the damages caused by the sinking of the schooner Magellan, through a collision which took place between that vessel and the ship Civilta, off Hart's Island, at a little after half past two o'clock in the morning, on the 22d of December, 1872. The schooner was bound for Boston, from New York. The ship was in tow of the steamtug Restless, being towed behind her, by a hawser, and was bound to New York, from New Haven. The night was pleasant and lit by the moon. The wind was light, and a little to the west of south. The schooner was sailing free, with her booms off to port, and was making from two to three knots an hour. The ship and tug were making over seven knots an hour. The schooner went safely by the tug, and came in contact with the hawser, and broke it, and then the ship struck the port side of the schooner at about the port fore rigging of the schooner, the schoon-

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

[2] [Affirmed by circuit court (case not reported), and by supreme court in The Civilta v. Perry, 103 U. S. 699.]

er's port side being crushed in, and the ship's bowsprit being broken, and the two vessels becoming so entangled that the schooner, when she sank, sank under the ship's bows.

The libel avers, that the schooner was heading about northeast; that the lights of the tug and of the ship were discovered about half a mile off, bearing a little on the port bow of the schooner; that the schooner was kept steadily on her course, without change; that the tug headed for the schooner, until she was very near to the schooner, and then suddenly sheered to port, across the bows of the schooner, and just cleared her, but brought the ship down upon the schooner; that the schooner made no change in her course, and did nothing to cause the collision, and the same could have been easily avoided by the ship and tug, if they had either changed their course earlier, or had changed it to starboard, instead of changing it to port, or had stopped in time; that the schooner could have been seen in abundance of time to enable the tug and ship to avoid her, and she was so seen, but, if she was not, it was in consequence of the want of a lookout, or of negligence on his part; and that the ship was in charge of a pilot, and the collision was caused by negligence on the part of both the ship and the tug.

The answer of the ship sets forth, that the ship had a Hell Gate pilot on board, and was being towed with general instructions from the tug to follow in her wake; that the course of the tug was southwest, that being the regular and proper course, in the neighborhood of Hart's Island, for vessels bound westerly; that the schooner was made ahead and off the starboard bow of the tug, and steering about northeast, and about on a parallel course with the tug and the ship, and on a course which, if continued, would have carried the schooner at a safe distance on the starboard side of the tug and ship; that the schooner passed the tug, the tug having kept steadily on her course; that, when the schooner had thus passed, and when, by keeping steadily on her course, she would, with equal safety, have passed the ship, she kept away to the right, between the tug and the ship, and, although she was repeatedly hailed, from the tug and the ship, as soon as such change was made, to starboard, kept on, and ran upon the hawser by which the ship was being towed, and, by striking it, and by her onward motion, came in contact with the stem of the ship; that, the instant the change of the course of the schooner was seen, the wheel of the tug was starboarded, and she kept off to the left, and the wheel of the ship was promptly starboarded, to follow in the wake of the tug, and, if possible, avoid the schooner, but, owing to the change of the course of the schooner, the collision could not be avoided either by the tug or the ship; that, as the schooner approached the ship, and although careful attention was given, no one could be seen on the deck of the schooner until after the collision, when they were seen hurrying up from below, only partially dressed; that there was no lookout on the schooner, and, if there was any man at the wheel, he was asleep; that the collision was caused by no fault of those navigating on board of the ship, as she was helpless, and steadily followed, as directed, the wake of the tug; that the collision was not by the fault of the tug; and that it was caused by those on board of the schooner, and in charge of her navigation, in, among other things, not having a lookout, and not having a man at the wheel attending properly to his duties, and not seeing the ship in tow of the tug, and changing the course of the schooner, when she had a free wind, and not changing back, when hailed. The answer of the steamtug contains like averments.

The course through Long Island Sound, from the eastward, to a point between Execution Rocks light and Sands' Point light is west southwest, by the coast survey chart. From that point to a point some distance to the westward of where this collision occurred, the course, to the westward, is, by such chart, southwest one-quarter south. The schooner insists that she was heading, by compass, northeast, when she sighted the green and red lights of the tug, and the white bow light of the tug, and two white lights aloft on the tug, and a white light on the foreyard of the ship, and that those lights were sighted bearing from a point to a point and a half on the port bow of the schooner, or, as the libel says, "bearing a little on the port bow of the schooner." The tug and the ship insist that they were heading, by compass, southwest, when they saw the sails and hull of the schooner, but none of her lights, bearing from a point to a point and a half on the starboard bow of the tug and of the ship, or, as the answers say, "ahead and off the starboard bow." The libellants claim that the tug and the ship, from being thus off the port bow of the schooner, drew across her course, she keeping her course, until the tug crossed such course and shut in her red light, so that the tug left the ship in such a position that the schooner, in her onward course, got in between the tug and the ship. The defense claims, that the schooner was on a parallel course with the tug and the ship, and at a sufficient distance off to pass safely to their starboard, and that the schooner, after getting by the tug, ported suddenly, and sheered sharply in between the tug and the ship.

The witnesses on the part of the schooner are Tracy (her mate), who was at her wheel, George Parker (a hand), who was forward on the lookout, Sargent (her master), and Clark Parker (a hand). As the two vessels approached each other, Tracy and George Parker were the only persons on the deck of the schooner. Sargent and Clark Parker were in the cabin. Tracy had taken the

wheel at two o'clock, some thirty to forty minutes before the collision. He had been on the lookout, forward, from one to two o'clock, and, during that hour, George Parker was at the wheel. At two o'clock Tracy and George Parker changed places. Tracy says, that, when he took the wheel, the schooner was a little past the Stepping Stones; that her course, when he took the wheel, was north northeast; and that, as soon as he took the wheel, he changed her course to northeast. The point of change would be about the point where, on the chart, the marked course, going to the westward, changes from south southwest to southwest one quarter south, such marked course being north northeast, from off Throg's Neck, eastwardly, to a little to the eastward of the Stepping Stones, and then northeast one quarter north to a point between Execution Rocks light and Sands' Point light, and then east northeast nearly up to Stratford Point buoy.

Tracy says, that he saw the lights of the tug, namely, her green and red lights, and the white light at her stem, and her two lights aloft, and the light on the foreyard of the ship, all at the same time, bearing about a point, or a point and a half, on his lee, or port, bow; that he saw them before any report was made to him by the lookout, of any light; that the lookout's hail was, "a steamer on your lee bow;" that the tug and ship were then from a half to three-quarters of a mile off, and steering, as he thought, about southwest by south; that, when 50 or 100 yards off, the tug changed her course and went across his bows, to his starboard, and hid her red light; that, up to that time, there had been no change in the course of the schooner, and her helm was then about amidships; that, when the tug showed on his starboard bow, he stepped three or four feet, to the gangway, and called to all hands to come on deck, letting go of the wheel and coming back and taking it again; that there was no change of it while he was gone; that he was steering northeast at the time, by compass; that, when the tug had got her length clear of him on his weather bow, he heard a hail from her, "keep off;" that, at that time, the ship was under his lee, tending a little ahead; that the schooner struck the ship's hawser, and then the two vessels struck each other; that the schooner had up her mainsail, foresail, jib, flying jib and main gaff-topsail; that, up to the time the tug changed her course, he had seen no colored lights on the ship; that, when he first saw the lights, he thought it was a tug towing a vessel; that he heard no whistles from the tug, before the collision; and that, if the tug had kept on, without changing, she would have hit the schooner.

George Parker testifies, that he was forward of the foremast, looking out; that, when he first saw the lights, he saw the side lights, and bow light, and a light aloft, on the tug, and a light on the ship, from three-quarters of a mile to a mile off, and bearing from one to two points on his lee bow; that he reported to Tracy, "a steamer on the lee bow," and Tracy answered that he saw her; that, when the tug was from 50 to 100 yards off, and her lights were bearing a point or more on his lee, she hid her red light; that, after the tug went by the bow of the schooner, he heard a hail from the tug "keep off;" that he did not leave his place forward until the tug had got within 20 feet; that he saw no colored lights on the ship before the collision; and that he did not hear any whistles from the tug.

Sargent was in the cabin. He did not hear the report of the lookout, or the answer of Tracy, or the whistles from the tug. The first thing he heard was Tracy's call for all hands to come on deck, and then he went out. He says, that, when he got on deck, the ship was under his lee bow, and Sands' Point light was nearly ahead, on the starboard side, between the jib boom and the fore rigging of the schooner; that he and his crew got into a small boat; that he was astern of the schooner, in the boat, and about in a line with the keel of the schooner, when she sank, and then noticed that Sands' Point light bore from two and a half to three points on the starboard bow of the schooner, which would make the schooner head about north northeast when she sank, she not having separated from the ship.

The witnesses for the defence are, Franklin (pilot of the tug, and who was at her wheel in the pilot house), Parks and Milliken (hands on the tug, and who were in the pilot house), Banta (a Hell Gate pilot, who was on the ship, on deck), Valcich (master of the ship, who was on deck), Dik (a hand on the ship, who was on the lookout, forward), Rosa (a hand on the ship, who was steering her by a tiller), and Stanger (mate of the ship, who had been below, but came on deck before the collision, on hearing whistles blown by the tug).

Franklin says, that he first made the schooner probably 700 yards off, and bearing about a point or a point and a half on his starboard bow; that he saw her sails and the shape of her, but saw no lights on her; that he judged her to be heading about northeast; that she passed his bow, to his right, and about from 60 to 100 feet off; that he was steering southwest; that, as the schooner passed him, she changed her course, by putting down her helm, and went in between the tug and the ship, and struck the hawser; that, when he saw that change, he blew five whistles and hailed to the schooner to keep off, that he had a ship in tow, and put his wheel to starboard; that the tug changed her heading one point to the southward, before the collision; that the schooner was heading about southeast when the ship struck her; that, from Sands' Point the tug and ship were in charge of the Hell Gate pi-

lot who was on the ship; and that he had received no orders from that pilot.

Parks and Milliken each give substantially the same testimony as Franklin, in regard to the above matters.

Banta says, that the ship had her colored lights up, and a white light forward; that he was aft near the tiller; that, when he first saw the schooner, the ship was heading southwest, by compass; that he saw the sails of the schooner bearing about a point and a half on his starboard bow, and about 600 yards off; that he saw no lights on the schooner; that he next heard five whistles from the tug, and saw the schooner luffing sharp, and heard a hail from the tug to keep off, and helped to put the tiller of the ship to starboard, and then ran forward, by which time the vessels had struck; that, up to the time of the whistles, he noticed no change in the tug; that, when the vessels struck, the schooner was heading about southeast; that the ship changed only one point by starboarding; that he was pilot of the ship from Sands' Point, and it was his place to hail the tug if her course was not suitable; and that he gave no direction to the tug, and was not close enough to her to give any.

Valcich says, that the first he saw of the schooner was her sails, bearing nearly a point off his starboard bow, and a little on the starboard side of the tug, and from 600 to 700 yards off from the tug; that he saw no lights on her; that he was standing on the forecastle of the ship, and saw the schooner, when she had got nearly past the tug, alter her course more to the southward, by a quick sheer; that, when the schooner changed, the tug blew five whistles, and hailed to the schooner, and he and his lookout hailed to her; that the schooner changed from northeast to southeast; that, when the schooner changed, the tug kept off one point, and the ship starboarded one point; and that he starboarded as the schooner was going across his bow. The above is his version, on his direct examination. On his cross-examination, he says, that he was standing aft when he heard the tug's whistles; that he then saw the ship starboard; that he then went forward; and that, before the ship starboarded, he saw that the tug had changed her course. On his direct examination, again, he reiterates, that he was on the forecastle when he saw the schooner change, and adds, that the schooner changed her course after he heard the whistles of the tug; that, when he heard those whistles, the schooner was heading about northeast; that the tug went off to the southward before the schooner did; that he was running forward when the tug changed; and that he was on the forecastle, on the starboard side, when the schooner changed.

Dik says, that he was on the lookout, on the forecastle of the ship; that he first saw the schooner ahead of the tug, on his starboard bow, and about 20 or 30 fathoms from the tug; that he saw the schooner pass the tug; that, after the tug blew her whistles, the schooner, when a little astern of the tug, changed her course; that, after the schooner changed, the tug changed, to go more to the south; and that he saw no lights on the schooner.

Rosa says, that he had the tiller of the ship, and was steering southwest, when he heard the whistles from the tug; that, soon after that, he saw the schooner crossing his bow; that then he put his helm to starboard, by the order of, and with the aid of, the pilot; that the ship had changed about a point towards the south when the crash came; that he did not see the schooner before he heard the whistles; and that he saw the tug change, when the schooner got across the bow of the ship.

Stanger says, that, while below, he heard the whistles of the tug; that he came up, and looked at the compass; that the ship was then heading southwest; that he then ran forward and saw the schooner astern of the tug, crossing; that he saw the schooner strike the hawser, and was on the forecastle when the vessels struck; that he saw no lights on the schooner; and that, when he got on the forecastle, the tug was keeping to the south.

On the facts proved in this case, the ship must be regarded as a ship under steam, at the place of collision. From Sands' Point, westward, the ship and tug were under the charge and direction, as to navigation, of the pilot on board of the ship, who was in the service of the ship. It is true, that the steam power of the ship was on board of the tug, more than 250 feet away; but, the fact that it was at that distance off was owing to the voluntary action of the pilot, who might have had the tug alongside of the ship, and did put her alongside after the collision. The steam power of the ship, by which alone she was moving, was where the ship chose to have it. If the tug had been alongside of the ship, the two would, in law, have been regarded, quoad the schooner, as one vessel, and that a steam vessel, the motive power being in the tug, and the governing power in the ship. It can make no difference, so far as the rights of the schooner, as against the ship, are concerned, that the tug, at the option of the ship, was 250 feet away (The Cleadon, 14 Moore, P. C. 92, 97). If the schooner did nothing to produce the collision, it was the duty of the ship, as a ship under steam, to keep out of the way of the schooner, and the duty of the schooner to keep her course. The question is, whether the ship failed to discharge that duty, through any fault of the schooner, in not keeping her course, or otherwise. The burden is on the ship, to exculpate herself. In my judgment she has not done so.

The ship sets up, in her answer, that the schooner did not have a lookout. This is sought to be maintained by evidence that he

was not seen from the other vessels. But, it is shown that he was at his post, and reported the tug, and left his post only when it was becoming dangerous for him to remain there.

The ship also sets up, in her answer, that the schooner did not have a man at the wheel, properly attending to his duties, and that, if there was any man at the wheel, he was asleep. This is shown, by the evidence, to be a reckless assertion, and void of foundation.

The ship also sets up, that the schooner did not see the ship in tow of the tug. This is disproved by the evidence.

The ship also sets up, that the schooner changed her course at a time and place when otherwise she would have gone safely by the ship, and did not change back, when hailed. It is for the ship to establish this change of course, and to establish it, if made, as one not made in the moment of peril.

The positive evidence from the schooner is to the contrary of any such change. If it is to be taken as absolutely true, that the schooner and the ship were steering opposite and parallel courses, it cannot be true that the tug and ship were seen off the port bow of the schooner, and that, at the same time, the schooner was seen off the starboard bows of the tug and ship. The testimony from each vessel, as to where away she saw the other vessel, is more reliable evidence, when such testimony from both vessels is applied to the case, as to the manner in which the two vessels were approaching each other, than any testimony as to compass courses, particularly where, as here, the vessels were in a comparatively narrow strait, and had lights ahead, the schooner being headed to go between Execution Rocks light and Sands' Point light, and being about two miles away from them, and the tug and ship being headed about for Throg's Neck light, and being about three miles away from it. It is true, that the proper chart courses of the two vessels, in the reach where they met, would be, that of the schooner northeast one-quarter north, and that of the ship southwest one-quarter south, and thus directly opposite; but, allowing for a little divergence from such courses, and for a tendency on the part of the witnesses from both vessels to exaggerate, the schooner, the extent to which the ship was on the port bow of the schooner, and the ship, the extent to which the schooner was on the starboard bow of the ship, and the vessels are brought each nearly ahead to the other, and nearly end on, and yet drawing across the courses of each other, the tug and ship drawing across the course of the schooner from the port side of the schooner to the starboard side of the schooner, and the schooner drawing across the course of the tug and ship from their starboard side to their port side, and thus the schooner seeing the tug and ship a little on her port bow, and the tug and ship seeing the schooner a little on their starboard bow. Then again, the schooner saw both of the colored lights of the tug, up to a time when the tug was but a few feet off from the schooner, and then the green light of the tug remained in view, and her red light went out of view, showing that she must have been nearly ahead to the schooner, but drawing from port to starboard of the schooner. And, in this regard, it is very important to note, that the tug and ship saw no lights on the schooner, although the evidence is that they were set, and properly burning. All that the persons on the tug and ship saw, was the sails and hull of the schooner. If they had seen her colored lights, and observed and described their bearing and movements, we should have been able to see how the schooner was approaching the tug and ship, as we are able to see how the tug and ship were approaching the schooner, from the view had on the schooner of the colored lights of the tug. I conclude, from these considerations, and from the whole evidence, that the schooner did not change her course; that the tug and ship mistook the course of the schooner; that the schooner's course was really drawing on to the course of the tug and ship, in such wise that the two courses were practically end on, where they crossed; that the unchanged courses of the schooner and the ship crossed each other just in advance of the ship, and either between the tug and the ship, or at a point ahead of the tug, so that the tug, by starboarding, avoided striking the schooner; and that the tug and ship, not seeing any colored lights on the schooner, and thus not being able to know which way the schooner was coming, ought not to have kept on, with undiminished speed. The tug did not slow until the schooner got up to her, and did not stop until the schooner was just striking the hawser.

The change attributed to the schooner is a deliberate one, made by porting, to luff into the wind. It is not a change which could have taken place by the leaving of her wheel, because that would have caused her to go to port, by falling off with the wind. The schooner cannot be held in fault for not starboarding, either before being hailed from the tug or after that. She had a right to suppose the tug and ship would avoid her; and the discovery by her that the tug was crossing her bows, and that the ship was getting in her way, was made, and the hail from the tug came, at a time when a collision with the ship was inevitable, so far as there appears to have been any power in the schooner to avoid it by starboarding.

The suggestion that the schooner's lights were not burning, because they were not seen from the tug or ship, cannot control the distinct evidence from the schooner that they were burning. Moreover, it is not set up, in either of the answers, that any want of lights on the schooner misled the tug or the ship, or contributed to the collision. Nor is any allegation to that effect made, in either

of the answers, respecting the non-exhibition of a flash light by the schooner. The ship had her colored lights burning, and yet neither of them was seen from on board of the schooner, before the collision, while all the other lights of the tug, and the white light of the ship, were seen; and the whistles of the tug were not heard on the schooner. It is, therefore, not a strange circumstance, that the schooner's colored lights were not seen.

Is the tug, also, liable for this collision? She was subject to the orders of the pilot in charge of the ship, as is clearly shown. But the tug received no orders from him. While it would have been the general duty of the tug to have followed all orders from the ship, and while the tug would not have been liable, if the collision had resulted from her following improper orders given from the ship, yet, under the actual facts of this case, I think the tug is liable equally with the ship. In the absence of any special instructions from the pilot in charge of the ship, as to what was to be done in view of the approach of the schooner, it was the duty of the master of the tug, knowing, as he did, that, from Sands' Point, the pilot on the ship was in charge, and knowing, also, that the ship was too far behind for orders to be given, and that it was the privilege and duty of the tug to be placed alongside of the ship, where orders could be readily received, to take care so to navigate the tug and the ship as to avoid a collision between either and the schooner. The Secret, 8 Mitch. Mar. Reg. 116. If the collision had happened to the eastward of Sands' Point, the tug would clearly have been liable, and the ship not liable. The fact that the ship is held liable for this collision, for the reasons before given, cannot exonerate the tug from responsibility for not practically giving the charge up to the ship, by taking the ship alongside from Sands' Point, and for leaving the state of things, as regarded the relations of the tug to the schooner, to continue the same as they were before the tug and ship reached Sands' Point.

There must be a decree for the libellants, against both vessels, with costs, with a reference to a commissioner to ascertain the damages sustained by the libellants.

[NOTE. The claimant of the ship, Casimir Casulich, and the owner of the tug, John R. Baker, appealed from the decree herein to the circuit court, which affirmed the district court decree in an unreported case. Claimants then appealed to the supreme court.

[Both ship and tug were in fault. Those on board mistook the course of the schooner and failed to observe her lights, although they were properly set and burning brightly, and took no steps in time to avoid the collision. Both were responsible for the navigation,—the ship, because her pilot was in general charge; and the tug, because of the duty which rested on her to act upon her own responsibility in the situation in which she was placed. The tug was in fault in failing of her own motion to change her course so as to keep both herself and the ship out of the way; and the ship was in fault because the pilot, who was likewise in charge of the tug, neglected to give her the necessary directions, when he saw or ought to have seen, that no precautions were taken by the tug to avoid the approaching danger. Mr. Chief Justice Waite delivering the opinion of the court in The Civilita and The Restless, 103 U. S. 699.]

Case No. 2,776.

CLAFLIN v. ROBBINS.

[1 Flip. 603;[1] 4 Am. Law Rec. 505.]

Circuit Court, N. D. Ohio. Oct. Term, 1876.

REMOVAL—ON MOTION TO REMAND—SUIT AT LAW—WHAT IS IT?

1. The definition of a suit of a civil nature under the removal act [March 3, 1875; 18 Stat. 470].

[Cited in Fidelity Trust Co. v. Gill Car Co., 25 Fed. 745.]

[2. A proceeding under the Ohio statute to compel an assignee for the benefit of creditors to allow a claim is a suit at law within the removal act.]

[Action by H. B. Claflin & Co. against Ambrose M. Robbins, assignee of George V. De Forest.]

Homer B. De Wolf and R. P. Ranney, for plaintiffs.

Ingersoll & Williams and Grannis & Henderson, for defendant.

WELKER, District Judge. The plaintiffs filed their petition in the court of common pleas of Cuyahoga county, on the 28th of June, 1875, against the defendant as assignee of George V. De Forest, alleging that De Forest was indebted to them on sundry notes described in the petition, amounting in all to over eighty-six thousand dollars; that on the 11th day of September, 1874, De Forest made an assignment for the benefit of his creditors to the said Robbins; that the trust was duly accepted by the said Robbins on the 15th of September thereafter, and he was duly qualified as such; that within six months after legal notice of the assignment and qualification, the plaintiffs presented their claims, duly authenticated, to the said assignee for allowance, and who then rejected the same and endorsed his disallowance thereon; and praying judgment against said assignee that he allow the claim in the settlement of his trust and for costs of suit.

Before answer, and before the term of the court of common pleas at which the case could be first tried, the plaintiffs filed their petition in said court for removal of the suit to this court and the necessary affidavit with bond and surety. Thereupon the said court accepted the surety and ordered that no further proceedings be had in said court. On the 15th of July, 1875, the plaintiffs entered in this court a copy of the record in the suit, and the case was accordingly docketed.

The defendant files a motion to remand the action to the court of common pleas, for

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

the following reasons: 1st—That the action was improperly removed to this court. 2d—That it does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court.

On the hearing it was admitted that plaintiffs were nonresidents, and had complied with all the provisions of the statute for removal, and the only question raised and insisted upon was as to the character of the suit; whether it is covered by the statute authorizing removals, and comes within its provisions. The statute provides (section 2): "That any suit of a civil nature, at law or equity," may be removed, etc. Is this, then, a suit of "a civil nature, at law?" In order to determine this question it will be necessary to examine the statute under which the suit was instituted. It is founded upon the statute of Ohio "regulating the mode of administering assignments in trust for the benefit of creditors," which provides in section 74 (1 Swan & C. 710), as follows: "Creditors shall present their claims within six months * * * to the assignee for allowance, and the assignee shall endorse his allowance or rejection thereon, and claimants whose claims are rejected shall be required to bring suit against the assignee to enforce such claims within thirty days after the same shall have been rejected, in which, if he recover, the judgment shall be against the assignee, that he allow the same in the settlement of his trusts, with or without the costs, as the court shall think right; provided, however, that the assignee may make any defense to such action that the assignor might have made to a suit instituted against him before the assignment for the same cause of action."

What is a suit at law? It is defined in 2 Bouv. Law Dict. 558, to be an action, civil action, and applies to any proceeding in a court of justice in which the plaintiff pursues in such court the remedy which the law affords him. It will be seen that the proceedings authorized and directed in this statute embody all the elements of a suit at law—provide for a trial and a defense, a recovery and a judgment for the amount claimed, and for costs. The only difference between this and other actions consists in the fact that after judgment no execution is issued in the usual form, but instead thereof the assignee is required to allow the claim, which will entitle the plaintiff to a pro rata share of the estate in his hands, and is in this way executed. In all other respects the trial is to be conducted in the same manner as if the assignor were sued. It will also be observed that no tribunal is fixed in the statute in which the suit must be prosecuted, nor any particular form or mode of proceeding prescribed, leaving the parties to their rights to select the courts having jurisdiction of the case, and the modes and forms adopted therein.

It is claimed that this suit is only authorized by the statute. This is true, but it must also be borne in mind that after suit is brought it is to be conducted to judgment like other suits at law, involving all the incidents of other trials and may be tried even by jury as other cases. The assignee is not an appointee of the probate court under the statute. He is selected by the assignor in his instrument of assignment. These assignments in Ohio are common law assignments. The statute in question does not authorize them, but only undertakes to "regulate" them. The probate courts only get control of such assignments when either the assignee, assignor, or some creditor files such assignment in the probate court. If not so filed such trusts would be under the control of the common law courts of the state, if appealed to by any persons interested therein.

This action is a suit at law, and comes clearly under the description of "suits authorized" to be removed from state courts to this court. The motion is therefore overruled.

CLAFLIN, Ex parte. See Cases Nos. 17,387 and 17,388.

CLAFLIN (SMITH v.). See Case No. 13,026.

Case No. 2,777.

CLAFLIN v. STEINBERG.

[2 Dill. 324.][1]

Circuit Court, D. Kansas. 1871.

PRACTICE—POWER OF JUDGE IN VACATION — DISCHARGING ATTACHED PROPERTY.

1. One of the judges of the circuit court will not, against the objection of the adverse party, hear in vacation a motion to discharge property attached pursuant to the local laws of the state, although the motion is one which may be properly made and heard by the court in term.

2. The provision of the state attachment act, that such a motion may be made in vacation before, and decided by, the state judge, in whose court the action is pending, has, although the attachment act be adopted by rule in the federal court, no application to the judges of the latter tribunal.

On motion to discharge property attached. The plaintiff, a citizen of New York, brought an action in the circuit court of the United States for the district of Kansas, against the defendant, a citizen of that state. The action was commenced by attachment, and property of the defendant was seized under the writ, and is in the custody of the marshal. By rule, the court has adopted the statutes of Kansas in relation to practice and proceedings at law when not inconsistent with the constitution and laws of the United States, including the attachment act of that state. By that act it is made a ground of attachment that the debt for which the suit is brought was fraudulently created or incurred; and the plaintiff made an affidavit to this effect in this case. It is also pro-

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

vided in this act that the defendant may move to discharge the attached property; and the practice in the state courts under this statute is to receive affidavits in support of such a motion, and counter-affidavits in opposition to it. In other words, the truth of the ground for the attachment is, in this manner, inquired into, and if found not to be true the property attached is ordered to be discharged. Gen. St. Kan. 672, §§ 228, 229. By a statute of Kansas relating to the district courts of the state it is provided, among other powers of the district judges, that they may in vacation hear motions to dissolve injunctions, and to discharge attached property. Id. 304, § 2. In the present case, commenced, as above stated, by attachment, the defendant gave to the plaintiff notice that he would move before the circuit judge at his chambers in the city of Davenport, to discharge the attached property, and the motion was, by consent, postponed, to be heard before the circuit judge at his chambers in the city of St. Louis, on October 5, 1871. Accordingly, on that day the parties appeared; the defendant's counsel producing affidavits to negative the truth of the cause alleged for the attachment. The plaintiff's counsel produced counter-affidavits, and made the point that the motion could not be heard at chambers.

Fenlon & Stillings, for the motion.

John M. Krum, Henry M. Herman, and Hiram Griswold, opposed.

DILLON, Circuit Judge. The federal circuit court for Kansas has adopted the attachment act of the state, and under it the writ of attachment was issued. That act provides that a motion may be made to discharge the attached property, and it is admitted to be the settled practice under it that such a motion may be grounded upon a denial of the truth of the cause stated for the attachment, and may be supported and opposed by affidavits. Accordingly, I have no doubt that the court in term may entertain and hear this motion. Garden City Co. v. Smith [Case No. 5,217].

But may it be heard and decided by one of the judges of the court in vacation? Without going at large into a discussion of the question of power, it is my judgment that I ought to decline to act upon the motion, even if I have the authority to hear it at chambers. The circuit court does not derive its jurisdiction, nor its judges their powers, from the state legislation; and the statute of the state which authorizes a state judge to hear in vacation a motion to discharge attached property, has no application, and can have none, to the federal court or its judges. There is no act of congress giving the federal judges this power, and there has been no rule adopted authorizing such a practice. Whether it would be competent to adopt such a rule I need not inquire. The state court is held by a single judge, who resides near the place where the suit is pending, and, for convenience, the legislature has authorized him to hear in vacation a matter which the same judge would otherwise hear in term. But there are three judges entitled to seats in the federal circuit court, two of them living hundreds of miles distant from the district. If I must hear this motion, as a matter of right so might either of the other judges. Such a practice would be inconvenient and expensive; but the chief objection to it is, that it would deprive the plaintiff of the right to a decision of the question by the court, which sits in the state, and which the law contemplates shall, whenever practicable, be held by two judges, and not by one.

This may be illustrated by the practice established by the United States statutes when there is a difference of opinion between the federal judges. In such an event, the legal questions involved must be certified to the supreme court; for the opinion of neither judge can then prevail. But the practice contended for in this case involves a practical disregard of that plain requirement of the federal statute, and the assumption of authority not intended to be vested in one judge of the court without respect to the opinion of his associate. Motion denied.

CLAFLIN (TOBEY v.). See Case No. 14,066.

CLAFLIN (UNITED STATES v.). See Cases Nos. 14,798 and 14,799.

CLAFLIN v. WELLS. See Cases Nos. 17,387 and 17,388.

Case No. 2,778.

CLAGETT et al. v. GIBSON.

[3 Cranch, C. C. 359.][1]

Circuit Court, District of Columbia. Dec., 1828.

MANUMISSION IN FRAUD OF CREDITORS—WHO IS A CREDITOR—CLAIM FOR ALIMONY — EVIDENCE — PROCEEDINGS IN OTHER SUIT.

1. A feme covert, who has sued for alimony, is so far to be considered a creditor of her husband as to make it competent for her, in a suit by his slaves for freedom, to show that her husband's deed of manumission, made pending the suit for alimony, and while he was prohibited by injunction from conveying away his property, was made in fraud of her rights; although he had, at the date of the deed of manumission, other property, more than sufficient to pay all the equitable or legal debts due by him to his wife, and left enough to pay the amount due to her.

2. A deed of manumission, by the husband of his slaves, pending a suit by his wife for alimony, and made for the purpose of preventing her from recovering her claim, is fraudulent and void; but if only made to prevent her from obtaining, at his death, a distributive portion of his personal estate, such motive for making the deed is no ground for impeaching its validity.

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

3. The proceedings in the suit for alimony are competent evidence for the defendant in the suit of the negroes for their freedom.

Petition for freedom. The defendant [Ann Gibson], while the widow of Abraham Young, married one Gerard Gibson. The petitioners [Phillis Clagett and her children] were her [defendant's] property at the time of her marriage with Gibson; and claimed their freedom under his deed of emancipation, dated October 31, 1826, duly acknowledged and recorded according to the Maryland act of 1796 (chapter 67, § 29), by which he emancipates them to be free after his death. The defendant had filed a petition to this court against Gibson, her husband, for alimony, and obtained an injunction on the 10th of July, 1826, to prevent him from conveying away his property. This suit for alimony was pending at the date of the deed of manumission. He died in the following year.

Mr. Key, for defendant, offered in evidence the transcript of the record in the suit for alimony, in order to show that the deed was made to prevent the defendant from obtaining a sentence for alimony.

Mr. Elkins and Mr. Coxe, for petitioner, objected that it was res inter alios acta.

THE COURT (nem. con.) permitted the record to be read in evidence only to show the existence and pendency of the suit for alimony.

Mr. Jones, for defendant, contended that the defendant must be considered as a creditor of her husband, (having sued for alimony,) at the date of the deed of emancipation, and that the deed, being made in fraud of her rights, was void; and being "in prejudice of" a creditor, was also void as to her under the 29th section of the act of 1796 (chapter 67). By filing the bill, she had a lien on all his property for her separate maintenance.

Mr. Coxe, contra. By a manumission by deed, the right of freedom vests instanter, although to take effect in futuro. It is otherwise in emancipation by will. The order for alimony was not made until the following March. The decree is only in personam; it created no lien on the property.

THE COURT (THRUSTON, Circuit Judge, contra) was of opinion, that the wife, at the date of the deed of manumission, ought to be considered as a creditor in equity, and it was therefore competent for her to show that the deed was made in fraud of her rights. She had a right to maintenance; she had claimed it in her petition; and whether it would be granted or not, was immaterial.

THE COURT also, at the prayer of the defendant's counsel, instructed the jury, that if they should be satisfied by the evidence that Gerard Gibson made the deed of manumission while the claim of his wife for alimony was pending, and for the purpose of preventing her from recovering her said claim, then such deed of manumission was fraudulent and void, and the petitioners are not entitled to their freedom under the said deed. But if the jury shall believe, from the evidence, that he made the said deed with the view of preventing her from obtaining, at his death, a distributive portion of his said property, such motive for making the said deed, is no ground for impeaching its validity.

Verdict for the defendant.

CLAGETT (QUANDO v.). See Case No. 11,492.

Case No. 2,779.

Case of CLAGGETT.

[2 Cranch, C. C. 247.][1]

Circuit Court, District of Columbia. Oct. Term, 1821.

DISCHARGE OF JUROR.

A juror who has a cause at issue which he expects will be tried at the same term, will be discharged, and if not discharged, may be challenged.

Darius Claggett, who was summoned as a juror, made affidavit that he had a cause at issue in this court, which he expected would be tried at this term, and prayed to be discharged. See Acts Md. 1715, c. 37, § 9; 1778, c. 21, §§ 2, 3; and 1797, c. 87.

THE COURT (MORSELL, Circuit Judge, contra) discharged him.

Case No. 2,780.

CLAGGETT v. WARD.

[5 Cranch, C. C. 669.][1]

Circuit Court, District of Columbia. March Term, 1840.

DISCHARGE OF INSOLVENT—EXONERATION OF BAIL.

If the defendant has been discharged under the insolvent law of Maryland the bail will be exonerated.

Motion by R. J. Brent, for an exoneretur upon the bailpiece, the defendant [Thomas Ward] having been discharged under the insolvent law of Maryland. Beers v. Haughton, 9 Pet. [34 U. S.] 329.

Mr. Morfit, for the plaintiff [Darius Claggett] contended that as the law of Maryland went to discharge the debtor from the obligation of the contract, and as this debt was not contracted in Maryland, the act of Maryland, so far as it impaired the contract, was unconstitutional and void; and cited Gordon v. Tumer, 5 Har. & J. 369; Hickley v. Farmers' & Merchants' Bank, 5 Gill & J. 377; 3 Story, Comm. 340, 365; Smith v. Buchannan, 1 East, 6; Campbell v. Claudius [Case No. 2,356]; Constitutional Class Book,

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

82. He also contended, that upon the principle of comity, a discharge in Maryland could not affect a citizen of this district, because a discharge here does not affect a non-resident creditor.

THE COURT (THRUSTON, Circuit Judge, absent) ordered the exoneretur to be entered, upon filing the certificate of discharge of the debtor in Maryland.

CLAIRBORNE, The (JARVIS v.). See Case No. 7,225.

Case No. 2,781.

In re CLAIRMONT.[1]

[1 Lowell, 230;[2] 1 N. B. R. 276 (Quarto, 42); 1 Am. Law T. Rep. Bankr. 6.]

District Court, D. Massachusetts. 1868.

BANKRUPTCY—CONFIRMATION OF ASSIGNEE—DISQUALIFICATION.

1. In passing upon the confirmation of an assignee who has been chosen by the creditors, the court must be guided by a sound judicial discretion, and ought to reject one whom there is probable cause to believe disqualified by character or otherwise from performing the duties of the place with fairness.

[Cited in Re Wetmore, Case No. 17,466.]

2. A person who resides out of the district, or who has a direct interest adverse to that of the creditors generally, or who is the attorney of such a person or of the bankrupt, is disqualified.

3. But a general creditor, or the attorney of one, or a person who has been an attorney of the bankrupt in matters not connected with the bankruptcy, is not necessarily ineligible. Mere bias or prejudice arising from information concerning the conduct and dealings of the bankrupt will not usually disqualify.

LOWELL, District Judge. The person whom the majority in number and value of the creditors choose to be the assignee ought to be confirmed, unless disqualified by residence out of the district, by personal character, or by come interest adverse to that of the body of creditors. I expect the register to report any such objection, if known to him, whether taken by any creditor or not. When objection is taken the burden of proving it is undoubtedly upon the objector, and yet in so delicate a matter, and one in which direct evidence is not always possible, reasonable cause of suspicion might in some cases be sufficient for my action, which is intended to be discretionary. The most common application is to add an assignee to those chosen by the creditors, and this is often put on the ground that two parties have been formed among the creditors who have very closely contested the election and divided the vote. I do not usually yield to this suggestion because, as was said by counsel in one case, the statute does not appear to intend a minority representation; and it is within the jurisdiction of the creditors to decide upon the number of the assignees as well as to choose them. It is suggested perhaps that one of these parties is more favorable to the bankrupt, and the other is disposed to treat him with rigor, but I do not consider that any such general bias ought to disqualify a person of standing and character. One reason is that it would be almost impossible to find, in these contested cases, any suitable assignee, connected in any way with the estate, who had not formed such an impression. When there is a failure to elect from a balance of power in different sets of creditors, the majority in number differing from that in value, I have found it to be inexpedient to undertake to compromise the difference by appointing one assignee from each side, and I shall usually in such cases go outside of the estate and take some person who is entirely unbiased: and so where I add an assignee to those chosen. But I do not dictate to the creditors and require them to follow my example. If they choose one of their own number, I shall not usually refuse to confirm him merely because he may have taken one side in a contest of this kind, and have formed some general impression favorable or unfavorable to the conduct and dealings of the bankrupt.

If, on the other hand, the party supposed to be favorable to the bankrupt should prevail, I should not set aside the election unless there were similar grounds for it in the character or interest of the assignee as I have already referred to. The attorney of a creditor would not be ineligible unless his constituent were, and one who has been the attorney of the debtor in matters not connected with the bankruptcy, but who has ceased to have any retainer, might be confirmed.

It must be remembered that creditors retain an important power over the settlement of the estate. They have a right to require the assignee to prosecute or defend actions, to object to the proof of debts, and to examine the bankrupt; or they can do some of these things in their own behalf if they prefer it; they ought to exercise an oversight of the affairs, and to keep the assignee advised of important facts, and they can oblige him to act upon the information given him. This being so, I look to the character of the assignee, his direct interest, if any, and his present relations to the parties to any actual or probable litigation, but not much to any supposed general bias for or against the bankrupt or his dealings.

CLANCEY (UNITED STATES v.). See Case No. 14,800.

[1] This report contains the substance of the observations of Lowell, J., in several cases, including that of Clairmont.

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

Case No. 2,782.

In re CLANCY.

[10 N. B. R. (1874) 215.][1]

District Court, E. D. Michigan.

BANKRUPTCY—CLAIM OF LANDLORD.

Where premises under a lease are taken and condemned to the use of a railroad company, and damages are paid by the company to the tenant, upon the basis that his obligation to pay rent during the remainder of the term will continue, which obligation he expressly recognizes when he receives the money, and which he partly performs; the landlord, on the bankruptcy of the tenant, will be allowed to prove, as a claim against the estate, the amount of the unpaid installments of rent, at their value at the date of the bankruptcy.

The register certified that Guy F. Hinchman, executor of the estate of James Abbott, tendered as proof of debt against said bankrupt's estate his deposition, setting forth that at and before the filing of the petition for the adjudication of said [John] Clancy as a bankrupt, he, said Clancy, was indebted to said Hinchman, as such executor, in the sum of two thousand six hundred and twenty dollars, for rent of land leased by Hinchman to Clancy by a lease in writing, a copy of which, together with other exhibits, were annexed to the proof, from which the following facts appeared: First. The term for which the premises were leased began on January 1, 1872, and would end January 1, 1877. Second. The rent has been paid in full to the 1st day of April, 1873, and the sum of seventy dollars on account of the rent which became due July 1, 1873, leaving unpaid of the rent which became due by the terms of the lease on that day, the sum of one hundred and five dollars. The instalments of rent which would become due October 1, 1873, and January 1, 1874, would be, each, one hundred and seventy-five dollars, and for each of the remaining years of the term 1874, 1875, and 1876, two hundred dollars would become due at the end of each quarter. The whole sum unpaid, due and to become due by the terms of the lease, being two thousand eight hundred and fifty-five dollars. The claimant rebates the interest on the sums not due, and claims two thousand six hundred and twenty dollars as the sum to which he is entitled, as computed at January 1, 1874. Third. On the 15th of March, 1873, the premises leased were, by an order of the circuit court for the county of Wayne, upon proceedings instituted by the Detroit, Lansing, and Lake Michigan Railroad Company, and in due form of law, as prescribed by the statutes of the state of Michigan, condemned for the use of said company, and under the statute provided in such cases, the damages or compensation which ought justly to be made by said company to the owners of or persons interested in the premises so condemned were adjudged by the court, on the verdict of the jury empaneled under the statute, to the owners of the fee or reversionary interest in the premises leased to the bankrupt, as well as to other persons, the sum of six thousand two hundred and twenty-five dollars, and to the said bankrupt by reason of the taking of his leasehold interest in said premises, the sum of nine thousand five hundred dollars, which last-mentioned sum was paid to said Clancy March 27, 1873. Fourth. The jury empaneled to inquire what damages or compensation ought to be allowed to parties interested, were instructed by the circuit judge "that, in estimating the value of the leasehold interest of said John Clancy, and in awarding him the value thereof, said jury were to take into consideration that said John Clancy would not be released from paying the rent * * * as it might become due, and that they should make their estimates and award upon the basis that out of the moneys so paid by said company to said Clancy, said Clancy was to pay said installments of rent as they should become due."

[By Hovey K. Clarke, Register:]

This claim is for rent, which section 19 of the bankrupt act [14 Stat. 525] provides may be proved "as if the same grew due from day to day," a provision which, so far as I know, has been uniformly construed to authorize the proving of claims for rent up to the date of the bankruptcy, and no longer. The section cited concludes with the words: "no debts other than those above specified shall be proved or allowed against the estate." There is no other provision concerning the proof of claims for rent than the one cited; and whether the bankrupt will remain liable on the lease for rent which subsequently becomes due, even though he should be discharged from other indebtedness or not, it seems to me unavoidable that no claim can be maintained against his estate in bankruptcy for rent accruing after December 12, 1873, the date when the proceedings in this case were commenced. It may become a question, however, whether, notwithstanding this claim is stated to be for rent, it may not be included in that class of provable claims described in the first paragraph of section 19 as a debt existing at the date of the bankruptcy, but not payable until a future day. This raises the question, what was the effect of the proceedings in the Wayne circuit court on behalf of the railroad company, by which the premises leased were taken under the authority of the state and appropriated to the use of the company. If the circuit judge correctly charged the jury that the tenant would not be released from his obligation to pay rent, and that the jury must take that fact into consideration, the effect of which would be to enhance the compensation to be allowed to the tenant, and to diminish that to be allowed to the landlord—then, so far as the agreement to pay rent is concerned, the relation of landlord and tenant is undisturbed,

[1] [Reprinted by permission.]

the landlord's right to collect his rent as it shall become due remains unaffected until the happening of the bankruptcy, when, by force of the bankrupt act, this right is so far changed that the rent is to be computed "as if the same grew due from day to day," instead of at the stated quarterly period fixed by the lease. The direction of the circuit judge to the jury simply confirms the lease as an existing contract on the part of the tenant to pay rent, and this contract is the basis of the proof offered here. There is nothing in the principle as stated by the circuit judge, which authorizes any claim here except upon the lease, and that in the same manner as though the tenancy had never been disturbed by the proceedings to take possession of the premises leased; nor is there anything in the bankrupt act which, in the exceptional condition of this particular case, will allow a landlord to prove a claim for over three years' rent yet to accrue—a right which is uniformly denied to all other landlords. If these views be correct, the amount to be allowed in this case cannot exceed the rent accrued and unpaid at December 12, 1873, the date of commencing proceedings, which I compute as four hundred and eighty-nine dollars and fifteen cents, out of which the seventy dollars paid must be deducted, leaving due, at that date, four hundred and nineteen dollars and fifteen cents.

There is, however, another question which is presented upon the facts set forth in the deposition offered in proof of this claim, and one of sufficient importance, as it seems to me, to entitle it to the consideration of the court. The rent had been paid in full to the 1st day of April, 1873. Prior to that date, the right of both landlord and tenant to the possession of the premises had been terminated by a proceeding in the state court, by which the state, in its exercise of the right of eminent domain, had authorized the railroad company to assume exclusive possession of the premises leased. By the lease on which this claim is founded, the landlord assured to the tenant the quiet enjoyment of the premises in language as explicit as that which bound the tenant to pay the rent. That eviction by a paramount title discharges a tenant from the obligation to pay rent, is undisputed. That this tenant has not been evicted, and that by a paramount title, it seems to me impossible to deny without violence to the substantial import of these terms. The character of this eviction and of its consequences to the parties affected by it, are properly the subject of inquiry, but that inquiry ought to lead to the application of such a rule as will be just to all parties. It is true that courts, in the application of well established, and, for the most part, wisely established principles, are sometimes obliged to sanction results which are not approved by their sense of justice. If any such principles control the facts of this case, of course they must be applied.

I understand it to be asserted by the claimant who offers this proof, that the words "eviction" and "paramount title" have a technical significance, which so restrains their natural and obvious import, that, while a landlord will be discharged from his obligation to protect his tenant in the enjoyment of the subject of the tenancy, when that enjoyment has been disturbed by the exercise of the right of eminent domain, yet such disturbance is not equally available as a defense by the tenant against the landlord in an action for the rent. It is true that the exercise of the right of eminent domain involves no impeachment of that title of the landlord on which he relied to assure his tenant the quiet enjoyment of the premises leased; and for that reason it is just that the landlord should not be liable for a breach of that covenant. The inability to make good that covenant results from the assertion of a title to which both landlord and tenant are equally subject; and in view of the possible assertion of which, the lease must be supposed to have been executed by both parties. The assertion of the right and power of the state puts an end, practically, to the rights of both landlord and tenant to the possession of the premises, and they are remitted for compensation for the invasion of their rights to the company for whose benefit their property has been seized. And, if compensation to the landlord is to be adjusted upon the theory that the tenant will still be liable for the payment of the rent, why should not the compensation of the tenant be adjusted upon the theory that the covenant for quiet enjoyment still remains in force? It is true that this method of remitting the parties to each other for their compensation would inure greatly to the advantage of the company, and therefore is not likely to be adopted; but this illustration of the principle ought to be conclusive against its application so as to transfer to one party compensation for damages which are really suffered by the other—which was actually done by the circuit court in this case. For, the actual damage to the claimant in this case was the value of the fee of the land, less the value of the lease, in excess of a sum for which the rent is a fair income. Ordinarily, the value of a lease is accurately indicated by the rent reserved. But, as was probable in this case, and will always be likely to be where the value of real estate is from year to year increasing, the value of a lease may be ascertained by the bonus which a party would pay for an assignment of it. If it was worth no bonus, then a release from the obligation to pay rent would be all the tenant could claim, and the whole compensation would go to the landlord. But, by the rule adopted in the circuit court, assuming that the obligation to pay rent remains, then the tenant must be entitled to such a sum from the company as will enable him to meet those payments. This sum in

gross being paid to the tenant, what security has the landlord that it will be applied to discharge the obligation which was the only ground of its allowance, and not a very reliable one, as the result in this case shows? While the lease remained, the landlord's right of re-entry afforded abundant security. Of this, by the rule contended for here, the landlord is arbitrarily deprived, by some technical views concerning eviction, which, if the law compels us to regard as sound, do not reflect much credit upon the law, as a system for securing justice to those who appeal to its tribunals.

It is surprising that the attempt to apply a rule so artificial as this, has not led all courts to see that on the assertion by the state of the right of eminent domain, over premises subject to a lease, that the nearest approach to justice to both parties can be made by treating the lease as at an end, and allow each party to look for compensation—irrespective of any possible contingencies as to future claims against each other—to the law, which provides for damages or compensation in such cases. I have been referred to the case of Dyer v. Wightman, 66 Pa. St. 425, as an authority for the rule contended for by the claimant in this case. Its force seems to me much greater against the rule, than in support of it. Dyer brought an action of debt against Wightman for two years' rent. The defense was that the premises had been appropriated by a railroad company. The defense offered evidence of the allowance of damages against the company to the party under whom the plaintiff claimed. The court admitted the evidence, and charged the jury that the title of both parties to the lease, as well as the owner of the fee, under whom Dyer claimed, and to whom the damages, the proof of the payment of which was offered, were paid, "was changed. Each could recover the value of his or her particular interest or estate in the land from the railroad company; but the relation of landlord and tenant between the parties was thereby extinguished, and their rights under such relationship ended." Page 426. The verdict was for the defendant, and the judgment was carried by writ of error to the supreme court. The court, in delivering the opinion (page 427), concede it to be "well settled that a taking by the sovereign under the right of eminent domain is not an eviction." Yet, notwithstanding this ceremonious act of homage to the traditions of the law, to the constraints of which courts feel so often compelled to submit, the court in Pennsylvania found reason to affirm the opinion of the court below, that the relation of landlord and tenant was extinguished, and their rights under such relationship ended (page 429), and the judgment was accordingly affirmed. The reasoning of the opinion fully supports the conclusion of the court, that by such a taking the relation of landlord and tenant was extinguished, and that therefore the tenant was no longer bound to pay rent. "The dispossession of the tenant, by an authority which neither he nor his landlord could resist, would strike most men as an adequate reason why he should no longer be obliged to pay rent; and a reason none the less conclusive because of the doubts expressed by learned judges, whether such dispossession was or was not a technical eviction."

It is insisted before me, as I understand, by the counsel who appeared for the claimant, that the court in Pennsylvania was able to reach the result in the case of Dyer v. Wightman only because of certain equity powers exercised by the courts in that state, not competent to common law courts. I am unable to see anything in this suggestion of any importance to the case presented by the claimant. The proceedings before the Wayne circuit court were not according to the course of the common law, but were in pursuance of a statute conferring a special jurisdiction, without which the circuit court would have had no power to affect the title of the parties to the premises, or confer any right upon the railroad company. Before this can be done the statute laws of 1871 (page 339) require notice to all "parties, so far as they can be ascertained, who own or have, or claim to own or have estate or interest in said property." It provides a mode to "ascertain and determine the damages or compensation which ought justly to be made by said company to the owners of or persons interested in each particular description of land." Laws 1871, p. 343. I think it not only an unnecessarily narrow view of the scope of this statute, but also essentially erroneous, to withhold from the jury the power to pass fully on the question of damages and compensation in which any party has an interest; and that it is a mere mockery to tell a landlord that he must take, as a part of his compensation for the loss of premises under a lease, the unsecured liability of the tenant to pay rent for the period the lease may have to run, whether it be five years or fifty; for the performance of which the lease while in force was ample security; but, in the subject of which, in the now changed circumstances, the tenant has no enjoyment, nor any duty except the continued payment of rent for the remainder of the term. Such a view of "compensation" I am persuaded is not what the statute contemplated. If the power of the jury over the whole subject of compensation was as ample as by the views above presented it appears to me to have been, then the compensation as fixed by them to be allowed to all the parties before them, of whom the claimant was one, has concluded all such parties; and if the claimant has suffered by an erroneous ruling of the circuit judge, he is remediless, except as the statute under which the action was had, may afford him an opportunity to have it reviewed. If this ruling had been

submitted to and affirmed by the supreme court of the state it might then become proper for this court to accept the law of the state as interpreted by its highest tribunal. In the absence of any such decision, the law, I think, must be interpreted as it applies to cases in this court, as the district judge shall determine, or the circuit judge, if a case shall be made calling for any such review.

These views lead me to the conclusion that no claim can be made on the lease of Hinchman, executor, etc., to Clancy, against the bankrupt's estate. I send herewith the proof of debt offered by the claimant and its accompanying schedules and depositions.

Pending the proceedings on the register's certificate before the district judge, the claimant was allowed to introduce additional evidence tending to show an actual agreement by him at the time he received the damages awarded in his favor, to continue to pay the rent during the unexpired portion of the term at the rate fixed by the lease.

LONGYEAR, District Judge. Without taking issue with the foregoing views of the learned register, on general principles, or, as applied to an ordinary case of a claim for rent, I think the peculiar circumstances of this case are such as, in equity at least, to entitle the claimant to the whole of his claim. By receiving from the railroad company the money allowed on account of rent to be paid in the future, and agreeing, in consideration thereof, to continue to pay rent the same as though his use and enjoyment of the premises had not been disturbed, Clancy must be held to have waived any and all legal objection he may have been entitled to make to the payment of rent on account of such disturbance; and the assignee occupies no better position than, but precisely the same as, Clancy in that respect. The claim in question must therefore be allowed as proven. Let it be so certified to the register.

Case No. 2,783.

In re CLAP.

Ex parte TARBELL.

[2 Lowell, 168.] [1]

District Court, D. Massachusetts. Sept., 1872.

BANKRUPTCY—PARTNERSHIP DEBTS — DECEASE OF PARTNER—RIGHTS OF CREDITORS.

1. Upon the death of one member of a firm, the survivor is bound in equity to apply the joint estate to the payment of the joint debts; and the representatives of the deceased partner, and, in case of bankruptcy, the creditors of the firm may enforce this equity.

2. A partner, by his will, made his brother, who was his copartner, executor, and devised to him the residue of his estate in trust for certain purposes, and authorized him to use in his business the property given him in trust, until it should be wanted for distribution. *Held*, that the intent of the will was, that the residue only should be used in business, and that the surviving partner was bound to settle the affairs and pay the debts of the firm in the usual way, notwithstanding this clause.

3. The surviving partner carried on the business as before, and notified creditors and others dealing with him that his brother's capital remained in the business; he paid the greater part of the joint debts, and contracted new debts; he converted a part of the joint property into money, but less in value than the sum of the joint debts, and became bankrupt, having in his possession bank-stock and other specific assets standing in the name of the firm, without change, since the death of his brother,—*Held*, that a joint creditor of the old firm, who had not received the notice above mentioned, could require that joint property remaining in specie, as it stood at the death of the deceased partner, should be applied to the payment of his debt in exclusion of the separate creditors of the bankrupt.

4. It seems, if the creditor had received the notice, it would not have affected his lien, unless he had done some act amounting to an election.

5. The fact that the surviving partner was executor and trustee of the deceased partner does not affect the rights of joint creditors, for equitable rights are not lost by the union or merger of different legal titles in one person; and, when bankruptcy occurs, the creditors may themselves assert the lien, which, while the surviving partner is solvent, is vested in the executor of the deceased partner.

The petitioner asked to have the assets marshalled by the trustee appointed, and acting instead of an assignee, under section 43 of the bankrupt act [14 Stat. 538]. The parties agreed to the facts, which were substantially these: Samuel G. Clap and Edmund W. Clap were partners for many years under the firm of Clap & Brother, and during that time the petitioner lent them $10,000, for which he held their firm notes. Samuel died in 1870; and Edmund carried on the business under the same name, until his bankruptcy in 1872, and used therein the assets of the old firm, of which several persons dealing with him, some of whom are now creditors, had notice; but the petitioner had no such notice. Edmund had drawn out of the firm, at the time of his brother's death, a very large sum beyond what Samuel had drawn. Since that time he had paid the old debts beyond the specific joint assets then on hand, if his indebtedness to the firm is omitted from the computation; but if that were counted in, he was still in arrears to the firm at the time of his bankruptcy. There then remained, and have come to the possession of his trustee, specific assets, consisting of bank-stock, real estate, &c., which was the property of the old firm. By his will, Samuel Clap, after giving to his wife certain chattels and a life-estate in his house, provided as follows: "3d. I give the residue, including the reversion of the house so given to my wife, of all the estate of which I shall be possessed at my decease, to my brother, Edmund W. Clap, for ever, in trust, for the uses hereinafter set forth," authorizing the trustee to sell, invest,

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

&c. He then provides for a division of the income between his wife and his two daughters during their lives, giving large discretion to the trustee to advance money to the daughters out of the principal, in certain contingencies; he appoints the same brother executor; and, finally, 11th. "My brother is authorized to employ and use in his business the estate and property herein given him in trust, or any part thereof, before the same shall be required for distribution, charging himself with interest therefor at six per cent." The petitioner asked that an account be taken of the joint assets remaining at the time of the bankruptcy, and that the same be applied to the payment of his debt, before any part thereof should go to the separate debts of the bankrupt.

C. B. Goodrich, for petitioner.
W. A. Field, for respondents.

LOWELL, District Judge. The petitioner asks that the trustee may be ordered to keep distinct accounts of the joint and separate estates, and that the proceeds of each may be appropriated to the corresponding class of debts. The bankrupt act—section 36 [14 Stat. 534]—requires this to be done when partners are bankrupt, but does not, in so many words, refer to the bankruptcy of one partner only; but there is no doubt that it applies generally to all settlements in bankruptcy, whether one or all the partners are before the court. Under a similar section in the insolvent law of Massachusetts, it was held that separate accounts ought to be kept whenever there were joint debts still outstanding, whether there remained joint assets or not, and whether one or more of the partners were before the court: Barclay v. Phelps, 4 Metc. [Mass.] 397; Howe v. Lawrence, 9 Cush. 553; Harmon v. Clark, 13 Gray, 114; Robb v. Mudge, 14 Gray, 539. These cases, and others cited by the respondent for another purpose, which will be noticed presently, carry the doctrine to its utmost length, by deciding that, in the absence of positive fraud, the joint creditors have no claim on what was once specifically joint property, and has been converted into separate property by the agreement of the parties. I have expressed my doubt on former occasions whether some of these cases do not go too far; but I will not discuss them now, because they are not cases which concern a dissolution of the copartnership by the death of a partner. In such a case, the representatives of the deceased partner have a right to require the survivor to apply the joint property to pay the joint debts; and, if he becomes bankrupt, the joint creditors may insist that this shall be done: Story, Partn. § 361; Lindl. Partn. 577; Evans v. Evans, 9 Paige, 178; Stocken v. Dawson, 9 Beav. 239, affirmed 17 Law J. Ch. 282; Tillinghast v. Champlin, 4 R. I. 173. The supreme court has applied this equity in favor of joint creditors as against the United States, claiming a priority for a separate debt of one of the partners, and in favor of separate creditors as against joint creditors, under a trust deed which was ambiguous on its face, but dealt only with separate property: U. S. v. Hack, 8 Pet. [33 U. S.] 271; Murrill v. Neill, 8 How. [49 U. S.] 414.

Partnership debts being in equity joint and several, it has been held in some cases that, in the settlement of the estates of deceased persons, all creditors come in equally against the separate assets. Such was formerly the law of Massachusetts, when estates of deceased persons were insolvent: Sparhawk v. Russell, 10 Metc. [Mass.] 305. But a statute has changed the rule in that state, and the same mode of marshalling applies, whether the insolvent is dead or living: Gen. St. c. 99, § 18; Rice's Case, 7 Allen, 112. I am not aware that it ever was held that the separate creditors could claim against joint assets, until the joint creditors were satisfied. The superior position of the joint creditors was founded on the higher nature of their security, being several as well as joint. See the able note of the American editors to Silk v. Prime, 2 [White & T.] Lead Cas. Eq. 111. So that, even when the law of Massachusetts permitted the joint creditors an equal share of separate assets, I suppose a court of equity would have given the surviving partner a prior right to joint assets. But however this may be, it has always been the rule in equity, when a living person was bankrupt, that the assets should be marshalled.

The respondent, not denying the general proposition, insists that this case does not come within it; because the late Samuel G. Clap has, by his will, relinquished the lien, and that the bankrupt has so dealt with the property as to convert it into his separate estate. The cases cited establish the doctrine already referred to, that where partners, acting in good faith, whether before or after the dissolution of the firm, convert the joint into separate property, in whole or in part, the creditors are bound by that action; because their lien depends on that of the partner himself, and, if he has in good faith relinquished it, they cannot revive it. Whatever was done here is admitted to have been done in good faith; and there is no intimation even of a knowledge of insolvency on the part of the present bankrupt, at any time before he filed his petition, so that, if these cases apply, he comes within them. But I do not read the will as making any such severance. The residue is given to the surviving partner upon certain trusts, and he is authorized to use, in his business, "the estate and property herein given him in trust, or any part thereof, before the same shall be required for distribution." This language is broad enough, perhaps, to include the whole property; because he held it all in trust, either as executor or trustee; but, in the connection in which it is found, it clearly means the trust

fund, as I believe both parties concede. The residue, which is to constitute the trust fund, cannot be ascertained until debts as well as legacies are paid. I can find nothing in the will that contemplates a continuance of the business in the old name, nor any gift of the whole joint estate to Edmund, in order that he might continue it; nothing, in short, that binds the testator legally or equitably for new debts, or relinquishes the right of his representatives to insist that the old debts shall be paid, and the business of the firm shall be wound up in the usual way. If, by the will, the surviving partner is possessed of the whole estate, in one capacity or another, still his duty is the same in either: Wedderburn v. Wedderburn, 4 Mylne & C. 41. Equity never permits equitable rights to be lost by the merger or union of different legal titles in one person; and, when bankruptcy occurs, the joint creditors may assert the lien which before that time was vested in the executor of the deceased partner. It may be that there is a stronger legal hold upon him to do as executor what he would be bound to do as surviving partner; I mean to say, a remedy for a breach of duty may be simpler, but the duty is the same, to wind up the business, pay the joint debts from the joint assets, and dispose of the testator's share, as required by his will. If he had, in fact, converted all the joint assets into money, and paid it away, the lien might have been lost; but he has not done so. The case finds that there are specific assets, consisting largely of bank-stock, remaining in his hands, in the same condition that they were in at his brother's death; and the lien, certainly, has not been displaced from these.

Nor can the fact that he retained Samuel's property, and did business thereon, and so notified some of his creditors, affect the rights of the petitioner, who was not notified. Indeed, it is very doubtful whether notice would make any difference: Newsome v. Coles, 2 Camp. 617. It being found that this action was not in accordance with the will, nothing but a legal or equitable estoppel can change the rights of the parties. The rule that chattels and personal property, left in the order and disposition of a bankrupt by the consent of the true owner, are to be held for his debts, has never had a place in the more recent bankrupt and insolvent laws of this country, and certainly has none in our present law. And even in England a surviving or remaining partner does not hold the joint assets in his order and disposition in this sense, unless the other partner was dormant, or unless there was an express agreement to that effect, because he holds in trust to pay the joint creditors: Colly. Partn. § 883; and, a fortiori, if he holds under a will which is notice to all the world. This case, in its present aspect, does not bring up the whole account for settlement; and I do not know precisely what proportion of the joint assets have been converted. If it should turn out that there is any balance due the bankrupt on the final adjustment, no doubt that will go to his separate creditors. In the absence of fraud or preference, I cannot review the acts of the surviving partner in paying either joint or separate debts, both of which I suppose he continued to pay until he found he must suspend. I understand that proceedings will be taken by the representative of Samuel Clap to settle the partnership account, and I do not now decide whether any balance which would be otherwise due that estate will be affected with any equity in favor of Edmund's creditors, by reason of the permission to use the trust fund in business. Petition granted.

Case No. 2,784.

In re CLAP.

Ex parte SMITH.

[2 Lowell, 226.][1]

District Court, D. Massachusetts. March, 1873.

PARTNERSHIP DEBT—CONVERSION INTO DEBT OF SURVIVOR.

The mere exchange of the note of a firm, dissolved by the death of one partner, for a note similar in all respects to the surrendered note, signed with the firm's name, by the surviving partner, does not convert the joint debt into a separate debt of the surviving partner, unless it appears that such conversion was intended by the holder of the note.

In bankruptcy. The facts concerning the partnership of E. W. & S. G. Clap, and its dissolution by the death of the latter, the provisions of his will, and the state of the accounts and assets, were shown, in the case of George G. Tarbell [Case No. 2,783], petitioner. In 1852, J. C. Smith lent the firm $1,000, and took their promissory note, signed in the firm name, and was afterwards, before the death of S. G. Clap, paid $250 of the principal sum; interest was paid him yearly; and, in June, 1871, after the death of Samuel, he surrendered the old note, and took a new one, signed in the same firm name, which he held at the time of the bankruptcy. Neither party had any intention of changing the security by giving and taking the new notes; and whether Smith knew of the death of one partner is uncertain. The change was made merely because the old note was worn, and covered with indorsements. Smith petitioned to prove his debt against the joint estate.

T. L. Wakefield, for petitioner. 1. The new note was not payment of the old debt. Even in Massachusetts, whose law goes farther in this direction than that of most of the states, a note is only presumed to be payment until shown not to be so intended: Butts v. Dean, 2 Metc. [Mass.] 78; Curtis v. Hubbard, 9 Metc. [Mass.] 328; Watkins v.

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

Hill, 8 Pick. 522; Reed v. Upton, 10 Pick. 524; Thurston v. Blanchard, 22 Pick. 21; Melledge v. Boston Iron Co., 5 Cush. 170.

2. Taking the note was not an accord and satisfaction; because there was no new consideration and no advantage: it merely lost him one promisor: 2 Pars. Cont. 683, and notes g and li.

3. The consideration of the debt determines against whose estate it should be proved: Ex parte Christie, 3 Mont. D. & D. 736; Ex parte Brown, cited in 1 Atk. 225.

W. A. Field, for administrator of S. G. Clap. 1. Death of a copartner is a public fact of which persons interested are to take notice: Marlett v. Jackman, 3 Allen, 287.

2. The firm having been dissolved by the death of one partner, the survivor cannot bind his estate, unless by a contract duly made in closing up the business; and this note does not purport to be given by E. W. Clap as surviving partner, and was not so given in fact: Palmer v. Dodge, 4 Ohio St. 21; Lockwood v. Comstock [Case No. 8,449]; Parker v. Macomber, 18 Pick. 505; Perrin v. Keene, 19 Me. 355; Lumberman's Bank v. Pratt, 51 Me. 563; Lusk v. Smith, 8 Barb. 570; Hurst v. Hill, 8 Md. 399; Kilgour v. Finlyson, 1 H. Bl. 155.

3. The petitioner may have mistaken the law; but he did the act he intended to do, and the legal consequences are conclusively presumed to be within his knowledge and intent. It is now well settled that an express or implied agreement to take the continuing partner as sole debtor is founded on good consideration, and slight circumstances will be sufficient to prove that the assent of the creditor to such a conversion: Thompson v. Percival, 5 Barn. & Adol. 925; Shaw v. McGregory, 105 Mass. 96; Ex parte Channel, 3 De Gex, F. & J. 752; Evans v. Drummond, 4 Esp. 89; Hart v. Alexander, 7 Car. & P. 746; Robs. Bankr. 508, 509, and notes.

Wakefield, in reply. If the note be treated as made by the surviving partner, it was within his authority as such: Ide v. Ingraham, 5 Gray, 106. See, too, T. Pars. Partn. 404; 5 Whart. 530; Brown v. Clark, 14 Pa. St. 469; Robinson v. Taylor, 4 Barr. [Pa. St.] 242. There are no circumstances, even slight, to prove a conversion of this debt.

LOWELL, District Judge. The doctrine laid down in Lodge v. Dicas, 3 Barn. & Ald. 611, and David v. Ellice, 5 Barn. & C. 196, that a promise by a joint creditor to look to one partner only and release the other is void for want of consideration, was soon changed in England by the case of Thompson v. Percival, 5 Barn. & Adol. 925, which has been followed ever since. And it is now perfectly well settled that such a contract is not void, and that the reason given for holding it so is unsound, since a separate debt may be more beneficial to the creditor than a joint debt: Hart v. Alexander, 2 Mees. & W. 484; Lyth v. Ault, 7 Exch. 669. Supposing the partners to have agreed to convert the joint into a separate debt, the only inquiry is, whether this has been assented to by the creditor; and this is usually to be ascertained from the conduct of the parties. See an excellent summary of the decisions in 1 Lindl. Partn. (2d Ed.) 353. The question arises often in bankruptcy; because the fund out of which the creditor is to be paid may depend upon the answer. In bankruptcy, the prevailing doctrine is, that if the continuing partner has assumed the debts, whether by deed or parol, and the joint creditors have assented, before the bankruptcy, the conversion is complete. "It is apprehended," says Collyer (Partn. 5th Am. Ed. § 918), "that the conversion must depend on the assent [of the creditor], in whatever manner the assent is evidenced; that, although there be a deed, bare assent will be sufficient, though it would be insufficient at law; and that where there is no deed, assent will be necessary, although perhaps it might be unnecessary at law." In this country, the courts were reluctant to lose sight of the old common-law idea that a promise to take the sole responsibility of one of two joint debtors was nudum pactum; but I understand the later English doctrine has now fully prevailed here. For a discussion of this point, see In re Johnson [Case No. 7,369].

When the partnership has been dissolved by the death of one partner, the joint remedy is lost; but his estate may be followed in chancery, unless equitable considerations exist to prevent it, such as an express promise, or a course of dealing, or other circumstances, like those which would exonerate a retiring partner at law. Mr. Lindley, at the place above cited, says, "A court of equity will consider all the circumstances, and decline to assist the creditor, if, upon the whole, justice so requires;" but adds, that the small number of cases in which relief has been refused, compared with those in which it has been granted, shows the leaning of the court in favor of the creditor. And this remark is fully borne out by the authorities: Devaynes v. Noble (Sleech's Case) 1 Mer. 530; Winter v. Innes, 4 Mylne & C. 101; Harris v. Farwell, 15 Beav. 31. In Massachusetts, the debt is severed at law by the death, and the creditor may proceed against the estate of the decedent as if for his sole debt. Gen. St. c. 97, § 28. It is not necessary to resort to chancery; but the citations above given will prove that the rule is substantially similar in both jurisdictions. In bankruptcy, notwithstanding the severance, the joint creditor retains his right to be paid out of the joint estate: Burnside v. Merrick, 4 Metc. [Mass.] 537; Howard v. Priest, 5 Metc. [Mass.] 582; Lodge v. Prichard, 1 De Gex, J. & S. 610; Ridgway v. Clare, 19 Beav. 111; Hills v. McRae, 9 Hare, 297. In this case, there is no evidence that the estate of Samuel Clap was entitled to

be exonerated from the joint debts, or that the bankrupt had agreed to assume them, or any other of the circumstances or equities from which such an agreement would be inferred; so that there is no foundation on which to base a supposed assent of creditors. The case stands nakedly on the fact that the creditor has taken a negotiable security from the surviving partner. It is undoubtedly true, that if a creditor of two partners takes the negotiable security of one, in satisfaction of his debt, his remedy against the other is gone. The leading case of Thompson v. Percival, above cited, was of that character. This decision is approved by Mr. Justice Story, Partn. (6th Ed.) § 155, and see the cases in note 3 to that section. But if the note or bill of one partner is not taken as satisfaction, but as security for the joint debt, the creditor may, if the security is dishonored, sue or prove in bankruptcy, as the case may be, on the original debt. Indeed, he may often have his election to prove against one or the other. This is familiar law in ordinary transactions, and has been often applied to the case of partners. Thus where, at the time of taking the separate security, the creditor expressly reserved his rights against the retiring partner, and retained the bill which had his name upon it, no discharge was worked: Bedford v. Deakin, 2 Barn. & Ald. 210. The intent is the pivot of the matter; though there are a few cases, like Harris v. Lindsay [Case No. 6,123], in which the intent is conclusively presumed from conduct which would amount to a sort of estoppel, of all which circumstances this case is free. Potter v. McCoy, 26 Pa. St. 458.

The difference between the law of Massachusetts and that of England and most of the states of the Union, I understand to be merely this: That in the courts of this state a negotiable bill or note is taken to be a more beneficial security than a book account, or any debt of that kind, and, though it does not operate as a merger in law, is presumed prima facie to be taken as payment. But it is a mere question of fact, and any evidence which rebuts the presumption is competent, and it is easily overcome. In other courts, the ordinary presumption of fact is the other way. On the other hand, I suppose that it is not difficult to find cases out of Massachusetts in which the deliberate exchange of one note for another is presumed to be intended as a payment of the note given up; but this is rather because the old one is given up than because the new one is taken. See Newmarch v. Clay, 14 East, 239; Arnold v. Camp, 12 Johns. 409. But the question always comes back to the intent of the parties. Melledge v. Boston Iron Co., 5 Cush. 158, cited by the petitioner, much resembled the present case. There the plaintiffs sold goods to an incorporated company, and took the note of its agents, supposing the signature to bind the company. The judge at the trial ruled that if the plaintiff received the notes under a misapprehension concerning the identity of the parties, and this mistake was caused by the acts of the company, the original debt would not be merged or lost. This instruction was held by the court to be sufficiently favorable to the defendants. I do not consider the latter clause of the instruction, that the belief was induced by the acts of the company, to be essential. The question is one of intent; and, if there was a misapprehension, that is enough, provided no equities have intervened to make it unjust to correct the mistake. It was on this ground that the ruling was sustained, and was said to be not too favorable to the plaintiff. It was less favorable than the law would have warranted. In this case, I am asked to presume that the petitioner must have known the death of one partner, the contents of his will, and the legal effect of these facts; and thence to infer that the note was taken for whatever it might legally turn out to be; which, on the face of it, is precisely what the old one was, but in law, it is said, can only bind the bankrupt individually. If there was a mistake, it is added, the law only was misconceived.

If the mere fact of the exchange of notes were shown, the presumptions might follow; but inferences cannot prove what both parties testify was not the fact. If the mistake were wholly one of law, such a mistake is often sufficient, even in a criminal case, where policy allows no mistakes of law, to rebut an inference of intent; but the mistake here appears to have been partly concerning the status of the partnership, depending on facts not known to the petitioner, though he might, perhaps, if the contrary were not proved, be presumed to know them.

There is another point to be considered. The surviving partner, who was likewise executor of his brother's will, was liable in two capacities to pay this debt; and his giving a note for it, in one capacity, ought hardly to be held to exonerate himself in the other, especially when on the face of it the intent is to bind both. By the death the debt was severed; the creditor might sue the surviving partner for the whole at common law, and he might sue the executor for the whole by virtue of the statute. Why should an acknowledgment of the debt by one exonerate the other, in the absence of any direct evidence of such a purpose, and even against the direct evidence? I hold, therefore, that this note ought not in bankruptcy to be construed as the separate note of E. W. Clap, doing business under the name of the late firm, because it was not so intended by the parties; and that the note, whatever it may be in itself, being made under the circumstances admitted here, does not convert the debt into the separate debt of the now bankrupt, nor extinguish the original liability of the old firm; and it follows that the peti-

tioner is entitled to come in against the joint assets remaining in specie of the original firm. Order accordingly.

Case No. 2,785.

In re CLAPP et al.

[2 Lowell, 468;[1] 14 N. B. R. 191.]

District Court, D. Massachusetts. March, 1876.

BANKRUPTCY—ATTACHMENT—DISSOLUTION.

1. Attachments are not dissolved by the acceptance and recording of a resolution of composition.

[Cited in Re O'Neil, Case No. 10,528; Re Hazens, Id. 6,285.]

2. All liens are preserved which are not expressly disposed of by the bankrupt act of 1867 [14 Stat. 517].

3. An attachment can be dissolved only by an assignment.

LOWELL, District Judge. Objection has been made by three attaching creditors and by two deputy sheriffs that certain expenses of attachments of the debtor's property are not provided for by the resolution for composition. This objection might be a very important one in some cases. It would be very unjust that creditors should be bound to accept a certain amount of their debt and lose all their costs. It will, however, be soon enough to decide such a case when it arises. Here there has been no first meeting of creditors, no assignee chosen, and of course no assignment. It follows, as I have repeatedly decided, that attachments are not dissolved. My attention has lately been called to a decision of the court of appeals of Maryland, that an attachment less than four months old ought to be quashed after a composition has been duly accepted and recorded. Miller v. Mackenzie [43 Md. 404]. And I think it due to that decision to give my reasons for the opposite opinion. It cannot be denied that all liens of every kind, legal, equitable, maritime, statutory, are preserved by the bankrupt law, and by every such law, unless expressly mentioned and disposed of by the statute. As early as the time of James I. the English law provided that neither attachments nor judgments should give the holders of them an advantage over the other creditors in bankruptcy, unless the lien of the judgments were perfected by seizure or levy on execution. The bankrupt act of 1841 [5 Stat. 440] split on this very rock, the highest court holding, in opposition to the able argument of Story, J., that attachments were all preserved. Peck v. Jenness, 7 How. [48 U. S.] 612. It is true that liens were expressly preserved by the act of 1841, and the decision of the supreme court was only required upon the definition of liens; but, as I have said, it is plain, and has been decided by every court that has had the question to consider, that liens are as carefully preserved by our present law as by any of its predecessors, excepting where positively affected by express words. The argument of the case I have cited is precisely that of Story, J., which the supreme court overruled, that the debt being gone, the security must go with it; and, logically followed, it cannot stop with attachments less than four months old, nor, indeed, with any other security. The true rule is, that, liens being preserved, the debt is preserved, so far as necessary in rem.

Now, there is nothing in the bankrupt law, including the sections which authorize a settlement by composition, that dissolves an attachment, excepting an assignment by the judge or register. Accordingly, it has been the practice here to call a first meeting, and have an assignee chosen, when it was found that there were attaching creditors who were not willing to come in. It seems almost a technical point, I agree, but there is no help for it; and there are, besides, some advantages in having an assignee to see that the composition is duly carried out. Where no such advantage would be derived, I have not found attaching creditors disposed to insist on obstructing the proceedings, provided their reasonable costs incurred in good faith are paid. In this case, the attaching creditors have the remedy in their own hands; for they can refuse to release their attachments until their costs are paid, and, indeed, their debts too, for that matter, unless they have in some mode released their attachments or estopped themselves. This state of things might be a reason for setting aside the resolution at the request of the other creditors; but as no one has asked for the order on that ground, and as I infer from the papers that the attaching creditors are ready to accept their share with the rest, if their costs are paid, I shall order the resolutions to be recorded, subject to be rescinded hereafter if it shall be necessary for the protection of the general creditors. Resolutions to be recorded.

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

CLAPP (FORSYTH v.). See Case No. 4,949.

CLAPP (MASON v.). See Case No. 9,233.

CLAPP (WILSON PACKING CO. v.). See Cases Nos. 17,850 and 17,851.

Case No. 2,786.

CLAPP v. YOUNG et al.

[1 Spr. 40;[1] 9 Hunt, Mer. Mag. 173; 6 Law Rep. 111.]

District Court, D. Massachusetts. Feb., 1843.

FRAUDULENT SALE — WHO MAY COMPLAIN—COLLISION—VESSEL AT ANCHOR—BURDEN OF PROOF.

1. The question whether the sale of a vessel was fraudulent as against creditors, can-

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

not be raised by third persons, who have no interest in the question.

2. In cases of collision, where it appeared that one of the vessels had neglected an ordinary and proper measure of precaution, the burden was on her to show that the collision was not owing to her neglect.

[Cited in Bulloch v. The Lamar, Case No. 2,129; Martinez v. The Anglo Norman, Id. 9,174.]

3. The schooner Eddington went into Provincetown harbor in a gale of wind. After coming to anchor, she was driven from her moorings toward the flats, where she was brought up by her small anchor, and lay head to the wind. In this position, she was run foul of in the night time by another vessel, the Lion, having no person on board. *Held*, that the owners of the Lion had omitted a reasonable and ordinary measure of security, and that the collision was to be attributed to their neglect, notwithstanding a usage at Provincetown to leave vessels, owned in that place and manned by persons residing there, at anchor in the harbor, without any person on board.

In admiralty.

Benjamin R. Curtis, for libellant.

F. C. Loring and C. W. Loring, for respondents.

SPRAGUE, District Judge. This is a libel by the owner of a schooner called the Eddington against the owners of a schooner called Lion, for damage by collision. The first question is whether the libellant was owner of the Eddington. He has produced the usual muniments of title, a bill of sale, and an enrolment in his own name. It is insisted that the sale was without consideration, and for the purpose of defeating the creditors of Chandler Clapp, the former owner. But the respondents are not his creditors and are not in a position to raise that question. If Chandler Clapp chose to give the vessel to the libellant, it was no concern of the respondents; the sale would be good as to them as well as between the parties.

The next question is, whether there was any collision between those two vessels. On the morning of the third of October, 1841, the Eddington went into Provincetown harbor as a place of refuge, as a gale had then commenced. She came to anchor, but was subsequently driven from her moorings to the flats or near them, where she was brought up by her small anchor, and lay head to the wind. In this position she was run foul of in the night by some vessel having no person on board. Was that vessel the Lion? The master, mate, and a seaman by the name of Brennan testify that they were on board the Eddington and saw the vessel which came in contact with her, and when she was cleared from her, and kept sight of that vessel until she had drifted ashore; and the captain and Brennan testify that on the next day they went on board the same vessel, and that it was the Lion. They all three testify to certain distinctive marks of the vessel which came in collision with them, as to some of which they concur, and others are stated by one or two, but not by all. And it is shown not only by the testimony of the captain and Brennan, but by Howard, the mate of the Lion, that these marks belonged to that vessel, and there is no proof that they belonged to any other; and they were such that it cannot be supposed that any other vessel would bear, some of them being descriptive of injuries received. The Lion is proved to have been a pink-sterned schooner of about sixty or seventy tons, which had previously during the same night drifted against the Tarquin, where she received considerable injury, and among other things, her larboard bulwarks were carried away, and her anchors were left, one on board, and the other under the Tarquin, both her cables having been cut by one of the crew of the latter vessel. The vessel which drifted against the Eddington came broadside on, the bowsprit of the Eddington going between her masts, and it is testified by one at least on board of the Eddington that her waist was cut down. Now it is testified by Howard, the mate of the Lion, that when he went on board of her the next day she had her bulwarks on both sides knocked down nearly to the mainmast, which is most satisfactorily accounted for; if, after the larboard bulwarks were carried away by the Tarquin, as testified by Jefferson, she drifted broadside upon the Eddington, and there carried away her starboard bulwarks. There were several other marks testified to by those on board the Eddington which it is not necessary to enumerate. It is sufficient to say that if they were in fact seen at the time of the collision they identify the Lion beyond any rational doubt. But it is insisted that such was the darkness of the night that it is impossible that those on board the Eddington should have seen what they testify they saw, or kept sight of the vessel until she reached the shore, nearly or quite half a mile distant. Six witnesses have been produced by the respondents, who testify strongly to this impossibility; while six other witnesses have been produced by the libellant, who testify that it was practicable to see as stated by those on board the Eddington. Now, it is to be observed, in the first place, that these last, three in number, testify affirmatively and positively that they did see certain things, and that of the six witnesses in behalf of the respondents, five were on land, while the other six witnesses produced by the libellant were on board six different vessels in the harbor, and testify that the foaming and combing of the sea was such that a person could see better on the water than on the land, and they state certain things which they themselves saw and did. We cannot be certain that those on shore speak of the same point of time as those on board the Eddington, and we may well suppose that there was some variation in the degrees of light and darkness during the night; and as the moon was only three days from the full, I do not think it is shown

to be incredible that the witnesses for the libellant should have seen what they affirm.

It is further contended that from the position of the two vessels and the direction of the wind it was impossible that they should have come together, and a number of witnesses have expressed this opinion. But it is to be observed,

1. That some of them, at least, seem to refer to the position of the Eddington the morning after the gale, which was a considerable distance, and by the plan offered by the respondents, nearly a quarter of a mile from the edge of the flats where the collision is alleged to have taken place.

2. Some if not all assume, that the Lion went in a straight line, by a "dead drift" as it was expressed, from the place of her moorings to the point where she was found after the gale, which is founded on the supposition that the wind was all the time in one direction, whereas Cowan, one of the witnesses for the respondent, testifies that the wind changed about eleven o'clock to the north, and other witnesses also speak of a change of the wind. Now it appears, that the Lion dragged her anchors from the place of her moorings until she came in contact with the Tarquin, when her cables were cut and her anchors left. As there was no one on board the Lion, we cannot know how long she was in drifting, how often she brought up while her anchors were ahead, or how near she may have been to the Tarquin when she last brought up. She remained in collision with the Tarquin about half an hour. I am not aware that the relative positions of the Tarquin and the Eddington have been stated, or that any witness has expressed an opinion that a vessel could not have been carried from the Tarquin to the Eddington. If the Tarquin was north of the Eddington and the Lion parted from the Tarquin after the wind had come to the north, as testified by Cowan, there would be no improbability in her striking the Eddington, and being afterward carried in a southerly direction to the point where she was found next morning.

3. Other witnesses who saw the position of the two vessels and had every opportunity to know the state of the wind, express the opinion that they did come in collision.

4. What other vessel could it have been that run foul of the Eddington? The captain of that vessel, before he left Provincetown, and soon after the occurrence, charged it upon the Lion, and said he should claim compensation. The attention of the respondents was early called to this subject; and yet in all their testimony they have presented but one ground of probability that it was some other vessel, and that is that other vessels were found after the gale lying nearer to the Eddington. It so happens that all those vessels, as appears by the testimony of Cowan, a witness for the respondents, who, from the proximity of his residence, seems to have had the best means of knowledge, were strangers with their crews on board. The only two that are named are the Vestal and the Amanda. Martin Stoddard also testifies that the Vestal had a crew on board; and Charles Bruce testifies that he was on board the Amanda, that she came in collision with no other vessel, and that there was no vessel on shore nearer to the Eddington than the Lion, excepting his own. It also appears, that the Vestal had a square stern. It has already been stated that there was no person on board the vessel which came in contact with the Eddington; and the captain, mate and Brennan testify that she had a pink stern. It has been contended that these three witnesses are not entitled to belief. As to the captain, although his general character is shown to be good, yet from the character of the conveyance of the vessel to his brother, the libellant, and the bias that he may be under as master or agent of his brother, if indeed he have not a pecuniary interest, I think reliance should not be placed upon his testimony when in conflict with that of disinterested witnesses, or in matters of opinion.

But against the mate and Brennan no such objections exist. It is indeed suggested that the latter expects to go to sea again with the captain, but the mate was discharged immediately after a gale, for a cause, as appears by the log book, which would be far from conciliating his favor, and there is no reason to suppose that he has any partiality whatever, either for the captain or the libellant. On the whole, I do not think there is any substantial reason to doubt that it was the Lion which came in collision with the Eddington. It has been suggested that the Eddington was in fault in not having let go both anchors, in the first instance, and in keeping her yards and topmasts aloft. This, however, has not been much urged, and I do not think that the evidence shows it to be blameworthy.

The most important and the most difficult question still remains. Is the collision to be attributed to negligence on the part of the Lion? The only neglect alleged is the leaving her alone when it was seen that a gale was coming on, with from thirty to fifty vessels at anchor in the harbor. Notwithstanding the wide diversity of opinion among the witnesses, I am fully satisfied, from testimony, that a vessel is rendered more safe from collision by having some person on board. But this is by no means decisive; for it has been well contended by the counsel for the respondents that the owners were not bound to take extraordinary measures of precaution, however conducive to safety. The question is, whether they have omitted a reasonable and ordinary measure of security. Now I think it appears by various maritime codes, adopted by different nations, in different ages, to have been the opinion of those who have legislated upon the subject, that a vessel ought not to

be left without some person on board, and this is strongly indicative of the general sense of the maritime world. The evidence in this case, derived from numerous witnesses who have had much experience as mariners in all kinds of vessels, satisfactorily proves that, as a general rule, some person ought to be left on board a vessel while lying at anchor in a harbor, especially when a gale is coming on, and that the omission to do so is a neglect of duty. But it is also fully proved to have been for a long time the established usage at Provincetown to leave vessels, owned in that place, and manned by persons residing there, at anchor in the harbor without any person on board; and that this usage prevails at all times, whether a gale is coming on or not, and embraces not only fishermen and small craft, but coasters and other vessels there owned; some of them being as large as two hundred tons burthen. Some evidence has been introduced to prove that a similar usage prevails in other places in Massachusetts. But it is to be remarked that all those named, excepting Cape Ann, are tide harbors; and that the testimony comes only from occasional visitors, and not from the residents of any of those places, and is by no means satisfactory as to the generality of the usage, and its extent or limitations, and especially whether it prevails when a gale is foreseen. That it is material that the witnesses should have spoken to this point is apparent from the testimony of witnesses from Truro, which lies on the harbor of Provincetown, by which it appears that, although they adopt the usage of their neighbors in fair weather, yet when a gale is seen to be approaching, some persons are put on board their vessels for greater security. The usage, therefore, which is to cover the present case, is not shown to exist except among the inhabitants of Provincetown.

It is proved that the usage was followed in the present case. Howard, the mate of the Lion, testifies that seeing a gale coming on, he and the captain went on board of her and let go a second anchor and moored her in the usual manner. It has been urged with much force by the counsel for the respondents: 1. That all the ordinary and usual precautions were adopted, and that they were not bound to extraordinary and unusual measures; and 2. That the fact that such usage had been adopted and universally practised upon by the people of Provincetown, known to be prudent, sagacious and economical, is conclusive evidence that it is safe and proper. As to the last point, it may be observed in the first place, that the practice of the people of Truro is evidence on the other hand that it is not safe and proper to leave vessels alone when a gale is foreseen; and in the next place that the usage is not adopted by the people of Provincetown for its safety, or because there is less danger of vessels striking adrift or coming in collision in that than in other harbors, but for their own convenience, their vessels being generally small and employed in the fisheries, are much in the harbor, and very often with little or no lading on board; and the officers and crew having their families and homes at Provincetown, the convenience of the practice to them outweighs its hazards; and therefore they have been content to adopt it with the mutual understanding that when accidents occur each one shall bear the damage occasioned to his own vessel by drifting or collision. This may be all very well as among themselves, but the question is whether a stranger vessel, not assenting to the usage or participating in its benefits, shall be subjected to its hazards. It is to be borne in mind that this is not a case of contract, where a party having made an agreement with reference to a known usage, thereby assents to and adopts it. The harbor of Provincetown, as part of the great highway, is equally open to all vessels of the United States, and much resorted to as a place of safety by strangers, and oftentimes by those laden with valuable cargoes. The libellant's vessel did not enter it by the indulgence of the people of Provincetown, but used its waters as a matter of right, independent of their consent. When it is said that all the usual and ordinary precautions were adopted, the truth of the proposition depends on the standard to which reference is had. If referred to the practice of the inhabitants of Provincetown it is true, but with reference to the general maritime practice it is not true. The question, then, is whether a person who has adopted the usage of a village of about 2,200 inhabitants in contravention of the practice of all the rest of the maritime world, can be correctly said to have adopted all the usual and ordinary precautions? Is it not apparent that the inhabitants of Provincetown have habitually violated a general rule for safety adopted by mariners? And the defence of the respondents is, that they have only participated in this violation. When the libellant entered the harbor of Provincetown, he was bound only by the general maritime rules and usages, and he had a right to rely upon their observance by others using the same public waters.

It has been further contended that, even if there was negligence in leaving the Lion without any person on board, yet the injury to the Eddington was not occasioned thereby. Now I think that when it is shown that a collision has taken place between two vessels, and that one of them had neglected an ordinary and proper measure of prevention, the burthen at least, is on her to show that the collision was not owing to her neglect, but would have equally happened if she had performed her duty.

This burden the respondents have assumed and insist that such was the extreme darkness of the night and violence of the gale, that human efforts would have been vain,

that no sail could have been set, nor the course of the vessel in any manner changed, and that if it could a vessel could not have been seen far enough to avoid striking her.

I have already stated that after examination and comparison of the mass of conflicting evidence, I am satisfied that upon the water a vessel could have been seen at some distance, and far enough to be avoided by any vessel which could be sheered. As to the possibility of changing the course of the vessel, opposite opinions have been strongly expressed by different witnesses; but I am relieved from the necessity of settling the pretensions of conflicting theories, by the fact that some vessels were sheered so as to avoid others.

I refer particularly to the testimony of Joseph Barnes, who was master of the Panther, who states that his vessel went ashore when the gale was the heaviest; that several vessels lay to leeward of his; he slipped his cable and "run through the fleet before the wind;" that he had a jib set, "sheered through the other vessels very well, passed several, and run ashore safe." And Martin Stoddard, master of the Gentile, who, after stating that he slipped his cable and hoisted the jib up, proceeds to say: "Our vessel swung off before the wind. I took the helm with one other man and steered her ashore by sheering one way and another to clear her of vessels. When we hoisted the jib up it burst, but it held until we swung off before the wind." Charles Bruce, master of the Amanda, testifies that he sheered his vessel; and to this we may add the success of Jefferson in disengaging the Lion from the Tarquin. These are pregnant facts, and they stand wholly uncontroverted. There is no evidence that any one attempted to sheer his vessel without some success.

Upon the best consideration which I have been able to bestow upon this case, I am of opinion that the defence is not sustained, and that the decree must be in favor of the libellant.

It has been stated that a decision adverse to the local usage which has been relied upon will subject the people of Provincetown to great inconvenience. If so, it is a consequence much to be regretted, but cannot vary the duty of the court.

Case No. 2,787.

The CLARA.

[13 Blatchf. 509.][1]

Circuit Court, E. D. New York. Aug. 16, 1876.[2]

COLLISION AT DELAWARE BREAKWATER — STORM — WATCH — LIGHTS — LOOKOUT.

A vessel, the N., was lying at anchor inside of the Delaware breakwater, in the month of February, having gone there for safety from an approaching storm. Night came on, and it was very dark, and a large number of vessels came in, and a severe snow storm set in. The N. had no watch on deck. It was not proved that she had a light set. The C. came in for shelter from the storm, having proper lights, and a proper lookout, and, in anchoring, collided with and sank the N. *Held*, that the N. was in fault in not having a watch on deck, and could not recover against the C.

[Cited in The Isaac Bell, 9 Fed. 848; The Erastus Corning, 25 Fed. 574.]

[See note at end of case.]

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

[In admiralty. Libel by Jotham Shepherd and others, owners of the schooner Julia Newell, against the schooner Clara, for a loss sustained by collision. There was a decree for libellants in the district court (case unreported), and Lemuel H. Hopkins and others, claimants of the Clara, appeal.]

Scudder & Carter, for libellants.
Owen & Gray, for claimants.

HUNT, Circuit Justice. A collision occurred about five o'clock, a. m., of the 25th of February, 1874, inside the Delaware breakwater, between the schooners Clara and Julia Newell, whereby the latter was sunk. The Newell, a small schooner of 78 tons burden, on the afternoon of the 23d of February, anchored within the breakwater for shelter from an approaching storm, and the Clara, being on a voyage from New York to Baltimore, foreseeing the approaching storm, bore away for and also put into the breakwater for safety, where she arrived about five o'clock, a. m., of the 25th of February, and, while proceeding to a suitable and proper anchorage, collided with the Newell. There were then a large number of vessels in the breakwater, and others were constantly arriving. At the time the Clara entered the breakwater the night was cold and very dark, the moon having gone down several hours before. The Newell was lying without a watch on deck. The storm set in about the time the Clara came to anchor, and was a very severe snow storm. If the Newell had had a sufficient watch on deck, the accident might have been prevented. The Clara was well manned, and had proper lights and a proper lookout.

Whether the Newell had set and burning the light required by law for a vessel at anchor, is a matter of considerable doubt. The evidence is conflicting, and it is quite difficult to determine what the truth is. I do not, however, pass upon this point, as I hold that the absence of an anchor watch on the Newell is fatal to her right of recovery. On this point there is no conflict of evidence. The mate of the Newell testifies, that, at the time of the collision, and for a considerable period before, no one was upon the deck of the Newell. It was his watch, and he kept it

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

[2] [Affirmed in The Clara, 102 U. S. 200.]

by going on deck occasionally, but remaining the most of the time in the cabin. At the time of the shouts and clamor preceding the collision, he was in the cabin, reading an almanac, and no one was on the deck. When he reached the deck, it was too late to avoid the catastrophe.

The place of refuge sought by each of these vessels was an artificial harbor off the coast of Delaware, constructed by the United States in aid of the coastwise commerce of the country. Sixty or seventy vessels had, at this time, put in there, to avoid an impending storm. It was an inclement season of the year, the month of February. The night was dark and rough, and a severe snow storm soon came on. The Newell and the Clara had each a perfect right, as had all other vessels, to take advantage of this place of safety. It was, however, the duty of each to take the proper and customary measures for its own protection, and to avoid injury to others. As she came in, the Clara was bound to have a sufficient and careful lookout, in addition to the lights required by the statute. This, I think, she had. The Newell was bound to keep a head light, and was, also, bound to keep a watch upon her deck. The latter duty she entirely omitted. If her mate had been upon deck, keeping a careful lookout, he might have seen the Clara and her lights at such a distance, that, by hails and shouts, he could have warned her of the position of the Newell. If he could not have seen her lights, he might have heard the noise arising from lowering her sails and casting her anchors. It is testified, that the Clara could have heard a hail from the Newell at a distance of one hundred yards, and thus the accident might have been avoided. The omission was a want of proper vigilance, and it is by no means certain, that, if well kept, the watch would not have preserved both vessels in safety. The Sapphire, 11 Wall. [78 U. S.] 170, 171; The Indiana [Case No. 7,020]; Cohen v. The Wilder [Id. 2,965]; The Lydia [Id. 8,614]. The lookout of the Clara failed to discover the light of the Newell, if she had one, but the Newell might have seen her lights, or heard her noise, and, by shouts and hails, have given that notice which was needed. For this negligence I think she loses her right of recovery, and that the decree must be reversed and the libel dismissed.

[NOTE. From this decree, libellants appealed to the supreme court [102 U. S. 200], where the decree of the circuit was affirmed.

[The grounds of the affirmance are thus stated by Mr. Justice Swayne: "While undoubtedly it was the duty of the Clara to enter the breakwater and proceed to her anchorage with the greatest care and circumspection, the case discloses no fault whatever, of omission or commission, on her part. The findings, however, as to the Newell, put her deeply in the wrong, and there is nothing in the record which mitigates in any degree the severe condemnation which her recklessness invoked."]

Case No. 2,788.

The CLARA.

The CLARA CLARITA.

[5 Ben. 375.] [1]

District Court, S. D. New York. Nov., 1871.[2]

COLLISION—SALVAGE—TOWING A VESSEL ON FIRE AGAINST VESSEL AT ANCHOR — INEVITABLE ACCIDENT.

1. A ferry-boat, lying at a dock, caught fire at night. A tug went to her assistance, and, after having in vain attempted to put out the fire, she, at the request of those in charge of the ferry-boat, who feared the spread of the fire, towed the ferry-boat out into the stream by a hempen hawser, for the purpose of taking her to where she could be beached. The hawser burned off twice, the ferry-boat drifting each time. The second time, before the tug could prevent it, she drifted against the bows of a schooner, and set her on fire. The tug, fastening to the ferry-boat again, pulled her away, and towed her till she sank, and then returned to the schooner and rendered her assistance in putting out the fire on board of her. The schooner was lying at anchor in a usual place, having no anchor-watch on deck, and it appeared that it was not usual to keep an anchor-watch upon vessels so anchored, except in cases of fog or storm. The owners of the tug claimed to recover salvage from the schooner, and the owners of the schooner claimed to recover damages from the tug for the setting of the schooner on fire. *Held*, that, the schooner being at anchor in a proper place, the burden of proof was on the tug to prove that she was not in fault in towing the ferry-boat against the schooner, and none the less so, because the ferry-boat was on fire.

[Cited in Southwestern Transp. Co. v. Pittsburg Coal Co., 42 Fed. 920.]

[See note at end of case.]

2. That the action of the tug, in towing the ferry-boat away from the dock, was not within the rule which authorizes one, in case of necessity, to destroy another's property, in order to prevent the spread of a fire.

[Followed in The Chickasaw, 38 Fed. 361, 362.]

[See note at end of case.]

3. That the towing of the ferry-boat out by a hempen hawser, which was likely to burn off and let her drift, was an act of negligence on the part of the tug.

[Followed in The Chickasaw, 38 Fed. 361, 362.]

[See note at end of case.]

4. That the drifting of the ferry-boat against the schooner was not an inevitable accident, but was the result of negligence on the part of the tug, and the latter, therefore, was not entitled to recover salvage.

[See note at end of case.]

5. That the schooner was without fault, and was entitled to recover her damages.

[Cited in The Fremont, Case No. 5,094.]

[See note at end of case.]

[In admiralty. Libels by the New York Harbor Protection Company, owner of the steamtug Clara Clarita, against the schooner Clara to recover for services rendered in ex-

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

[2] [Affirmed by circuit court in Case No. 2,789, and by supreme court in The Clarita and The Clara, 23 Wall. (90 U. S.) 1.]

tinguishing a fire, and by Augustus M. Cox and others, owners of the schooner, against the tug to recover the damages caused by the fire.]

Cornelius Van Santvoord, for steamtug.
Edward H. Owen, for schooner.

BLATCHFORD, District Judge. These are two causes heard together. The libel in the first above entitled cause is filed by the owners of the steamtug Clara Clarita, to recover a salvage compensation for services rendered to the schooner Clara, in extinguishing a fire on board of her. The libellants are a corporation, and the libel is filed on behalf of the libellants and of all others entitled. The substance of the libel is, that, on the evening of the 1st of August, 1870, a fire broke out on board of the ferry-boat James Watt, lying in a slip on the New Jersey shore, opposite the city of New York; that the steamtug proceeded to the ferry-boat, and, at the request of those in charge of the ferry-boat, endeavored, by the use of the hose and steam pumps of the steamtug, to extinguish the fire, but without success; that, when this was apparent to those in charge of the ferry-boat, they, fearing that the fire would spread to the adjoining wharves and to other vessels, requested the master of the steamtug to take the ferry-boat in tow, and drag her out of the slip, for the purpose of beaching her in some place where, even if she could not be saved herself, she would be prevented from causing damage and danger to others; that, in compliance with such request, and under the employment of those in charge of the ferry-boat, the master and crew of the steamtug made fast a hawser to the ferry-boat, and dragged her clear of the slip, and started with her on the way to Hoboken flats, about a quarter of a mile distant; that, when she started, the flames were chiefly confined to the hold of the ferry-boat, and there was every reason to believe that she could be successfully towed to and beached upon the flats; that, as the wind and tide were setting up the river, the steamtug made all haste, with their aid, towards the nearest place of safety, but the flames suddenly broke out in all parts of the ferry-boat, and the hawser by which she was being towed was burned off, and she swung adrift; that she was then taken in tow again by another hawser, but that also was soon burned away, and she drifted off a second time, and in spite of all efforts that could be used to prevent it, and, without any fault or negligence on the part of the master and crew of the steamtug, drifted, under the impulse of the wind and tide, against and upon the schooner, which was lying at anchor; that another hawser was made fast to the ferry-boat, as soon as it could be done, and she was finally dragged clear of the schooner, but not before the schooner had caught fire from the burning ferry-boat; that the ferry-boat, soon afterwards, sank in the river; that, after that, the master and crew of the steamtug immediately turned their attention to the schooner, which was then burning fiercely from her foremast forward to and including her bowsprit and all her head sails; that the steamtug was brought alongside of her, and made fast to her, and two or more streams of water, through hose, were brought to bear on the flames; and that, by the use of the apparatus of the steam tug, after three or four hours of exertion on the part of her master and crew, during which they were exposed to great danger and hardship, the flames were subdued, and the schooner was preserved from entire destruction, and restored, with comparatively trifling damage, to her master and owners. For this service, the libellants claim salvage, alleging the value of the schooner to have been $20,000.

The answer to this libel avers, that it was gross carelessness and negligence on the part of the steamtug to attempt to tow the burning ferry-boat, with the wind and tide as they were, by a hempen hawser, which was liable at any moment to be destroyed, as it was, in fact, by the flames which enveloped the boat; that the libellants had the sole care and management of the burning boat; that, when they undertook and agreed to haul her from her slip around upon the Hoboken flats, and commenced that service, no person remained on board of her, who had been previously connected with her, or who had any power or control over her; that she was, in fact, under the exclusive direction and control of the libellants; that, inasmuch as the libellants voluntarily undertook to tow the burning ferry-boat, they are responsible for all the consequences, and are liable to the claimants for causing her to get foul of and to set on fire the schooner, which was then lawfully and properly lying at anchor in the river; that the libellants are not entitled to salvage for the services rendered; that the schooner would not have been set on fire by the burning ferry-boat, if the libellants had not voluntarily agreed and attempted to tow the burning boat, or if, in doing that, they had exercised proper care; that the schooner was run into and set on fire by the negligence of those in charge of the steamtug, and from no fault or neglect of duty on the part of the schooner; and that the schooner was not set on fire by any accident, but by the sole and culpable fault of those navigating and having charge of the steamtug in towing the burning ferry-boat.

The libel in the second above entitled cause is brought by the owners of the schooner against the steamtug, to recover for the damages caused by the fire. The libel alleges, that, while the schooner was lying at anchor, having the proper light, a white light in the starboard fore rigging, about twenty feet above the deck, she was carelessly and

wrongfully set on fire by the burning ferry-boat, which the steamtug had been, and was, attempting to tow; that the night was clear, and the tide flood; that the steamtug, when first discovered by those on board of the schooner, was in dangerous proximity to the schooner, although there was abundant sea room on all sides, and was wrongfully attempting to take the burning boat across the schooner's bows; that the burning boat, over which the steamtug had the exclusive and entire control, was wrongfully towed against, and permitted to strike, the bows of the schooner, where she hung for some time, setting fire to her; and that such collision and fire were caused solely through the fault and negligence of those navigating the steamtug, in that she had no competent look-out, properly stationed, and faithfully attending to his duties, and was negligently navigated, in that she attempted to cross the schooner's bows, when in such close proximity to her as to endanger her safety, and not through any fault on the part of those in charge of the schooner.

The answer of the owners of the steamtug sets up the same matters, in substance, that are contained in the libel filed by them against the schooner, with the variation, that it avers, that, after the hawser to the ferry-boat had been twice burned away, it was again made fast, but the fastening pulled out or gave way, and afterwards, and before it could be again made fast, the ferry-boat drifted against the schooner. It also alleges, that, when the ferry-boat broke loose the last time, the schooner was a considerable distance away from her; that the steamtug was proceeding with all speed, and with every precaution, in a direction away from where the schooner was lying, and diagonally up and across the river, towards the New Jersey shore; that, shortly before or immediately after the ferry-boat got afoul of the schooner, the officers and crew of the schooner deserted her; that the movements of the burning boat were distinctly visible for a great distance; that, if the officers and crew of the schooner had exercised even ordinary precaution, skill or diligence in the management of their vessel, they had ample and sufficient warning of the approaching danger to have easily avoided it; that, if the steamtug was not discovered by those on board of the schooner, until she was in dangerous proximity, it was because of the negligence and want of care and attention on the part of those in charge of the schooner; that the collision or injury was not caused by any negligence on the part of those in charge of the steamtug; and that it was, as far as they were concerned, the result of inevitable accident, the effect of which might, however, have been avoided by proper care on the part of those in charge of the schooner.

The schooner was, on the evidence, at anchor in a proper place, and exhibited the light required by article 7 of the rules concerning lights in the act of April 29, 1864 (13 Stat. 59). Under these circumstances of helplessness on the part of the schooner, the burden is upon the steamtug to show that the steamtug was without fault, or that the schooner was in fault, or that the disaster was the result of inevitable accident. Amoskeag Manuf'g Co. v. The John Adams [Case No. 338]. This duty is incumbent on the steamtug in this case, because she was in the exclusive charge of her own master and crew, and was engaged, on the employment of the ferry-boat, in towing that vessel, which had no master or crew on board. The steamtug was, therefore, responsible for the proper navigation of both herself and the ferry-boat; and those who have suffered damage through any fault of the persons in charge of the steamtug are entitled to look to her for recompense. Sturgis v. Boyer, 24 How. [65 U. S.] 110, 122. Such would have been the rule if the ferry-boat had been under tow, under like circumstances, without being on fire; and the fact that she was on fire when taken in tow cannot alter the rule, as between the schooner and the steamtug, in regard to the burden of proof.

It is contended, on the part of the schooner, that the steamtug, knowing the burning condition of the ferryboat, anticipating that the flames, which were as yet confined to the hold, would ultimately burst forth, because an unsuccessful attempt had been made to reach, with water, the seat of the fire, having in view the object of protecting the wharf, and sheds and buildings and vessels adjacent, from being burned, when the flames should so burst forth, voluntarily, and without any legal compulsion or duty, undertook to tow the ferry-boat, for hire, to a place of safety, the owners of the steamtug having no proprietary interest in the ferry-boat, or in any of the property supposed to be in danger of taking fire; that the steamtug, however properly fitted to tow a ferry-boat that was not on fire, was not furnished with the necessary appliances to tow a burning vessel, so that the work could be done with safety to other vessels; that the fact, that a hempen hawser would be liable to burn off, if, as was anticipated, when the towing was commenced, the flames should burst out from the hold, and that, as a consequence, the ferry-boat would drift with the wind and tide, the direction and force of which were seen and known, and without control, no one being on board of her, and would be liable to come into contact with vessels at anchor, and set them on fire, was obvious, and should have induced either the towing by a chain or the refraining altogether from the towing; and that, however properly, in the actual predicament, the steamtug may have managed the navigation of the ferry-boat, after once getting her clear of the slip, the case is not one of inevitable accident, or absence of fault on the part of the steamtug, because of the original gross

negligence in taking the ferry-boat in tow at all, under the circumstances, with a hempen hawser.

It is impossible to resist the force of these considerations. It was negligence and carelessness on the part of the steamtug, to undertake to tow the burning boat with a hempen hawser; and the fact that the anticipated bursting forth of the flames occurred, and burned off the hawser twice, at least, so that the burning boat drifted against, and set fire to, the schooner, instead of remaining in the slip, and setting fire to something other than the schooner, when the flames burst forth, is not, in the eye of the law, a case of inevitable accident. The Juliet Erskine, 6 Notes of Cas. 633.

The view urged on the part of the steamtug is, that negligence is not predicable of the act of towing the ferry-boat out of the slip, with the ordinary appliances with which the steamtug was furnished, it having been necessary so to do, to prevent the spread of the fire; that any individual may do what is necessary to prevent the spread of a fire, even to the pulling down of buildings, without being responsible, in trespass or otherwise; that such act is, in contemplation of law, one done for the commonwealth, and is, as a ground of exemption from damages, of the same effect as a loss happening by a tempest or other irresistible force; and that the act of towing, being justifiable, carries with it the right to exemption from liability for contingent and unavoidable damage done to other vessels, in the course of the towing.

Without calling in question the well-settled principles, that, at common law, any person, in case of actual necessity, to prevent the spreading of a fire, may prostrate a building in a block or street, without being responsible in trespass or otherwise, that the sufferer, in such case, has no legal redress for the injury, and that, in case of a danger happening by tempest, a passenger in a vessel may, if necessary to save the lives of the passengers, throw overboard the goods of another, without being liable in trespass to their owner, I do not think the present case is brought within these principles. It cannot be held that it was necessary to set this schooner on fire in order to prevent the apprehended spread of the fire if the ferry-boat should be left to burn in the slip, in the sense in which the word "necessity" is understood in the principle of law referred to. The necessity must be a direct one, an obvious one, a necessarily resulting one. In the case of the building, or of the goods in the vessel, the necessity for the sacrifice, as well as the act of sacrifice, must both of them be direct, in reference to the thing sacrificed. There must be no fault, in either substituting a fancied necessity for a real necessity, or in negligently doing what is done, so that the existence of necessity comes to rest only on the fact of sacrifice, when the sacrifice would not have occurred but for the negligence.

In the present case, it was entirely plain, before the towing commenced, that the ordinary hempen hawser would be likely to burn off if the flames should burst out, and it was anticipated that they would burst out. It is not contended, on the part of the steamtug, that, if the hawsers had not successively burned off, she would not have been able to haul the ferry-boat in safety out of the way of the schooner. It must, therefore, be held to have been negligence on the part of the steamtug to tow the ferry-boat at all with a hempen hawser, and the damage done to the schooner cannot be regarded as unavoidable, however properly the steamtug may have managed the navigation after once getting the ferry-boat out into the river. The risk of the burning of the hawsers must be borne by the steamtug and not by the schooner. The steamtug was, therefore, in fault, in allowing the ferry-boat to collide with the schooner and set her on fire, such collision being shown to have been directly the result of towing the burning boat with a hempen hawser.

The next inquiry is, as to whether the schooner was in fault. The only fault alleged against her is, that she had no watch on deck at the time the burning ferry-boat approached her. It is claimed on the part of the steamtug, that, if there had been a competent watch on the deck of the schooner, the approach of, and the danger of collision with, the ferry-boat, would have been observed from the schooner in time for her anchor-chain to have been sheered or slipped, so as to have allowed the ferry-boat to pass by without striking or setting fire to the schooner. The proof in this case is, that the officers and crew of the schooner were on board of her, but were asleep in the cabin, with the exception of one man, who was on deck, but had not been set as a watch, and was probably asleep, and that they were aroused by a shout from the steamtug, and came on deck just before the ferry-boat struck the schooner; and that it is not customary for vessels of the size and character of this schooner to have an anchor-watch on deck in the locality where she was anchored, unless in case of a fog, or of bad weather. There was no fog on this occasion, and the night was clear and fine, the wind moderate, and the tide flood. Nor is it established on the part of the steamtug (and the burden of proof is on her, in this respect), that anything which the schooner could have done, in the way of sheering or slipping her chain, after she could or ought to have reasonably apprehended danger from the ferry-boat, if she had had an anchor-watch, or even if her crew had all of them been on deck, would have avoided the collision and its consequences. Under these circumstances, the schooner was not at all in fault. I do not intend, however, to imply

that there is any rule of law in the admiralty which required this schooner to keep an anchor-watch on the night in question.

As to the claim for salvage, the owners of the steamtug are not entitled to its allowance. The steamtug having, through her own fault, set the schooner on fire, has no claim for salvage for putting out such fire, the service being one rendered for her own benefit, one in which she herself was the most deeply interested, and one which only had the effect to reduce the amount of her liability for damages to the owners of the schooner. The Iola [Case No. 12,279]; Cargo ex Capella, L. R. 1 Adm. & Ecc. 356.

The libel against the schooner must be dismissed, with costs. In the case against the steamtug, there must be a decree for the libellants, with costs, with a reference to a commissioner to ascertain the damages sustained by them.

[NOTE. The Harbor Protection Company appealed from the decree herein to the circuit court, where the same was affirmed. Case No. 2,789, next following.

[From the affirmance, the claimant of the tug appealed to the supreme court, which affirmed the circuit court decree, Mr. Justice Clifford, who delivered the opinion, speaking for the court, holding that the ferry-boat was not liable, as at the time of the injury complained of she was in charge of, and under the control of, the tug, the officers and crew of which were the agents of her owners, and not the agents of the ferry-boat, by reason of the contract for the service having been made with the master of the tug; that the evidence failed to disclose that the injury to the schooner was the result of inevitable accident; that, as the schooner was anchored in a proper place, and had her signal light properly displayed, the burden of proof was on the tug to show that the disaster was caused by the fault of the schooner, or occurred through inevitable accident; and that the evidence failed to show that the schooner did not have a proper anchor-watch, or that the absence of such a watch in any wise contributed to the casualty. The Clarita and The Clara, 23 Wall. (90 U. S.) 1.]

Case No. 2,789.

The CLARA.

[5 Ben. 376, note.][1]

Circuit Court, S. D. New York. Aug., 1873.[2]

[For a statement of the facts of this case, see Case No. 2,788, next preceding.]

WOODRUFF, Circuit Judge. I concur in the conclusion of the district judge in these cases, and for substantially the same reasons assigned in his opinion. Assuming that the owners of the ferry-boat exercised a lawful right to remove their boat from the slip in which it lay (and, no doubt, they had such right, notwithstanding she was on fire, and whether her remaining in the slip did or did not involve danger to other property), whoever attempted her removal was bound to use precautions to prevent her from being carried by wind and tide against other vessels lying at anchor in the harbor, corresponding to the danger and consequences of such a result. The danger was extraordinary, and more than usual precautions to secure and retain control of the burning mass were, therefore, required by ordinary prudence. Reasonable care, in such circumstances, is not to be determined by the ordinary usages of tugs engaged in towing when no such circumstances of peril to others exist. Proofs, therefore, of the customary practice of tugs engaged in towing vessels in and about the harbor, to use hempen hawsers only, does not furnish a satisfactory test of the caution and care, due from a tugboat professedly engaged in the business of rescuing vessels from conditions of extraordinary peril, including fire on board. The testimony taken in this court does not, I think, exonerate the tug. It is so obvious as hardly to require proof, that a chain attached to the burning boat would have prevented the loss of control over her. The use of such a chain is not proved impracticable, and it is equally obvious, I think, that it was not only practicable but easy. No heavy anchor chain, extending from one boat to the other, which the hands of the boat could not manage, was required. All that was essential was, that the attachment to the burning boat, extending a few feet therefrom, should be incombustible; for the rest, a rope or hempen hawser was sufficient. The parties expected the flames to spread through and over the burning boat. It was this expectation which induced the attempt to remove her from the slip. In view of this, it was negligence to remove her under no other control than a rope, which, presumptively, would be burned off so soon as the expected spread of the fire should reach it. In this respect, it was not like a shifting of the location of the boat, with a view to the extinguishment of the fire before it should thus extend. Before any hawser was attached for the purpose of drawing her from the slip, chains were to be found, both on the ferry-boat and on the tug, and it is not to be doubted, that a chain, of suitable length to form a connection of the hawser to the burning boat, might readily have been elsewhere procured. In regard to the alleged neglect of the schooner in not keeping an anchor watch, and as to the allowance of damages by the commissioner, it is sufficient to say, that I concur in the opinion of the district judge, and in his overruling the exceptions to the report of the commissioner. The decree in each case must be entered in conformity with the decision below, dismissing the libel for salvage in the first entitled

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

[2] [Affirming decree of the district court in Case No. 2,788. Decree of the circuit court affirmed by supreme court in The Clarita and The Clara, 23 Wall. (90 U. S.) 1.]

cause, and awarding the damages found in favor of the libellants in the second, with costs in each case.

[NOTE. This decision was affirmed by the supreme court in The Clarita and The Clara, 23 Wall. (90 U. S.) 1. See Case No. 2,788, note.]

Case No. 2,790.

CLARA v. EWELL.

[2 Cranch, C. C. 208.][1]

Circuit Court, District of Columbia. June Term, 1820.

EVIDENCE—PROOF OF AGE—MEMORANDUM BY DECEASED PERSON.

An old entry in a memorandum-book of a deceased person, stating the ages of the several members of the writer's family, may be given in evidence to prove the age of a witness.

To prove the age of Mrs. Storer, a witness in this cause, the defendant [Thomas Ewell] offered a memorandum-book in the handwriting of the Rev. Lee Massy, deceased, dated April 19th, 1777, in which he stated the names and ages of his family, who were then inoculated for the small-pox, and the different modes of treatment and different doses of medicine for their respective ages. Mrs. Storer was then one of his family, and her name was placed in the class of those between six and ten years old.

Mr. Jones, for plaintiff, objected to the competency of the evidence.

But THE COURT (nem. con.) overruled the objection, and permitted the memorandum to be read to the jury.

CLARA CLARITA, The. See Cases Nos. 2,787-2,789.

Case No. 2,791.

The CLARA DAVIDSON.

[6 Wkly. Notes Cas. 356.]

District Court, E. D. Pennsylvania. Jan. 10, 1879.

ADMIRALTY PRACTICE—DECREE AGAINST DECEASED STIPULATOR.

A decree rendered against a stipulator after his death, although in ignorance of that fact, is void, and will be set aside on motion.

In admiralty. McCoy and others, owners of the schooner Eliza Ann, filed a libel for the collision against the schooner Clara Davidson. The master of the latter vessel appeared and made claim with one Edwards as stipulator. The suit proceeded and a decree for half damages was made against the claimant and stipulator, in 1876. Edwards had died before the decree, but the fact was unknown to libellant, had never been suggested of record, and no substitution was made.

E. B. Watson, for administrator, moved to vacate the decree.

J. W. Carleton, contra.

THE COURT (CADWALADER, District Judge), holding the decree against the surety void by reason of his previous death, ordered it vacated.

Case No. 2,792.

The CLARA M. PORTER.

[3 Ware, 39;[1] 18 Law Rep. 678.]

District Court, D. Massachusetts. Jan., 1856.

COLLISION—SAIL AND SAIL—WIND FREE AND CLOSE-HAULED.

1. When a vessel comes down with the wind free in an open sea, to speak another vessel which is close hauled on the starboard tack, the former has the entire duty of so manoeuvring as to avoid a collision, and it is the duty as well as the right of the latter, in case a collision is apprehended, to keep her course.

2. If a vessel with the wind free attempts, without necessity, to cross the bows of a vessel close-hauled, and a collision takes place, the former vessel will be held prima facie to be in fault.

In admiralty.

R. H. Dana, Jr., for libelants.

Bartlett and Thaxter, for claimants.

WARE, District Judge (holding the court for SPRAGUE, District Judge). The schooner Jenny Lind, a vessel of about eighty tons burthen, duly licensed for carrying on the codfishery, sailed from Southport, in Maine, on the 4th of April, fitted out for a fishing voyage on the Bank fisheries. On the 5th of May, near Sable island, while pursuing the objects of her voyage, and having on board two hundred and seventy quintals of fish, being then under sail, close hauled to the wind on her starboard tack, she saw a sail ahead at the distance of one-and-a-half or two miles, which proved to be the Clara M. Porter. The Jenny Lind was sailing on a north-westerly course, with a six knot breeze from the northeast, and the vessel seen was sailing nearly, if not precisely, in an opposite direction on her larboard tack. She was seen from the Jenny Lind over her weather-bow, and consequently the line on which she was sailing was to the windward. The vessels being under sail, on lines nearly, if not exactly, parallel, the Clara M. Porter would have passed to the windward. But soon after she was seen, she changed her course, put off before the wind, and came down with the intention of crossing the line of the Jenny Lind and speaking her at the leeward. From some miscalculation or mismanagement in one or the other vessel, or in both, instead of passing the Jenny Lind, as

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

[1] [Reported by George F. Emery, Esq.]

she intended, she came directly in collision with her, striking her amidships, head on, and damaged her so severely, that within half or three-quarters of an hour she sunk. Her crew saved themselves by escaping on board the Clara M. Porter. The Jenny Lind being close-hauled on her starboard tack, had, by the well-known law of the sea, the right of way. She had not only a right to hold on her course, but ordinarily, when a vessel, thus close-hauled on this tack, sees another sail approaching, with the wind free, and there is a possible danger of collision, it is her duty to hold her course, and it belongs to the vessel having the wind free to keep clear of her. In this case, the Clara M. Porter, having the entire command of her motions, and with ample sea room, if there had been danger of meeting, was bound to give way and avoid it. The collision would have been avoided if she had held her course, which would have carried her to the windward. If she wished to speak the Jenny Lind, she should have changed her course only so far as to have passed her within speaking distance at the windward, and then have crossed her track astern, if that was her object. The danger of collision would then have been avoided. Instead of this, she attempted the experiment of crossing her bows. It requires but little nautical experience to inform us that this is a hazardous manoeuvre, which ought not, in ordinary cases, to be attempted. If it is, without something like a necessity requiring it, and a collision is the consequence, the party making the attempt must be held prima facie in fault. In this case, with a fair and moderate breeze, and an open sea, no such necessity could exist.

It is admitted in the argument for the respondent, that the Jenny Lind had a right to hold her course, and it is argued that if she had done so, the Clara M. Porter would have crossed her line ahead safely and passed to her lee; but it is contended that the Jenny Lind, instead of holding on her course, first bore away before the wind and then luffed back into her first course, and that the collision is to be ascribed to this cause; that she was in fault, first, by deviating and bearing away, and again, after doing this, in luffing back. The argument proceeds on the ground that the Jenny Lind was bound to hold her course. This is the important and turning point in the case. If the Jenny Lind did what was imputed to her, it being her duty to hold her course, it is contended that the collision must be ascribed to her fault, and if the counsel is correct, even admitting that the Clara M. Porter was in fault in attempting the hazardous experiment of crossing the bows of the Jenny Lind, the collision must be considered as having been occasioned in part by faults on both sides. If so, then according to the recent decision of the supreme court in the case of The Catharine v. Dickinson, 17 How. [58 U. S.] 170, the loss is to be equally divided between the two vessels. Such, also, is the rule of the English admiralty. The Monarch, 1 W. Rob. Adm. 26; Hay v. Le Neve, 2 Shaw, 395.

The evidence on this point is conflicting. The two principal witnesses for the libelants are Silas Orne, the master, and Baker Orne, his brother, and the mate, both part owners of the Jenny Lind and parties to the suit, and admissible as witnesses in such cases only from necessity. But both of them were on deck, Baker having the helm, and both in situations in which they must have known whether their vessel was put off before the wind or not; and they both swear positively and directly that she was not; that she had, for a considerable time before the Porter was in sight, been on that course, and that it was at no time changed. The captain states that he several times hailed the Porter, and this is confirmed by Captain Woodbury, to put her wheel down and luff, but though she seemed to change her wheel back and forth, no change was made in her course. Most of the crew of the Jenny Lind, just before the collision, were below at dinner, and on hearing the captain hail they hurried on deck. Their statements on this point are, consequently, not so clear nor so much to be relied on, but as far as they go, they fully confirm the testimony of the master and mate. On the other hand, Captain Woodbury, of the Clara M. Porter, says, that when he was coming down before the wind, at twice hailing distance, the Jenny Lind appeared to put off, and fearing a collision, he put his wheel down; that he heard the hail from the Jenny Lind to put his wheel down, but that it was then hard down, and that the Jenny Lind, after bearing away, appeared to him to come to. Stewart, an experienced seaman on the Porter, says, that he saw the Jenny Lind on the wind, and that if she had kept her course, the Porter would have passed ahead of her, or she would have come into us; but that she kept off, and then he feared a collision. Foster, who was at the helm of the Clara M. Porter, says, that after they approached the Jenny Lind, coming down before the wind, she put off more free; that he intended to cross her bows, and come under her lee. These witnesses confirm the testimony of Captain Woodbury, that the Jenny Lind, as they approached her, put off more before the wind, but none of them say, that after she put off she again luffed back into the wind. Now, if the Jenny Lind put off more before the wind, and the Clara M. Porter was also before the wind, the latter vessel, if she came in collision, must have struck the Jenny Lind obliquely. But she, in fact, struck her head on, perpendicularly. The only way by which the manner of the collision can be explained, if the Jenny Lind went off before the wind, is, by supposing that she came back again as stated by Cap-

tain Woodbury. But there is, it appears to me, an intrinsic improbability in this supposition. If it was done by the Jenny Lind shortly before the meeting, as it was, if at all, it would only make the collision more dangerous, by converting an oblique into a perpendicular collision. Besides, if I have the testimony of the witnesses correctly, no one of them confirms Captain Woodbury in this particular.

The testimony of the two Ornes is fairly open to the observations made upon it, as coming from deeply interested witnesses. But similar remarks will apply with about the same force to Captain Woodbury, who feels as strong an interest in justifying himself to his owners; and will also apply with diminished force to all testimony on one side and the other. The crews of each vessel probably had a natural inclination to find their own vessel clear of blame.

There then remains the testimony of the witnesses from the Tamerlane. At the time of the collision, and for some time before, the Tamerlane was from half a mile to a mile astern of the Jenny Lind, the latter being a point or a point and a half on her starboard bow, and sailing on the same course. Her crew were all, or nearly all, on deck, and the depositions of three of them have been taken by the libellants. They state that they were on deck observing the two vessels in plain sight, with a full opportunity of noticing their movements. They were so situated, sailing nearly on the same line with the Jenny Lind and almost directly astern, that if she had changed her course it could clearly be seen from their vessel. They all concur in saying that there was no change in her course, and fully confirm the testimony of her crew. The Tamerlane was from the same port with the Jenny Lind; the masters and crews of the two vessels neighbors and acquaintances; and the counsel for the respondents has, with some reason, argued, that in a controversy between the owners of the Jenny Lind and strangers, their sympathies would naturally be with their townsmen and friends. Some deduction, it is supposed, ought to be made from their testimony on this account. I do not mean to deny that this circumstance might be entitled to some consideration, if their testimony consisted of minute facts, each of minor importance in itself, and deriving their importance from the combined effects of the whole, and from the coloring given to the facts. But their testimony is to a single fact, and one, which from their situation, they could observe and know, if not with absolute certainty, at least with a pretty near approximation to it. To this fact their testimony is direct and precise. We are, then, reduced to the necessity of supposing that it is, if not certainly true, at least probably so, or of imputing wilful prevarication to the witnesses. An attempt is made by the claimants to discredit the two principal witnesses for the Jenny Lind, her master and mate, by showing that they have, at different times, made declarations and admissions inconsistent with their testimony given in court. But this evidence does not appear to me materially to impair their credit, sustained as their testimony is by other witnesses.

My opinion, on the whole proof of the case, is, that the collision was occasioned by the fault of the Clara M. Porter, and the decree must be against her. The case will go to a commissioner to ascertain the amount of the damage.

Case No. 2,793.

CLARE v. NATIONAL CITY BANK.

[14 Blatchf. 445.][1]

Circuit Court, S. D. New York. May 2, 1878.

COSTS AFTER REMOVAL.

Items of costs which would have been taxable in favor of a party in a state court, on a judgment for him, are not taxable in his favor, on a judgment for him in this court, after the removal of the cause into this court, unless such items are taxable under sections 823 and 824 of the Revised Statutes.

[Followed in Chadbourne v. German-American Ins. Co., 31 Fed. 625. Cited in Henning v. W. U. Tel. Co., 40 Fed. 659. Cited, but not followed, in Cleaver v. Traders' Ins. Co., Id. 864.]

[At law. Action by William K. Clare against the National City Bank.]

James S. Stearns, for plaintiff.

William H. Arnoux, for defendant.

CHOATE, District Judge. This is an appeal from the clerk's taxation of costs. The suit is an action at law originally brought in a state court. After three trials in the state court, in two of which the plaintiff had a verdict, which, upon appeal, was set aside, and the judgment reversed, with costs to the defendant, to abide the event, the cause was removed into this court by the plaintiff, and the defendant now has a verdict and a judgment. The clerk, in taxing the costs, has disallowed the fees taxable by the New York Code, to the defendant's attorney, as fees for proceedings before and after the granting of a new trial, term fees, trial fees, argument fees, fees for making and serving a case, &c., which, if the case had proceeded to the same result in the state court, would have been taxable against the plaintiff, for the proceedings prior to the removal of the cause, amounting, in all, to $435. From the disallowance of these items the defendant appeals.

The clerk is right in his taxation. In this court, the amount of costs to be allowed to attorneys is governed by sections 823 and

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

824 of the Revised Statutes, which do not give to the attorney any of the fees now in question. In general, there is no vested right to costs till judgment, and they are only recoverable as taxable by the law in force at the time of taxation. The acts authorizing the removal of causes to this court provide that the cause removed shall proceed in the same manner as if originally commenced here, and there is nothing in those acts which lends support to the defendant's claim for these costs.

CLAREMONT BANK (KITTREDGE v.). See Cases Nos. 7,858 and 7,859.

CLARENCE, The (PERSEE v.). See Case No. 11,016.

CLARENDON (LEWIS v.). See Case No. 8,320.

Case No. 2,794.

The CLARION.

[Cited in Cartwell v. The John Taylor, Case No. 2,482. Nowhere reported; opinion not now accessible.]

Case No. 2,795.

The CLARION.

[Brown, Adm. 74.] [1]

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

JURISDICTION—HAULING OFF STRANDED VESSEL.

Admiralty has jurisdiction of a suit to recover for services of a tug in hauling off a vessel aground, though the same do not amount to a salvage service.

In admiralty. Exceptions to libel for services rendered by libellants' tug John Owen to the brig Clarion, aground upon St. Clair flats, in towing her off the flats and into Detroit river, in October, 1857.

Willey & Carey, for libellants.
Basset & Kent, for claimant.

WILLSON, District Judge. Exceptions were filed to the libel in this case upon the ground that the services set forth were not of a maritime character, and that this court has no jurisdiction. I am satisfied, however, they cannot be sustained. The services of a steam tug, in hauling off a sailing vessel aground, are of a very meritorious description; if the vessel were aground upon a lee shore, exposed to the open lake, they might amount to a salvage service. In any event, they could not be less meritorious than towage, and this court has already held, in the case of The Acadia [Case No. 24], that a lien exists for towage. I think the contract in this case is a maritime one, within the definition laid down in De Lovio v. Boit [Id. 3,776].

Exceptions overruled.

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

CLARISSA ANN, The (GRIGG v.). See Case No. 5,826.

CLARITA, The CLARA. See Cases Nos. 2,787–2,789.

Case No. 2,795a.

Case of CLARK.

[Cited in Re Moore, Case No. 9,751. Nowhere reported; opinion not now accessible.]

Case No. 2,796.

Ex parte CLARK.

In re HEALEY.

[1 Spr. 69.] [1]

District Court, D. Massachusetts. Nov., 1843.

MARITIME LIENS—DISBURSEMENTS ABROAD BY MASTER.

A master of a ship having expended his own money for necessary disbursements abroad, has a lien therefor, which may be enforced after the return of the ship to her home port.

[Cited in The Eliza Jane, Case No. 4,363; The Tangier, Id. 13,744.]

This was a petition filed under the United States bankrupt law, by W. F. Clark, master of the brig Maria Theresa, to be allowed $83 out of the estate of Mark Healey, a bankrupt and sole owner of the Maria Theresa, for which sum Clark claimed a lien on the vessel. It was agreed that the Maria Theresa sailed from the East Indies for Boston, in the autumn of 1842; that during the voyage, in January, 1843, she put into St. Helena and obtained provisions and supplies, for which the master drew a bill of exchange, for $83, on the owner. It was also agreed that the Maria Theresa did not arrive in Boston until sometime after the 14th of March, 1843, on which day Healey was declared a bankrupt, and his property assigned; and that, immediately upon her arrival, she was taken possession of by Healey's assignee. Meanwhile the draft drawn by Clark at St. Helena was presented, and upon non-acceptance immediately protested, and Clark was notified that he would be held as drawer. He thereupon filed this petition, praying that upon his delivering up the draft, the assignee should be directed to pay the amount in full.

Edwin Howland, for petitioner.
A. H. Fiske, assignee, pro se.

SPRAGUE, District Judge. The question is whether the master of a vessel, having expended his own money for necessary disbursements abroad, has a lien therefor on the vessel, after she has returned to her home port. It is the settled law in this country that he has no lien upon the vessel for his wages (Abb. Shipp. 147, note); but he has a lien on the freight not only for

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

disbursements (The Packet [Case No. 10,654]), but also for his wages (Drinkwater v. The Spartan [Id. 4,085]; Ingersoll v. Van Bokkelin, 7 Cow. 670; Abb. Shipp. 139, 147, 377, note). Such lien extends to the cargo also, when it belongs to his employers. Id. 139, note; Hussey v. Christie, 13 Ves. 594 (Sumner's Ed.) note.

No satisfactory reason has ever been given why a master should not have a lien upon the vessel, even for wages. It is often said that it is because he has a contract with the owners; but this is assigning no reason, for in nearly all the cases of acknowledged lien there is such personal contract. It is said, also, that having the custody and care of the vessel, and being bound to protect it against adverse claims, it would be dangerous to allow him to libel the vessel in a foreign port. But this is no argument against the existence of a lien, but only against a particular time or place of enforcing it; and it presents no show of reason why, after the return of the vessel to her home port, the actual residence of her owners, he should not be allowed to enforce a claim against the vessel, for his personal services in navigating and preserving her. But the rule against such lien for wages is too firmly established to be shaken. The master's claim for necessary disbursements for the vessel in a foreign country, stands upon stronger grounds than his claim for wages. Such expenditure has actually gone to the repairs, equipments, and necessaries for the ship, without which she could not have properly pursued her voyage, and been restored to her owners, and any other person making the same advances would have a maritime lien therefor. There is no rule or principle, either of law or justice, that deprives the master of such a lien, or precludes him from enforcing it, by process against the vessel in her home port, in the presence, and with the knowledge of her owners. The Packet [supra]; Hussey v. Christie, 13 Ves. 594, note; Gardner v. The New Jersey [Case No. 5,233]; 2 Story, Eq. Jur. § 1241; Whitt. Liens, 73, 74; 3 Kent, Comm. 167. The claim of the master, therefore, in the present case, is sustained.

Decree for petitioner.

NOTE [from original report]. It is now held in England, that the master has no lien, on the ship, freight or cargo, in the home port, for necessary disbursements abroad, or for wages. Wilkins v. Carmichael, 1 Doug. 101; Hussey v. Christie, 9 East, 426; Smith v. Plummer, 1 Barn. & Ald. 575; Atkinson v. Cotesworth, 3 Barn. & C. 647; Richardson v. Campbell, 5 Barn. & Ald. 203, note; Gibson v. Ingo, 6 Hare, 112; The Johannes Christoph, 33 Eng. Law & Eq. 600; Bristowe v. Whitmore, 35 Law T. 173. In the United States, it is settled that he has such a lien on freight (and on cargo, when it belongs to the owners of the ship,) for his disbursements. See, in addition to the authorities cited in the text, Lane v. Penniman, 4 Mass. 91; Lewis v. Hancock, 11 Mass. 72; Goodridge v. Lord, 10 Mass. 483; Ingersoll v. Van Bokkelin, 7 Cow. 670, 5 Wend. 315; Richardson v. Whiting, 18 Pick. 530; Shaw v. Gookin, 7 N. H. 16; Hodgson v. Butts, 3 Cranch [7 U. S.] 140; Newhall v. Dunlap, 14 Me. 180; 3 Kent, Comm. 167. These cases have followed the earlier English decisions: Watkinson v. Bernadiston, 2 P. Wms. 367; Ex parte Cheesman, 2 Eden, 181; White v. Baring, 4 Esp. 22; Ex parte Halkett, 3 Ves. & B. 135, 2 Rose, 194, 229, and 19 Ves. 474; Pierson v. Robinson, 3 Swanst. 139, note. It is intimated in The Larch [Case No. 8,085], that the American cases do not necessarily decide that the master has a lien on the freight; but only an equitable right to have the freight applied to pay the expenses incurred in earning it, as in Green v. Briggs, 6 Hare, 395. But see the cases. As to the master's lien on the freight for wages, see Drinkwater v. The Spartan [supra]; The Packet [supra]; and also the remark in the opinion of Putnam, J. (Richardson v. Whiting, supra), that this lien had been enforced in the United States district court for Massachusetts, by Davis, J. Contra, Ingersoll v. Van Bokkelin, 5 Wend. 315, overruling, on this point, the same case in 7 Cow. 670. As to his lien on the ship, for disbursements, it is stated in The Larch [supra], that "it has never been decided in this country," that the lien exists. But see, in addition to the decision of the learned judge of the United States district court for Maine, overruled by The Larch, and the decision in the text, Gardner v. The New Jersey [supra]. Compare, also, The Packet, supra, and the remarks of Chancellor Kent thereon (Comm. 167), with The Orleans, 11 Pet. [36 U. S.] 182.

Case No. 2,797.

In re CLARK.

[2 Ben. 540.][1]

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

HABEAS CORPUS — EXAMINATION BEFORE COMMISSIONER — EVIDENCE — INDICTMENT IN ANOTHER DISTRICT.

1. Where, on writs of habeas corpus and certiorari to a United States commissioner, it appeared that the commissioner had issued a warrant to arrest the petitioner, on a charge of conspiring to defraud the United States, in the eastern district of Michigan, who had been arrested and brought before him, and demanded an examination, and on the examination the evidence consisted of an indictment found against him in the eastern district of Michigan, and proof that on that indictment the district court of that district had issued a warrant for his arrest, the indictment averring that the prisoner, with certain others named, did, at the city of Washington, conspire, combine, confederate, and agree together to defraud the United States, in a manner particularly set forth, and that one of the parties to said conspiracy, named Lee, at Detroit, in the eastern district of Michigan, in pursuance of said conspiracy, did do an act to effect the object of said conspiracy, said act being particularly set forth, and on such proof the commissioner committed the prisoner for trial in the eastern district of Michigan, and thereupon this habeas corpus was issued, and the discharge of the prisoner claimed, on the sole ground that the indictment produced did not aver that an offence against the United States had been committed in the eastern district of Michigan: *Held*, that the question whether the indictment sufficiently averred an offence committed in the eastern district of Michigan should not be prejudged on a proceeding like this.

[Cited in Re Buell, Case No. 2,102; U. S. v. Haskins, Id. 15,322.]

2. That on such a proceeding the indictment must be considered sufficient, unless it be so

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

defective in its material averments that it would be the manifest duty of a court before which it was presented by a grand jury to decline to take action upon it.

[Cited in Re Doig, 4 Fed. 195.]

3. That this indictment was not of that character.

4. Whether, in such a proceeding before a commissioner, such an indictment can be examined, and its sufficiency passed upon—quere.

[Cited in Re Alexander, Case No. 162.]

BENEDICT, District Judge. The prisoner, Beverly Clark, being detained in custody by the marshal of this district, has been brought before me by a writ of habeas corpus and by a writ of certiorari. The proceedings before Commissioner Osborn, which resulted in his committal, are also before me.

By these returns, it appears that in September last, a deputy marshal of the eastern district of Michigan procured a warrant from Commissioner Osborn, in this district, directing the marshal of this district to apprehend and bring the prisoner before him to answer to a charge of conspiring to defraud the United States in the eastern district of Michigan. The prisoner having been arrested on such warrant, was brought before the commissioner, and demanded an examination, which was had. Upon this examination, an indictment found against the prisoner by a grand jury in the eastern district of Michigan was put in evidence, together with proof that it had been filed in the district court of that district, and was still pending undetermined, and that upon it the court had issued to the marshal of that district a warrant directing the arrest of the prisoner. No other evidence was produced to the commissioner, and he thereupon committed the prisoner for trial in the eastern district of Michigan, by virtue of which commitment he is now held by the marshal of this district.

The sufficiency of these proceedings is now called in question, and I am asked to discharge the prisoner because, as it is claimed, the indictment produced before the commissioner does not aver that an offence against the United States has been committed in the eastern district of Michigan.

In disposing of the single issue which has been thus made, I notice at the outset that the question here is not whether proof before a commissioner of the fact that an indictment against the person before him has been found by a grand jury of the United States, in a court of the United States, and that such court has so far acted upon the indictment as to issue its warrant for the arrest of the person to answer to the charge, is not sufficient proof to require the commissioner to commit such person for trial in the district where the indictment was found. Nor is the question here whether the proceedings in the district court of Michigan would not have been sufficient to justify the detention by the marshal of this district, had that court seen fit to issue its bench warrant to that officer directly.

Here the proceeding seems to have been an original proceeding instituted in this district before Commissioner Osborn, in which the indictment itself was put in evidence, as showing sufficient cause for the committal of the prisoner for trial in Michigan.

The questions then are, whether, in such a mode of procedure, the commissioner is at liberty to examine the indictment, and pass upon the sufficiency of its averments, and if so, whether the averments of this indictment are sufficient to warrant the committal of the prisoner for trial in Michigan.

For the purposes of this case, I shall assume —although I do not intend so to decide— that when the method of procedure is such as that adopted in this case, the indictment, which is put in evidence before the commissioner, must be looked into, and accordingly I have examined the present indictment, and I find that it avers that the prisoner, with certain others named, did, at the city of Washington, conspire, combine, confederate, and agree together to defraud the United States, in the manner particularly set forth, and that Andrew T. Lee, one of the parties to said conspiracy, afterwards, at Detroit, in the eastern district of Michigan, in pursuance of and according to said conspiracy, combination, and agreement, had as aforesaid, did do an act to effect the object of said conspiracy, which act is also particularly set forth. It was here intended to set out the offence created by the act of March 2d, 1867 [14 Stat. 484]. which declares, "that if two or more persons either conspire to commit any offence against the laws of the United States, or to defraud the United States in any manner whatever, and one or more of said parties to said conspiracy shall do any act to effect the object thereof, the parties to said conspiracy shall be deemed guilty of a misdemeanor;" and were this indictment before me upon demurrer or plea to the jurisdiction, it might not perhaps be difficult to decide whether the averment in question did or did not amount in law to an averment of an offence committed in Michigan. But that question, as it seems to me, should not be prejudged upon a proceeding like the present. Upon such a proceeding, the indictment must be considered sufficient, unless it be so defective in the material averments that it would be the manifest duty of a court before which it was presented by the grand jury to decline to take action upon it. In the present case, the court in Michigan has felt bound to receive this indictment, and to issue a warrant upon it; and, to my mind, the averment in question is not so clearly an averment of an offence committed in Washington, instead of one committed in Michigan, as to justify the commissioner in refusing to commit the prisoner upon it, or to warrant his discharge before me. It raises a question

which properly belongs to the court in which the indictment is pending.

My conclusion, therefore, is, that the prisoner must be remanded to the custody of the marshal.

Case No. 2,798.

In re CLARK et al.

[4 Ben. 88; 3 N. B. R. 491 (Quarto, 123); 3 N. B. R. 524 (Quarto, 130); 1 Am. Law T. Rep. Bankr. 189.] [1]

District Court, S. D. New York. Feb., 1870.

PARTNERSHIP—STATE COURT RECEIVER—CONFLICT OF JURISDICTION.

1. B. & C. were partners. C. began a suit in a state court for a dissolution of the partnership and a settlement of the accounts, claiming that on such settlement a large amount would be due to him, and in that suit he procured the appointment of receivers, who took possession of the partnership property. On that ground proceedings in bankruptcy were taken against the firm, and it was adjudged bankrupt. An assignee was appointed and an assignment executed. The assignee applied to the bankruptcy court for an order directing the marshal to take from the possession of the receivers the property of the bankrupts in their possession, enjoining the receivers and the bankrupts from interfering with the property, and enjoining C. from the further prosecution of the suit in the state court; and for general relief. *Held*, that the amount claimed by C. in the suit in the state court would be individual property of C., which, under the 14th and 36th sections of the bankruptcy act [14 Stat. 523], passed to the assignee in bankruptcy to be applied to the payment of his separate debts.

2. That, therefore, the assignee would be allowed to prosecute the suit in the state court in his own name; that C. must execute the proper papers to enable him to do so; that C. must be enjoined from further prosecuting the suit in the state court; and that the bankrupts must be enjoined from interfering with the property in the possession of the receivers.

3. That a decision on the other prayers of the petition be suspended.

4. After the making of the above order, the assignee applied to the state court for an order declaring that, as the interests of both parties had vested in the assignee, the suit had abated. Pending that application to the state court, he applied again to the bankruptcy court for an order to the marshal to take the property from the possession of the receivers and enjoin them from interfering with it, or, if it should refuse this order, that it would direct him to make such application in the state court. *Held*, that, as the jurisdiction of the state court over the subject matter of the suit and over the parties, when it was instituted, and its power to appoint a receiver were not questioned, this court had no power to grant the relief asked; and that it was not necessary to make the order directing the assignee to apply to the state court.

[Cited in Hewett v. Norton, Case No. 6,441.]

On the 19th of November, 1869, an action was commenced in the superior court of the city of New York, by the bankrupt [Abraham B.] Clark against the bankrupt [Abraham] Bininger. The complaint in that action, the truth of which was deposed to by the plaintiff therein, set forth, that a copartnership which had existed between the parties to the action since the 1st of June, 1861, in the business of the importation and sale of liquors, &c., was dissolved on the 19th of November, 1869; that the said parties then owned certain real estate, and a large and valuable stock of goods, and had a large amount of debts due them, and a valuable good will; that the copartnership suspended payment on the 4th of November, 1869, owing to sundry specified wrongful acts of the defendant; that its assets amounted to $500,000 or thereabouts, and its entire indebtedness did not exceed the sum of $200,000; that the defendant had, since such suspension, usurped the entire control and management of the business, to the exclusion of the plaintiff, and with a view to deprive him of his rights in the copartnership; that if the management and settlement of the business should be left to the defendant, the rights and interests of the plaintiff and of the creditors of the copartnership would be greatly jeoparded if not sacrificed; and that, on a final accounting between the parties to the action, a large sum would be found to be due to the plaintiff, after paying all just debts of the copartnership, over and above all advances or otherwise made by the defendant to the plaintiff or to the copartnership. The complainant demanded judgment, that the copartnership should be dissolved; that a receiver of the property, rights and good will of the copartnership should be appointed, with power to dispose of the same for the benefit of all parties entitled thereto; that the proceeds thereof, after the payment of all just debts of the copartnership and of the costs of the action, should be divided between the parties to the action, according to their respective rights; and that the defendant should be enjoined and restrained from interfering with the property, rights and good will of the copartnership. On the 19th of November, 1869, an order was made in said action appointing a receiver of the property and effects of said copartnership, who, on the same day, took possession, as such receiver, of certain goods, wares and merchandise, real estate, and other property of the said copartnership. Subsequently a co-receiver was appointed in the action, who entered into possession as such, with the original receiver, of the said property.

On the 11th of December, 1869, a petition in involuntary bankruptcy was filed in this court against Clark and Bininger, under which they were adjudged bankrupts. [See Case No. 1,420.] An assignee was appointed, and the usual assignment was made to him, and a warrant of seizure, according to Form No. 59, was issued to the marshal. The assignee now presented a petition to this court, setting forth that the said original receiver resisted the marshal in his endeavors to take possession of the copartnership estate of the

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 3 N. B. R. 491 (Quarto, 123), contains only a partial report.]

bankrupts; that the marshal had never become exclusively possessed of said estate; that most of the joint creditors of the bankrupts had proved their debts in these proceedings; and that the said assignee had notified the receivers of his appointment, and had requested them to deliver to him the said property in their possession. The petition claimed that the right, title, and interest of the bankrupts in the property which was the subject of controversy in the state court, had ceased, by means of the proceedings aforesaid, and had become vested in the assignee; that all the interests, claims, and remedies of creditors of the bankrupts against the said property had also ceased and become vested in the assignee; and that the only remedy and resort of the bankrupts, or of their creditors, against the said property, was in this court.

The prayer of the petition was (1), that this court would order the marshal to take from the possession of the receivers the joint estate and property of the bankrupts, now or heretofore in the possession of the receivers; (2), that this court would enjoin the receivers and the bankrupts from any further interfering with the said property, to the end that it might be brought within the jurisdiction of this court, so that this court might collect all the assets of the bankrupts and ascertain and liquidate the liens and other specific claims thereon, and adjust the various priorities and conflicting interests of all parties, and marshal and dispose of the different funds and assets, so as to secure the rights of all parties, and the due distribution of the assets among all the creditors, and that, thereupon, the proceedings on the petition might be further continued in this court, in order that any lien and claim of the receivers upon the property might be determined and provided for; (3), that the bankrupt Clark might be restrained and enjoined from further prosecuting his said action against the bankrupt Bininger, or applying for any order or decree therein, without the leave of this court; (4), that such further, or other, or different rule, or order, might be made as might be proper in the premises.

The receivers appeared and resisted the granting of the prayer of the petition, so far as it affected them. They claimed that their appointment was legal and valid; that their duty required them to hold and safely keep the said property; and that they had a lien upon the said property for their lawful fees and disbursements therein incurred. Clark also appeared in opposition to the application.

F. N. Bangs, for assignee.
R. A. Pryor and J. F. Morgan, for receivers.
M. Compton, for Clark.

BLATCHFORD, District Judge. It is apparent, from the frame of the complaint in the suit in the state court, that the reason for bringing it was, that a large sum would, on a final accounting between Clark and Bininger, be found due to Clark, after paying the debts of the copartnership, over and above all advances or otherwise made by Bininger to Clark, or to the copartnership, and that the conduct of Bininger had been such towards Clark, and in the management of the business of the copartnership, before and after its suspension, that, if the management and settlement of such business were to be left to Bininger, the rights and interests of Clark and of the creditors of the copartnership would be put in peril. Hence the prayer for a receiver, for a judicial winding up of the the affairs of the copartnership, and for an injunction against Bininger. On the facts stated, and with a net surplus of assets amounting to $300,000, after paying the debts of the copartnership, it is apparent that a large individual property would remain, to go to Clark. By virtue of the 14th and 36th sections of the bankruptcy act, this individual property of Clark's passed to the assignee in bankruptcy, to be applied, if necessary, to the payment of his separate debts. By the 14th section it is specially provided, that all rights in equity of the bankrupt, and all his rights of action for property or estate, real or personal, and for any cause of action which he had against any person, arising from contract, with the like right, title, power, and authority to sue for and recover the same, as the bankrupt might or could have had, if no assignment had been made, shall, in virtue of the adjudication of bankuptcy and the appointment of his assignee, be at once vested in such assignee. Under this provision, all the rights and rights of action which Clark is seeking to enforce in the suit brought by him, have passed out of Clark and are vested in the assignee in bankruptcy. The 14th section also provides, that the assignee may sue for and recover such estate, and may prosecute and defend all suits at law or in equity, pending at the time of the adjudication of bankruptcy, in which the bankrupt is a party, in his own name, in the same manner, and with the like effect, as they might have been prosecuted or defended by such bankrupt. The 16th section provides, that if, at the time of the commencement of proceedings in bankruptcy, an action is pending, in the name of the debtor, for the recovery of a debt or other thing, which might or ought to pass to the assignee by the assignment, the assignee shall, if he requires it, be admitted to prosecute the action in his own name, in like manner, and with like effect, as if it had been originally commenced by him. These provisions of the 14th and 16th sections include suits and actions pending in the state courts, and are addressed to the courts in which such suits or actions are pending, quite as much as to the federal courts. The 26th section provides, that the bankrupt shall, at all times, until his dis-

charge, be subject to the order of the bankruptcy court, and shall, at the expense of the estate, execute all proper writings and instruments, and do and perform all acts required by the court touching the assigned property or estate, and to enable the assignee to demand, recover, and receive all the property and estate assigned, wherever situated, and that, for neglect or refusal to obey any order of the court, such bankrupt may be committed and punished as for a contempt of court.

As all the rights of action which Clark is seeking to enforce in the suit pending in the state court, are now vested in the assignee in bankruptcy, it is proper that such assignee should be allowed to prosecute such action in his own name, and that this court should require Clark to execute all such writings, and do all such acts, as will enable such assignee so to prosecute such action. To that end, an order will be entered, that Clark execute and deliver to the assignee the proper papers to enable the assignee to be admitted to prosecute such action in his own name, in the same manner, and with the like effect, as it might have been prosecuted by Clark, and that Clark himself refrain from further prosecuting said action, or applying for any order or decree therein, without the leave of this court. The bankrupts must be enjoined from interfering with the property of which the receivers have possession.

This relief, of turning over to the assignee the prosecution of the action brought by Clark in the state court, though not specifically prayed for in the petition, was asked for by the assignee, on the hearing on the petition, under the prayer for general relief, and as a corollary to the prayer for an injunction restraining Clark from further prosecuting such action. As it is quite probable that, if the assignee be substituted as plaintiff in the action, it may be desirable that the possession of the receivers should not be disturbed until such substitution shall take place, a decision on the other matters involved in the prayer of the petition is suspended for the present.

After the making, on the 17th of February, of the order above granted, the assignee applied to the state court for an order adjudging that, as the former interests of both of the parties to the action in that court in the property in controversy therein had become, by the bankruptcy act, vested in the assignee in bankruptcy, such action had abated for want of proper parties to prosecute or defend the same, and that such assignee was entitled to the property in controversy in the cause, subject to any lawful right or claim of the receivers, for the purpose of disposing of the same pursuant to the bankruptcy act, and directing a discontinuance of such action, and a dismissal of the complaint therein. The question of the granting of such order by the state court was still pending unheard, when the assignee renewed his application to this court for an order to the marshal to take the property in question from the possession of the receivers, and to enjoin the receivers from any further interfering therewith. This application was founded on the petition before presented, and on an affidavit made by the assignee on the 23d of February, in which he set forth that he was unwilling to make any further application to the state court, lest he might expose himself to censure and punishment from said court; that he believed that if this court had jurisdiction to take from the receivers the possession of the property in controversy, there was a great necessity for the exercise of such jurisdiction, and he prayed that it might be exercised; that the claims of the receivers for compensation and fees were extravagant, and far beyond what the law allowed; that while he did not apprehend that the state court would make any allowance beyond what the law authorized, yet he believed that the receivers would persist in their extravagant demands, and that, by reason of the appeals which are permissible in the state courts, a very great length of time must necessarily elapse, in case an attempt was made to adjust such fees in the state court; and that so long as the receivers were permitted to retain the property as security for a lien which did not exceed five per cent. of its actual value, sales were prevented, expenses were accruing, and waste was committed. The affidavit concluded with the prayer that if this court decided that it had no jurisdiction or power to take the property from the custody of the receivers, and put it into the custody of the assignee, to the end that, without prejudice to the lien and claim of the receivers, it might be converted into money, this court would direct the assignee to apply to the state court, so that he might be acting in that court upon the order and responsibility of this court, and might not seem voluntarily to have gone out of or waived any reliance upon the jurisdiction of this court.

F. N. Bangs, for assignee.
J. F. Morgan, for receivers.

BLATCHFORD, District Judge. The petition of the assignee, on which this application is founded, and which makes the bankrupts and the receivers parties thereto, is not founded upon any allegation that the transfer of property effected by the proceedings in the state court, was void under the 35th or the 39th section of the bankruptcy act, nor does it pray that such transfer may be adjudged void and set aside. On the contrary, it sets forth, on its face, that prior to the commencement of the proceedings in bankruptcy, the action in the state court was brought, and one of the two receivers was appointed by that court, and such receiver had taken possession of

the property in question. The property is still in his possession and in that of his co-receiver, and the application to this court is, that, under these circumstances, this court will summarily declare such property to have so been the property of the bankrupts at the time of the commencement of the proceedings in bankruptcy, and to have so passed to the assignee by the assignment in bankruptcy to him, as to warrant this court in directing the marshal to forcibly dispossess the receivers, and take the property and put it into the hands of the assignee. The jurisdiction of the state court over the subject-matter of the suit therein, and over the parties thereto, when it was instituted and the receiver was appointed, and its jurisdiction to appoint such receiver, are in no manner impeached or questioned. It is only claimed, that, by reason of subsequently transpiring events, this court shall decide that the state court ought to, and shall be made, by compulsion from this court, to give up possession of the property, without its being shown that such possession of the property by the state court can be properly adjudged by this court to be void or invalid, by reason of provisions of the bankruptcy act.

It would seem to be only necessary to state these propositions, to reach the conclusion that this court cannot grant the particular relief asked. The questions involved were considered by this court in the case of In re Vogel [Case No. 16,982]. When property is lawfully placed in the custody of a receiver by the court which appoints such receiver, it is in the custody, and under the protection and control, of such court, for the time being, and no other court has a right to interfere with such possession, unless it be some court which has a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises. Peck v. Jenness, 7 How. [48 U. S.] 612, 625; Williams v. Benedict, 8 How. [49 U. S.] 107, 112; Wiswall v. Sampson, 14 How. [55 U. S.] 52, 66; Peale v. Phipps, Id. 368, 374; Taylor v. Carryl, 20 How. [61 U. S.] 583, 594–597; Freeman v. Howe, 24 How. [65 U. S.] 450; Buck v. Colbath, 3 Wall. [70 U. S.] 334. In the present posture of this case, it does not appear that this court has such superior jurisdiction in the premises, or such supervisory control over the state court, in respect to the property in question, as to authorize it to take away from the state court the possession of such property, or to enjoin the receivers from further interfering with such property. This court will always be sedulous to enforce its just powers, but it will not demand from any other tribunal anything which it would not itself be willing to concede under like circumstances. In the case referred to, of In re Vogel, it compelled the restitution to an assignee in bankruptcy of property which had been taken away by process of a state court, from the custody of this court, and its decision was affirmed by the circuit court on review. The principle on which such restitution was enforced would authorize the state court, in the present case, to compel restitution to its receivers of such property as this court should take away, by force, from the custody of such state court, and this court might then retaliate, and the confusion and endless strife would ensue which are so forcibly characterized by the supreme court, in the opinion delivered in the case of Buck v. Colbath, before cited.

In respect to the application made at the conclusion of the assignee's affidavit, that this court will direct him to apply to the state court, so that he may be acting in that court on the order and responsibility of this court, and may not seem voluntarily to have gone out of, or waived any reliance upon, the jurisdiction of this court—inasmuch as he has asked and obtained from this court an order providing him with the means of being admitted to prosecute, in his own name, the action in the state court, and enjoining the bankrupt Clark from opposing his application to the state court in the premises, and giving him leave to apply to the state court for such order in the action as he should be advised to apply for, and inasmuch as he has applied to the state court for the granting of the order, before mentioned, discontinuing the action in that court, and dismissing the complaint therein, it seems hardly necessary that this court should direct him to apply to the state court.

The applications are, therefore, denied.

Case No. 2,799.

In re CLARK.

[5 Ben. 389;[1] 6 N. B. R. 197.]

District Court, S. D. New York. Nov. 16, 1871.

AUDITING ASSIGNEE'S ACCOUNT—SECOND MEETING.

1. At the second meeting of creditors, the assignee must present his accounts, in accordance with section 27 of the bankruptcy act [of 1867 (14 Stat. 529)]. Such accounts it is the duty of the register to audit, under section 4 of the act and general order No. 5. Creditors must be prepared then to object to such accounts.

2. The provision, in section 28, for the passing of the final accounts of the assignee, does not imply that accounts presented by him at the second meeting of creditors shall not be then audited by the register.

In bankruptcy.

[On certificate of I. T. Williams, Register:]

[2] [I, the undersigned register in charge of this case, do hereby certify that I was, on

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

[2] [From 6 N. B. R. 197.]

the thirty-first day of October last, served with a paper requesting me, among other things, to audit and pass certain accounts filed with me at an adjourned second meeting of creditors of said separate estate, held on the ninth day of October, eighteen hundred and seventy-one, and direct the payment of such of the outstanding claims as were not objected to. The said paper recites that the period of ten days had elapsed since the accounts were so filed, and that no creditor had objected to said accounts, nor to any of said outstanding claims, and that there had been filed with me consents of several creditors to the payment of said claims.

[And I further certify that the said second meeting was so as aforesaid held after several adjournments, and that but one of the creditors of said estate attended this second meeting, to wit, Mr. Mortimore Addoms; that the accounts aforesaid were filed on that day, and a dividend declared of ten per cent. upon the claims proved; that at the close of the meeting checks were drawn and countersigned for the payment of all said dividends; that the claims against the said assignee by his attorneys amounted to the sum of five thousand one hundred and eighty-nine dollars and nine cents; that believing the said assignee and his said attorneys all perfectly responsible for any overpayment that might be made, I determined to countersign checks for the payment of said claims of said attorneys upon receiving from them an affidavit that the services so charged for had in fact been rendered, and that they were fit and proper services, and that the sum charged therefor was reasonable and proper, and thereupon drafted such an affidavit for that purpose; that said attorneys refused to swear to the same, all of which proceedings will appear from the certified copy memorandum of said day and filed with the clerk of this court; that on the twelfth day of October aforesaid, I received a notification from said attorneys, addressed to the said assignee and myself, which is herewith submitted. Whereupon, on the same day, I wrote a note to the said assignee, in reply to which I received, on the fourteenth day of October aforesaid, a letter from the said assignee; also a letter from his said attorneys, both of which are herewith submitted. Unwilling to have any unfavorable consequences follow upon my omission to countersign checks for the payment of the said claims of said attorneys, I determined, as I deemed the said assignee as well as his attorneys perfectly responsible, to countersign the said checks in case the said assignee—with full knowledge of the fact that I believed the law to be such, that the said claims of said attorneys would be open to be objected to by the creditors at the final meeting in case they or any of them should elect so to object—desired me to do so. I thereupon, on the sixteenth of October aforesaid, wrote him a note, in reply to which I received on the seventeenth of October a letter, which is herewith submitted. That on the same day I received a paper from several of the creditors protesting against the said bill of said attorneys; and having received from the said attorneys a note in which they say, "Under your extraordinary ruling that even the register's own check is no protection to an assignee on a final accounting, we should not permit him to pay us any money even if you ordered him to do so," no further steps in that direction have yet been taken.

[And now, touching my duty to "audit and pass the said accounts prior to the final meeting of creditors, I have been desirous to do so if it could be legally done. The difficulties that present themselves to my mind are as follows: The fourth section provides that the register "shall audit and pass accounts of the assignee." Section twenty-eight provides that "preparatory to the final dividend the assignee shall submit his account to the court and file the same, and give notice to the creditors of such filing, and shall also give notice that he will apply for a settlement of his accounts and for a discharge from all liability as assignee, at a time to be specified in such notice; and at such time the court shall audit and pass the accounts of the assignee," &c. I find nothing in the act or general orders to modify or change this provision. It seems to be imperative as to time and manner. The creditors are relieved from objecting at any other time or under any other circumstances, and if so relieved, they cannot be bound to object at any prior time, or forever after hold their peace.

[The request to direct payment of such of the said outstanding claims as were not objected to, would seem to imply a duty on the part of the creditors to object at such second meeting or be precluded of all objection thereafter. But that meeting was called under the provisions of section twenty-seven, and no notice was given to creditors that the assignee would file his accounts and apply for a settlement of the same as required by section twenty-eight. It cannot possibly be said, therefore, even if the register have power to audit and pass the accounts at any save at a final meeting, that he has power to audit and pass them at a meeting at which no notice to that effect was given to creditors. The attempt therefore to bind the creditors thus without notice ought not to be urged upon the court. The assignee ought not to be heard to object that the court may not, at the final meeting, allow him for sums paid as counsel fees. This would be to impugn the honor and integrity of the court. The presumption at least is that the court, as well as all officers of the law, will do its duty.

[I have usually, in similar cases, attempted to protect the assignee as well as the fund, when paying claims against the es-

tate, by taking an affidavit of the justness of the claim before countersigning the checks. This would perhaps throw the burden of proof upon the creditor objecting at the final meeting, and require of him something that would be in the nature of a surcharging or falsifying of the claim. Had the attorneys in this case been able to swear to the affidavit as required, it is scarcely probable that the creditors would at the final meeting take upon themselves the burden of surcharging or falsifying their claim; certainly not unless they thought the claim grossly unjust. All of which is respectfully submitted.] [2]

BLATCHFORD, District Judge. Inasmuch as the register has, by section 4 of the act and general order No. 5, the general power to audit and pass the accounts of assignees, and, by section 27, it is provided, that, at the second general meeting of creditors, the assignee must report and exhibit to the court and to the creditors just and true accounts of all his receipts and payments, verified by his oath, and produce and file vouchers for all payments for which vouchers are required by any rule of the court, I think that the register has power, and that it is his duty, to audit any accounts so reported and exhibited. Section 27 requires the assignee to exhibit at the same time a schedule of creditors and property, and a statement of the whole estate, as then ascertained, and of property recovered and property outstanding, and debts or claims undetermined, and moneys remaining in hand, and then and there the creditors, by a majority in value, are to determine what net sum shall be divided, retaining a sum sufficient to provide for undetermined claims not proved, and for other expenses and contingencies. The creditors are to have notice of this meeting, and must, therefore, be prepared to object, if they desire, to such accounts as the assignee shall then report and exhibit, under section 27. In order to arrive at the net sum to be divided, the outstanding claims, not disputed or objected to, must be arrived at, and their amount deducted. If they are not disputed or objected to, and appear to be proper charges, it is the duty of the register to direct their payment, as part of the business of auditing and passing the accounts even though they have not been actually paid by the assignee. They may properly come under the head of "other expenses," the amount of which is to be retained by the assignee, such retention being specifically authorized by the meeting and the register, to meet the specific items, as such expenses.

The provision in section 28, for auditing and passing the accounts of the assignee at the meeting for the final dividend, cannot be regarded as in any manner implying that such accounts of the assignee as are presented at the second general meeting of creditors shall not then be audited and passed by the register.

[2] [From 6 N. B. R. 197.]

Case No. 2,800.

In re CLARK.

[2 Biss. 73;[1] 3 N. B. R. 16 (Quarto, 3); 1 Chi. Leg. News, 113.]

District Court, N. D. Illinois. Dec. Term, 1868.

DISCHARGE OF INVOLUNTARY BANKRUPT.

1. An involuntary bankrupt may be discharged unless some act specified in the 29th section [of the act of 1867 (14 Stat. 531)] is proved against him.

[Cited in Re Bunster, Case No. 2,136.]

2. His estate having been administered upon, and the object of the law having been fulfilled, if he has acted in good faith there is no reason why he should be compelled to go through the vain ceremony of filing a voluntary petition.

Application by involuntary bankrupt for discharge.

DRUMMOND, District Judge. In this case the register of the first district has certified to the court that there is no opposition to the discharge of the bankrupt by any creditor, and that he is entitled to his discharge provided it is competent in law to discharge an involuntary bankrupt.

I understand, also, that doubt has been expressed on this point in other quarters, and I have therefore examined the question. It is rather singular that the bankrupt law nowhere refers in express words to the discharge of an involuntary bankrupt, but I think that the necessary conclusion from the whole law is, that the fact of the applicant being an involuntary bankrupt should not of itself alone prevent his discharge.

The 42d section declares, that "the warrant shall be directed, and the property of the debtor shall be taken thereon and shall be assigned and distributed in the same manner and with similar proceedings to those hereinbefore provided for the taking possession, assignment, and distribution of the property of the debtor upon his own petition." The object in both cases—voluntary and involuntary—is the same, the distribution of the assets of the bankrupt among his creditors in conformity with the modes pointed out by the law.

Undoubtedly, if the act of bankruptcy alleged and proved against the involuntary bankrupt comes within any of the alternatives specified in the 29th section, which prevent or render invalid any discharge, he should not be discharged; but if there be nothing of that kind set forth in the petition by the creditor, nor otherwise shown, I see no good reason why the party should be compelled to go through the vain cere-

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

mony of filing a petition himself, to be released from his debts, when his debts and assets have just been administered by the bankrupt court, at the instance of a creditor. For example, under the 39th section, if a debtor shall conceal himself to avoid the service of legal process in an action for the recovery of a debt or demand provable under the act—that would constitute an act of bankruptcy, and authorize proceedings by a creditor against him, but unless that concealment were accompanied with some of the acts or omissions specified in the 29th section it would not prevent his discharge; and so of some other acts of bankruptcy mentioned in the 39th section. Upon principle, if the involuntary bankrupt has acted in good faith, there is no good reason why he should not be released from the payment of his debts upon the surrender of all his property to the assignee, as well as the volunteer; and, though the language of the act touching discharges applies generally if not always to those who have filed their own petition, yet I think the necessary implication is that if the 29th section does not prevent it, the involuntary bankrupt is entitled to his discharge.

It seems to me if congress had intended to exclude all involuntary cases, without distinction from the relief of a discharge, it would have been clearly expressed. But there are two words used in a parenthesis in the form of discharge given in the 32d section, which, though it is merely in a form, and the law declares that the form of a certificate may be that in substance, yet would seem to indicate that the discharge might be as well of the involuntary as voluntary bankrupt: "On which day the petition for adjudication was filed by (or against) him." There is also, possibly, an inference to be drawn from the language used in the beginning of the 30th section, in favor of the opinion already intimated, by the words "on his own application," and a similar inference may be drawn from parts of the 36th and 37th sections.

On the whole, therefore, I can have no doubt that in a proper case an involuntary bankrupt may be discharged.

This is also declared to be the law in Re Bunster [Case No. 2,136].

Case No. 2,801.

In re CLARK.

[9 Blatchf. 372;[1] 6 N. B. R. 403.]

Circuit Court, D. Vermont. Jan., 1872.[2]

BANKRUPTCY — POWER OF THE DISTRICT COURT — SUMMARY JURISDICTION — MODE OF REVIEW — TESTIMONY IN EQUITY.

1. The district court has, under the 1st section of the bankruptcy act of March 2d, 1867 (14 Stat. 517), power to prohibit any proceeding in a state court by a creditor, to liquidate and enforce a lien on the property of a debtor who is adjudged a bankrupt by such court. Such power is to be exercised summarily, and does not require a formal suit.

[Cited in Re Ulrich, Case No. 14,328; Re Brunquest, Id. 2,055; Re Duncan, Id. 4,131; Re Cooper, Id. 3,190; Re Mead, 58 Fed. 312.]

2. When the property affected by a lien is confessedly the property of the bankrupt, and has passed to the assignee, and it only remains to ascertain and liquidate the alleged lien, the summary jurisdiction of the district court is entirely adequate.

[Cited in Re Duncan, Case No. 4,131; Re Casey, Id. 2,495; Re Sims, Id. 12,888.]

3. The power of the bankruptcy court to give further relief, in protection of the estate of the bankrupt, on a renewed application, on new or further evidence, after it has made one order in the premises, considered and sustained.

[Cited in Phelps v. Sellick, Case No. 11,079; Re Hufnagel, Id. 6,837.]

4. Semble, that the mode of review of an order made in the exercise of such summary jurisdiction, is not by an appeal under the 8th section of the bankruptcy act.

5. The testimony, in a suit in equity, may be taken orally, in open court.

6. An order of the district court, restraining an alleged creditor of the bankrupt's from further prosecuting an action in a state court, in which he had attached property of the bankrupt's, affirmed.

[Quoted in Hudson v. Schwab, Case No. 6,835.]

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

In bankruptcy. One Burton, many months before proceedings were commenced in bankruptcy against [Alanson M.] Clark, had commenced an action in the state court, against the latter, on book account, for $150,000, and therein had attached property of Clark, to be held to satisfy any judgment he might recover in that action. He had also recovered a judgment for $46,000, against Clark, on a set-off in another action, pending at the same time, and for this judgment he had no security. Clark, becoming greatly embarrassed, and, in fact, insolvent, other attachments were levied on his property. In January, 1870, by consent, the judgment for $46,000 was reversed, and soon thereafter an agreement was made by Clark with Burton, that all suits between Clark and Burton, (of which there were several,) except the action on book account, should be discontinued, and that, in such last named action, Burton might prove all his demands against Clark, without objection as to the form of action, and without any claim that they or any of them were barred by the statute of limitations. Clark was adjudged a bankrupt in February, 1870, and Samson, his assignee in bankruptcy, applied to the district court to enjoin Burton and Clark from acting under that agreement, and to stay the prosecution of the action on book account, on the ground that the arrangement between Burton and Clark was collusive and fraudulent, and made to give Burton an unlawful prefer-

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

[2] [Affirming Samson v. Burton, Case No. 12,286.]

ence; and an order was made forbidding the parties from making any use of the agreement, but not forbidding the prosecution of the suit. [Case No. 12,285.] On a review of that order in the circuit court, it was affirmed, and leave was given to make a further or renewed application to the district court, upon new or additional evidence. [Case unreported.] Thereupon, the assignee presented the petition now in question, to the district court, praying an injunction against the prosecution of the action on book account in the state court. The bankrupt and Burton appeared and answered. The issues were tried by the district court, by the examination of witnesses and the taking of proofs orally before the court. The proofs were deemed to establish that the fraudulent scheme or contrivance to give to Burton a preference was entered into before the reversal of the judgment above mentioned; that that reversal by consent was in execution of that scheme; that its design was to remove an obstacle to proving, in the action on book account, the matters claimed as a set-off, and determined by that judgment, and so, by letting them, with other claims, into the action on book account, waiving all forms and the statute of limitations, bring them within the scope of the attachment lien, whereas, in truth, and without such reversal, Burton had not and could not gain any security therefor; and that, from a period shortly before that reversal of the judgment, Clark and Burton, who were brothers in law, were acting throughout in collusion, and with the fraudulent design to make use of the attachment lien acquired in the action on book account, as a means of sweeping into the hands of Burton so much of the bankrupt estate as possible, by the use of claims theretofore unsecured, and claims outlawed, collusively exaggerated, or fictitious, and not to be seriously contested by Clark, and so pervert the action to a fraudulent use, to the prejudice of other creditors, if not to deprive them of any share of the estate. The court, thereupon, made an order restraining Burton from further prosecuting the action on book account, in the state court. [Case No. 12,286.] From this order, Burton brought an appeal to this court, in the form and manner prescribed by the 8th section of the bankruptcy act of March 2, 1867 (14 Stat. 520), as if the order had been made in a suit in equity, proceeding on pleadings and proofs to a decree. On the hearing of the appeal, the assignee moved to dismiss it, on the ground that the order was made in the exercise of the summary jurisdiction given to the district court by the 1st section of said act, and could only be reviewed in accordance with the provisions of the 2d section.

George F. Edmunds and Edward J. Phelps, for assignee.

Luke P. Poland, Reuben C. Benton, and Heman S. Royce, for Benton.

WOODRUFF, Circuit Judge. In the conclusions of the district judge upon the questions of fact, I concur. I shall, therefore, content myself with stating the questions raised on this appeal, and, very briefly, my conclusions thereon.

It is contended, for the appellant: (1.) That the district court had no power to proceed summarily, in this case; (2.) that the assignee is concluded by a former order, which will be hereafter referred to; (3.) that this proceeding is, in substance, a suit in equity, and an appeal, under the 8th section, is proper; (4.) that it was irregular and erroneous to try the questions of fact by the examination of witnesses in open court, but the testimony should have been taken [and reduced to writing][3] before an examiner [which is claimed to be prescribed by the rules of the supreme court in equity].[3] (5.) that neither the proofs, nor the law applicable thereto, warranted the order, in any form of proceeding.

(1.) I have no doubt whatever of the power and jurisdiction of the district court, under the 1st section of the bankrupt law, to assume the entire administration of the estate of the debtor, to determine all questions touching the existence of liens thereon, to ascertain and settle the amount of such liens, and to make provision for the liquidation and settlement thereof; and, as incidental to this, it has ample power to restrain a claimant of such lien from proceeding elsewhere to enforce his lien. Language more comprehensive can hardly be suggested than is employed in the act, giving power to collect all the assets, to ascertain and liquidate the liens and other specific claims thereon, adjust the various priorities, and marshal and dispose of the different funds and assets, so as to secure the rights of all parties. To this end, power is given to compel obedience to all orders, by process of contempt and other remedial process. The entire estate is brought within the reach of these comprehensive powers, by vesting it in the assignee appointed by the court, to administer it, under the direction of the court. Nor can it make any difference with the power of the court over this subject, that the lien or alleged lien is inchoate, and incapable of execution, until the amount secured thereby is ascertained and settled. Ascertainment and liquidation are expressly authorized; and the subsequent provisions of the act, relating to creditors having mortgages, liens or other security, show how fully the whole administration of the estate is confided to the court. True, it does not necessarily follow, that, in all cases, the court must prohibit any proceeding in the state court for the benefit of a creditor having a lien. There is, however, no want of power. Often, it is quite convenient, and, ordinarily, it may be quite desirable, to permit pending actions to pro-

[3] [From 6 N. B. R. 403.]

ceed, so far as to ascertain the amount due. In one case,—In re Iron Mountain Co. [Case No. 7,065],—a foreclosure of a mortgage in the state court was permitted, though begun after petition filed in the district court, and, under the special circumstances of the case, I deemed it proper, on review in this court, to affirm the order. But, the power to control the creditors in this respect is, I think, clearly given. Two considerations illustrate the importance of the power, which are especially applicable to liens by attachment: 1. Without such power, there is no adequate protection to the other creditors, against collusion between the bankrupt and the claimant, not even aided by the authority given to the assignee to defend. 2. The early settlement of the estate may sometimes require that the court in bankruptcy should take the determination of claims which are in dispute into its own hands. I deem it equally clear, that this power conferred by the 1st section is to be summarily exercised, and does not require a formal suit. Indeed, whatever powers are given by the 1st section are designed to be exercised summarily.

There are cases, in which, in order to bring the property pursued by the assignee within the control of the court or its assignee, or to remove obstacles to its administration, it may be necessary for the assignee to prosecute an action at law or a suit in equity; and such cases are provided for in the 2d section. But, when the property affected by a lien is confessedly the property of the bankrupt, and has passed to the assignee, and it only remains to ascertain and liquidate the alleged lien, the summary jurisdiction of the district court is entirely adequate.

(2.) On a prior petition, setting out some of the matters alleged in the present petition, the district court had made an order enjoining Burton from making any use of a written agreement entered into between him and the bankrupt, on the ground that it was a collusive and fraudulent arrangement, for the purpose of securing to Burton a preference over other creditors, in respect of certain claims which had already been merged in a judgment, or barred by such judgment, and for which, so long as such judgment was in force, Burton had no security. But such order did not invalidate or impeach a previous reversal, which had been entered by consent, of that judgment, because it did not then sufficiently appear that such collusive and fraudulent arrangement was entered into prior to such reversal, or that such reversal was part of the scheme devised to secure to Burton a preference. Shortly after such reversal, the said written agreement was entered into between Burton and the bankrupt, which, if carried into execution, would have permitted Burton to prove all claims which he had or alleged against the bankrupt, in an action "on book," in which he had attached the bankrupt's property, and thus secure an apparent lien, and, possibly, an actual lien, for the amount due to him upon the said claims, for which, so long as the said judgment was in force, he had no security. The former order of the district court left to Burton such right to prove the said claims, as the laws of Vermont might give to him. That order, this court, on review, affirmed, but leave was given to the assignee to renew his application for other or further order in the premises, upon new or additional evidence. Thereupon, the present petition was presented to the district court.

The suggestion, that the decision upon the former hearing was final and conclusive, as res adjudicata, is without foundation. Even in a formal suit in equity, the court may qualify the decree, so that it shall not operate to prevent a new suit; and nothing is more common, in disposing of motions, than to give leave to renew, or apply, upon new or further evidence, for additional relief. The highly equitable and remedial powers conferred on the court in bankruptcy are not less free from restriction, nor are they hampered by such technical rules as will prevent the doing of what is just and for the protection of the estate, even if it requires the revocation of an order once made.

(3.) The proceeding in question was not a formal suit, but was a summary proceeding. It does not conform, in the manner of its institution, the manner of its prosecution, or in its form, to a suit in equity. True, the facts stated and the relief sought were like, in some of their features, to bills for analogous relief in suits in equity; but that proves nothing. These same facts were the proper ground of a summary application, and for the relief which it was competent for the court summarily to grant. If these proceedings are compared with the rules prescribed to the courts of the United States in equity, relating to the commencement of suits, the form of bills, appearance therein, &c., &c., no question will, I think, remain on this point. It would seem to follow, that the mode adopted to obtain a review of the order of the district court, was not warranted. It will, however, be more satisfactory to the parties, if the case is disposed of upon grounds which import that no error was committed in the order appealed from, and, also, upon grounds alike applicable to the proceeding, if it were regarded as a suit in form; and I therefore consider the other points.

(4.) It was not ground for a reversal of the order, that the witnesses were orally examined before the court. The rules of the supreme court have not taken away the power which the court has, as a court of equity, to have the testimony of the witnesses taken in open court. That power is expressly reserved in the seventy-eighth rule, which implies its existence and its perpetuation. It is there left to the discretion of the court.

(5.) I have, perhaps, already sufficiently expressed my views of the merits. The conclusions of the district judge were, I think,

warranted by the evidence. The power of the court over the subject I have already stated. Independent of any question of actual corrupt design, the arrangement to remove the impediment of an actual adjudication, and bring the claims therein determined under the operation of the attachment in the action "on book," was an attempt to give an illegal preference in fraud of the bankrupt law. On that subject I have already expressed my opinion, on the former review, above mentioned. It is not enough to say, that, if the debt were permitted to be established in the pending action, the court could control the execution of the judgment. I would not express any doubt of that; but it will save embarrassment, expense, and any apparent effect of a formal judgment, to be avoided by the assignee, to arrest the execution of the fraudulent scheme. And this is especially true, in view of the evidence of actual fraudulent collusion, which is deemed established.

The order should be affirmed.

Case No. 2,802.

In re CLARK.

[9 Blatchf. 379;[1] 6 N. B. R. 410.]

Circuit Court, D. Vermont. Jan., 1872.

BANKRUPTCY—REVIEW BY CIRCUIT COURT—PRACTICE — EVIDENCE — POWERS OF THE DISTRICT COURT.

1. The jurisdiction of the circuit court, to review summary proceedings in bankruptcy, is not limited by any measure of the value of the property involved.

2. A petition of review, in bankruptcy, merely reciting the proceedings in the district court, and its decree, and alleging that the petitioner is aggrieved thereby, and praying a review and a reversal, without pointing out any errors, or supposed errors, in law or in fact, or specifying any ground or reason for such reversal, except that the petitioner is aggrieved, commented on, as loose practice, not to be sanctioned.

3. Where property comes to the possession of an assignee in bankruptcy, as part of the estate of the bankrupt, and is taken from his possession under a writ of replevin, issued from a state court, in a proceeding to which the assignee is not a party, and in which the title of the assignee is not in question, the district court is bound to see that such possession by the assignee is not forcibly displaced.

4. A finding of fact, by the district court, on the examination of witnesses in the presence of the court, should not be reversed by the circuit court, without a very clear and decided conviction that it is erroneous.

5. The review given to the circuit court, by the 2d section of the bankruptcy act of March 2, 1867 (14 Stat. 518), is given to it as a court of equity; and it is not bound to reverse upon strictly legal grounds, if satisfied that the facts are correctly found, and that no injustice has been done.

6. Declarations of the bankrupt, held to have been properly admitted in evidence, on the trial of a suit between the assignee and a third person, as to the title to certain property, as declarations made by him while in conspiracy with such third person to cover and conceal such property, and as part of the res gestae.

7. Where an assignee in bankruptcy proceeded, in the district court, by petition, to recover certain property, as assets of the bankrupt, and the respondent answered the petition, and did not object to the form or substance of the proceedings, or to the jurisdiction of the court, but submitted to its jurisdiction, and set up, by his answer, his own title to the property, and prayed that the court would adjudge as to the title, between him and the assignee, and it did so adjudge, the circuit court, on review, will not consider the question as to whether a more formal suit would or would not have been proper.

[Petition of review.]

Reuben C. Benton, for Blake.

Edward J. Phelps, for assignee.

WOODRUFF, Circuit Judge. Amos J. Samson, the assignee of Alanson M. Clark, in bankruptcy, applied, by petition, to the district court, to compel the return to him of certain property, which he alleged to be part of the personal estate of the bankrupt, of which he had taken possession, and which had been taken from his possession, and delivered by the sheriff to William H. Blake, by virtue of a writ of replevin, issued in the name of the said Blake, against one La Crosse. Blake appeared, and, without objection to the form of the proceeding, answered the petition, denying that the property was in the possession of the assignee, averring title to the property in himself, denying, also, that the property was ever the property of the bankrupt, and praying the court to adjust and settle the right to the said property, as between himself and the assignee, and to direct the assignee to interfere no further therewith.

A trial of the issues thus raised was had in the district court, on which it appeared, that the assignee of Clark, after his appointment, entered upon a farm, of which the title, at the time of the adjudication in bankruptcy, was in the bankrupt, and which was occupied by one La Crosse, under an agreement with the bankrupt for the purchase thereof, but for which the consideration was to be paid at a future day, upon notes which had been given therefor by La Crosse. The property in question was upon this farm. La Crosse made no claim to this personal property, yielded the possession thereof to the assignee, as the property of the bankrupt, and agreed to take care of the same for him. After this, the property was taken by Blake, through the writ of replevin out of the state court, to which La Crosse alone was made defendant. Evidence was given, tending to show that the personal property, prior to the proceedings in bankruptcy, belonged to the bankrupt, and remained on his farm. On the other hand, evidence on the part of Blake tended to show, that the property in question belonged to La Crosse, and that, prior to the proceedings in bankruptcy, an execution on a judgment against La Crosse was levied thereon, and the same was sold

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

by the sheriff, and purchased by the said Blake. Other evidence tended to show that the sale on the execution, and the purchase by Blake, were part of a fraudulent scheme by the bankrupt, when wholly insolvent, and on the eve of the proceedings against him in bankruptcy, by the aid of Blake, to cover and conceal his property, by the form of legal proceedings, wherein the property was levied upon and sold as the property of La Crosse, though, in truth, belonging to Clark himself; that Blake bid off the property by the procurement of Clark; that the purchase money was furnished or repaid by Clark to Blake, the design being to prevent the property from being thereafter taken by his creditors; and that the possession of the property was not changed, but the same remained on the farm of Clark. The district court found and adjudged, that the said Blake has not, and never had, any right, title, or interest in the property; and that the same was the property of the said bankrupt, until the filing of the petition against him in bankruptcy, and became vested in the assignee, and came lawfully into his possession; and the court thereupon ordered and decreed the restoration of the said property to the possession of the assignee, or in default thereof, payment by the said Blake of its value, $178, with costs. The said Blake has brought this petition of review, stating the proceedings above detailed, and that it was adjudged and decreed by the district court as also above recited, and then alleging, "that he is aggrieved by said adjudication and decree," wherefore he prays a review and reversal, and that this court will make such adjudication and decree as shall seem meet, &c., &c., without pointing out any errors, or supposed errors, in law or in fact, or specifying any ground or reason for a reversal of such decree, except the sweeping statement that he is aggrieved. The respondent, the assignee, moved to dismiss this petition, on the grounds, that the value of the property is not sufficient to give this court jurisdiction; and that the petition alleges no error in law, assigns no specific error in fact, and contains only an allegation that the petitioner is aggrieved. At the hearing, the court reserved the consideration of this motion, and directed the argument to proceed on the merits.

I find no warrant for limiting the jurisdiction of this court to review summary proceedings in bankruptcy by any measure of the value of the property involved; and no statutory provision, nor any decision of the courts, was referred to, prescribing or affirming any such limitation. If, therefore, the proceedings below ought to be regarded as summary proceedings, this court has jurisdiction to review them. If, on the other hand, though informal, they were, in substance, a suit, as upon bill and cross-bill, then no proper appeal was taken; upon which, however, it will not be necessary to rest any conclusion.

As to the other ground on which the motion to dismiss was urged, it is sufficient to say, that, although I shall dispose of this case when I hold that there is no sufficient ground for reversing the decree of the district court, I do not desire to sanction so loose a practice as this petition of review pursues. Nevertheless, as the defect might be cured by amendment, and as no prejudice can come to the assignee or to the estate, under the conclusion which has been reached on the other branch of the case, it is better for all interested as creditors or otherwise, that no further delay should happen, through mere defect in the formal proceedings.

The proofs, I think, warranted the conclusion of the court below, that the property in question came to the possession of the assignee as part of the estate of the bankrupt, and was in his possession when Blake took it by his writ of replevin. The district court would have failed in its duty, had it suffered that possession to be forcibly displaced by a third person, although using the form of process of the state court, to which the assignee was not a party, and in which the title of the assignee was not in question, but the property was to be subjected to such fate as a contest between two strangers to the proceedings in bankruptcy might involve. The district court was open to the application of such third party, if he desired to assert title and claim a delivery of the property by the assignee to him; or, a suit at law or in equity, as the case might require, could have been brought against the assignee, by such third party, in that or in this court.

As to the title to the property itself, that depended upon questions of fact, in respect to which there is no such preponderance of evidence against the conclusion of the district court, as calls for a reversal. On the contrary, my own conviction concurs with that of the district judge. If it were otherwise, a finding of fact, upon an examination of witnesses in the presence of the court, where the opportunity for judging correctly of the credibility of the witnesses and weight of the testimony is better than can ordinarily be afforded by an inspection of the testimony when reduced to writing, should not be reversed without a very clear and decided conviction that it is erroneous.

It was strenuously insisted, that error was committed in the admissions of declarations of the bankrupt in evidence. On this point, these observations are pertinent: (1.) This review is given to the court as a court of equity; and there, on an enquiry into questions of fact, the court, on appeal, are not bound to reverse upon strictly legal grounds, if satisfied that the facts are correctly found, and that no injustice has been done. (2.) The declarations in question were in aid, and in partial execution of, or, at least, while Clark was engaged in, the alleged scheme to cover and conceal his property, to which Blake was a party. They were, therefore, admissible, as a declaration of a co-con-

spirator in the attempt to defraud. (3.) For the reason last stated, they were properly regarded as a part of the res gestae, when title in La Crosse was set up by Blake, and the fraudulent sale and pretended purchase by Blake were relied on.

It was not objected, on the argument of this review, that the proceedings on the petition of the assignee were not regular and proper, or that the order or decree sought to be reviewed was not within the summary jurisdiction of the district court. Blake, the petitioner in review, appeared in the district court and answered the petition. He not only raised no objection to the form or substance of the proceeding, or the jurisdiction of the court therein, but, submitting to the jurisdiction, he invoked its exercise in his own behalf, by filing an answer, in the nature of a cross bill in equity, alleging his own title, and praying the court to adjust and settle the right to the said property, as between him and the assignee, to give to him the control thereof, and to restrain the assignee from interference therewith. Upon the issues of fact, the parties went to trial, and with the result above stated. This court is, therefore, not called upon to consider whether the determination of the question of title to this property should have been sought by a summary proceeding in the district court, or by a proceeding formally commenced by process. Jurisdiction of the subject-matter and question existed in the court, and both parties submitted themselves to its exercise, and, indeed, invoked it in the form and manner stated. Nor does the petitioner in review raise any objection, in this court, that there is any defect or error in the decree or order, founded on the mode of procedure in the district court. Besides, the court having found, as matter of fact, that the property was in the possession of the assignee, the court had power to protect that possession against interference except by resort to a proper legal proceeding to which the assignee should be a party; and, therefore, when Blake, the claimant, by his cross petition, invoked the controlling power of the court over the assignee, as its officer, and submitted to a trial of the questions which he asked the court to determine, no question arises here whether a more formal suit would or would not have been proper.

The judgment or decree must be affirmed, with costs.

Case No. 2,803.

In re CLARK.

[43 How. Pr. 70.]

District Court, S. D. New York. April 5, 1872.

BANKRUPTCY—ALLOWANCE FOR SERVICES OF BANKRUPT'S COUNSEL.

[Services of counsel, rendered bankrupt in resisting the petition filed against him, in examination before register, in preparing schedules, and in settling conflicting claims and rights between the bankrupt and the assignee, may be allowed out of the estate on the written approval of the assignee and certificate of the register.]

[In bankruptcy. Application of Mansfield Compton for compensation out of the fund in the hands of the assignee for services rendered the bankrupt as an attorney in resisting the petition filed against him, for services while the bankrupt was under examination before the register, for services in preparing schedules, and for other services in settling conflicting claims and rights between the bankrupt and the assignee.]

[On certificate of I. T. Williams, Register.]

I, the undersigned, register in charge of the above-entitled matter, do hereby certify and report that on the 27th day of October last a claim against the assignee of the said estate for professional services was filed with me by Mansfield Compton, Esq., amounting to the sum of $1,000, upon the back of which said claim was indorsed the words and figures following: "I the undersigned, object and disallow the foregoing claim, and require evidence to be produced to establish the same; and I apply to the register for an order for the examination of the claimant and his witnesses touching his claim. The said claim was presented to me this 27th day of October, 1871. John S. Beecher, Assignee of A. B. Clark, by C. W. Bangs, his attorney, pro hac vicae;" which said claim with said indorsements thereon are hereto annexed. That on the 6th day of November, aforesaid, I received a written request from the said Bangs, reciting that said Compton had presented the claim aforesaid to the said assignee, and that he had been served with a notice by said Compton that the examination of said claim would be proceeded with before the register on the 8th day of November, 1871, at 11 a. m., and that he was advised that John J. Monell and Richard H. Corbett are each of them necessary witnesses for the assignee on the hearing of said claim, and applying for a summons or order for the examination of said witnesses returnable on the 8th day of November, at 11 a. m., at the office of said register; and the assignee thereby raised the point "that it was the duty of the register upon said application to issue the summonses or order thereby applied for, and that, should the register decline to issue such summonses or order the register was requested to certify to the court the point so raised," which said notice is hereto annexed. That I did not issue such summons or order as so requested, not thinking it necessary to bring said Corbett or the said Monell down from his residence at Newburgh on that day, for the reasons hereinafter stated. That on the 8th day of November aforesaid, at 11 a. m., the said Compton appeared before me, and the said assignee also appeared by F. M. Bangs,

Esq., his counsel. That the said Bangs thereupon asked for an adjournment, alleging as a ground thereof "that certain creditors had filed a protest against any attorney's fees being allowed the assignee, and that the assignee had taken measures to call the creditors together, and had notified the protesting creditors, that they might, if they chose, employ attorneys and counsel to attend the trial of this claim, and that such protesting creditors did not appear, and that there was no proof that M. Compton had notified any of the creditors of his claim. That thereupon the assignee had not thought it expedient to employ counsel at his own expense, nor to pledge the estate to meet such expenses." Mr. Bangs further stated that he appeared only for the purpose of making that point. I overruled this application, stating as a reason therefor that "I should not pay any attention to such a protest save to execute the accounts of the counsel carefully, and allow them for all services properly rendered to the estate, the full going prices usually charged by competent counsel for similar services. That I did not think that a ground of adjournment, and, if the assignee did not take care of the estate by a proper defense, I should do my best to supply the omission." The said Bangs thereupon renewed his application for a postponement of said hearing, alleging as a ground therefor that "he had applied to the register for an order that the said Corbett and Monell appear as witnesses for the said assignee on this hearing, and that said application had not been granted." I denied this application also, stating as a reason therefor, "1. That the grounds alleged therefor were not consistent with those above alleged for such postponement. 2. That M. Compton had informed me that when he served the notice for this hearing upon Mr. Bangs he was informed by him that he should not dispute the amount of the bill, but only raise the point of law, and that M. Compton had also informed him that his testimony would probably occupy the whole of one sitting." To this Mr. Bangs urged that "the general orders required the register to sit six hours, and he denied that it would require six hours to take the testimony on the part of M. Compton." I then decided that, as Mr. Corbett had come in and was present, and could be examined by Mr. Bangs, if the time should permit, I would go on and take the testimony of the witnesses who were present as far as the same could be done at one session. Thereupon Mr. Bangs stated that he now appeared for Hardy, Blake & Co., and "demurred to the bill on its face;" but I decided, that I would take the testimony, and pass upon all these questions at the close of it. And thereupon Mr. Bangs proceeded to put his said objection in the nature of a demurrer to the bill of items of M. Compton's claim into writing, and, having done so, handed me two papers, both of which are hereto annexed, asking me to certify the point so raised to the court. I decided that, "under the 11th general order the pendency of such an issue before the judge ought not to suspend or delay the proceedings in this case before the register. That it would not be a convenient practice to send the case up till the testimony was in, unless, indeed, it should be lengthy, in which case I might think it proper to send it up before;" and thereupon the said Bangs left. I therefore proceeded and took the testimony of the said Compton and the testimony of Balestier, which are hereto annexed. And I submit the two points above raised by the said Bangs, without comment.

And touching the said claim of the said Compton, I submit that I am unable to see, from the testimony, any privity of contract between the assignee and the claimant. The only ground upon which his claim can rest is, the provision of the act itself. The services claimed were, for resisting the petition filed against the bankrupt; for services while the bankrupt was under examination before register; for services in preparing schedules, and for other services in settling conflicting claims and rights between the bankrupt and the assignee. They are services that are rendered in almost every case of involuntary bankruptcy, and if allowed here, they must be allowed in every similar case. The question, therefore, becomes important, and with a view of obtaining a careful consideration of it, I beg to call the attention of the court to what it seems to me, must be the effect of rejecting this and similar claims. The bankrupt's first notice of proceedings in bankruptcy against him is the service of the order to show cause why he should not be adjudged a bankrupt. The moment of that service, is the moment that fixes his status with regard to his property. That moment his property, if afterward adjudged a bankrupt, becomes the property of the assignee thereafter to be appointed. He has, therefore, nothing with which he may retain counsel, call witnesses, or assist himself in his defense; yet, the 41st section of the act [14 Stat. 537], provides, that he may appear in court and defend. It further provides that, in case he is successful in his defense, he may have costs of his antagonist. Clearly this implies the right—a right in virtue of the very terms of the act itself—to retain and be aided by counsel. There is no presumption of law that counsel will serve, or witnesses attend, without compensation. Where shall the money to defray such expenses come from? It must come from the property—what should be the assets—of the bankrupt. It will be taken before or after the adjudication. It will be taken either stealthily by the bankrupt, or openly by order of the court. There can be no doubt, as to which of these two courses will most promote the

public interest and the wholesome administration of the law. It will not answer this view to say, that the law presumes all men honest, that the law will not presume that a man will commit a fraud or violate a law. It is enough to say that good legislation will not place a man under temptations to commit a wrong, which experience shows the mass of mankind have not the virtue to resist. It is true, we must submit to the law as we find it; but I think it clear, that if the bankruptcy act will bear the construction contended for, it ought to be adopted.

Upon the question then of the true construction of the act, it would seem, that congress must have intended that the costs and expenses of the bankrupt in his defense, and other proceedings should be paid out of the proceeds of his estate. A court will be reluctant to hold, that the law making power while expressly providing, that a party may appear in court and defend himself by the aid of counsel and witnesses, intended in the same act to deprive him of all the means of doing so. The fact, that no provision is made for withholding from the assets to be handed over to the assignee sufficient to pay these costs and expenses, warrants us in looking sharply to the act to find from what source it was intended, that such costs and expenses should be paid. We find in section 28, a provision for paying out of the fund "the fees, costs and expenses of suits and the several proceedings in bankruptcy under this act." This language would seem to be broad enough to cover the case before us. The words "fees, costs, and expenses" are not limited to the side of the creditors or the assignee, nor yet to the officers of the court. It is the daily practice of allowing the counsel for the petitioning creditor to be paid out of the fund for his services in the bankruptcy court. On what express words of the act are similar fees for similar services denied to the counsel for the bankrupt? Certainly none. By whatever argument these words of the act are made to embrace the compensation of counsel for the petitioning creditor the same argument will apply a fortiori to the compensation of counsel for the bankrupt.

I submitted the question herein presented to this court in 1868, in the Case of Heirschberg [Case No. 6,329]. In that case, the bankrupts' attorneys had not thought it right to take from the funds of the bankrupts their compensation in advance for filing his petition, &c., but had come in after the estate had gone into the hands of the assignee and asked to be paid from the fund. I then submitted to the court as a reason for allowing it, that "the funds from which the solicitor is paid must come from what should be the assets of the bankrupt, or from his future earnings. In pursuing the course here pursued, the solicitor submits the amount of his compensation to the court under the eye of the creditors. In the course ordinarily pursued, he obtains his compensation from the same fund, the amount being measured by the good feelings of the bankrupt, and under some temptation to give him a larger sum than the creditors would sanction, or the court might think a just compensation. If the act will bear this construction, it would seem to tend to a better practice than that which it is believed now generally prevails." I recur to these remarks now only to say that the experience of three years has only deepened the impression then expressed—and since the Case of Comstock [Case No. 3,074], in which one of our ablest judges has taken the same view here urged, I have thought it right to submit the question again, asking for a careful reconsideration of the question. Should the court think the views here expressed, well taken, I recommend that an order be entered, allowing the claimant the sum of $250, which I think would be a fair compensation for the services which would seem to come under provisions of the act, upon the principle of construction above contended for. Respectfully submitted.

BLATCHFORD, District Judge. On evidence and a certificate bringing this case within the decision in Re Montgomery [Id. 9,726], I should follow that decision.

NOTE. The decision in the Case of Montgomery, above referred to, is as follows, Blatchford, District Judge: "If the assignee shall, in writing, approve of the payment of this bill out of the funds of this estate on the grounds set forth in the petition of Mr. Olney, and in the certificate of the register, and of the amount of the charges, and order will be made allowing its payment."

Case No. 2,804.

In re CLARK et al.

[The case reported under above title in 3 N. B. R. 487 (Quarto, 122), and in 1 Am. Law T. Rep. Bankr. 186, is the same as Case No. 1,418.]

Case No. 2,805.

In re CLARK et al.

[4 N. B. R. 237 (Quarto, 70).][1]

District Court, S. D. New York. Nov. 7, 1870.

EXAMINATION OF BANKRUPT—RELEVANCY AND MATERIALITY OF EVIDENCE.

Where wife of a member of a bankrupt firm loaned the firm, previous to its bankruptcy, moneys arising from the sale of property which had been held in her husband's name, but the proceeds of which were promised to her in consideration of her executing a deed therefor, said moneys not appearing on the firm books to the credit of the wife, but to credit of her husband as a member of the firm, no separate account appearing in the husband's separate ac-

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count-books, except under the head of family expense—and where the husband purchased, as the agent of his wife in her absence from home, real estate, which was conveyed to her in her own name, and which real estate was improved by his wife through her husband, as her agent, and the implements paid for by firm checks, as in payment to her of her loans to the firm, this testimony being objected to as immaterial and irrelevant, and given under and subject to such objections, and the question as to what estate said bankrupt's wife had, and had she any estate except the property above referred to, and was she possessed of thirty-seven thousand dollars, being also objected to, *held*, the questions must be answered.

[In the matter of Clark, West, Maxwell and Davis.]

I, Isaac Dayton, register in bankruptcy, having charge of these proceedings, and holding examination of E. Spencer West, one of the above-named bankrupts, under section 26 of the bankrupt act of 1867 [14 Stat. 529], hereby certify that in the course of said examination certain questions hereinafter stated at length, were refused to be answered by said E. Spencer West, and a certificate thereof and of the question so arising requested by him.

After testifying to the following effect: That his wife had loaned his firm money; don't know how much, or when; but at one time, in 1863, five or six hundred dollars; at another time, in 1864, about twenty-two thousand dollars; that this loan was a portion of the proceeds of the sale of a house which stood in his name, and which he promised to give to her in consideration of her executing the deed, and she was opposed to the sale of the property, and had hesitated to execute it without that assurance, and he did so give it to her; that this house cost eighteen thousand dollars and sold for thirty thousand five hundred dollars; that the money received for this was in check of the purchaser, payable to order of the bankrupt; that these were transferred to his firm. "Q. 410. What account did your firm keep with your wife as to this money (loan of five or six hundred dollars in 1863)? A. The firm of Clark, West & Co. had no account with my wife, and kept no account at any time, but the loan went into my own individual private expense account, as agreed in our copartnership between Clark and myself, that the expense account of either larger than the other should draw interest. Q. 428. Did you keep any account individually with your wife of this loan made by her, of the profits on the 34th street house and furniture? A. I kept no book-account, but we talked the matter over about what the amount was. Q. 429. Was any account kept by the firm of this amount? A. All money that passed this way through me was kept in my family expense account." That, in November, 1865, he heard by common report that land was for sale in 152d street; that his wife negotiated for this; was himself the party to the agreement, as his wife was away from home at the time it was drawn and executed. The price was sixteen thousand dollars. That his wife made the necessary payments; three thousand dollars of the purchase-money was paid in checks either of himself or Clark, West & Co. Clark, West & Co. owed her that amount, they had been having the use of her money; the deed of the property is in the name of his wife, Mrs. Sarah O. West. That his wife built upon the property; that he acted as her agent in calling at various places to ascertain the price of materials, and after consultation about the price requested the material to be sent and delivered, and on presentation of the bill it would be paid for, and with various parties who were in the habit of performing certain portions of the work on the buildings, and that workmen they would employ would be paid on Saturday; don't know that he ever informed any one that he acted as agent, may have done so; that he did not hire any workmen. The bills were presented to his wife; he looked over the most of them; bills were paid by checks of Clark, West & Co. The checks which were so given were to return the loan made by his wife. The work was done by the day's work; no accounts or memorandums were kept of payments or amounts due. Don't know how much it cost to build. Had some receipts and some checks (returned from bank), but these are lost or destroyed. This property he thinks worth sixty or seventy thousand dollars, or more, perhaps, but there are three mortgages on it—one for twelve thousand dollars, one for twenty-five thousand dollars, and one for fifty thousand dollars. There are sixteen lots in all; there is a brick house, frame house, and stable upon them; don't think he would advise their sale for four thousand dollars per lot. When the first frame house was completed he removed into it, and has remained there ever since, and has not paid his wife any rent; the second house (brick) is for sale, applications to be made to bankrupt. Don't know how much firm owed Mrs. West at any time; don't know how much has been paid to his wife, or for her use; think she has been paid in full with interest. No account has been kept with Mrs. West in books of the firm, or in bankrupt's private books, nor any account with E. S. West in the books of the firm (except his general expense account and loan-book account) to show how much Mrs. West was creditor or debtor at any time.

(All the foregoing testimony relating to the property of the bankrupt's wife was objected to as immaterial and irrelevant, and the questions were answered subject to that objection.) "Q. 632. What estate has Mrs. Sarah O. West? (Objected to as irrelevant, and requested to be certified by counsel for bankrupt.) Q. 633. Is Mrs. S. O. West possessed of any estate except the property in 152d street? (Same objection and request.) Q. 634. Is Mrs. S. O. West possessed of thirty-seven thousand dollars?" (Same objection and request, which questions the bankrupt re-

quested to be certified to the judge for his opinion, which is hereby done.)

BLATCHFORD, District Judge. The questions must be answered. The clerk will certify this decision to the register, Isaac Dayton, Esq.

Case No. 2,806.

In re CLARK et al.

[5 N. B. R. 255.] [1]

District Court, S. D. New York. April 25, 1871.

BANKRUPTCY—PROOF OF CLAIM BY SECURED CREDITOR.

Where a creditor who has ample security for his claim makes proof of the same, without mentioning the security, through inadvertence and ignorance of the law, an order will be entered granting to the said creditor leave to withdraw his proof and restoring to him his rights as though no proof had been filed.

[Cited in Re Hope Min. Co., Case No. 6,681; Re Parkes, Id. 10,754; Re Baxter, 12 Fed. 75.]

[On certificate of I. T. Williams, Register:]

The undersigned register to whom the above entitled case is referred, respectfully reports and certifies to this honorable court: That John Byrne, by his attorney in fact, on the seventeenth day of January, eighteen hundred and seventy, made proof in due form of law, before me, of his claim against the estate of said bankrupts for the sum of six thousand seven hundred dollars, without making any reference to any security held therefor. That afterwards and on the thirtieth of March, eighteen hundred and seventy-one, the said John Byrne filed his petition before me which is hereto annexed, from which it appears that he has ample security for his claim, and that the proving thereof was made and filed through inadvertence or ignorance of his attorney of the fact that any security was held therefor, praying for leave to withdraw his said proof, and that he be restored to his rights in all things as if no such proof had been made or filed. That notice of the filing of said petition was given to the assignee in these proceedings who thereupon appeared before me and objected to the granting of the prayer of the said petition, on the ground that the said security had been by the making and filing of said proof waived, and that the estate had thereby assumed rights which he did not feel at liberty to relinquish. Whereupon I hereby certify the issue so framed to this court for decision. And I further certify and report that I am perfectly satisfied that the said proof was made and filed solely through inadvertence and in ignorance of the law, or of the facts of the case on the part of the said attorney who made the same, and that the said petitioner, had he known the facts and law, would not have made or filed the said proof. Wherefore I recommend to this honorable court that an order be entered giving leave to said petitioner to withdraw his said proof, and that he be in all things restored to his rights as though no proof of claim had been made or filed.

BLATCHFORD, District Judge. An order to the effect recommended by the register should be entered.

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Case No. 2,807.

In re CLARK et al.

[6 N. B. R. 194.] [1]

District Court, S. D. New York. Nov. 11, 1871.

POWER OF REGISTER IN BANKRUPTCY — INFORMATION FROM ASSIGNEE—CALLING MEETINGS.

1. The register in charge has power to order an assignee to furnish him with all necessary information as to funds in his hands.

2. A third meeting of creditors—not being a final meeting—should not be called except for cause shown, and if the register be satisfied that no such cause exists, he is justified in refusing to grant the order for such a meeting.

[On certificate of I. T. Williams, Register:]

I, the undersigned register in charge of the above entitled proceedings, do hereby certify to this court, that I did, on the twenty-seventh day of October, eighteen hundred and seventy-one, receive from the assignee in this case a request to call a third meeting of creditors. That, as the said request did not state the reasons why such a request was made, I applied to the said assignee by letter, dated the thirty-first day of October, eighteen hundred and seventy-one, to call at my office and confer with me upon the subject of such application. That I received in reply thereto a letter from Messrs. Bangs, Sedgwick & North, "attorneys for the said assignee, pro hac vice," bearing date first November, eighteen hundred and seventy-one, which is herewith submitted. That, upon an examination of the accounts of said assignee on file in my office, I find, so far as I can understand the same, that no funds have been received since the last dividend meeting of the creditors held on the twenty-ninth day of March, eighteen hundred and seventy-one, at which meeting a dividend of six per cent. was duly declared and paid—save the sum of ninety-seven dollars and forty-one cents, which appears to be the amount of interest which has accrued upon the sum of eight thousand eight hundred and twenty-six dollars and seventy-six cents, which is now and was, as I understand, on deposit in the United States Trust Company at the time of the said last dividend meeting, and is not yet in a condition to be divided among the creditors. In doubt whether any further sums were in the hands of the said assignee and uncertain if the

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said sums so in the said trust company could yet be divided among the creditors, I did, on the sixth of November, eighteen hundred and seventy-one, issue an order to the said assignee for information on this subject. In reply to the said order, I received a letter from the said attorneys for the said assignee on the seventh day of November, eighteen hundred and seventy-one, and on the same day I also received from said attorneys a request to certify the point to the court as to whether I had authority to make the said order. Upon the question of the power of the register to make such an order, I submit that section twenty-eight of the act devolves upon the register the exercise of a discretion in reference to "further dividend meetings." He should call them if "occasion requires." This makes it his duty to ascertain if the occasion does require it. What other means of information has he at command? If he cannot order this information to be given, he is powerless to execute the duty imposed upon him by statute. General order 5 makes it his duty to "take proceeding for the declaration and payment of dividends." Dividend meetings are most generally called for at the request of creditors, or, in many cases, they would never be called. In such cases creditors often aver that the assignee has funds, &c. The practice then is to order the assignee to file accounts from which this fact can be ascertained, or otherwise inform the register upon the subject. When the fact is ascertained the register exercises a discretion—calling or not calling a meeting as the facts may warrant. It is clear from section twenty-eight that the meeting asked for, not being the final meeting, should not be called except for cause shown. See In re Son [Case No. 13,174].

And I further certify that on the fourth day of November inst., I was served with a paper to which was appended divers printed papers, being accounts and so forth, raising the point that it is my duty by law to grant the order so applied for, and requesting me to certify the point so raised to the court; and I further certify that before I had sufficient time to prepare said certificate I was served—to wit, on the eighth day of November—with an order of this court requiring me to call a meeting of creditors or certify the point so raised as aforesaid. I have not been served with a copy of the petition upon which said order is founded, and am ignorant of what it may allege. But in obedience to said order I certify that under rule six of this court, and the ruling in Re Son [supra], it is the duty of the register to ascertain for what purpose the meeting is asked, and whether there be any funds for distribution. That without such information on the subject, I cannot be called upon to exercise the discretion, which the act devolves upon me the duty of exercising, upon an application of this character. I have therefore waited in the hope of receiving such information so that I might intelligently pass upon the application. In Re Littlefield [Case No. 8,398], Lowell, J., in speaking of the second and third meetings of creditors which had been held, says: "The meetings in this case having been called by order of the court, it must be presumed that good cause was shown for the action of the court in the premises." And I further certify that from my knowledge of this case, and from what has transpired before me, I do not understand that it is the purpose of the assignee or his counsel, that a further dividend should be declared at the meeting asked for. But if the contrary be shown, or if reasonable grounds of any character whatsoever for calling such meeting be made to appear, I shall most cheerfully grant the order asked for. All of which is respectfully submitted.

BLATCHFORD, District Judge. I think the register had the authority to make the order of November sixth, eighteen hundred and seventy-one, and I concur in his views in regard to the calling of a third general meeting of creditors in this case.

Case No. 2,808.

In re CLARK et al.

[6 N. B. R. 202.][1]

District Court, S. D. New York. Nov. 23, 1871.

BANKRUPTCY — OBJECTIONS TO PROOF OF DEBT—CERTIFICATION.

When written objections to a proof of debt are filed with the register and testimony is taken thereon, it is his duty, if requested by either party, to certify the same to the district judge for decision, even though no proof whatever be offered tending to invalidate the debt so proved.

[On certificate of I. T. Williams, Register:]

I, the undersigned register in charge of the above entitled matter, do hereby certify that on the second of August, eighteen hundred and seventy, Thomas D. James made proof before me of his claim against the said estate in due form of law. That on the third day of April, eighteen hundred and seventy-one, the assignee, by C. W. Bangs, his attorney, objected in writing to said claim, and filed said objection with me. That on the second day of November inst. the said Thomas D. James voluntarily appeared before me in person, and the said assignee, by Mr. F. N. Bangs, his counsel, also voluntarily appeared and stated that they desired to take proof of said claim, whereupon the said James was by me duly sworn and proceeded to give testimony. That at the close of said testimony, the said Bangs stated that he desired to state a question and have it certified to the court. He then wrote and signed a paper and handed it to the said James, who

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thereupon, at the request of Mr. Bangs, signed the same. And I further certify that in my judgment no "point or matter" is raised upon the said papers within the meaning of the sixth section of the act. The words "point or matter arising" in said section must be construed so as to harmonize with the other provisions of the act. It cannot be that everything that a register is required to do can, at the request of a party, be carried before the judge. The order of reference in this case directs the register "to take such proceedings therein as are required by the said act." The act requires the register, in addition to divers specified things, "to sit in chambers and dispatch there such part of the administrative business of the court and such uncontested matters as should be defined in general rules and orders, or as the district judge shall in any particular matter direct."

Now if, upon the papers herewith presented, any point or matter is raised which is not equally raised by every other act a register may do, such point or matter is not perceived by me. The proof of debt, filed the second day of August, eighteen hundred and seventy, established prima facie the right of Mr. James to be placed on the list of unsecured creditors for the sum of one thousand one hundred and twenty-nine dollars and sixty-three cents, principal and interest. The objection to this claim made it proper, and gave both him and the assignee an opportunity to submit such evidence as each might see fit to offer. They have had this opportunity; Mr. James has but repeated the testimony which he gave in his deposition of August second, eighteen hundred and seventy. The assignee offers nothing, but asks that the "point or matter raised" be certified to the judge. How, then, does the case differ from what it would have been had the assignee or any creditor asked to have the point or matter raised on the deposition of August second, certified to the court? Except, perhaps, that there is less reason for such a certifying up, as the deposition of November second gives the proof more circumstantially and more fully than the law seems to require in the deposition of August second. It is perfectly plain that if this may be required to be certified, the register may be compelled to certify every deposition of a creditor proving his debt, when asked to do so by an assignee or a creditor. Such a practice, it is certain, would not be tolerated by the court. It is my custom, and I believe the custom of most of the registers throughout the country, under the decision of this court in Re Orne [Case No. 10,582] to examine upon my own motion, into claims upon which suspicion is thrown either by the assignee or by a creditor, giving to either party if not satisfied with the conclusion to which I have come, an opportunity to have it certified to the judge for decision. I therefore submit that this matter should be remitted to the register to proceed thereon according to law. Respectfully submitted.

BLATCHFORD, District Judge. I am of opinion that the facts set forth in the certificate of the register show a case within the provision of the fourth section of the act, that in all matters where an issue of fact or of law is raised and contested by any party to the proceedings before a register, it shall be his duty to cause the question or issue to be stated by the opposing parties in writing, and he shall adjourn the same into court for decision by the judge. In the present case the opposing parties have stated in writing the question or issue. I think on the evidence that all of the claim of Mr. James is allowable, except the item of ten dollars and fifty-six cents.

Case No. 2,809.

In re CLARK et al.

[6 N. B. R. 204.][1]

District Court, S. D. New York. Nov. 23, 1871.

ORDER BY REGISTER IN BANKRUPTCY OF PAYMENT OF ACCOUNTS.

When the register gave notice at the second meeting of creditors called only under the twenty-seventh section of the act [14 Stat. 530], that the accounts of the assignee filed at such meeting would not be audited or passed at such meeting, as no notice of such auditing or passing had been given to creditors, and as the amounts had not been on file ten days, as required by the twenty-eighth section of the act, *Held*, on an application by the assignee to the district judge to compel the register to order the payment of such accounts, that the register was right in refusing to make such order.

[On certificate of I. T. Williams, Register:]

I, the undersigned register in charge of this matter, do hereby certify and report, that a petition was filed with me on the twentieth day of November inst., by the assignee in these proceedings, John S. Beecher, Esq., reciting that on the twenty-ninth day of March, eighteen hundred and seventy-one, a second general meeting of the creditors of the said bankrupts was held before me, at which time the said assignee filed a report and an account; that at said meeting no objection was made to the said accounts or any item therein, and that at the said meeting a dividend of six per cent. was declared and ordered to be paid; that no order has been made auditing or passing said accounts, or determining or adjusting the balance of money with which the assignee was then chargeable and applying to the register in charge to make an order: "First. That the said credit be allowed and the amount of the balance of money with which the said assignee is chargeable, after allowing him the said credits claimed by him, is fixed, determined and adjusted, at the sum of nineteen thousand three hundred and ninety-nine dollars and sixty-six cents, and the said account is

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audited and passed accordingly. Second. A dividend of six per cent. having been duly ordered to be paid by the creditors present at said meeting, it is further ordered that the same be paid by means of checks, to be countersigned by the said register, pursuant to a dividend list (form thirty-eight,) to be furnished to the assignee by the register." The said petition further prays that if the register refuse to grant said application or decide not to grant the same, that then the petitioner, upon said application and upon said accounts to said petition annexed, raised the point that it is by law the duty of the register to grant said application, and requests the register to certify to the court the point so raised.

I, the said register, having decided not to grant said application, do, pursuant to said request, now certify: That the said second meeting so above referred to, was ordered under the provisions of the twenty-seventh section of the bankrupt act, and not under the twenty-eighth; that the notice of said meeting given to creditors was as follows: "This is to give notice that the second general meeting of the creditors of said bankrupts will be held at 27 Chambers street, in the city of New York, on the twenty-ninth day of March, eighteen hundred and seventy-one, at one o'clock p. m., at the office of and before Isaiah T. Williams, Esq., register in bankruptcy, pursuant to an order made by said register, for the purposes named in the twenty-seventh section of the bankrupt act of March, eighteen hundred and sixty-seven;" that no other or different notice was given to said creditors of said meeting; that at said meeting the said assignee presented his accounts for the first time; that the register took said accounts and stated to the meeting in substance that the said accounts would then be filed and that they could be examined thereafter by any creditors who desired to examine the same, and that they would not be audited or passed until the final meeting of creditors, and thereupon made an entry to that effect, to which ruling no one then and there in anywise objected; that said accounts were not nor were any or either of them examined by the register or by any creditors to his knowledge; that the same were then filed in the office of the register where they have ever since remained, and have since that time been examined by several of the creditors, most of whom, so for as the knowledge of the register extends, have objected to the same; that on the nineteenth day of October, ult., written objections and a protest against said claims were filed with me. And I further certify that it has always been and is now the uniform practice, where it is proposed to ask to have the accounts of the assignee audited and passed, to order the meeting under the twenty-eighth section of the act, and to require the assignee to file his accounts before such meeting is ordered, and then under the order for such meeting to give notice to the creditors ten days before such meeting that such accounts have been filed with the register, and that the assignee will apply at such meeting for a settlement of the same under the twenty-eighth section of the act. And I further certify, that in my opinion, the order asked for in said petition would have the effect to mislead and betray the said creditors touching their rights, and in my judgment would be a violation of the letter and spirit of the provisions of the bankrupt act in such case made. But I forbear to enter further into the discussion of the case, deeming it unnecessary to do so and for the further reason that I am informed that should the court desire to hear an argument upon the questions now raised, Mr. L. R. Marsh, of counsel for the Continental Bank, Mr. E. L. Fancher, of counsel for the Ocean Bank, and divers other creditors by their respective counsel, will submit either oral arguments or written points.

BLATCHFORD, District Judge. In view of the statements made by the register to the second meeting of creditors, I think he is correct in refusing to make the order applied for so far as the first direction therein is concerned. As to the second direction, I understand the certificate as not applying to it.

Case No. 2,810.

In re CLARK.

[9 N. B. R. (1874) 67.][1]

District Court, S. D. New York.

REGISTER IN BANKRUPTCY — COUNTERSIGNING CHECKS—OBJECTION TO ASSIGNEE'S ACCOUNT.

1. The duty of countersigning checks devolved upon the register by the act is a judicial and not a ministerial duty.

2. Creditors are not bound to object to the assignee's account save at a meeting called pursuant to the provisions of the twenty-eighth section of the act [14 Stat. 530].

[Cited in Re Brunquest, Case No. 2,055.]

[On certificate of I. T. Williams, Register in Bankruptcy:]

I, the undersigned register in charge of the above entitled matter, do hereby certify the facts of this case as follows:

That on the 27th day of March, 1871, a meeting of the creditors of the estate of Bininger & Clark, also a meeting of the creditors of the separate estates of said bankrupts was called by an order of the register, under the provisions of the twenty-seventh section of the act, and not pursuant to the provisions of the twenty-eighth section of the act. That at the time said meeting was so called no accounts of any kind whatever had been filed with me by said assignee; that the notice of said meeting sent to creditors contained no notice that the assignee would apply at

[1] [Reprinted by permission.]

said meeting for the settlement of his accounts, or for a discharge of his liabilities as assignee, as is required by the twenty-eighth section of said act; that no accounts were filed until the said meeting was actually being held; that said meeting was then adjourned, nothing whatever being done save the filing of said accounts; that after several adjournments, said meeting came on to be, and was, held on the 9th day of October, 1871, at which meeting there was no attendance of any person save Mr. F. N. Bangs acting for the assignee, and Mr. Addoms, a creditor, or an attorney for one of the creditors; that it appeared from the said account then filed that the sum of thirteen thousand nine hundred and fifteen dollars and eighty-three cents had come to the hands of the assignee from the separate estate of the said Clark; that the assignee had paid therefrom to Messrs. Bangs, Sedgwick & North, the sum of two thousand five hundred and seventy-three dollars and eleven cents for their professional services and disbursements in said separate estate, and to the register in charge thereof the sum of ninety-seven dollars and ninety-five cents, and that claims were prosecuted against said estate as follows:

Messrs. Bangs, Sedgwick & North, for professional services and disbursements	$5,187 09
The applicant as assignee	238 16
The register, for fees	350 00

As a majority in amount of the creditors were not present at said meeting, it devolved upon the assignee to fix the amount of the dividend, and thereupon the said Bangs, for the said assignee, declared a dividend of ten per cent. upon the undisputed claims against said separate estate. For the payment of which said dividend, amounting in all to one thousand and forty-nine dollars and eight cents, checks were duly countersigned by me and delivered to the said Bangs for said creditors; that I did not audit or pass said accounts at said meeting, but, on the contrary, duly ruled and gave notice at said meeting to the effect that I would not audit or pass said accounts until the final meeting of the creditors, at which meeting they would have received the notice required by the twenty-eighth section of the act, and made an entry to that effect, to which no one dissented or in any manner objected; that on the same day Mr. Bangs, for the said assignee, drew divers checks for the payment of said claims, to wit: checks for the payment of the said sum of five thousand one hundred and eighty-seven dollars and nine cents, to the order of the said Bangs, Sedgwick & North, for the payment of their said claims for professional services and disbursements; a check for the said sum of two hundred and thirty-eight dollars and sixteen cents, payable to the order of the said assignee, for the payment of his said claim for his commissions as assignee, and a check for the said sum of three hundred and fifty dollars, to the order of the register, for the payment of his said claim for register's fees in this matter; that I declined to countersign said checks so payable to the order of the said Bangs, Sedgwick & North without some proof that the services charged by them had been rendered, and that they were necessary and proper, and were reasonably worth the sums charged for the same, and thereupon I drafted an affidavit to that effect for the said Bangs, Sedgwick & North to verify the said claim; that the same was presented to said Bangs and he declined to swear to it, whereupon I declined to deliver the said checks; that afterwards, and on the 31st day of October, the said Bangs for said assignee, filed with me written objections to my said claim, and on the 19th day of October, 1871, divers creditors filed with me written objections to the claim of the said Bangs, Sedgwick & North, protesting against the same. And I further certify, that in my opinion, if it be the law that the register is bound to pass all accounts of the assignee, and pay all claims presented by him, at the second meeting of creditors, which are not at such second meeting objected to by creditors, this case, under the circumstances above set forth, should be an exception to such rule. But the order asked for would require me to audit those accounts and pass them, not at such sums and amounts as I might think just, but at such sums and amounts as the assignee has thought fit to set down. This would have the effect to strip the language of the act of all its force, and efficacy. "Audit" means "to hear, examine, adjust, pass upon, and settle the account * * * in its nature it requires the exercise of judgment." Morris v. People, 3 Denio, 391.

I cannot think that the duty of countersigning checks devolved upon me by the act is a mere mechanical duty. The law is settled otherwise. See People v. Wood, 35 Barb. 653, 657. The court say, "It is their duty (officers required to countersign checks, &c.,) to inform themselves in regard to it and countersign or refuse as they may deem proper after such investigation." But were my duties less strictly and clearly defined, there is something in this case that almost suggests the exercise of even doubtful powers. Here is an assignee who has received from the separate estate of one of the bankrupts the sum of thirteen thousand nine hundred and fifteen dollars and eighty-three cents. He shows at the meeting that he has paid therefrom to his counsel, for their services and disbursements in said separate estate, the sum of two thousand five hundred and seventy-three dollars and eleven cents; that they claim for similar services and disbursements the further sum of five thousand one hundred and eighty-seven dollars and nine cents, amounting in all to the sum of seven thousand seven hundred dollars and twenty cents. At the same meeting he declares a

dividend to creditors which amounts in all to one thousand and forty-nine dollars and eight cents, leaving the balance of what remains in his hands for his future action. Add to this the fact that the counsel making this claim was unable or unwilling to swear to the rendition and value of their services as required by me; and I cannot but think that had I yielded to the pressure and countersigned those checks I should neither have been secure upon my official bond nor innocent upon my oath of office.

NOTE [from original report]. The animus in the above opinion is so apparent as to render it utterly valueless as authority, but we print it to point a moral: to call the attention of the law makers to the necessity of a carefully prepared clause to secure the conscientious auditing of assignees' accounts, and to prevent estates in bankruptcy being eaten up by assignees, their counsel, and registers.

Case No. 2,811.

In re CLARK et al.

[17 N. B. R. 554.][1]

District Court, S. D. New York. May 8, 1878.

VACATING PROVISIONAL WARRANT.

A provisional warrant issued in voluntary proceedings upon papers regular on their face, and upon proof by affidavit of facts showing that it was very necessary for the protection of the estate, will not be vacated where such facts are not disproved and it appears that the purpose of the bankrupts in making the motion is to deprive the marshal of his fees, and this whether it was one which the court had power to issue or not.

[In the matter of James A. Clark, a bankrupt.]

Hugh Porter, for motion.
Wm. F. Scott, contra.

CHOATE, District Judge. Motion to vacate a provisional warrant. The bankrupts filed their voluntary petition March 28, 1878. April 4th, and before adjudication, this warrant was issued, on affidavit of a creditor showing that the property of the firm was not safe in the hands of the bankrupts. The affidavit also stated that an adjudication had been made. The bankrupts gave notice of this motion on proof that an adjudication had not been made, and on affidavits tending to disprove in part the facts alleged in the moving papers as to the danger of allowing the bankrupts to retain possession. Before the hearing of the motion, an adjudication was made and an assignee appointed. The averment in the creditor's affidavit, that an adjudication had been made, was made by mistake. It is now insisted that the court had no power, in a voluntary case, to issue a provisional warrant before adjudication. But, without determining this question, the motion must be denied. The only object of vacating the warrant since the appointment of an assignee, is to deprive the marshal of his charges for the custody of the property, as a charge on the estate. This is the avowed purpose of the bankrupts in pressing this motion. The warrant was issued on papers in any view regular on their face, and upon proof by affidavit of facts showing that it was very necessary for the protection of the estate, facts which the affidavits now produced in behalf of this motion do not disprove. Under these circumstances it would be highly unjust to deprive the marshal of his proper charges incurred in good faith, and whether the warrant was one which the court had power to issue or not. I do not feel called upon to vacate it. Motion denied.

[1] [Reprinted by permission.]

Case No. 2,812.

In re CLARK et al.

[36 Leg. Int. 414;[1] 19 N. B. R. 301.]

District Court, D. New Jersey. Sept., 1879.

OPPOSING BANKRUPT'S DISCHARGE.

In order to defeat a discharge on any of the grounds set forth in section 5110, Rev. St. U. S. (Bankrupt Law), the creditors must take the initiative. The court will not become the actor when interested parties are quiet.

[In the matter of James S. and John N. Clark, bankrupts.]

NIXON, District Judge. This is an application for a discharge by two partners, the firm having been adjudicated bankrupt. The register has made a special report in the case. He says that the bankrupts have conformed to all the modal requirements of the law, and that he recommends their discharge, unless the court will take notice of their violation of the fifth clause of section 5110 of the bankrupt act, without any appearance of opposing creditors or specification against their discharge. No creditor has formally resisted their application for a discharge; but an extended examination of the bankrupts before the register, pending the proceedings in bankruptcy, shows quite conclusively that the applicants had given fraudulent preferences, contrary to the provisions of the law, by the payment to a number of their creditors, in full, when they were hopelessly insolvent, and knew that they were so.

It has been held, and I think, properly, that in order to defeat a discharge on any of the grounds set forth in section 5110, the creditors must take the initiative. In re Schuyler [Case No. 12,494]; In re Rosenfeld [Id. 12,057]. If they do not enter an appearance and file specifications they are not regarded as opposing the discharge, but, on the contrary, as assenting to it. The court cannot be expected to become the actor, when interested parties are quiet, except in those cases where there is a question whether the modal requirements of the law have been complied with. The discharge will be granted.

[1] [Reprinted from 36 Leg. Int. 414, by permission.]

CLARK, IN RE. See Cases Nos. 2,842–2,844.
CLARK (ABBE v.). See Case No. 5.

Case No. 2,813.

CLARK v. BAILEY.

[Nowhere reported; opinion not now accessible.]

Case No. 2,814.

CLARK et al. v. BAILEY.

WORK et al. v. BAILEY.

[12 Blatchf. 156;[1] 19 Int. Rev. Rec. 207.]

Circuit Court, S. D. New York. June 16, 1874.[2]

INTERNAL REVENUE—TAX ON BANK CAPITAL—"DEPOSITS OF MONEY SUBJECT TO CHECK OR DRAFT."

1. Whether the mere business of buying, carrying and selling stocks for others, on the deposit of money or property as a "margin" for their security, would come within the definition in the 79th section of the act of June 30, 1864 (13 Stat. 251), as originally enacted, and as amended by the 9th section of the act of July 13, 1866 (14 Stat. 115), describing "bankers," quere.

2. Section 110 of the said act of June 30, 1864 (13 Stat. 277) as amended by the 9th section of the said act of July 13, 1866 (14 Stat. 136), declaring that there shall be levied, collected and paid "a tax of one twenty-fourth of one per centum, each month, * * * upon the capital of any bank, association, company or corporation, and on the capital employed by any person in the business of banking, beyond the average amount invested in United States bonds," does not authorize or justify the levy or collection of a tax of one twenty-fourth of one per centum upon money borrowed, in the ordinary course of business, by a copartnership firm engaged in the business of banking.

3. A tax of one twenty-fourth of one per centum each month, upon the average amount of the deposits of money subject to payment by check or draft, is leviable and collectable, under said section 110, even though interest at an agreed rate is allowed and paid on such deposits.

4. But, securities or money left as a pledge, for indemnity, to save the pledgee from loss on purchasing or selling stocks for his customer, are not "deposits of money subject to payment by check or draft."

[See note at end of case.]

[At law. Separate actions by Luther C. Clark and others, comprising the firm of Clark, Dodge & Co., and by Frank Work and others, against Joshua F. Bailey, collector of internal revenue, to recover back taxes imposed and collected.]

John E. Burrill, for plaintiff.

George Bliss, Dist. Atty., for defendant.

WOODRUFF, Circuit Judge. 1. I am of opinion, that, at the respective times when the taxes were imposed and collected, for recovering back which the plaintiffs in the first above named action bring their suit, they were bankers doing business as such, within the definition given in the acts of congress of June 30, 1864, and July 13, 1866 (13 Stat. 251, § 79; 14 Stat. 115, subd. 1). Besides their business of purchasing stocks, advancing money therefor, and, in the language of those engaged in such business, "carrying them on a margin," they had "a place of business where credits were opened by the deposit of money * * subject to be paid upon draft, check, or order."

Whether the mere business of buying, carrying, and selling stocks for others, on the deposit of money or property as a "margin" for their security, would come within the definition in the statute describing "bankers," and, therefore, whether the plaintiffs in the second above suit are or are not bankers, the conclusion I have formed on the point next to be stated renders it unnecessary to determine. They did no other business.

2. I am of opinion that the terms of section 110 of the act of June 30, 1864, as amended by the 9th section of the act of July 13, 1866 (13 Stat. 277; 14 Stat. 136), declaring that there shall be levied, collected, and paid "a tax of one twenty-fourth of one per centum, each month, * * upon the capital of any bank, association, company, or corporation, and on the capital employed by any person in the business of banking, beyond the average amount invested in United States bonds," do not authorize nor justify the levy or collection of a tax of one twenty-fourth of one per centum upon money borrowed, in the ordinary course of business, by a copartnership firm engaged in the business of banking.

The term "capital," in the statute, has its ordinary signification, as universally used in trade, commerce, manufacturing, and other specific business. It is that stock in trade which, irrespective of particular transactions or dealings, constitutes the basis of credit, or the fund belonging to the person, invested in the business. It is money or property appropriated to the purposes of the business of a person or firm, analogous to the capital in a corporation, derived or derivable from the contribution of stockholders, and denominated "capital stock."

Under the act of June 30, 1864, there was some uncertainty in the application of the terms used, when applied to a mere individual or firm. By the 110th section of that act (13 Stat. 277) the tax was directed to be levied each month "upon the average amount of the capital of any bank, association, company, or corporation, or person, engaged in the business of banking, beyond the amount invested in United States bonds." When a person was found engaged in the business of banking, it was not clear that, as he answered the description in the statute, the tax was not to be levied on all of his capital, however invested or employed. The same individual

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

[2] [Affirmed in Bailey v. Clark, 21 Wall. (88 U. S.) 284.]

or firm might be engaged in the business of banking, and, at the same time, have capital employed in manufacturing or otherwise. In a comprehensive sense, his or their capital would embrace all, and it might, perhaps, not be permitted to hold that the capital to be taxed was, under that statute, only such part of his capital as was employed in banking. The act of 1866 removed this doubt. Where an individual or firm appropriated a portion of his or their capital to manufacturing or other distinct business, and another portion to the business of banking, this statute of 1866 made a discrimination, and confined the tax to the latter. So, it might often be true of an individual, that, in reliance upon his known wealth, he commenced and carried on a large business as a banker, when the largest portion of that wealth was invested in real estate. In popular sense, such a man is called a "capitalist," defined to be "usually a man of large property, which is or may be employed in business." Under the act of 1864, what was the "capital" of such a person? It was not easy to say, unless, by construction, it was held to mean, what the act of 1866 makes it mean, the capital employed in the business of banking, i. e., such portion of his wealth as he might, either at the beginning, or from time to time, withdraw from other investment or other uses, and employ, either in the form of money or securities or property, for the carrying on of his business as a banker.

In the case of a copartnership, the meaning of the term "capital" is very closely analogous to the same term applied to a corporation. It is the capital stock, or stock in trade. It is the basis of the joint adventures —the contribution of the several copartners —a ground upon which, in general, distribution of profits proceeds, in whole or in part.

The plaintiffs in each of these cases are a copartnership firm, having a capital contributed, in money or property, to the uses of the joint business. In a supposable case, such capital may not be limited to the original contribution, nor even to any definite sum named in articles of copartnership, but may include successive further contributions or advances by the partners for the purposes of such business. On that possible case, it is, however, not material to dwell, as nothing in these cases raises such a question. It is suggested in order to avoid a different inference from what it is intended to hold. So, also, in a supposable case, the capital of a firm may consist, in part, or even in whole, of money or property borrowed to be employed as capital, as the basis of the financial reputation and credit of a firm, and, as between the lender and the creditors of the firm, to be at the risk of the business. No doubt, a member of a copartnership often borrows a portion, and sometimes the whole, of his contribution to the capital stock, from personal friends. It may be lent for the very purpose of such contribution, and so become, in every sense, a part of the capital or stock in trade. No doubt, all of the members of a copartnership, and even the firm in its joint capacity, may procure such special advances, to be placed, as between the lenders and the copartnership creditors, at the risk of the business, as the basis of copartnership credit, and to constitute the fund to which creditors may look as their security, before the lender is permitted to withdraw it. This suggestion is also made in order to exclude the contrary inference, and not because any such state of facts exists in these cases.

It is not according to the ordinary use of language, and, as I think, not according to any proper use of language, to say, of a mercantile firm, that every discount which they procure at bank is so much added to their capital; and yet, if they buy goods with the proceeds, they use such proceeds in their business. It would not satisfy the demands of common honesty, if a man, engaged in business of any kind, being asked the amount of capital employed in his business, should include in his reply all the sums which, in the conduct of his business, he had borrowed and had not yet repaid. When the debts of a copartnership are paid, what remains is capital, or capital and profits, as the case may be.

The argument in support of the tax on money borrowed in the ordinary course of the business, assumes that "capital employed by any person in the business" means precisely what "the money or property employed by any person in the business" would mean, and so it includes all money, however derived. This begs the whole question. It deprives the word "capital" of any distinctive meaning. It withdraws it from its intimate association with the other part of the sentence, and the meaning of the same word, "capital" there applied to an association or company. It overlooks the consideration, that no reason exists why a copartnership should pay this tax on borrowed money, when an association or company, (not necessarily incorporated,) in any other form, should not. It would give to the term "capital" a new and unusual meaning. It would make every bank discount an addition to capital. The statute does not so read. It would have been easy, very easy, to say so in terms, if congress had so intended.

It is not an insignificant circumstance, that, by the act of June 6, 1872, 17 Stat. 256, congress expressly enacted, that the words "capital employed," in said 110th section, "shall not include moneys borrowed or received from day to day, in the usual course of business, from any person not a partner of, or interested in, the said bank, association, or firm." It is possible to say that this statute changed the law. But it seems to me that the language is better

adapted to declare the construction and meaning of the law. It would have been easy and appropriate, if that alone was the design, to say that hereafter money so borrowed shall not be liable to the tax. My opinion, that the terms employed did not include money so borrowed, renders it unnecessary to do more than say that this further enactment is not inconsistent with that view, and may well have been passed in order to remove any doubt theretofore entertained on the subject.

I have not overlooked the suggestion in behalf of the defendant, that this construction of the statute enables persons having a very small capital to carry on a very large business of the kind now in question—buying stocks on commission, "carrying" them, by borrowing thereon the amount required to pay for them, and selling them when directed by the customer, and paying the loan without paying the specified tax on the money used for the purpose. This may be so. I do not know how large a capital may be necessary to the establishment of such a financial credit as will secure to a person or a firm a large patronage from stock dealers or speculators. But the answer is, that the statute does not declare money borrowed for the purposes of the ordinary and daily conduct of the business, taxable. Had it been intended to tax such money, it was easy to say so. If the evil urged required remedy, it was easy to correct it, and it was for the legislature to correct, and it is not for the courts to give a forced and unnatural meaning to language, for that purpose.

The result of these considerations is, that the tax levied and collected from these plaintiffs in both cases was illegal, and the necessary preliminary proceedings, protest, appeal, and suit in due season, having, as admitted, been taken by them, they are entitled to recover.

3. As to the firm of Clark, Dodge & Company, the plaintiffs in the first of the above named cases, I am of opinion that they were liable to the tax levied and collected, each month, upon the average amount of the deposits of money subject to payment by check or draft. That they received such deposits in their business is distinctly proved, and the amounts are shown, entirely distinct from moneys borrowed, in the statements put in evidence. The circumstance that they allowed and paid their depositors interest, at some agreed rate, does not affect this question. The same is done in favor of depositors by very many duly incorporated banks in this city and elsewhere. But, securities or money left with either of the above plaintiffs as a pledge for their indemnity, to save them from loss on purchasing or selling stocks for the customer, are not of this character. They are not "moneys subject to payment by check or draft," in any just sense of those terms, as applied to moneys deposited with a bank or banker.

Judgments in these cases must be entered for the plaintiffs, in conformity with this opinion. The amounts are mere matters of computation, from the statements of the taxes paid, admitted and used on the trial. If the parties do not agree on the computation, I will settle the amount on entering the judgment herein.

[NOTE. "The term 'capital' employed by a banker in the business of banking, in the 110th section of the revenue act of July 15, 1866, does not include moneys borrowed by him from time to time temporarily, in the ordinary course of his business. It applies only to the property or moneys of the banker set apart from other uses and permanently invested in the business." Mr. Justice Field, in Bailey v. Clark, 21 Wall. (88 U. S.) 284, on error by the plaintiff to the circuit court.]

CLARK (BEECHER v.). See Case No. 1,223.

Case No. 2,815.

CLARK v. BININGER.

[Cited in Lamson v. Burton, Case No. 12,285. Nowhere reported; opinion not now accessible.]

CLARK (BOWEN v.). See Case No. 1,721.

Case No. 2,816.

CLARK v. BURNHAM.

[2 Story, 1.] [1]

Circuit Court, D. Maine. May Term, 1837.

STATUTE OF FRAUDS — MEMORANDUM — SUBSTITUTION OF PAROL AGREEMENT—RESULTING TRUST.

1. Where an agreement was made for the purchase of lands, and the following paper was given,—"Ellsworth, Dec. 15, 1834. Received of Daniel Burnham and Cyrus S. Clark, one thousand dollars, to be accounted for if they shall furnish me satisfactory security for certain lands on the Naraguagus river, say one hundred and nineteen thousand acres, for one hundred and thirteen thousand dollars, on or before Friday morning next; otherwise to be forfeited. John Black,"—it was *held* to be a sufficient memorandum of the terms of sale, under the statute of frauds.

[Cited in Williams v. Morris, 95 U. S. 456.]

2. By a parol agreement having been subsequently substituted therefor, by which the said land was transferred, by deed, to other persons than those therein mentioned, and a bill being brought by Clark to recover a certain part from the grantees, as a resulting trust to him, it was *held*, that the written memorandum only created a presumption of a resulting trust, which could be rebutted by proof; and proof being given, that Clark did not advance any portion of the purchase money, as stated in the memorandum, it was *held*, that he was not entitled to a resulting trust, and that the contract was within the statute of frauds.

[Cited in Smith v. Burnham, Case No. 13,019.]

Bill in equity. The bill, in substance, states, that about December 15th, 1834, Clark and Burnham entered into an informal con-

[1] [Reported by William W. Story, Esq.]

tract with John Black, agent of the devisees named in William Bingham's will, for the purchase of sundry large tracts of land, in different parts of Maine, (particularly described in the bill) for which there was to be paid $113,000 as nearly as recollected; of which agreement, a memorandum was then made, and signed by said Black, and, by consent of Clark, delivered to Burnham; and which Burnham is called on to produce in court—by which agreement, Black was to give bond to Clark and Burnham, conditioned to give them a deed or deeds of said lands, on payment of the sum above named; that Clark and Burnham then paid Black $1,000, in equal portions, in part of consideration, the same being to be forfeited, if the contract should not be completed; that, afterwards, about the 19th of said December, it was agreed between Clark and Burnham, that David Webster should be interested in the purchase one half, Burnham three eighths, and Clark one eighth, in common; but that it was farther arranged and agreed, that the bond or bonds to be given by Black should be conditioned to convey the lands to Burnham and Webster only; and that they should be the obligees; and that, in this manner, Clark's one eighth should be secured to Burnham in trust for Clark. That bonds or contracts were accordingly so given by Black to Burnham and Webster, for conveyance of the said lands, on payment, as before mentioned, of the sum of $113,000, by five instalments; the first of which was payable in 60 days from December 15th, 1834; the second on December 15th, 1835; the third on December 15th, 1836; the fourth on December 15th, 1837, and the fifth on December 15th, 1838. That in consequence of the above agreement and arrangement with Clark, and of his giving up all his interest in the contract, except the one eighth, and the sum of $500, advanced to Black, Burnham engaged, on request, to assign and transfer to Clark one eighth part of his interest in the said contract and lands, and return to Clark the balance of the $500, after deducting one eighth of the said $1,000 paid as aforesaid. That on December 22nd, Clark demanded of Burnham such transfer and assignment, it being before any payment became due; but that he fraudulently refused to do it. That Clark was ready to pay his proportion of the said instalment on receiving such assignment, and of the other instalments, as they should become due.

The answer was, in substance, as follows: The defendant first denies, that there was ever any contract in writing between the parties, in relation to the subject-matter of the bill, and pleads the statute of frauds in bar. And in support of his said plea, he answers, that some time in the first part of December, 1834, he had some conversation in Portland with one David Webster, touching the purchase of certain lands, which had been previously advertised by Black, and he then and there agreed with Webster to purchase the same in company with him; and then and there farther agreed to go immediately to Ellsworth, and secure the said purchase for himself and Webster, he, (Webster), being obliged to make a previous journey to the forks of the Kennebec, and agreeing to meet the defendant on Thursday, December 18th, and then proceed to Ellsworth, and close the purchase, if the defendant should succeed in securing the same. That the defendant, accordingly, left Portland on December 12th, and arrived in Bangor on the next day, where he found Clark, with whom he had no previous acquaintance, but whom he knew, by reputation, as a merchant, who had failed in Portland. That he had a conversation with Clark about the purchase of a tract of land, situated on Hog bay, in Hancock county, which the defendant thought could be purchased for three thousand dollars. That Clark proposed to become interested in the said purchase, and that they agreed to examine the said tract, and if it looked well, to purchase together. But that the defendant did not then inform Clark of his previous agreement with Webster, not deeming it prudent to inform any one of it, until the purchase should be secured, and intending to avail himself of the Hog bay purchase afterwards. That Clark and the defendant then went to Ellsworth in company, and on his arrival, this defendant called on Black, and told him of his and Webster's desire to purchase. It being Sunday, little was said, and the defendant agreed to call on the next day; and, on his return to the public house, informed Clark of the same; considering himself now safe, by having so notified Black. That some conversation then took place between Clark and the defendant about the quality of the lands, and of the defendant's and Webster's chance in making the said purchase; but nothing was then said about Clark's becoming interested; neither did this defendant then think of it, as he had never had it in contemplation to be interested with any one except Webster, and he also knew Clark's inability to engage in so large a speculation. That on the next day, the defendant called again on Black, and Clark went with him by invitation. That the defendant then stated to Black his agreement with Webster, and requested the refusal of the lands until Webster's arrival. Black, at first, peremptorily refused; stating, that Webster well knew that such was not his mode of doing business; that he did not know Burnham; and that, although he knew and had confidence in Webster, yet if he wished to make the purchase, he should have come in person, and closed the bargain at once. That the defendant and Black then had much conversation in Clark's presence; that the defendant urged Black to give the refusal, and stated the reason why Webster was not present; and that he did not wish the refusal for the purpose of speculating

upon it, but for the purpose of purchase; and that he offered to deposit with Black one or two thousand dollars, to be forfeited if the lands were not taken by the time specified. That while this was going on, Clark occasionally made remarks, and put questions about the lands, and also made remarks going to induce Black to give the refusal; his object being, as this defendant supposed, to aid the defendant in obtaining the refusal. That Black finally consented to take one thousand dollars, as proposed, and to give the defendant the refusal, until the morning of the next Friday; that the defendant then paid to Black one thousand dollars of his own money, and that Black then gave him a written paper, of which the following is a copy, as near as the defendant can recollect: "Ellsworth, Dec. 15, 1834. Received of Daniel Burnham and Cyrus S. Clark, one thousand dollars, to be accounted for, if they shall furnish me satisfactory security for certain lands on the Naraguagus river, say one hundred and nineteen thousand acres for one hundred and thirteen thousand dollars, on or before Friday morning next; otherwise to be forfeited. John Black." That, on taking this paper, the defendant noticed the insertion of Clark's name, but did not think it worth his while to object to it, as the money was paid by the defendant, and the paper was in his own possession; and as he was accordingly anxious to secure the refusal, and did not consider the shape or form of the writing to be material. That after receiving the said writing, the defendant inquired of Black, if he would take some other responsible man in the place of Webster, in case he did not arrive by the time appointed; that the defendant made such inquiry, in order that he might be prepared, in case of any unforeseen occurrence, which might prevent the said arrival; that the defendant named R. M. N. Smyth, of Bangor, and that Black expressed his willingness to take him, and also some others named by defendant. That, after some other conversation, Clark and the defendant returned to their lodgings; that Clark then inquired whether he could not be interested in the purchase, and said he thought he could procure some responsible individuals to become interested with him, whose security would be satisfactory to Black; that the defendant expressed his willingness to let Clark take an interest, if Webster did not arrive; but if he did, no third partner could be admitted; but that the defendant should be glad to admit him if Webster did not arrive; and he, Clark, could procure such security, as would be satisfactory to Black; as the defendant had no idea of forfeiting his thousand dollars. That Clark then proposed to pay the defendant five hundred dollars, and to be considered interested in one half if Webster did not arrive; that the defendant at first refused, as he doubted Clark's ability, and had no doubt that Webster would arrive. But that Clark became urgent, in order that he might be considered as having the first claim in case of Webster's non-arrival, and that the defendant finally consented to take it, on this express condition, that if Webster did arrive, the money was to be returned, and Clark to be considered as no farther interested; and that Clark accordingly paid the defendant two hundred dollars, and gave him his note on demand for three hundred dollars more, which Clark agreed to pay, as soon as they should arrive in Bangor. In consequence of all which, and of the necessity of immediate action, the Hog bay speculation was deferred. That Clark and the defendant then returned to Bangor; and that Clark, then and there, as he informed defendant, tried to find some responsible individual to become interested, and make the cash payment, in case Webster did not arrive; and that Clark, also, as he told the defendant, tried to procure three hundred dollars, to pay his aforesaid note; but, as he informed defendant, he entirely failed in both attempts, and did not pay, or offer to pay the note. That the defendant also tried to find some responsible individual to take Webster's place, in case of his failure to arrive; but that the defendant was also unsuccessful; the magnitude of the undertaking, and its uncertainty, deterring all to whom defendant applied. That on Thursday, Webster did arrive, and expressed his readiness to complete the purchase; and that Clark then expressed his desire to be interested in some way, and said, that he was unable to purchase any part himself, or to procure any one to do so for him; but that he desired to have the right of pre-emption in one eighth, and wished the defendant to use his influence with Webster to procure it for him; that the defendant declined making any agreement with Clark about it, and told him that as Webster had arrived, he, Clark, had no claim on the purchase; and then offered to repay Clark his money and note, which Clark then declined receiving, stating, that he hoped to make some arrangement by which to become interested; that he admitted, that he had no claim to any part; and that the defendant then distinctly told Clark, that he had no wish to have any third person interested with them, and did not think, that Webster had; but that he finally agreed to sound Webster on the subject. That the defendant and Webster then went to Ellsworth, and on the way, the defendant hinted to Webster that there were others desirous of becoming interested with them, (one R. M. N. Smyth having also, after the arrival of Webster, expressed his desire to take a share,) but that Webster expressed himself so much averse to it, that the defendant dropped the subject, and did not, previous to the completion of the said purchase, mention Clark's name as in any way connected with it. That on arriving at Ellsworth on Fri-

day, the defendant and Webster notified Black, and received a conveyance of the lands, and some others, for which they gave their joint and several notes for one hundred and thirteen thousand dollars, divided into five equal payments; that the said notes were dated December 15, 1834, the first being payable in sixty days, and the residue in one, two, three and four years from date; that the one thousand dollars advanced by the defendant was indorsed on one of the notes, and that the defendant gave up the receipt aforesaid to Black, retaining no copy. That after completing the said purchase, the defendant and Webster returned to Bangor, where the defendant again saw Clark, who then, to this defendant's astonishment, claimed to be interested in said purchase, by virtue of the insertion of his name in the paper afore described, and of having paid two hundred dollars and given his note for three hundred dollars. But that Clark did not then, or any other time, offer to pay or secure any part of the purchase-money of the said lands, or pretend, that he could or would furnish the said security; that the defendant then told Clark, that neither he nor Webster was willing to admit any other partner, especially one whose notes would not be acceptable to Black, or of any value in the market; neither could they give a bond of the lands, as they had given their own notes to a large amount, one fifth part of which must be paid in sixty days, and they relied on making a sale in order to meet said payment; that the defendant then recapitulated to said Clark all the circumstances of his connection with the transaction, declined admitting him to a share in the purchase, and offered him his note and money, which the said Clark then and there received, and this defendant then supposed the whole matter ended, so far as Clark was concerned. That shortly afterwards, and before the defendant left Bangor, Clark sued this defendant, and claimed to recover five hundred dollars for so much money had and received; that the defendant employed counsel to defend, but that the said suit was never entered; and why the said suit was commenced, the defendant could not conceive, except it might be for the purposes of intimidation. That the defendant and Webster left Bangor on Tuesday, December 23rd, and in the course of the same winter, before the expiration of the sixty days, contracted to sell all their interest in eleven sixteenths of the said purchase; that before the said sale was completed, the said first payment became due, and was made accordingly, deducting the aforesaid one thousand dollars advanced by the defendant to Black. That the defendant and Webster were enabled to make the said first payment, by reason of the said contract to sell eleven sixteenths; that accordingly, on the 19th of February, they completed the said sale; but that before it was completed, on the same day, the defendant was served with a subpoena to appear before Judge Ware, to answer to the said Clark, in a bill in equity, on Thursday, March 5th, 1835, at which time he appeared, and not being prepared with any evidence, an injunction was granted, restraining the defendant and Webster from selling the remaining five sixteenths. That this defendant has since understood, and believes, that the said Clark's object, in filing the said bill, was to embarrass the said sale, and force the defendant to a compromise of his inequitable claim, knowing the necessity, under which the defendant and Webster were, of making a sale, in order to make the first payment; that the defendant has understood and believes, that Clark has repeatedly so declared, —and that the said Clark has, in fact, much vexed and harassed the said Webster and the defendant, and prevented their making a sale up to the present time. That the defendant denies that any agreement, of the purport set forth in the bill, was ever made between the said Clark and the defendant, that Webster should become owner of one half, and the defendant of three eighths, and Clark of one eighth; or that the contract should be in the names of Webster and the defendant alone, and thus one eighth should be secured to the defendant, in trust for Clark; or that it was ever agreed by the defendant, on any consideration, to hold one eighth in trust for Clark; or, at his request, to assign one eighth to him; or that any part of the said five hundred dollars should be deducted, as part pay for the said one eighth; or that there was ever any understanding, express or implied, as to the points above specified between the said Burnham and Clark. The defendant further denies, that the said Clark ever demanded any transfer or assignment of the said eighth; or expressed his readiness to make his proportion of any payments, other than is hereinbefore stated; neither does the defendant believe, that the said Clark has ever, at any time, been ready or able to make said payments, or to give security therefor.

P. Mellen, for plaintiff.

W. P. Fessenden and Fessenden, for defendant.

STORY, Circuit Justice, delivered the opinion of the court, in substance, as follows: The present bill is not founded upon the original paper or receipt of John Black, given to the plaintiff and the defendant, dated on the 18th of December, 1834, and referred to in the bill and answer. Under that contract, if Clark (the plaintiff) is entitled to any part of the purchase from Black, he is entitled to a moiety, his name being used in that contract as one of the purchasers, and there being no other evidence to explain the interest of the purchaser. It has been said, that the receipt so signed by Black, is nothing but a naked

receipt, and not a memorandum of any contract for the purchase of the lands. I think otherwise; and that however imperfect in its expressions, it purports to contain a memorandum of the terms of the purchase by Burnham and Clark, viz. the purchase of the lands (119,000 acres) on the Naraguagus river, for the sum of $113,000, to be received on or before the next Friday. The terms of the instrument are as follows: "Ellsworth, Dec. 15, 1834. Received of Daniel Burnham and Cyrus S. Clark one thousand dollars, to be accounted for, if they shall furnish me satisfactory security for certain lands on the Naraguagus river, say one hundred and nineteen thousand acres for one hundred and thirteen thousand dollars, on or before Friday morning next; otherwise to be forfeited. John Black." The money, according to the terms of the memorandum, was plainly to be paid and secured by Burnham and Clark, and the lands were to be conveyed or secured jointly to them upon their complying with the conditions of the contract. But there is the less need to dwell on this point, because it does not constitute the groundwork of the present bill.

The case made by the bill, and for which the plaintiff now seeks relief, is founded upon a subsequent substituted contract, by which the same lands were to be purchased on the joint account of David Webster and Burnham and Clark, in which Webster was to have one moiety, and Burnham three eighth parts, and Clark one eighth part; and that Clark's share was to be conveyed to Burnham in trust for Clark. The bill seeks from Burnham a conveyance of this one eighth part as a trust for Clark, upon the latter's paying and securing his proportion of the purchase-money. The answer denies, that there ever was any such substituted contract as the bill asserts; and insists on the benefit of the statute of frauds. It is clear that the substituted contract was not in writing. It is, therefore, a mere parol contract for the purchase of lands, and open to the objection of being within the statute of frauds, unless it constitutes a case of a resulting trust. But is the substituted contract itself sufficiently proved as an absolute, unconditional parol contract, as asserted in the bill? The answer positively denies it. The proofs are not clear to establish it. The most that can be said, is, that there is proof of some loose talk and indeterminate conversations between Burnham and Clark on the subject. It does not appear to me, that the court can, under such circumstances, say, that the contract itself is sufficiently proved. But if the substituted contract were sufficiently proved, as a parol contract, it would be within the statute of frauds, unless, at the time when it was entered into, Clark was entitled to a resulting trust in the lands, in virtue of the original contract of Burnham and himself with Black. Now, that depends upon this,—whether any part of the purchase-money of $1,000, paid to Black, belonged to Clark. If it did, then the argument is, that a resulting trust arises, by operation of law, in favor of Clark to the extent of the share of the purchase-money paid by him. The argument in its general bearing in cases of joint purchases, is sound; for where lands are purchased with the several funds of two persons, there arises a resulting trust in the land to each, according to his share of the purchase-money, in whosesoever name the conveyance may have been taken. See 2 Story, Eq. Jur. § 1206, and the cases there cited.

The defendant insists, that he paid one half of the sum of $1,000, which was delivered to Black for the purpose of securing the bargain. Now, the answer denies that any part of the money paid to Black was Clark's, or paid on Clark's account. It admits, however, a conditional agreement afterwards, to let Clark into an interest in the purchase, if Webster would consent; and that upon this agreement, $200 was paid in money to Burnham, by Clark, and a note given by him for the remaining $300. Afterwards the purchase was made exclusively by Burnham and Webster with Black, and they, and they alone, gave their notes and security for the whole purchase-money, in which Clark did not join; nor had any part in the final negotiation. The $200 were afterwards repaid by Burnham to Clark, and the note of $300 was also given up to him. Now, there is no sufficient proof, that the $500 was, at the time, paid by, or on account of, Clark: and, taking the whole evidence, it seems to me, that the final bargain for an interest in the land, by Clark, with Burnham, was a subsequent transaction; and no fixed agreement existed between them at the time, when the money was paid to Black, and the money then paid, was not in any part the money of Clark, but wholly of Burnham. It is true, that the memorandum purports, that the money was paid jointly by Burnham and Clark; and without that, the plaintiff would scarcely have any ground to stand upon. But this receipt creates only a presumption of a resulting trust for Clark; and a resulting trust may always be rebutted by counter parol evidence. Now, in the present case, the answer, which is responsive to the bill, expressly denies, that the money was paid to Black by, or on account of, Clark; and asserts, that it was all Burnham's own money, and paid upon his own sole account. At all events, the transaction is so obscure and doubtful in its circumstances, that a court of equity would not be warranted in pronouncing upon such imperfect materials, that there was a clear resulting trust for Clark. If there was any such trust, it would be in a moiety of the whole purchase then contemplated. Besides; there is another most important consideration in the case,

and that is, that the money was not paid as a part of a present fixed bargain between the parties for the land. It was a mere deposit, to be forfeited if the purchase was not finally made, and satisfactory security given for the whole purchase-money ($113,000,) on or before the ensuing Friday morning. Now it is manifest that Clark never did give any such security; nor did he ever complete, or offer to complete, the bargain with Black; but it was completed exclusively by and in the names of Burnham and Webster, who gave their own satisfactory security therefor. Indeed, the whole evidence shows, that at this time Clark was utterly insolvent and had failed; and it is certainly extremely improbable, that Burnham would, under such circumstances, become liable in effect as surety for Clark for half the purchase-money; or that Clark would, as an insolvent debtor, attempt to purchase half the land. And yet this is his statement as to the original contract between Burnham and himself. The other fact is not less significant. Clark actually received back his $200, and his note for $300. Why was this done, if he was then understood to be an absolute co-purchaser of any part, much more of a moiety of the land, the purchase being admitted to have been an advantageous bargain? The receipt of the money and the note by Clark certainly furnish strong evidence, under the circumstances, that he either considered the bargain as to himself a conditional one with Burnham, or that he voluntarily waived it upon the ground of his utter inability to furnish satisfactory security for his own part of the purchase-money, or of his consciousness, that he had no claim upon the land, unless Webster would consent to let him in to a participation in the purchase, which Webster refused. The taking back, then, of his money and note by Clark has, or at least may justly have, a twofold operation. 1. As evidence pro tanto in support of the allegations in the answer. 2. As evidence of a deliberate waiver of any claim to the enforcement of any right or trust in the land. The bill does not allege any fraud, or mistake, or surprise, in thus taking back the money and note. If the plaintiff meant to rely upon such a ground, it was indispensable, that he should have stated it in his bill. So far from doing so, he silently passes over the whole transaction, as if it never had existed. Now, it seems difficult to suppose a case, where a court of equity would interfere to help a party who had deliberately waived his right under a contract voluntarily, and without any fraud, or mistake, or surprise. A waiver with full knowledge of all the facts, is, we all know, in many cases a complete defence at law, or a good bar to a defence at law, according to circumstances, where it is voluntarily made. Nay, the doctrine has gone farther, and it has been held, that, if made under a mistake of law with full knowledge of the facts, it binds the party. And equity in this respect generally follows the law. And here, again, I may repeat, that in such a transaction, so obscure and imperfect in its character and proof, a court of equity ought not to act, for the very reason, that the onus probandi is on the plaintiff, and the answer of the defendant admits no part of the case. But in reality, the bill proceeds, not upon the original agreement with Black, (for he is no party to the bill, nor is any relief asked or even pretended to exist with him); but upon an original parol agreement between Burnham and Clark, which was displaced by another substituted parol agreement between them, in which Clark's interest is reduced from a moiety to an eighth in the land. Now, it seems to me clear, that such an agreement, being for an interest in lands, is within the statute of frauds, and should be in writing; for the statute applies not only to legal interests, but to equitable interests and trusts in lands, except resulting trusts. That the present is not a resulting trust has been already stated.

Upon the whole, my judgment is, and the district judge concurs in it, that the bill must be dismissed with costs.

Case No. 2,817.

CLARK v. CHICAGO.

[4 Biss. 486.] [1]

Circuit Court, N. D. Illinois. March, 1868.

MUNICIPAL CORPORATION—NEGLIGENCE—STEPS IN SIDEWALKS—DUTY OF CITY—ICE UPON THE SIDEWALKS.

1. The mere existence of a descent or step in the sidewalks of a city is not such a defect as to render the city liable for accidents to passengers in stepping from one elevation to another; the question is, whether the sidewalk or descent was properly constructed, in reference to the character of the city and condition of the streets.

2. The city is not bound, under all circumstances, to keep the sidewalks free from ice; it is only required to exercise reasonable diligence under the circumstances of the case.

[At law. Action by Charles Clark against the city of Chicago to recover damages for negligence.]

DRUMMOND, District Judge, charged the jury as follows:

The plaintiff on the morning of the 6th of February, 1866, was walking along the street at the corner of Randolph and Wells streets. Stepping upon what is called an apron, which, it is alleged, had some ice upon it, he slipped, fell and broke his leg. Doctor Pope was called in to set his leg. The healing process did not go on satisfactorily, and the surgeon came to the conclusion that it was necessary to amputate the leg, and called in

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

Dr. Burgess, and at the end of a few days it was amputated, when hemorrhage set in, and other unfavorable symptoms. It was amputated again, and finally the patient's life was saved. For the injury resulting from this fall, and in consequence of alleged negligence on the part of the city, this action is brought.

The first question to be determined is, whether it can be maintained under the circumstances of the case. That depends upon two questions. First, was the city guilty of negligence as to the manner in which the apron was constructed, or as to the manner in which it was occupied and maintained at the time? Secondly, was the plaintiff guilty of any negligence which contributed in any considerable degree to the result?—because, even admitting that there was negligence on the part of the city, if the plaintiff was guilty of any negligence which contributed to the result, he cannot maintain this action against the city.

The first question is one of law and of fact, and which the jury, under the direction of the court, is to decide. This apron, as it appears, consists of boards or planks, constructed for the purpose of enabling passengers to pass over the space where the water flows down to the sewer and is carried off. This particular apron was not even with the sidewalk in passing across Wells street from the west sidewalk to the roadway of the street, but there was a descent or a step from the sidewalk down to the apron, and in stepping from the sidewalk to the apron the plaintiff slipped and fell.

In determining this question, of course we have to look to the nature and object of the apron, and the mode and manner of its construction. In the first place, was it properly constructed? Was it placed in such a position as to be safe with reference to the grade and structure of the streets and to the object in view? Secondly, was it kept and maintained properly at the time; that is to say, looking at it in its position as it then was, was it unsafe—was it dangerous?

In a city like this it cannot be said that the mere fact that there is a descent or a step from a higher to a lower elevation of the street or sidewalk constitutes a defect of such a character as to render the city liable for any accident which a passenger may meet with in stepping from one level to another. In properly grading the streets, it is impossible that there should be a smooth, level walk in all places. Therefore, it is not, I think, such a fault or defect as to make the city liable simply because there was a step from a higher to a lower level.

Still, it is the duty of the city in constructing these aprons to have reference to the condition of the crossing at the place where they are constructed. What might be suitable in one place might not in another. There should be a fitness in things, looking at the grade and condition of the streets at the time. We have to build the streets gradually. We have to bring them up to grade gradually. We cannot expect the city to make complete streets at once. We must interpret their duty upon a reasonable basis in reference to the actual condition of affairs, and not require impracticable things from the city authorities. Looking at it in this light, was this apron constructed properly under the circumstances of the case? If it was, then, as a matter of course, so far as the structure is concerned, there was no fault on the part of the city. Then, was it maintained properly?—that is to say, in a proper condition.

The ground assumed on the part of the plaintiff is that ice was suffered to accumulate there, in consequence of which the accident happened. We must also, in looking at the question in this light, consider the circumstances of the case, and construe the duties of the city and its officers with reference thereto. The law requires of the city that it should keep its streets and sidewalks and crossings reasonably safe, all things considered. It does not require impossibilities, nor what is impracticable. I could not, then, instruct you that it was the duty of the city, under all circumstances, to remove the ice in mid-winter from the streets and crossings. That might be impossible. You must look at the question, therefore, by the light of the circumstances existing at the time, the state of the temperature and of the weather, taking all these things into consideration. Was it something required of the city and of the officers of the city that the ice at this particular apron should be removed at that time?

It must be admitted that while it was not the duty of the city, under all circumstances, to remove the ice from the streets or crossings, still, if there was anything out of the ordinary course of things which rendered the sidewalk and crossings especially dangerous, and which could have been removed, that it ought to have been done. For example, if there should be on one of the aprons, or at one of the crossings, anything which in its nature was especially dangerous, it would be the duty of the city to cause it to be removed. If there was an accumulation of ice which rendered that crossing especially dangerous, I think it was the duty of the city to remove it, while it might not have been its duty to remove entirely the ice from the apron. We have to apply a reasonable rule to the officers of the city in determining what is their duty in the premises. No absolute, inflexible rule can be laid down. You have to judge of the action of the city under the special circumstances of the case.

I cannot, therefore, instruct you that the mere fact that there was ice upon this apron in the early part of February, 1866, did of itself, irrespective of all other circumstances, constitute negligence on the part of the city. I would not impose so harsh a rule upon the

city authorities as to require them to cause all the ice that should be upon the sidewalks or crossings, at such an inclement season of the year, to be removed.

Verdict for defendant.

CLARK (CORY v.). See Case No. 3,260.

CLARK (CRABTREE v.). See Case No. 3,314.

Case No. 2,817a.

CLARK et al. v. CROPPER.

[Hempst. 213.] [1]

Superior Court, D. Arkansas. July, 1833.

ACTION BY ASSIGNEE OF NOTE—PROOF OF ASSIGNMENT.

1. The assignment of a note must be proved on the trial to entitle the assignee to judgment.

2. The case of Stroud v. Harrington [Case No. 13,546a] cited and approved.

In error to Hempstead circuit court.

[At law. Action by Levi Cropper against John Clark and Allen M. Oakley on a promissory note. There was a judgment for plaintiff, and defendants bring error.]

Before ESKRIDGE and CLAYTON, Judges.

OPINION OF THE COURT. There is an error in the judgment of the circuit court in rendering judgment against the defendant without the production of any evidence to prove the assignment of the note on which the action was brought. The case of Stroud v. Harrington, decided at the January term, 1831 [Case No. 13,546a], is in point, and contains the reasons upon which this opinion is based. The time at which the assignment was filed up at the trial, we do not regard as erroneous. Judgment reversed.

CLARK (DELAWARE & H. CANAL CO. v.). See Case No. 3,764.

Case No. 2,818.

CLARK v. DICK.

[1 Dill. 8; [2] 9 Am. Law Reg. (N. S.) 739.]

Circuit Court, D. Missouri. 1870.

CONSTITUTIONAL LAW—LIMITATION OF ACTIONS—REMOVAL OF CAUSES INTO THE FEDERAL COURTS.

1. Section 4, art. 11, of the constitution of the state of Missouri, which in substance exempts persons from liability for acts done during the recent civil war, by virtue of military authority vested in them by the government of the United States, or in pursuance of an order received from any person vested with such authority, is valid, and protects from prosecution or action all who can show for their acts the authorization of a military officer, acting under the commander-in-chief of the army of the United States.

2. Where in an action of trespass, the defendant pleaded, in substance, that civil war existed; that martial law was in force, and that the alleged trespasses were compulsory assessments, made upon the plaintiff or his property by virtue of an order of the commanding general of the army in that department: *Held*, that the facts pleaded brought the case within the above-mentioned section of the constitution of the state, under which they were a good defence to the action. That provision of the constitution is not void because of its retrospective operation, nor because other provisions of the constitution may prohibit the legislature from passing retroactive statutes. Nor does it conflict with the national constitution limiting the power of the states; nor is it rendered invalid by the fifth amendment to the constitution, as that is a limitation on the powers of the general government, and not on those of the states.

3. The facts above mentioned, pleaded as a defence to the action, bring the case within the two years limitation clause of the act of congress of 1863 (12 Stat. 757), and this limitation is applicable to a case originating in a state court, and by virtue thereof properly removed into the federal court.

4. This statute, providing for the transfer of this class of cases into the federal courts is constitutional (Cooper v. Nashville, 6 Wall. [73 U. S.] 247); and congress has the power to regulate the remedy, and to prescribe the period within which suits must be brought.

5. This statute, by its terms, applies to all cases described therein, and the limitation period extends to and includes cases of the character mentioned in the state courts as well as in the federal courts.

At law. This was an action of trespass originally commenced in one of the state courts of Missouri, and afterwards removed, under the act of congress of 1863 (12 Stat. 757), to the circuit court of the United States, for the district of Missouri. The right of removal was not contested or denied.

The trespasses were alleged to have been committed in the city of St. Louis, in January, 1862. The defendant [Franklin A. Dick] pleaded that at the time the alleged trespasses were committed, a state of civil war existed; that martial law was duly declared, and that the alleged trespasses were compulsory assessments or contributions, made by order of the general of the army of the United States in command of the department of Missouri; and claimed the benefit of section 4, art. 11, of the constitution of the state of Missouri, and of the two years' limitation clause of the above-mentioned act of congress of 1863, both of which are referred to in the opinion of the court. The plaintiff [William G. Clark] demurred to the pleas.

Lackland, Martin, & Lackland, for demurrer.

Sharp & Broadhead, contra.

Before MILLER, Circuit Justice, and TREAT and KREKEL, District Judges.

MILLER, Circuit Justice. The first plea is a very minute and specific statement of facts intended to show that at the time of the supposed trespasses there existed in the state of Missouri, and in the city of St.

[1] [Reported by Samuel H. Hempstead, Esq.]

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

Louis, where the transaction occurred, a state of flagrant war; that in consequence the commanding general had placed the city of St. Louis under martial law, and that by virtue of such military authority he had caused contributions to be levied on certain persons, of whom the plaintiff was one; that a commission had been appointed to assess these contributions, by the commanding general, and afterwards a committee authorized to revise the original assessment; that of this latter committee the defendant was a member and took part in its revision; but that they took no specific action in plaintiff's case; that the defendant had no other or further connection with the alleged trespasses, though other officers seized the goods mentioned under orders of the commanding general, in pursuance of said assessment. The proclamations and orders of the commanding general are set out in full, and the fourth section of article eleven of the constitution of Missouri is pleaded as a defence.

The second plea is, that the said supposed trespasses and wrongs complained of and set forth by the plaintiff in his petition, were done and committed under and by virtue of authority derived from the president of the United States, and more than two years before the commencement of this suit and during the Rebellion. The first plea may be liable to objection on the ground that it is a recital of facts after the manner of an answer in chancery, rather than a statement of the legal proposition which is supposed to be proved by these facts, and it is called by the pleader an answer. But we understand counsel for plaintiff to waive this objection, and the court is requested to pass upon the question, whether the plea discloses a substantial defence to the cause of action set out in the petition.

The validity of the plea is based by counsel on two distinct grounds: 1st. That the facts set out bring the case within the protection of section 4, art. 11, of the constitution of the state of Missouri. 2d. That the same facts show a condition of flagrant war which justified the substitution of martial law for the civil law, so far as to protect persons acting in obedience to military orders.

The provision of the constitution of Missouri relied on in this plea is as follows: "No person shall be prosecuted in any civil action or criminal proceeding, for or on account of any act by him done, performed, or executed, after the first day of January, one thousand eight hundred and sixty-one, by virtue of military authority vested in him by the government of the United States, to do such act, or in pursuance of orders received by him from any person vested with such authority; and if any action or proceeding shall heretofore have been, or shall be hereafter instituted against any person for the doing of any such act, the defendant may plead this section in bar thereof."

There does not seem to be any reason to doubt that the averments of this plea bring defendant's case within the language and intent of this provision. They show very clearly that the defendant acted under the orders of the military officer highest in command in the department of Missouri. That this officer represented the president, who is commander-in-chief of the army, and was vested with all the authority, as such military commander, that belonged to the president, cannot be doubted.

The defendant thus acted in pursuance of orders from one vested with full military authority; and unless we are to go into the question whether such authority can possibly exist in this country, we must concede that the case is one intended to be provided for by this section. If the defendant is required to show that the authority of the military commander was a rightful and legal authority in the particular matter in question, then the provision in the Missouri constitution is useless. For it must be conceded in all courts, that an act justified by lawful and competent authority in the particular case, cannot be the foundation of an action.

The clause we are considering was not intended for such a case. It was not needed. But the framers of that instrument were aware that many acts of violence had been done by the military, and by those subject to military orders, for which it might be difficult to find legal and technical justification, but which were thought to be necessary and proper to maintain the national supremacy. They therefore intended to provide for those cases. And while they did not pretend to give protection to lawless violence, committed by persons without orders from any competent authority or any recognized military officer, they did intend to shield from prosecution all who could show for their acts the authorization of a military officer, acting under the commander-in-chief of the army of the United States. The wisdom of this ordinance has lost none of its force by the lapse of time. As a provision for the repose and quiet of the community, it could nowhere be more useful than in Missouri. This section of the constitution was not in force when the acts complained of occurred. It has become a part of the constitution since, but, as its language clearly shows, was intended to have effect on such past transactions. It is said that for this reason it is void.

It has been repeatedly decided that retrospective laws are not void, for that reason, unless they are made so by express constitutional provision. There may be such a provision in the Missouri constitution as to retrospective statutes. But it is not a statute whose validity we are considering. It is one of the articles of the constitution itself, a part of the very fundamental law whose authority is invoked. Of course this must stand as well as any other part of the con-

stitution, and cannot be nullified by the more general provisions of the same instrument concerning the powers of the legislature. There does not seem to us to be anything in the nature of this law itself, or in its relation to the power of the people when in convention assembled to enact organic laws, which forbids them to pass this ordinance.

It is to be observed that plaintiff's right to recover by action in the courts for such trespasses as he describes, rests on the common law as adopted by the state of Missouri, that is, on the law of the state, and not on any law of the federal government. There is no common law of the federal government. The right to bring this suit is founded on the law of the state, however that right, once existing, may be restricted by the federal constitution, of which we shall inquire presently. We repeat, then, that we know of no limitation, except it can be found in the constitution of the United States, of the right of the state of Missouri, when represented in her sovereignty in convention, to take away the right of action which it had previously given, if the best interests of the body politic so convened require it.

This very proposition came before the supreme court of Missouri, in the case of Drehman v. Stifle, 41 Mo. 184, and the validity of this section, as applicable to suits for damages for trespass, was affirmed on grounds similar to those stated above. That case, however, was contested on the further ground, that this section of the Missouri constitution was in violation of the federal constitution, and therefore void. It was accordingly taken by a writ of error to the supreme court of the United States, and in that court it was urged that it was forbidden by several provisions of the federal constitution, limiting the power of the state legislatures. But that court held that it was not a bill of attainder, nor an ex post facto law, nor a law impairing the obligation of contracts,—in fact, that so far as the federal power in the matter was concerned, the courts saw nothing to render the section invalid. Drehman v. Stifle, 8 Wall. [75 U. S.] 595.

It is strenuously urged here, however, that plaintiff's right of action in this case was property, and that the Missouri constitution deprives him of that property without due process of law, within the meaning of the fifth amendment to the federal constitution. If we could see our way clear to hold that a right to sue for a personal trespass was property within the meaning of that amendment, the argument is in no way advanced. For it has been often held by the supreme court of the United States that the fifth and sixth amendments to the federal constitution are limitations upon the powers of the federal government, and not upon those of the states. In Twitchell v. Com., 7 Wall. [74 U. S.] 321, this is said to be no longer an open question. This amendment to the federal constitution cannot therefore render invalid the provision of the constitution of Missouri.

We are of opinion, for these reasons, that under the facts set out in the first plea this provision is a valid defense to the action. This renders unnecessary any further examination of the reasons urged in support of that plea.

The limitation clause of the act of congress of 1803 (12 Stat. 757) also covers this case, both in its language and spirit. The only objections made to this plea are that it is inapplicable to a case originating in a state court, and if so construed it is void because beyond the power of congress.

That congress has a right to provide for the trial of this class of cases in the federal courts is established by the case of Cooper v. Mayor of Nashville, 6 Wall. [73 U. S.] 247, in which that part of the statute is considered fully, and its constitutionality affirmed. The right of removal does not seem to have been contested or denied in the present case. The right of removal under this statute does not depend on the citizenship of the parties, but on the nature of the controversy. The defence set up is one which rests upon the exercise of certain powers in the name of the federal government, and the federal judiciary is the proper one to try such questions, because the constitution of the United States declares that the judicial power of the United States extends to all such questions.

If congress has the right to determine in what court such questions must be tried, it must necessarily have the power to regulate the remedy, including the right to prescribe the time within which the suit may be brought. That congress has the right to protect the officers upon whom it imposes delicate and important duties, from vexatious suits, arising out of transactions in which their official duties may involve them, by prescribing a reasonable time within which such suits may be brought, seems to be properly incidental to the right to command such services.

Nor is the objection sound, that in such cases the action if tried in the state court would be subject to the law of limitations prescribed by the state, while in the federal court a different rule would prevail. For the act of congress, by its terms applies to all cases of the character described in the statute, and we see no reason to limit its application to the federal courts. If congress has a right to legislate on this subject, it has a right to make that legislation the law of all courts into which such a case may come, and we think they have done this in the statute under consideration.

It will thus be seen that all the questions involved in these demurrers have been settled by the supreme court, and the demurrer is overruled. Judgment accordingly.

CLARK (DOYLE v.). See Case No. 4,053.

Case No. 2,819.

CLARK v. The ELLEN.

[32 Hunt, Mer. Mag. 716.]

District Court, N. D. New York. 1855.

COLLISION BETWEEN STEAM VESSELS — CROSSING COURSE—ERRONEOUS MANEUVER.

[A towboat left a landing just above a ferry slip in the East river, started down, and across the course of an incoming ferry boat. On discovering the latter, she stopped and backed, when, had she kept on, the collision complained of would not have ensued. *Held*, that the towboat was in fault in not making at once for the center of the stream as required by local laws, and in starting ahead at such time, and that the ferry boat had a right to presume that the towboat would not be suddenly put in motion or as suddenly stopped, and was, therefore, not in fault.]

[In admiralty. Libel by Oliver N. Clark, owner of the towboat King Philip, against the ferry boat Ellen, to recover damages sustained by collision.]

HALL, District Judge. This libel is filed by the owner of the steamboat King Philip, to recover the damages occasioned by a collision between the two steamboats, which happened September 14, 1853, in the East river, near the slip on the Brooklyn side of the Catherine ferry. The Ellen was one of the regular ferry boats at that ferry, and was crossing from New York. The King Philip was a towboat about the harbor, and was bound from Grand street to Staten Island. She had stopped just above the ferry to take a schooner in tow, but not succeeding in obtaining the job, she started ahead, straight down the river. The Ellen was in sight, heading for her slip before the King Philip started. The King Philip went on until about abreast of the upper slip of the ferry, when the Ellen was discovered, and the engine was stopped and backed, but the Ellen came into her, striking her nearly at right angles. The engine of the Ellen was stopped, and backed, but at the last moment. The collision occurred about three or four o'clock in the afternoon, and the tide was flood.

Held, by the court, that upon the proofs there was no proper lookout on board the King Philip. That it was the duty of the King Philip, when she started ahead, in accordance with the state law of April, 1848, to take such measures as would bring her to the center of the river, by the most direct and shortest route which was practicable under the circumstances, and to do so she would necessarily also follow the general rule of navigation by porting her helm as she approached the Ellen. That on the evidence she was so far above the Ellen, that, if she had so done, she would have passed under the Ellen's stern. But if she was not distant enough to have done so, as was claimed by the libelant, a difficult duty was imposed upon her. She was at rest, and could choose her own time for changing her position. The Ellen was in full view, and her purpose, and destination, and speed were sufficiently known; and those in charge of the King Philip knew, or were bound to know, the capabilities of their own vessel. They were also bound to know whether or not she could get under way and pass under the bows of the Ellen with safety, and, if she could not, she should have remained at rest until the Ellen had so far passed that the King Philip could pass in safety under her stern. The Jamaica [Case No. 7,173]. That the King Philip, therefore, was in fault, whatever her position was. That it is probable also that, if her engines had not been stopped, she would have passed the slip before the Ellen reached it, and no collision would have taken place. That the pilot of the Ellen had a right to assume that no steamer lying at rest at a safe distance above his track would suddenly be put in motion and run directly under his bows, so as to block the entrance into the slip, and especially that no steamer would suddenly get under way to cross his bows, and then as suddenly reverse her engine so as to block the entrance. And when he saw the wheels of the King Philip in motion, he was bound to act upon the supposition that the statute and the laws of navigation would be complied with until a contrary intention was clearly manifested. He was right in relying upon the proper navigation of the King Philip until the last moment, and then the engine was stopped and backed, and the helm ported, which was the proper course under the circumstances.

Libel dismissed, with costs.

Case No. 2,820.

CLARK v. FORD.

[1 Hayw. & H. 6.][1]

Circuit Court, District of Columbia. Jan. 12, 1841.

TRIAL — ELECTION OF PLEA — REFUSING INSTRUCTIONS—LIBEL—CANDIDATE FOR OFFICE—PROBABLE CAUSE.

1. A motion compelling the defendant to elect on which plea he will go to trial, allowed.

2. On a difference of opinion between two judges sitting on the bench, the court will refuse to give the instructions as prayed.

3. Where a paper was written for the purpose of preventing the reappointment of a party to office, and stating that his general reputation and character were such as to make him unfit for such appointment, and there was reasonable or probable cause for writing the said paper, it was *held*, that the plaintiff could not recover in an action for libel.

At law. Trespass on the case for libel. The declaration claims damages for injury received by the plaintiff. The defendant [Thomas Ford] pleaded not guilty and justification.

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

Brent & Brent, for plaintiff.
Joseph H. Bradley, for defendant.

This is an action of trespass on the case brought by John D. Clark, a justice of the peace for the county of Washington, whose office was about to expire, against the defendant, for libel. The case will appear in the bills of exceptions.

On motion made by the counsel for the plaintiff as to which plea the defendant would elect to go to trial, the plea of not guilty was stricken out, and the plaintiff joined issue. Upon the trial of the issue joined in this cause, the plaintiff, to maintain and prove the said issue on his part, gave in evidence a certain written paper addressed by the defendant to the president of the United States, and it was admitted by the said defendant that he wrote the said paper, and laid it before the said president; and the plaintiff further proceeded to show that the words set out in his said declaration are contained in said paper writing, and further that said John D. Clark was not renominated to office when his term of service expired, and the said plaintiff here rested his proof. Whereupon the defendant, by his counsel, did then and there pray the said court to instruct the jury, that the plaintiff was not entitled to recover in this action upon the evidence aforesaid, and the two judges then upon the bench did differ in opinion as to the law, and did therefore refuse to give the said instructions so prayed for by the counsel of the said defendant. For which refusal the counsel for the defendant excepted.

On the further trial of this cause, the plaintiff further, to maintain the issue on his part joined, offered evidence tending to show that the said defendant, before the presentation of the said paper to the president, threatened to have the said plaintiff broke if it cost him $20,000 to do so; that his character was not as represented in said paper.

Thereupon the defendant gave evidence to show that it was; and also that a great many other citizens of Washington united in an address to the president praying that the said Clark should not be renominated to the office of justice of the peace, his commission being about to expire. And the plaintiff then offered evidence that a majority of the citizens of the Second ward, with whom the witness had conversed on the subject, appeared to be desirous that the said Clark should be re-appointed to said office, and that he knew many of the most respectable citizens of said ward were in favor of it.

Thereupon the said defendant, by his counsel, did then and there pray the court to instruct the jury that if, from the evidence aforesaid, the jury shall be of the opinion that the said paper was written by the defendant to the president for the purpose of preventing the re-appointment of the said plaintiff to the office of justice of the peace, and if they shall further find that his general reputation and character was such as to make him unfit for such appointment, and also that there was reasonable or probable cause for the said defendant to write the said paper to the said president with the intent aforesaid, then the said plaintiff is not entitled to recover. And the said plaintiff, by his said counsel, then and there objected to the granting of the said instructions so as aforesaid prayed for, and on the part of the said defendant prayed the court to instruct the jury that, if the jury believe the defendant published the alleged libel, and that the defendant has failed to justify the same, then the plaintiff is entitled to recover, if the defendant maliciously or without probable cause published the alleged libel; which instructions prayed for on the part of the plaintiff were refused and the instructions prayed for on the part of the defendant, as aforesaid, were granted by the court, which refusal of the prayer of the plaintiff and granting of the prayer of the defendant were excepted to on the part of the plaintiff.

Verdict for the plaintiff. Damages, $900.

Joseph H. Bradley, for the defendant, moved for a new trial for the following reasons: That the verdict was against the evidence; that the verdict was against the law; on the ground of newly discovered evidence; that the damages given by the jury were excessive.

The motion was argued by counsel on both sides, and overruled by the court.

CLARK v. FOSS. See Case No. 2,852.

CLARK (GARRETSON v.). See Cases Nos. 5,248–5,250.

Case No. 2,821.

CLARK et al. v. GIBBONEY et al.

[3 Hughes, 391.][1]

Circuit Court, W. D. Virginia. June 3, 1879.

RES JUDICATA — ASSIGNMENT FOR BENEFIT OF CREDITORS—WAIVER OF BENEFIT — BREACH OF TRUST — ALLOWANCE OF CONFISCATION BY ASSIGNEE.

1. In a suit brought to enforce payment of a debt secured by an assignment out of a trustee's estate on the ground of breach of trust, *held*, that a former suit is invalid as a plea of res judicata, unless the record shows that the same subject-matter was involved and the same questions raised, or so involved in the main object of the controversy as to spring necessarily therefrom.

2. A suit on the note secured by an assignment, never prosecuted to final judgment, is not a waiver of the benefit of the assignment.

3. Payment of a debt by a trustee to a receiver under a confiscation decree of a Confederate court is a breach of trust for which the estate of the trustee is liable.

In equity. The general facts of this case are the same as those in the preceding case

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

of Dorr v. Gibboney's Ex'x [Case No. 4,006], except that there was no attachment suit in this case. Besides this, Clark, Dodge & Co. had brought suit on the note, but had never prosecuted it to final judgment, and it had been dismissed at the beginning of the war. The defendants claimed that this was a waiver of the benefit of the assignment. They also filed the record in the case of Preston v. Stuart, reported in 29 Grat. 289, in which case Clark, Dodge & Co. had been made nominal parties defendant, and attempted to use it as a plea of res judicata. These were the only additional questions raised.

James H. Gilmore and Robert M. Hughes, for the complainant, cited New England Bank v. Lewis, 8 Pick. 113; Coverdale v. Wilder, 17 Pick. 178; Skipwith v. Cunningham, 8 Leigh, 271; Clark v. Ward, 12 Grat. 440.

Joseph W. Caldwell, for Gibboney's executrix.

Johnston and Trigg, for Stuart & Palmer.

RIVES, District Judge. An estoppel by a former adjudication is pleaded in bar of this suit. It is alleged that this adjudication was had in the suit of Preston v. Stuart [29 Grat. 289], to which these complainants were nominally defendants. These complainants were parties, because secured by the assignment of 7th July, 1859; but no question was thereon raised or could have been adjudicated under the allegations of the bill as to the claim now preferred by the complainants. This suit was because of alleged frauds of the trustee constituting grounds on which his acts were assailed; and his sale to Palmer, Stuart & Parker of 10th June, 1862, under and by virtue of said assignment, was specially sought to be rescinded. Instead of the object of this suit being involved in the former, and barred thereby, it actually grows out of it, and is wholly consistent with its pretensions. Reference is had to this suit of Preston's for the evidence thereby afforded of the credit taken to himself for the payment of this debt by Gibboney, the trustee. With the main purpose of the controversy between Preston and his trustee, and the purchasers from the trustee, these plaintiffs had no connection; their claim is outside of that suit; in no wise conflicting with it; but, on the contrary, consistent therewith, and based thereon. An inspection of that voluminous record, is sufficient to snow the inapplicability and invalidity of this estoppel; so this plea, if not already received, should be overruled, or otherwise refused. For yet a stronger reason, the ex parte settlement of accounts by the trustee is no bar to a recovery in this case. The creditors in this suit need not to have assented to this assignment for their benefit. Their assent will be presumed. They can now be only deprived of it by some act of theirs so clearly inconsistent therewith as to constitute a waiver of it. The depositions of William Gibboney and his counsel are relied on as express waivers. They prove only an instruction of the creditors to their agent and counsel to sue for and press the collection of their debt at law; and not to wait upon the execution of the assignment for their benefit. This they had a perfect right to do; they were not restricted to the deed, and did not lose the benefit thereof by a resort to a suit on this note. They could concurrently proceed with both remedies. It is only when the creditor does some act or takes some step clearly indicating an abandonment of the deed for his protection, that he will be taken as waiving it. This doctrine of waiver is a reasonable one; and is not applicable to the state of facts relied on by the executrix of Gibboney. This suit, and its dismissal under the circstances of this case, cannot be tortured by any ingenuity into a renunciation of the benefits of this assignment.

The disposal of these preliminary objections to a recovery in this case brings us to the consideration of the merits of the controversy. It seems now conceded in the argument that the plaintiffs cannot be affected by the judicial sequestration of their debt. It was a nullity, and must be so regarded by this court upon reason and authority. Such a belligerent act is in its nature contingent; it must depend upon the success of the rebellion, in whose behalf it was enacted, and it must perish with the victory of the nation over its rebellious subjects. The question, then, reverts to one of liability as between the defendants to the original bill. To settle this the cross-bill was allowed; and under that, and the answers and pleading thereto, will this question be now considered and determined. It is conceded that this debt, thus illegally discharged and sequestrated, was the debt of the defendant Preston. He, however, had provided for it by his deed of assignment of 7th July, 1859. Gibboney united in that deed, and thereby undertook its execution. In pursuance thereof he chose to receive payment thereof, and take credit on his account of the trust estate therefor. Was not this an acquittal of the grantor? Can the credit inure to the trustee, and as between grantor and trustee be allowed to the latter, and still be claimed, as between them, of the grantor as a subsisting demand upon him? Surely not; he cannot have this credit and claim against it at the same time; the act of taking the credit in his settlement with the grantor acquits and discharges the latter, and the trustee cannot be allowed to repudiate his act when he has received the benefit of it. As between Preston and Gibboney the matter is finally and definitely settled; but otherwise as between these two and the creditors; but in consideration of the equities between the

two former, the creditor's resort should be primary against Gibboney and secondary against Preston in the event of Gibboney's insolvency. This view, doubtless, accounts for the failure of the defendant Preston to answer. He thus confesses his eventual liability, and doubtless has no fear of it.

The liability of Palmer & Stuart rests upon the mistaken declaration that they had assumed to pay such debts as were to be postponed because of the refusal to receive currency. There was no such understanding on their part. The provision is quite different, and is as follows: "It is further agreed and distinctly understood that in the event said Gibboney shall be unable to pay off the creditors of said Thomas L. Preston with the funds paid by said purchasers, in consequence of the refusal of said creditors or any of them to receive the money in payment, that then the said parties of the second part shall substitute their notes for the amount so refused, secured to the satisfaction of said Gibboney in notes, for equal instalments, payable in 1, 2, 3, 4, and 5 years from first July next, or sooner if the parties of the second part shall elect so to do, with interest on same from first July next, and interest on the whole amount, payable annually." It is clear from this quotation, therefore, that so far from its being true, as alleged, that these purchasers agreed to pay these deferred debts, it was incumbent on Gibboney, when unable to use current funds, to defer the payment through five years, if agreeable to the purchasers, so as to secure for such creditors a satisfactory medium of payment. Neither was there any obligation on the part of the vendees to see to the application of the purchase-money. The effect of the deed of assignment was to interpose for the discharge of the debts secured, a trustee whose acquittance or receipt should be all that the purchasers could require to discharge them of liability. It would be, therefore, to defeat the plain provisions of the assignment, and its manifest intent to deny Palmer & Stuart in this case the protection of the trustee's receipt for this debt, and his acquittance therefor. I cannot, therefore, think that they can in any event be held liable for the malversation of the trustee in turning over this debt to the hands of the Confederate receiver. Singular infidelity attended the agencies employed by these foreign creditors. One of their attorneys was William Gibboney, also a Confederate receiver, who, as his deposition shows, claimed this fund, and apparently gave up his claim upon the allowance of his commission of $120.85, being five per cent. on the amount of $2,417 paid Receiver Johnston, and upon the receipt of liberal fees by him and his associate. Truly, it might be said of this transaction, it was verily "quasi agnum committere lupo."

To ascertain the liability of Gibboney, let us reproduce the credit he takes to himself in his settlement of accounts in the Preston suit against him. It is as follows:

"73. Clark, Dodge & Co. v. W. K. Heiskell, acceptor, and Thomas L. Preston, on an acceptance due March 21st, 1859..	$2,017 05
Interest to July 12th, 1862....	400 38
	$2,417 43

"Received of Robert Gibboney, trustee of Thomas L. Preston, the sum of $2417.43 cents, according to the above statement, which debt was due from Thomas L. Preston, and recognized as such in his deed of trust to said Gibboney, and so paid me under the sequestration law as receiver for Washington county, the said Clark, Dodge & Co. having domicil in the state of New York. John W. Johnston, Receiver for Washington County. July 12, 1862."

In exhibit (Z), being trustee's settlement before Commissioner H. S. Mathews, under date of 4th November, 1862, Gibboney takes credit to himself, under date of July, 1862, as follows: "By amount paid John W. Johnston, receiver, $2417.43." The identity of the sum proves beyond all doubt the identity of the item. See exhibits of Thomas L. Preston, p. 105. This is indubitable documentary proof, that Gibboney, as trustee, has received credit for this payment to the receiver. Where now is the proof that he made this wrongful payment under any species of duress whatever? The language of his receipt sets out the domicil of Clark, Dodge & Co. as in New York; the suit being brought in the United States court, evidenced the jurisdictional fact that these suitors resided in another state; and I have no doubt that that residence was, under the proofs in this cause, known by Gibboney to be in New York. Hence, he was aware of his duty in behalf of these cestui que trusts, to refuse to receive this debt, and under the terms of this deed, to demand in its stead a note or notes at such time as would probably outlast the Rebellion. Did he, in good faith, such as is exacted of a fiduciary under these circumstances, seek in the mode thus provided by the deed to tide this debt over the war, and protect these loyal citizens in their just claims? He surely had the opportunity and authority to do so; but no proof is offered of any attempt on his part thus to protect these residents of a loyal state in their rightful dues during the Rebellion. On the contrary he seems to have seized with impatience and haste this opportunity of signalizing his fealty to the insurrectionary tribunals of the revolted states, and of acquiring cheaply and at the expense of those whom he should have protected and not betrayed, a reputation for a flaming, superserviceable zeal in these ungracious, if not vengeful, tasks of confiscation. While I acknowledge the favor shown by the courts to fiduciaries in the honest and well-meant, though mistaken, discharge of their duties, I cannot but regard

the voluntary participation of the trustee in this lawless act of sequestration under the proofs in this cause, as a reprehensible breach of trust, properly entailing upon his estate, the recovery sought of it in this cause. Whatever relief he may be entitled to from his confederates in this wrong-doing, must be sought in another action and before another tribunal. I am clear, neither his grantor nor his vendees can be required to indemnify him for this wrongful and void payment to the Confederate receiver.

Hence, a decree must be entered in the original suit for the plaintiff's debt, and interest and costs, with a reservation of their right to charge the estate of Preston in the hands of his present trustee, if the execution de bonis testatoris in this case should prove fruitless, and the cross-bill of Gibboney's testatrix must be dismissed with costs.

Case No. 2,822.

CLARK et al. v. GILBERT et al.

[5 Blatchf. 330;[1] 4 Int. Rev. Rec. 42.]

Circuit Court, S. D. New York. July 14, 1866.

INTERNAL REVENUE—BROKERS—ACT OF JUNE 30, 1864.

1. A person who, having a license as a banker, under the 1st subdivision of the 79th section of the internal revenue act of June 30, 1864 (13 Stat. 251), receives stock, bonds, &c., for sale for others, and sells them, charging the customary compensation, as a banker, and also loans money on stocks, bonds, &c., and sells such securities on account of the borrowers, and deducts from the sales the money loaned, with interest and the customary charges as a banker, is not liable to the tax of 1-20th of 1 per centum monthly, on such sales, under the 99th section of the act, which imposes such tax on brokers, and bankers doing business as brokers.

2. A person who purchases in his own name stocks, bonds, &c., for others, and advances his own money, and takes the transfers in his own name, and holds the stocks, bonds, &c., a security for the repayment of the money, and, on its repayment, delivers the securities as per agreement, or, in default of repayment, sells them to reimburse himself, and who also purchases and sells stocks, bonds, &c., for others, under certain stipulations as to risks, losses, and profits, is doing the business of a broker, and is subject to such tax of 1-20th of 1 per centum, monthly.

3. Under the 9th subdivision of the 79th section of the act, a person may, under his license as a banker, do business as a broker, without paying further license money; but, so far as he does business as a broker, he is to be regarded as a broker, and must pay a broker's tax on his transactions.

[2] [This suit was brought by the plaintiffs [Luther C. Clark and others, comprising the firm of Clark, Dodge & Co.], who were regularly licensed bankers, to enjoin [Sylvester S. Gilbert and Sheridan Shook] officers of the revenue, from assessing and collecting from them the broker's tax on sales imposed by section 99 of the excise act of June 30, 1864. An abstract of the points and argument submitted in support of the motion on the part of the plaintiffs to continue the injunction was published in volume 3, Record, p. 182.

[The officers of the revenue claimed under the instructions of the commissioner that the plaintiffs should pay such tax as bankers doing business as brokers. The counsel for the plaintiff made the points of which the substance is here given: (1) The tax imposed by the 99th section of the revenue act, is imposed upon brokers, and not on bankers. (2) The 79th section of same act expressly authorizes bankers to receive stock and securities for sale or discount, "and to lend and advance on such stocks and securities;" and this necessarily carries with it the right to sell the same, either to reimburse themselves or to discharge the duty to sell, imposed by the receipt of such stocks for the purpose of sale. (3) That the transactions in the fourth sub-division of the bill mentioned were equally exempt, because: (a) No tax is imposed on the purchase of stocks and securities but only on the sales. (b) When the purchase is made, no tax or duty is payable until the banker sells. (c) In such cases no sale is made, unless by order of the principal, or to reimburse the amount paid by the banker on the purchase, and in either case the transaction is within the category of "stocks received for sale or on which loans or advances are made." (4) That the distinction between the banker and the broker is clear and well defined, and that even if it should be that the transaction above mentioned were such as a broker might engage in, this did not convert the banker into a broker or deprive the banker of his exemption. (5) That even if the transactions in the fourth or other subdivisions should be decided to form part of a broker's business, and taxable as such, this did not render the plaintiffs taxable in respect to transactions which formed a part of the business of bankers. (6) That by combining the business of a banker and broker, the broker did not lose the exemption to which he was entitled as banker. (7) That even if the plaintiffs were taxable in respect to transactions had on account of others, this did not render them taxable on transactions made on their own account. (8) That the supreme court of the United States, in the Case of Fisk and Hatch, decided that bankers were exempt from taxation as bankers. (9) That in the Case of Cutting, that court decided that a broker doing business under the ninth paragraph of section seventy-nine was liable to pay taxes on all transactions specified in that paragraph. (10) That the supreme court had not decided that a banker licensed under the first sub-denomination of section seventy-nine was liable to pay any tax on the business for which he is so licensed, nor that where bankers engage in transactions in which brokers likewise en-

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

[2] [From 4 Int. Rev. Rec. 42.]

gage that they thereby lose such exemption as bankers.

[The district attorney controverted these propositions, and, in addition to the oral agreement, presented a printed brief, in which the questions were thoroughly discussed.] [2]

John E. Burrill and William M. Evarts, for plaintiffs.

Samuel G. Courtney, Dist. Atty., for defendants.

NELSON, Circuit Justice. [The bill is filed in this case against the defendants, who are the assessor and collector of the thirty-second collection district of New York, under the internal revenue laws, for the purpose of restraining them from the assessment and collection of the tax claimed to have accrued against the plaintiffs as bankers, doing business as brokers within said district, under the following circumstances:] [2] The plaintiffs have a license as bankers, and have, from time to time, received at their banking-house, stocks, bonds, and bullion for sale, and also have, during the same time, received bills of exchange and promissory notes for discount and sale, and did discount and sell the same for the account of the parties from whom they were received, and charged the customary compensation as bankers, and, also, during the time aforesaid, did, at their banking-house, lend and advance moneys to various parties, on stocks, bonds and bullion, and, after such advances and loans, did sell said stocks, bonds and bullion, on account of the parties from whom the same were received, and to whom the moneys were lent and advanced, deducting from said sales the moneys so loaned and advanced, with interest and the customary charges as bankers, and also bought and sold stocks, bonds, &c., on their own account, and not on commission or for others.

The tax claimed as having accrued out of the above dealings is 1-20th of one per centum, monthly, on all such sales of stocks, bonds, &c., under the 99th section of the act of June 30, 1864 (13 Stat. 273), which imposes the tax on brokers, and "bankers doing business as brokers." The question in the case is, whether or not the plaintiffs, in carrying on the aforesaid business, under a banker's license, are to be regarded as bankers doing business as brokers.

The 1st subdivision of this 79th section of the act enacts, that bankers employing a capital not exceeding $50,000, shall pay $100 for a license, and two dollars for every thousand over this amount, and then defines the term "banker" thus: "Every person, firm, or company, &c., having a place of business (1) where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check or order; or (2) where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes; or (3) where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or sale, shall be regarded a banker, under this act." Besides the license fee exacted, the banker, under the 110th section, pays a tax of 1-24th of 1 per centum, monthly, upon the average amount of deposits, 1-24th of one per centum, monthly, upon the average amount of the capital of his bank, beyond the amount invested in United States bonds, 1-12th of 1 per centum, monthly, on the average amount of circulation issued by the bank, and, in addition, 1-6th of 1 per centum, monthly, on the amount of circulation beyond 90 per centum of the capital. The license fee and the above tax are the burdens imposed on the banker for the privileges conferred. Now, among these, is the privilege of doing the business set forth in the bill of complaint and to which I have referred at large; and yet, it is claimed, that the plaintiffs are liable to the additional tax as brokers specified in the 99th section of the act. According to this construction, the license or privilege of the banker would be of little value. He might, indeed, receive deposits and pay them out, and advance or lend money on stocks, bonds, &c., but, in case of default in repayment, he must not sell the pledge to reimburse himself; and he may receive stocks, bonds, &c., for discount or sale, but is not at liberty to sell. If he does, it is insisted he instantly becomes a broker, and liable to the broker's monthly tax, in addition to the banker's, which he has already paid. I cannot agree to this view of the act. On the contrary, I am satisfied that the banker is, both by express terms, as well as by necessary implication, empowered to carry on the business authorized under his license, to its practical and useful results; that, when he is authorized to lend or advance money on stocks, bonds, &c., he has the right, in case of default in the repayment, to convert the security into money by way of reimbursement; and that, when he is authorized to receive stocks, bonds, &c., for sale, he may sell the same without, in either instance, making himself a broker.

The case of U. S. v. Fisk, 3 Wall. [70 U. S.] 445, decided by the supreme court at its last term, carried the privileges of the banker far beyond the present case; for, it was there held, that he could purchase and sell stocks, bonds, &c., for himself, and on his own account, under his license—a business not specified in the definition of a banker. That case, in effect, decided, that any business which a banker could carry on, as such, did not fall within the 99th section of the act.

The case of the plaintiffs, which is set forth in the fourth paragraph of the bill, is, in substance, that, in carrying on their busi-

[2] [From 4 Int. Rev. Rec. 42.]

ness as bankers, they purchase stocks, bonds, &c., for others, but make the purchases in their own name, and advance their own money, and take the transfers in their own name, and hold the stocks as security for the repayment of the money by the persons for whom the stocks are purchased; and, on receiving such repayment, with interest and the customary charges, deliver the stocks, bonds, &c., as per agreement, or, in default of repayment, sell the same to reimburse themselves. This business is not only outside of the business of a banker, as defined by the act, but comes directly within that of a broker, and is subject to the tax under the 99th section.

But, it is urged, that if the plaintiffs, in any of their dealings in stocks, bonds, &c., are brought within the category of bankers doing business as brokers, their whole business as bankers is thereby brought within it, and subjected to the broker's tax; and this extraordinary proposition is supposed to be decided in the case above referred to. The 9th subdivision of the 79th section, declaring who shall be a broker, is as follows: "Every person, firm, or company, &c., except such as hold a license as a banker, whose business it is, as a broker, to negotiate purchases or sales of stocks, &c., shall be regarded as a broker." The exception takes the banker out of the category of brokers; and, to make it more clear as to what was intended by the exception, a proviso is added, "that any person holding a license as a banker shall not be required to take out a license as a broker," meaning, obviously, that he may do business as a broker under his license as a banker. But, surely, there is nothing in the provision which thus permits the business of both a banker and a broker to be carried on under the banker's license, that suggests the idea, or gives any countenance to it, that dealing in both capacities merges the banker in the broker, so as to subject all his dealings to the broker's tax. The fair and natural inference would seem to be the other way, namely, that the broker is merged in the banker. But, I suppose, that the reasonable and proper conclusion is, that, although the license of the banker authorizes him to do the business of a broker without further payment of money, yet, so far as he may do that business, he is to be regarded as a broker, and must pay the broker's tax. This, I think, is not only the natural conclusion, and fair legal effect, from the provisions of the law referred to, but is confirmed, as will be seen, by the language of the 99th section, imposing the tax on brokers, which is as follows: "That all brokers and bankers doing business as brokers, shall be subject to pay the following duties," &c., clearly enough implying that the banker, besides carrying on his own business, may also engage in business as a broker; but, in such case, and as respects the business done as a broker, he must pay the tax imposed, over and above what he has already paid as a banker. This view of the statute was taken in the case of U. S. v. Fisk [3 Wall. (70 U. S.) 445], and is stated in the opinion in a few words: "Now, a banker," says Mr. Justice Grier, "pays a much higher license-tax than a broker, and is permitted to 'prosecute or carry on' the business or profession of a broker without paying any further license; but, if he prefers, he may not combine that business with his own."

An injunction must issue in conformity with this opinion.

[NOTE. The case of Peabody v. Gilbert, Case No. 10,868, was heard and disposed of in accordance with the foregoing opinion at the same time.]

CLARK (GONG BELL CO. v.). See Case No. 5,529.

CLARK (GREENOUGH v.). See Case No. 5,784.

Case No. 2,823.

CLARK v. HACKETT.

[1 Cliff. 269.][1]

Circuit Court, D. New Hampshire. May Term, 1859.[2]

BILL TO SET ASIDE SUPREME COURT JUDGMENT FOR FRAUD — JURISDICTION—CORROBORATION—AMENDMENTS—LIMITATION OF ACTIONS.

1. Circuit courts have no jurisdiction to review the judgments or decrees of the supreme court; and a circuit court for one circuit is equally destitute of authority to review a judgment or decree of a circuit court in another circuit; but semble, a judgment or decree of the supreme court, affirming a judgment or decree of a circuit court, may be reviewed in a circuit court, upon proof that both judgments or decrees were obtained by fraud.

[Cited in Glenny v. Langdon, 98 U. S. 24.]

2. Where fraud is charged in the bill, and positively denied in the answer, a decree cannot be pronounced for the complainant on the testimony of a single witness, without some corroboration either from the testimony of other witnesses, or from the circumstances proved in the case.

[See note at end of case.]

3. Under Act Cong. Aug. 19, 1841 [5 Stat. 446], limiting suits by or against assignees of bankrupts to two years after the cause of action accrued, a bill filed after two years cannot be regarded as an amendment to one for the same cause of action, filed before the expiration of the two years, but dismissed by the court.

This was a bill in equity, wherein the complainant sought to set aside and annul a certain decree of the supreme court of the United States of America, affirming on appeal a decree of the circuit court of the United States for the District of Columbia, and also to set aside the decree of the circuit court

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

[2] [Affirmed in Clark v. Hackett, 1 Black (66 U. S.) 77.]

so appealed from and affirmed. Those decrees were made in a suit in equity, in which one Benjamin C. Clark and the present defendant were complainants, and Ferdinand N. Clark, then known as Ferdinand Clark, was respondent. In the published decisions of the supreme court, in the case of Clark v. Clark, 17 How. [58 U. S.] 315, it appears that the complainant prosecuted a claim against the republic of Mexico, for the unlawful seizure of the cargo of the schooner Louisiana, and that there was awarded to him therefor the sum of $86,985.29 by the commissioners appointed under the treaty of April 11, 1839, with that republic.

After deducting some twenty per cent. as compensation to the agents employed in recovering the claim, there was left the sum of $69,429.14 as the amount in controversy in that suit. That award was made on the 15th of April, 1857, and on the 15th of May following Benjamin C. Clark, of Boston, filed a creditor's bill in the circuit court of the United States for the District of Columbia, claiming the fund for himself and other creditors of the respondent, who had taken the benefit of the bankrupt law on the 27th of March, 1843, in the district court of the United States for the district of New Hampshire.

On the 30th of the same May, W. H. Y. Hackett, the respondent in the present suit, and the then assignee in bankruptcy of the respondent in that suit, filed his bill in that court, also claiming the entire fund for the purpose of distribution among the creditors of the bankrupt, alleging the decease of the original assignee in bankruptcy, and setting up his own appointment in his place. In that bill the complainant, who is the present respondent, set forth his own appointment as assignee in bankruptcy in the place of one John Palmer, deceased, and prayed for leave to come in under the prayer of the original bill, and to be made the complainant in that suit. He then alleged that the respondent, the present complainant, was regularly declared a bankrupt in 1843, and that all his property vested in the assignee, who subsequently deceased, with proceedings in bankruptcy still pending; that the bankrupt had a claim against the republic of Mexico, to satisfy which claim the award was made; that the claim was not described so as to render it available to the bankrupt's creditors, and that no such evidences as would enable the assignee to recover the claim were put into his hands, leaving the assignee ignorant of the true value of the assets, and that the assignee therefore reported them to the court as of no value; that no right, title, or interest in the claim ever passed out of the assignee or became vested in the bankrupt; that the bankrupt had subsequently prosecuted the claim in his own right, falsely and fraudulently claiming that his own debts in bankruptcy had been satisfied, and that the claim had been revested in him; and finally the complainant in that suit alleged that the award belonged to him as the assignee of the bankrupt's estate. Whereupon he prayed for an injunction under the eighth section of the act of congress of March 3, 1849 [9 Stat. 394], and for general relief. The answer in that suit averred that the claim against the republic of Mexico was described in the schedule in the manner prescribed by the rules of the district court, and that it was mentioned as subject to a mortgage, and that no value was then set upon the claim, because he then believed it was without value. The answer further set up that the respondent communicated to the assignee the situation of all the claims mentioned in his schedules; that all the papers and evidences in support of the claims were not in his possession, but had been in the year 1842, or earlier, publicly filed before the commissioners under the convention of April 11, 1839, were afterwards placed in the public archives of the government, and there remained till the time of the award. The proceedings in the bankrupt court were then set forth in the answer, and the discharge of the bankrupt on December 17, 1844. Then the answer alleged that on March 14, 1845, the assignee filed a petition to sell the estate described in the bankrupt's schedules, and that, in pursuance to an order made to that effect, the estate and demands of the bankrupt were afterwards sold at public auction to R. M. Clark; that the respondent, on the day following the sale, purchased all the estate and demands from the said R. M. Clark, and that he afterwards prosecuted this claim at his own expense. On the 20th of June, 1847, the circuit court of the United States for the District of Columbia issued an injunction restraining the secretary of the treasury from paying the amount of the fund, and the respondent from receiving it till the further order of the court. On the 30th of May, 1853, the circuit court decreed that the fund should be paid to W. H. Y. Hackett, as assignee, for distribution among the creditors of the respondent. From that decree the respondent appealed to the supreme court of the United States, and in the December term, 1854, the decree of the circuit court was affirmed. Among the questions discussed at the bar in that suit, and included in the pleading, was whether the sale of the claim of R. M. Clark, and the purchase of the same by the respondent on the following day, was fraudulent or valid, and it was determined in the supreme court to be fraudulent.

The conditions of the pleadings, and the allegations therein in this suit, are sufficiently expressed in the opinion of the court.

H. B. Fernald and C. W. Tuttle, for complainant.

Mr. Hackett, pro se.

CLIFFORD, Circuit Justice. Both the circuit court and the supreme court, in their respective spheres of judicial action, had undoubted jurisdiction of the cause and the parties, and their determination of the matter is final and conclusive, unless it be shown, in due form of law, that their respective decrees were procured by the fraud of the complainant in that suit. Circuit courts have no jurisdiction to review the judgments or decrees of the supreme court in any case, and a circuit court for one circuit is equally destitute of authority to review or in any manner to revise the judgments or decrees rendered or passed by a circuit court for another circuit. They can only be reviewed on writ of error, or on appeal to the supreme court. Such obvious truths need only to be stated in order to command universal assent as self-evident propositions, so much so that any attempt to support or fortify them by argument or authority would be quite out of place. It is not upon any such grounds that the complainant in this suit seeks redress for his alleged wrongs. The charge against the respondent is, that the respective decrees pronounced in that suit were procured by fraud as alleged in the bill, and it is upon this ground alone that he prays that they may be set aside and annulled. Some reference now becomes necessary to the pleadings in this suit, in order that the causes of complaint and their nature may become more fully understood.

According to the allegations of the bill, the complainant filed his petition in bankruptcy on the 28th of January, 1843, and was declared a bankrupt on the 22d of March following, and on the 7th of December, 1844, a decree of the district court was passed, discharging him from the debts he owed in his private right at the time of presenting his petition. On the 22d of March, 1843, John Palmer was appointed assignee of his property, rights, and credits, and on the 14th of March, 1845, the district court decreed a license to the assignee to sell the assets of the bankrupt, and on the 9th of April, in the same year, the assignee sold all his assets at public auction to one R. M. Clark, for the sum of two dollars, and on the 14th the complainant purchased the same under a formal and sufficient bill of sale from the auction vendee for a valuable consideration. Among those assets so purchased, as the complainant alleges, was a certain claim against the republic of Mexico, for the unlawful seizure of the cargo of the schooner Louisiana, for which claim he admits the commissioners under the treaty aforesaid awarded him the sum of $86,786.29, payable from the treasury of the United States, on the 15th of May, 1857. He then alleges that one Benjamin C. Clark of Boston, falsely claiming to be one of his creditors by virtue of a certain pretended judgment, did on the 15th of March, 1851, petition by bill the circuit court of the United States for the District of Columbia, for an injunction to restrain the secretary of the treasury from paying him the fund until the further order of the court. That judgment which is particularly described in the bill he alleges was obtained against him by the fraud and collusion of the attorney employed to defend the suit, and therefore he avers that it is void. B. C. Clark, in his bill before mentioned, prayed that the then assignee, or such other as should be appointed, might come in under the prayer of the original bill and be made the party complainant in that cause. In that connection, the complainant in this cause alleges that one Charles G. Nazro, the copartner of Benjamin C. Clark, falsely pretending that the copartners were creditors of his estate in bankruptcy, on the 19th of May, 1851, petitioned the district court of the United States for the district of New Hampshire for the appointment of an assignee instead of John Palmer, deceased, praying that the respondent in this suit, or some other person, might be appointed as such assignee, and falsely representing at the same time that John Palmer left assets unsold, and that recent occurrences had given them value, and that the district court, on the same day, decreed that the respondent be appointed assignee for the purpose prayed in the petition. Upon receiving that appointment as assignee, the complainant alleges that the respondent, on leave granted by the circuit court of the United States for the District of Columbia, was made complainant in that cause, under the prayer of the original bill filed by Benjamin C. Clark, and that such proceedings were had in that suit so prosecuted by the respondent, that on the 28th of March, 1853, the said circuit court did decree that the fund, less twenty per cent, paid to the agents who prosecuted the claim, be paid over to the respondent as such assignee, to be by him distributed among the creditors of the complainant. He further alleges that he appealed from the decree of the circuit court to the supreme court of the United States, and that such proceedings were had in the supreme court, that the decree of the circuit court was affirmed. That fund was then received by the district court of the United States for the district of New Hampshire, as the complainant alleges, and still remains in its custody under that decree.

Such is the substance of the stating part of the bill. Certain denials are then made by the complainant, which it becomes important to notice. He denies that he owed the judgment in favor of B. C. Clark, or any part of the same since the filing of his petition to be declared a bankrupt, and repeated the allegation that it was obtained by fraud and collusion. He also denies that any debt was due to Nazro and Clark on the 28th of January, 1851. On the contrary, he avers that they were indebted to him, and he also

denies that John Palmer, as assignee, left unsold any of the assets, but avers that he closed and ended all the business appertaining thereto on the 9th of April, 1845. His theory is that all the proceedings in bankruptcy were closed by the original assignee, and he accordingly alleges that the respondent was not authorized to set aside the proceedings of the former assignee, and in so doing that he exceeded the authority of the court, and being deceived by the false representations of others, misrepresented the facts to the circuit court of the United States for the District of Columbia, and to the supreme court, by which false representations, and by the fraud and collusion of his own counsel, both courts, not knowing the real facts, were induced to decree, and did decree, that the fund should be paid over to the respondent. That claim, as he alleges, was considered valueless at the date of his petition to be declared a bankrupt, and continued to be so considered up to the time of its sale by the original assignee, and would not have been allowed by the commissioners but for his great skill and effort in prosecuting it, wherefore he claims that he was equitably entitled to the whole amount. He then sets forth the evidences on which he relies, to show that the judgment of B. C. Clark, described in his creditor's bill, was obtained by fraud and collusion. They consist chiefly of the alleged fraudulent and collusive conduct of the attorney employed by him to defend the suit in which the judgment was rendered. According to the allegations of the bill, his attorney was seasonably employed, duly instructed how to prepare and conduct the defence, and well knew that the complainant was ready and willing to aid and assist when called on for that purpose, and yet, as he alleges, his attorney fraudulently colluded and conspired with the plaintiff in that suit, and others in his interest, and fraudulently abandoned the defence, so that he was defaulted. These matters he admits were not pleaded in defence in the circuit court of the United States for the District of Columbia, and the reasons why they were not he alleges to be that he was fraudulently instructed by his counsel that the proceedings in bankruptcy, together with the sale of the assets by the original assignee, were a perfect and complete bar to that suit. Other minor matters are then set forth as showing the motive of some of the parties implicated, or the inducement which prompted them to aid in procuring the appointment of the respondent as assignee. On this point he alleges that Charles H. Dougherty and Michael Dougherty respectively claimed certain portions of the fund, on account of services alleged to have been rendered in getting it allowed, which he refused to admit, and that the latter said if he did not comply he would tie up the fund in Washington so that the complainant would not get any part of the award. Prompted solely by the reason that he refused to allow those claims, the complainant charges that Charles H. Dougherty and Michael Dougherty, and Joseph Hopkins Stewart, and one John L. Hayes, afterwards his counsel, and the respondent, intending and combining to defraud the complainant out of his just rights and to deprive him of the benefits of the award, conspired and confederated together, and, as the means of the final consummation of their designs, caused the proceedings before mentioned to be instituted in the district court of the United States for the district of New Hampshire, and by misrepresentation fraudulently induced that court to appoint the respondent assignee, and as further means of consummating their designs, caused the original proceedings to be commenced in the circuit court of the United States for the District of Columbia, and also caused the respondent to present his bill in that court, and become a party complainant in that cause. As a more effectual means of accomplishing their designs, he alleges that one of them offered his professional services to him, to act for him in the conduct and management of his defence, and that being ignorant of their purposes, he did retain and employ him to prepare and conduct his defence, but that he so aided and assisted the adverse party by keeping out material matters of defence contrary to his instructions, that the court decreed the case against him and granted the prayer of the bill. After stating in detail the several evidences so withheld, and specifying the several fraudulent acts, omissions, and conspiracies of his counsel in preparing and conducting his defence, he avers that he was ignorant of all those fraudulent acts, omissions and conspiracies of the parties named, until after the decree of the supreme court affirming the decree of the circuit court, and until after the final decree. Wherefore he prays that the decree of the supreme court affirming the decree of the circuit court, and the decree of the circuit court ordering the fund to be paid to the respondent as assignee, and enjoining the secretary of the treasury from paying the same to the complainant, may be set aside and annulled, and for other relief. On the 15th of August, 1857, the respondent appeared and filed his answer. Having already determined that this court possesses no jurisdiction to review the decree either of the supreme court or of the circuit court, it will only be necessary to refer to such portions of the answer as are responsive to the charge of fraud and collusion as set forth in the bill. Those allegations of the bill can only affect the respondent in this suit, and no one of the other persons implicated in the suggestions of fraud has become, or in any manner been made, a party to this proceeding. Separate denials are introduced into the answer to each distinct charge of fraud. They are full, clear, and explicit, and in respect to each

subject-matter embraced in the bill are as comprehensive as the charge. Actual fraud, when charged as in this case, is of course issuable, and as in all other cases where it is directly imputed, the burden of proof lies on the party who seeks to set aside the proceedings. Stronger evidence may be required to satisfy the court of the truth of a fact, irrespective of the effect of the answer in cases of fraud, than in other issuable matters in controversy, whether at law or in equity, but the fraud must be established by fair and reasonable inferences to be drawn from the facts proved, and unless it is so established the case fails, and the transaction rests unimpaired. Askham v. Barker, 19 Eng. Law & Eq. 529. Charges of actual fraud, unsupported by evidence showing the truth of the imputations, if denied by the answer, are of no avail, for the plain reason that fraud is not to be presumed in any case without proof, and he who makes the charge has the burden of proof to establish the imputation. Superadded to that general rule, which is applicable in all cases whether at law or in equity, is another equally salutary, which is peculiar to hearings in equity upon bill and answer, and that is, where the charge as made in the bill is positively denied in the answer, a decree cannot be pronounced for the complainant on the testimony of a single witness, without some corroboration either from testimony of other witnesses or from the circumstances proved in the case. In equity the established rule is that an answer, responsive to the allegations and charges made in the bill, and which contains clear and positive denials thereof, must prevail unless it is overcome by the testimony of two witnesses to the substantial facts, or at least by one witness, and such attendant circumstances as will supply the want of another witness, and thus control the statements of the answer, or show its incredibility or insufficiency as evidence. 3 Greenl. Ev. § 289; Daniel v. Mitchel [Case No. 3,562]; Hughes v. Blake, 6 Wheat. [19 U. S.] 453; Lenox v. Prout, 3 Wheat. [16 U. S.] 520.

Separate denials to each and every charge of fraud as made in the bill are contained in the answer, and in language as clear, positive, and explicit as could well be chosen, and in addition thereto the respondent declared that he wholly denies that he has at any time, for the purposes set forth in the bill or for any purpose conspired or confederated with the persons therein named, or any or either of them, to consummate any design in respect to the complainant, or the award, or any matter or thing charged in the bill. That denial is repeated and enlarged when the respondent says he wholly denies that he has confederated, conspired, or combined with any person or persons whether named or not named in the bill, in any way to defraud, injure, or prejudice him, or to deprive him of the award or any part thereof, or to influence the conduct of any person or persons retained or to be retained as counsel for the complainant in any or either of the suits mentioned, or in any other matter whatsoever. These references to the bill and answer are sufficient to show what the state of the pleadings is in the particular under consideration, and the result is, that the burden of proving the charges of fraud against the respondent as made in the bill is upon the complainant, according to the rule of law already laid down. Without repeating the charges of fraud as alleged in the bill, it will be sufficient to say that, so far as the respondent in this suit is concerned, not one of them is made out of any testimony in the case. Seven witnesses were examined by the complainant, and, after a careful perusal of their depositions, it is not perceived that there is anything in their statements, or the exhibits accompanying the same, which has any tendency to show, either that the decree of the circuit court of the United States for the District of Columbia, or the decree of the supreme court affirming the same, was procured by or through any fraud practiced by the respondent. This conclusion renders it unnecessary to enter upon a separate consideration of the several propositions assumed by the counsel for the complainant on this branch of the case, as the answer already given applies to them all, and as their separate examination would only serve to protract this investigation without accomplishing anything particularly beneficial to either party, it will be omitted. Recurring to the pleadings in this suit, there is not alleged in the bill so much as one fact deemed material to the decision of the controversy in its present stage, which is not directly met by the respondent and emphatically denied in the answer. Such positive denials in the answer, inasmuch as they are directly responsive to the charging part of the bill imputing actual fraud, must be considered by every rule of equity pleading as an insuperable barrier to any recovery by the complainant, unless those denials are overcome by competent and sufficient evidence. Eyre v. Potter, 15 How. [56 U. S.] 56; Price v. Berrington, 7 Eng. Law & Eq. 254. No such evidence has been exhibited by the complainant, and as this court has no power to grant relief under the circumstances of this case, except upon the ground of fraud, the prayer of the bill must be denied.

Another ground of defence assumed by the respondent deserves to be considered, for the reason that if tenable, it furnishes a complete answer to the suit, not only in its present form, but in any form in which it may be hereafter brought. By the eighth section of the bankrupt act of the 19th of August, 1841, it is among other things provided that no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an ad-

verse interest touching the property and rights of property aforesaid in any court whatever, unless the same shall be brought within two years after the declaration and decree in bankruptcy, or after the cause of suit shall have first accrued. Assuming the facts to be true as they are stated and charged in this bill of complaint, the cause of action in this suit accrued at the time when the complainant became possessed of the knowledge of the fraudulent acts, omissions, and conspiracies whereby the persons named in the bill procured the respective decrees which he now seeks to have set aside and annulled. In his bill the complainant alleges that he was ignorant of those fraudulent acts, omissions, and conspiracies until after the decree of the supreme court affirming the decree of the circuit court, and until after the final decree. It is conceded by the counsel on both sides, that the decree of the supreme court affirming the decree of the circuit court went into operation as early as the 7th of May, 1855. On that day the fund was paid over to the district court of the United States for the district of New Hampshire, under the final decree of the circuit court of the United States as affirmed by the supreme court, and it is admitted in argument by the counsel for the complainant that the limitation, if it applies at all, commenced to run from that date. Payment of the fund could not have been made until after the final decree in the circuit court, and the bill in effect admits that after the final decree the complainant became informed of the fraudulent acts, omissions, and conspiracies whereby those respective decrees had been procured. It is clear, therefore, that the limitation commenced as early as the 7th of May, 1855, when the fund was paid over to the bankrupt court, for distribution among the creditors of the complainant. As appears by the record, the bill in this suit was filed on the 19th of June, 1857,—more than two years after the cause of action accrued. Three propositions are assumed by the counsel for the complainant in answer to this ground of defence. In the first place, they insist in effect that so much of the answer as sets up this limitation as a bar to the suit is not properly before the court. No such defence was set up in the answer as originally filed on the 15th of August, 1857. A motion to amend the answer in this particular was made at the October term, 1858, and the amended answer was filed on the 1st of March following, which was duly allowed in court on the 16th of the same month. That motion was addressed to the discretion of the court, and being one which it was competent for the court to allow, it must be considered that it was duly and properly allowed. In the amended answer, the respondent set up the limitation in the act of congress before mentioned, and claims the same benefit of the provision as if he had pleaded the same, and the only question is whether it constitutes a bar to the suit.

It is insisted by the counsel for the complainant that it is not a bar because the respondent is not now, and was not at the time the decrees were pronounced, the legal assignee of his bankrupt estate. Their argument on this point assumes that his appointment was procured by fraudulent misrepresentations, as charged in the bill. It overlooks the important and controlling fact that all these charges of fraudulent misrepresentations as made in the bill are particularly and emphatically denied in the answer, and, being unsupported by any sufficient proof, cannot avail. In the absence of competent and sufficient proof to sustain the allegations of fraud when thus denied, it must be assumed, on the principles already explained, that the appointment was legally and properly made, and if so, then it is obvious that the proposition cannot be maintained.

One other branch of the argument only remains to be considered, and in respect to this last proposition a few words will be sufficient. It is insisted that the present bill is no more than an amendment to an original bill filed in this court on the 18th of March, 1856, which was subsequently dismissed by the court. Regarding the proposition as directly contradictory to the record in this suit, it cannot be sustained. As already remarked, this bill was filed in court on the 30th of June, 1857, and is in theory and fact an original bill, as clearly and fully appears by the record, which cannot be contradicted. King v. Robinson, 33 Me. 114, and cases cited. Suits, whether at law or in equity against an assignee in bankruptcy, under the act of congress of the 19th of August, 1841, by any person claiming an adverse interest touching the property or rights of property of the bankrupt's estate, must be brought within two years after the cause of action shall have first accrued, and if not so commenced within that time, that provision of the act of congress, if well pleaded, constitutes a complete bar to the suit. This suit was not commenced within the two years after the cause of action first accrued, and therefore is not maintainable.

On both grounds I am of the opinion that the suit cannot be maintained, and the bill is hereby dismissed with costs.

[NOTE. Complainant appealed to the supreme court, which affirmed the decree dismissing the bill, stating that the circuit court correctly held that the evidence entirely failed to establish the allegations of fraud. Mr. Justice Nelson delivered the opinion. Clark v. Hackett, 1 Black (66 U. S.) 77.]

CLARK (HARDY v.). See Case No. 6,058.

Case No. 2,824.

CLARK v. ISELIN et al.

[9 Blatchf. 196.][1]

Circuit Court, S. D. New York. Oct. 26, 1871.

APPEAL IN BANKRUPTCY.

Where a suit in equity is brought in the district court, under the jurisdiction conferred on that court by the second section of the bankruptcy act of March 2, 1867 (14 Stat. 518), by an assignee in bankruptcy, against a person claiming an adverse interest, touching property vested in the assignee, no appeal can, before a final decree in the suit, be taken to this court, by the defendants therein, from an interlocutory decree made by the district court.

[Cited in Re Casey, Case No. 2,495.]

[In equity. Bill by James R. Clark, Jr., assignee in bankruptcy of Henry E. Dibblee, D. P. Bingley, and J. J. Knauss, against Adrian Iselin and Isaac Iselin to set aside certain transfers and securities, as in fraud of the bankrupt law. Complainants move to dismiss an appeal from an interlocutory decree of the district court.]

Charles H. Smith, for plaintiff.

Henry W. Clark, for defendants.

WOODRUFF, Circuit Judge. It is conceded that this is a suit in equity in due form, commenced by bill, and proceeding, by answer, replication and formal proofs, to a hearing and decree, upon pleadings and proofs, in the district court. The suit is brought to set aside certain transfers of securities and a payment of money, alleged to have been made by a bankrupt to the defendants, in fraud of the bankrupt law, and to compel the defendants to account therefor, and for an account of certain securities previously held by the defendants, as security for certain indebtedness by the bankrupt to them, and of the moneys collected thereon. The decree in the district court adjudged the invalidity of the first named transfers, and directed an accounting by the defendants, referring the case to a master to take the account, with special directions in relation thereto, and ordered a recovery upon the coming in and confirmation of the report of the master. It is conceded, that this decree is interlocutory, and not a final decree. From such decree the defendants appealed to this court; and the complainant now moves to dismiss the appeal, on the ground that no appeal can regularly be brought until final decree is entered in the district court.

The jurisdiction in virtue whereof this suit was brought in the district court was conferred by the second section of the bankrupt law of March 2, 1867 (14 Stat. 518), wherein it is declared, that the circuit courts "shall have concurrent jurisdiction with the district courts of the same district, of all suits at law or in equity which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest * * * touching any property or rights of property of said bankrupt transferable to or vested in such assignee." Without this provision no such suit could have been brought in that court, and it is, therefore, true, that no provision of any prior statute regulating appeals had specific or express application to such a suit in the district court. Section 8 of the bankrupt law, however, provides, that "appeals may be taken from the district to the circuit courts in all cases in equity, * * * under the jurisdiction created by this act, when the debt or damages claimed amount to more than five hundred dollars;" and the section, after providing, also, for an appeal from a "decision" of the district court, allowing or rejecting a claim made by a supposed creditor, requires notice of the appeal to be given "within ten days after the entry of the decree or decision appealed from."

It is claimed, that there is no statute restriction which prohibits an appeal to the circuit court from an interlocutory decree made in the district court, and that, therefore, the practice of the high court of chancery in England, in this respect, like the practice in the late court of chancery in New York, permitting appeals from such decrees, ought to govern this question. Act Sept. 29, 1789 (1 Stat. 93, § 2); Act May 8, 1792 (1 Stat. 276, § 2); Hinde v. Vattier, 5 Pet. [30 U. S.] 398; Rule 90, Equity Rules Cir. Ct. It is also claimed, that the language of the eighth section, requiring that the appeal shall be taken within ten days after the entry of the "decree or decision," imports that such appeal may be taken without awaiting a final decree. There is no force in this last suggestion. The section provides for an appeal in two classes of cases, namely, in "cases in equity," and on a "decision" allowing or rejecting a claim. It was, therefore, appropriate to use the expression, "decree or decision appealed from." That language refers to, and is apt to describe, each class, and only indicates, that, in cases in equity, a decree may be the subject of appeal, and that, where a claim is allowed or rejected, the appeal is to be taken within ten days after the "decision," referring to the immediately preceding language, giving an appeal "from the decision" of the district court allowing or rejecting such claim.

I am of opinion, that the appeal, in cases in equity, must be from the final decree, and from that only. The language last referred to plainly indicates that it is to be from a decree, and not from any and every order in the progress of the cause; and yet appeals might, in England and in the state of New York, have been taken from orders in the progress of the cause, antecedent to even an interlocutory decree. The policy indicated in the legislation of congress, on the subject of appeals, as well as writs of error, in all other statutes, whether taken

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

from the district court to the circuit court, or from the circuit court to the supreme court, is uniform, in confining the review, in the appellate tribunal, to final judgments and decrees. The judiciary act of September 24, 1789, gave an appeal to the circuit court in causes of admiralty and maritime jurisdiction, from final decrees only. 1 Stat. 83, § 21. The review in the circuit court, provided for by the 22d section of that act, was only of final decrees and judgments. So, also, under the same act, and under the act of March 3, 1803 (2 Stat. 244), the appeal from the circuit court to the supreme court is given from final decrees only. Under the statutes giving such appeals, provision is made for the giving of a bond by the appellant, which has been uniformly held to require, if a supersedeas of execution was sought, that such bond be sufficient to secure the whole judgment or decree; and the provisions in respect to the operation of such an appeal, or writ of error, as a supersedeas of execution, if such bond be given, indicate that none other than judgments, or decrees ripe for execution are contemplated. In this respect, section 8 of the bankrupt law, now under consideration, implies the same, in the provision, that "no appeal shall be allowed unless the appellant, at the time of claiming the same, shall give bond in manner now required by law in cases of such appeals." The whole policy of the statutes has been to allow but one appeal, and that from the final decree; and no reason exists for allowing appeals from other orders or decrees, in a suit in equity brought by or against an assignee in bankruptcy, which would not have equal force in any other cause. It is true, that, if the interlocutory decree should be reversed, the labor and expense of the proceedings before the master may be lost; but that is equally true of causes in admiralty, and equally true of all appeals from the circuit court to the supreme court; and it is, moreover, true, that the proceedings before the master may not be wholly lost, even if, in some respect, the interlocutory decree be deemed erroneous. It may be modified. It may be even adapted to the facts which shall be reported by the master. Even the district court has power, on the coming in of the master's report, to conform the final decree to all the proofs in the cause. It is, at least, doubtful, whether to permit appeals from any other than final decrees does not, as the general rule, tend to prolong litigation and increase expense, without corresponding benefit; and it may well be, that congress did not, in this particular, regard the possible delays and protracted duration of chancery suits in England as desirable.

If, notwithstanding these suggestions, the question under the act was deemed doubtful, the authority given to the supreme court, by section 10 of the bankrupt law, to frame general orders "for regulating the practice and procedure upon appeals," followed by general order No. 26, in which the supreme court declare, that, "appeals in equity from the district to the circuit court, and from the circuit to the supreme court of the United States, shall be regulated by the rules governing appeals in equity in the courts of the United States," ought to be regarded as conclusive, at least as an opinion of the supreme court, that appeals under section 8 are to be made from final decrees only, if not a binding regulation upon the subject.

The appeal must be dismissed; but, as the question was deemed doubtful, and the appeal was taken out of abundant caution, and lest it should be urged, on appeal from the final decree, that the decision embodied in the interlocutory decree could not be reviewed, no costs should be allowed on this motion.

[NOTE. For proceedings on appeal from the final decree, and subsequent reversal of the circuit court decree thereon by the supreme court, see Case No. 2,825, next following.]

Case No. 2,825.

CLARK v. ISELIN et al.

[10 Blatchf. 204; 9 N. B. R. 19; 21 Pittsb. Leg. J. 82.][1]

Circuit Court, S. D. New York. Oct. 2, 1872.[2]

BANKRUPTCY—UNLAWFUL PREFERENCE.

1. The mere giving of security, on a loan of money, is not an illegal preference, under the bankruptcy act.

[Cited in Re Reynolds, Case No. 11,724; Re Strenz, 8 Fed. 313.]

[See note at end of case.]

2. A creditor, holding a warrant to confess judgment, who enters judgment on it, and levies, under such judgment, an execution on the property of his debtor, at a time when the debtor knows, and the creditor has cause to believe, that the debtor is insolvent, obtains an illegal preference, under said act, even though the debtor was not insolvent when the warrant was given.

[See note at end of case.]

3. If a creditor releases the goods of a debtor from the lien of an execution in favor of such creditor, and takes a transfer of other assets from the debtor, in payment of the debt, when the debtor is insolvent, and the creditor has cause to believe so, the preference is an illegal one, under said act.

[See note at end of case.]

In equity. This was a bill in equity filed, in the district court, by the plaintiff [James R. Clark, Jr.], as assignee in bankruptcy of [Henry E. Dibblee, D. P. Bingley, and J. J. Krauss, comprising] the firm of H. E. Dibblee & Co. against [Adrian Iselin and Isaac Iselin] the members of the firm of A. Iselin & Co. The bankrupts were adjudged such,

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. 21 Pittsb. Leg. J. 82, contains only a partial report.]

[2] [Reversed by the supreme court in Clark v. Iselin, 21 Wall. (88 U. S.) 360.]

in involuntary proceedings, on the 2d of June, 1869, the petition having been filed May 3d, 1869. [See Case No. 3,884.] The bill set forth, that, on the 25th of February, 1869, Dibblee, one of the bankrupts, without the knowledge of his other two copartners, Bingley and Krauss, gave to Iselin & Co. a confession of judgment in his own name, and in the name of the firm, for $54,100, with authority in it to enter judgment for that sum against the members of the firm, the consideration stated in the confession being securities amounting to the cash value of $54,100, loaned and advanced by Iselin & Co. to Dibblee & Co., some on the 20th of February, 1869, some on the 23d of February, 1869, and some on the 24th of February, 1869; that, on the 30th of April, 1869, Iselin & Co. entered a judgment, in their favor, against the three bankrupts, in the supreme court of New York, on such confession, for $54,100, and docketed the same, and issued an execution thereon, in which, on the same day, a levy was made on the stock in trade and merchandise of the bankrupts; that the securities mentioned in the confession of judgment were hypothecated by Dibblee, in February, 1869, to various banks in New York, as collateral security for loans made by said banks to the bankrupts, on their notes for $46,000; that, afterwards, Iselin & Co. paid the loans to the banks and received from them the securities; that, on the 1st of May, 1869, the bankrupts gave to Iselin & Co. a bill of sale of bills receivable and accounts amounting, on their face, to $47,839.52, and paid to Iselin & Co. $1,900 in cash, and Iselin & Co. accepted the same, and the securities received from said banks, which they had taken subject to their lien thereon for the money they had paid to said banks, in satisfaction of said judgment and execution, and the same were thereupon cancelled and satisfied of record; that the advance of the securities hypothecated to said banks was made by Iselin & Co. to enable the bankrupts to borrow money and apply it, or to apply other money, and which money was applied, to pay other debts due by the bankrupts to Iselin & Co.; that, in March and April, 1869, the bankrupts transferred to Iselin & Co. upwards of $61,000 of their assets, as collateral security for $61,000 of indebtedness to Iselin & Co., part of which Iselin & Co. had collected at the time the petition in bankruptcy was filed; that, between March 22d, 1869, and May 1st, 1869, the bankrupts paid to Iselin & Co. $20,108.52, in payment of $20,000 of call loans made by Iselin & Co. to the bankrupts on March 5th, 6th and 8th, 1869; that, on or about April 8th, 1869, the bankrupts paid to Iselin & Co. $7,944.88, for interest on prior indebtedness; that these transactions took place with a view, on the part of the bankrupts, to give a preference to Iselin & Co., as creditors of the bankrupts, and when the bankrupts were insolvent, and in fraud of the bankruptcy act; and that Iselin & Co. had reasonable cause to believe the bankrupts to be insolvent, and that a fraud on said act was intended by such dispositions of property. The bill prayed, that the title of Iselin & Co. to the securities and moneys so paid and assigned to them be decreed to be fraudulent and void as against the plaintiff, and that Iselin & Co. be decreed to account for, and pay to the plaintiff, the value of said securities, (less the amount for which the same were hypothecated to said banks), and all payments and transfers so made by the bankrupts to Iselin & Co., and the value of the assets so assigned in March and April, 1869, and by the bill of sale of May 1st, 1869. The district court decreed that the title of Iselin & Co. to the property assigned by the bill of sale of May 1st, 1869, and to the $1,900, and to the securities received from the banks, (subject to the amount paid by Iselin & Co. to redeem the same), was void, under the bankruptcy act, as against the plaintiff, and that Iselin & Co. should be precluded from proving in bankruptcy their judgment for $54,100, or debt for which it was recovered, and should account for the said property and money and securities. The final decree was for $61,988.14. In other respects the prayer of the bill was denied. [Case unreported.] Both parties appealed to this court.

[For dismissal of a prior appeal from the interlocutory decree, see Case No. 2,824, next preceding.]

Charles H. Smith, for plaintiff.

Stephen P. Nash and Henry W. Clark, for defendants.

WOODRUFF, Circuit Judge. The uncharitable prejudice which regards every one who does not pay his debts as a knave, and esteems every one who has befriended him a conspirator to defraud others, may, perhaps, find reasons for most unjust imputations upon the defendants in this cause. They are, in my opinion, wholly unwarranted by the proofs. On the contrary, looking to the purpose and intent of the actors in the transactions in question, the proofs fail to show any actual bad faith, or want of the highest integrity, in either of them.

The assignment made to Iselin & Co., May 1st, 1869, was, I think, a violation of the provisions of the bankrupt law, in the sense, that, by that law, it was invalid; but, even this was, I think, made under a real misapprehension, in the mistaken belief that it was proper, and in the discharge of a valid lien, which it was for the interest of the insolvent firm and its creditors to remove from their stock of goods then in the possession of the sheriff.

I think there was nothing in the transactions prior to that date, which was liable to any imputation, either as fraudulent in fact, or as contravening the provisions of

the bankrupt law. Lending to the firm of H. E. Dibblee & Co. $54,100, and taking security therefor, whether in the form of a confession of judgment, or a pledge of promissory notes, or a bond and mortgage of real estate, was not the taking of a preference, in any sense of that term, used in the bankrupt law. Had the firm, on the 25th of February, 1869, applied to an insurance company, or an individual having funds, for a loan upon bond and mortgage, and, receiving the loan, had given security, no one could say that an illegal preference had been given. In that case, and equally in the case of the loan made by Iselin & Co. here, the firm received the whole amount for which the lenders took security. The estate of the firm was enhanced for the payment of debts, or for the purposes of business, to the precise extent which it was burthened by the giving of the security. The balance sheet remained the same. If Iselin & Co. had been content to rest on the security they then had, I think their position would have been safe from impeachment on any ground.

Whether they could, after knowledge or reason to believe that H. E. Dibblee & Co. were insolvent, proceed, (on the authority given on the 25th of February,) to enter up judgment, and levy and collect the amount by execution, is, however, a different question. They would, at least, have been permitted to prove the debt against the estate of the bankrupts, even if the proceedings in bankruptcy had intervened, to prevent their having the benefit of the authority to enter up a judgment. Prior to the entry of judgment, Iselin & Co. had in their hands an instrument authorizing the entry of a judgment, but had, in fact, no lien upon the property of the firm. This instrument was called a security, but it was, in truth, only a means or instrument placed in their control, by which security and payment might be effected. It contemplated the possible necessity of being made effective, but it was, in itself, only inchoate, and, so long as it remained in the hands of Iselin & Co., it had no legal operation, and vested in them no right of property in any part of the estate of the debtors, either absolute, qualified, or contingent. In this condition of Iselin & Co. and Dibblee & Co., the proof shows, I think, that both Dibblee and Iselin became satisfied that the firm of the former was insolvent, and then attempted to make the instrument previously executed effectual.

It may be conceded, that it would have been a violation of good faith for Dibblee to do anything to prevent Iselin & Co. from obtaining full security by means of a judgment. It may even be conceded, that, as between Iselin & Co. and Dibblee & Co., the former had acquired an unquestionable right, both legal and equitable, to enter up judgment and enforce it. But, this is not the test of their right as against creditors, when Dibblee & Co. were adjudged bankrupt. Iselin & Co. had obtained no actual preference, when the affairs of Dibblee & Co. reached such a condition, that Dibblee must have known, and Iselin had cause to believe, and, I think, did believe, that the debtors were insolvent, and entered up the judgment, for obtaining the actual security and preference which it was in his power to effect through the instrument theretofore executed. In this point, the case does not differ from an example readily suggested. Suppose Iselin & Co. had made a loan, upon a promise by Dibblee & Co. in proper legal form, to give a bond and mortgage as security, whenever required. It would be bad faith in Dibblee thereafter to refuse to give the bond and mortgage, or to do anything which deprived him of the power to give such bond and mortgage, as a valid security; and yet, if, before it was given, Dibblee became or was insolvent, and Iselin became aware of it, the performance of the promise would have been, in fact, a giving and receiving a preference, and not less so because of the previous promise. So, of a promise to give a judgment; and so, of a writing actually delivered to Iselin & Co., but not made effective. As against creditors, the right to carry the promise, or the intention, into effect, is defeated. As against them, the actual gaining of the preference is forbidden. In the case of the promised bond and mortgage, I think this would not be questioned; and I perceive no distinction between the cases. As against the debtors, a court of equity would enforce their duty to make the contemplated security; and, in the absence of any conflicting rule, that court would consider that done which ought to be done, and so give effect to the intended security, as of the time when the loan was made. But, when the provisions of an express statute have intervened, and the exigency has arisen in which the statute declares the right of creditors to an equal distribution of the property, I think the creditor who has, in the mean time, relied upon an executory promise, or upon his possession of what is practically a mere authority to acquire and enforce a lien, must rest where he finds himself. To then give or take the preference is prohibited.

This is not all. On the 1st of May, after the insolvency of the firm was clear, the debtors made an actual transfer of assets, for the payment of the debt to Iselin & Co., and consented that the latter obtain further payment, by redeeming other assets from banks to which they were pledged for less than their value. This was a clear preference of Iselin & Co., whatever motive, in respect to liberating the stock of goods from the levy of the execution, may have prompted it. Freedom from the lien of the execution was an inducement to this

transfer, but did not justify it. The creditors of the bankrupts had a right to have the estate in the condition in which it was when Dibblee & Co. and Iselin & Co. became conscious of the insolvency, and of the effect of paying Iselin & Co. their debt.

These views result in an affirmance of the decree made below, so far as the surplus of the assets redeemed from banks, the cash payment of $1,900, and the transfer of the notes and accounts mentioned in the assignment of the 1st of May, 1869, were declared void as against the complainant, and so far, also, as it excludes Iselin & Co. from proving the debt thereby attempted to be paid.

As to the sum of $2,229.08, also decreed to be paid to the assignee, I am not able to discover, from the proofs, nor from the stipulation made by the parties, when this surplus, (over and above the amount due to Iselin & Co. upon their previous advances,) accrued. If they had collected it, and held it, at or before the petition in bankruptcy against Dibblee & Co. was filed, then they are entitled to retain it, and to apply it on the debt which was secured, or attempted to be secured, by the judgment. That debt was, and still is, a valid debt against the bankrupts, notwithstanding the creditors are not permitted to prove it against the estate in the hands of the assignee; and, if the moneys referred to are collected, so as to constitute a debt from Iselin & Co. to Dibblee & Co., by overpayment or collection on the securities for the other advances, then their claim against the bankrupts, for which the judgment was confessed, was a valid set off thereto, and Iselin & Co. should not be required to pay over that surplus to the assignee. The bankrupt law allows and requires such set off. Any collections in excess of the advances for which they were specifically pledged, made after the filing of the said petition, were collections for the account of the assignee, and, as to them, no such right of set off exists. As this point was not urged by counsel as an impeachment of the decree, I conclude that the sum of $2,229.08, in question, was so collected. If so, the decree must be affirmed; and, as both parties have appealed, neither should be allowed costs, as against the other.

[NOTE. Both parties appealed to the supreme court, where the decree of the circuit court was reversed,—the majority of the court holding, per Mr. Justice Strong, that the return of the notes held by defendants as collateral to Dibblee & Co. was merely to facilitate the collection thereof, and in no degree affected defendants' title thereto; that the withdrawal of the collateral for the first three notes, and the contemporaneous pledging of others in their stead, amounted to a mere exchange of securities; that the circumstances of the transactions between defendants and the bankrupts sufficiently showed that defendants did not suspect the insolvency of Dibblee & Co. at the time of the transactions in question, nor was there any evidence that during this period the bankrupts contemplated insolvency. The court further held that the confession of judgment was lawfully made, and that the subsequent entry of the judgment, the issue of the execution, and the levy thereunder, were not fraudulent, nor a procurement by the bankrupts of a seizure of their property with a view on their part to give a preference under the thirty-fifth section of the bankrupt act. Clark v. Iselin, 21 Wall. (88 U. S.) 360.]

Case No. 2,826.

CLARK v. KENNEDY MANUF'G CO. et al.

[14 Blatchf. 79;[1] 2 Ban. & A. 479; 11 O. G. 67.]

Circuit Court, D. Connecticut. Jan. 1, 1877.

PATENTS—"MANUFACTURE OF BOLTS"—CONSTRUCTION—INFRINGEMENT.

The invention set forth in reissued letters patent No, 6,291, granted to William J. Clark, February 16th, 1875, for an "improvement in the manufacture of bolts from round rods," consists in the manner in which the inventor applies lateral compression to the manufacture of an angular neck, and in the manner in which he permits the shaping mechanism to become anvil heads upon which the header can operate to form a head upon the bolt. The patent is to be construed as claiming a method or process, which consists in the combination of the operation of swaging the blank laterally by the described dies, or their equivalent, operating in substantially the same way, with the operation of upsetting the end of the bolt upon the anvil ends of the dies, to form the head. It does not claim broadly swaging by suitable dies, combined with upsetting to form a head. Therefore, a machine in which the swaging is produced by dies of a construction radically different from the dies of the patent, does not infringe the patent.

[In equity. Bill by William J. Clark against the Kennedy Manufacturing Company and Edwin Hills to restrain infringement of the second reissue of patent No. 43,669, the first reissue of which was numbered 1,916.]

Charles E. Mitchell and Benjamin F. Thurston, for plaintiff.

Charles R. Ingersoll, for defendants.

SHIPMAN, District Judge. This is a bill in equity to restrain the defendants from an alleged infringement of reissued letters patent of the United States, No. 6,291, granted to the plaintiff and dated February 16th, 1875, for an "improvement in the manufacture of bolts from round rods." The original patent was ante-dated February 2d, 1864, and the first reissue was dated March 28th, 1865. The answer alleges that the second reissue was not for the invention which was described in the original patent, and denies that the defendants have infringed the patent, and denies that the plaintiff was the first inventor of the patented improvement.

The main question in the case is in regard to infringement, and this question involves the precise character and extent of the plaintiff's

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

invention, and the proper construction of the letters patent. It is necessary to ascertain, in the first place, from the testimony as to the state of the art, and from the original and reissued patents, what was the invention of the patentee. Prior to the date of the plaintiff's invention, angular necked, round stemmed and headed bolt blanks had been made from iron whose cross section was square. The round stem, which was to receive the screw thread, was made cylindrical by rolling or hammering, which required expensive machinery and much labor. Angular necked bolt blanks were also made from the round iron of commerce. These blanks were formed in dies, a portion of which was round and a portion was square, but the neck of the bolt was formed wholly by the operation of upsetting or driving the metal into the square fixed matrix of the dies. It was practically impossible by the upsetting process to form a neck whose length would exceed the diameter of the bolt. The average length of the necks of bolts made by "staving up" was somewhat less than the diameter of the bolt. The head was formed by the same upsetting operation. It is necessary that the neck should be of considerable length, in order to prevent the bolt from turning around after it is driven into the wood and the nut is screwed upon the shank. The necks of staved up bolts were too short, and the bolts revolved in the wood. It is also desirable that the corners of the neck should be full and angular, so that the bolt may remain firmly imbedded in its place. The plaintiff's invention resulted in making from round iron an angular necked, round stemmed and headed bolt blank, having a neck of sufficient length to meet these mechanical requirements. He succeeded in making a cheap bolt, which has gone into general use, and the validity of his patent has been substantially acknowledged by the manufacturers of the country. His mechanism is described in the original specification as follows: "I construct a pair of dies of cast iron or other metal, making the grooves therein, for a portion of their lengths, of a semi-cylindrical form, and the remaining portion of an angular form. Each die being provided with a groove of this character, will permit the two, when placed together, to present at one end a cylindrical opening corresponding in diameter to that of the cylindrical bolt blank, while the opening at the opposite end, instead of being cylindrical, will be square or angular, but of similar sectional area to the cylindrical end, so that, when the two dies are forced together upon the bolt blank, (which is heated to a proper degree before being placed therein,) that part of the blank lying within the angular portion of the grooves will be swaged out, and forced to take the angular form corresponding to that of the angular portion of the groove, while the part lying within the cylindrical portion of the groove will retain its original shape, and, while the bolt blank is held in the dies, they form an anvil upon which a portion of the blank projecting from the dies, at the end containing the angular grooves, is upset, and formed into a head, by any proper machinery."

It will be understood that the process of moulding or shaping hot iron by swaging had long been understood at the date of the original patent, and that the manufacture of bolt blanks by swaging or lateral compression was also then known. Round necked bolts from square iron had been made by swaging, and square headed bolts had been made by the same process, but square necked bolts had not been made from round iron by lateral compression, prior to the plaintiff's invention.

The plaintiff, in the first place, insists that his invention consisted in constructing the angular neck mainly by the operation of swaging, supplemented by the operation of staving up, so that the neck of his bolt had all the advantages of swaging, in point of length, and was completed by the necessary result of the action of the header in forming the head, by pressing and forcing the metal into the mould, and that the invention resides in the combination of these two separate operations, which co-operate with each other in forming the bolt. The defendants, while conceding the importance of the invention, insist that it consists in the peculiar character of the dies which are described in the patent.

The main object of the patentee was to construct an angular necked bolt blank from round iron. The blank was, of course, to be headed, for a head is a necessary part of a bolt, and it was to be headed by some kind of upsetting machinery theretofore in use; but his inventive skill was directed to the construction of an angular necked bolt which was to be headed by old mechanism of some sort. If the patentee had supposed that the assistance which the upsetting operation furnished to the swaging operation, in the formation of the neck, was a part of his invention, the second reissue would naturally have distinctly pointed out this feature. The important part of the specification is as follows: "According to my invention, I make an angular necked, round stemmed, headed bolt blank from a round piece of iron, by first forming the neck into an angular shape in cross section by lateral pressure at all sides simultaneously, and then, while the said piece is firmly held in proper position, forming its projecting end into a protuberant head of the desired contour, by upsetting against the dies, as an anvil, by suitable machinery, that acts to upset the metal against the anvil ends of the closed dies, and form the head by a motion in the line of the axis of the bolt blank. * * * The operation of the dies is as follows: A round piece or rod of metal, suitably heated, is placed between the open swaging dies, with a sufficient portion

protruding at the anvil ends thereof to form the head. A lateral pressure is then brought against the dies and they are forced together, giving to the metal substantially the angular shape of the matrix formed by the dies. While the metal remains thus held, the upsetting machinery drives the protuberant end of the rod or piece longitudinally against the anvil ends of the closed dies, thereby forming the bolt head by upsetting the metal against the anvil ends of the dies, which only shape its under surface." It is true, that the patentee says that the lateral pressure gives to the metal "substantially the angular shape of the matrix formed by the dies," but he does not say that the shape is perfected by the upsetting operation, or give any further suggestion that the upsetting machinery performs any other office than that of shaping the head. Neither was there any testimony to the effect that, after the metal had been swaged, the angular shape of the neck was made more perfect and complete by the upsetting operation. It is undoubtedly true, that the portion of the neck under the head is made more full by the upsetting process, but the angularity of the neck is not increased thereby; and in neither of the patents is this fullness claimed as an improvement, or that the formation of the neck by the aid of upsetting is a part of the invention. On the contrary, the patentee says, in his first reissue, that the fullness is not intentional, but is incident to the operation of making the head. Again, the first two claims of the patent, which are the process claims, are as follows: "1. The process, substantially as hereinbefore set forth, of forming from a round piece of metal a headed bolt blank having an angular neck and a round stem, which process consists in subjecting a portion of the length of the round piece of metal to lateral swaging or compression on all sides simultaneously, to form the angular neck, and, while the piece is firmly held with the neck portion inclosed at all sides, upsetting the projecting end of the swaged piece of metal, to form the head of the bolt blank. 2. The process, substantially as hereinafter set forth, of forming the angular neck and protuberant head of a bolt, which consists in subjecting a round piece of metal to lateral swaging between angular grooved dies, the end surfaces of which dies, when closed, form the anvil against which the projecting end of the swaged piece of metal is upset and formed into a head by proper machinery." From the language of each of these claims, it appears to be manifest, that the formation of the neck is claimed to be effected by the swaging dies, before the heading machinery commences the formation of the head; and all that is claimed for the heading machinery is the compression of the head against the anvil ends of the dies.

It is next contended, that the invention consisted in the making a new and useful bolt by a process composed of two operations —the first, that of lateral swaging by dies capable of swaging; and the second, that of upsetting, to form the head—and also consists of a process to produce the result by means of certain described mechanism. It is true, that the bolt is formed by both swaging the neck and upsetting the head, and that the patentee is entitled to claim the upsetting in combination with the swaging operation, because these operations in combination had not existed in the formation of an angular necked and headed bolt from round iron. The gist of the invention and the inventive skill, however, consisted in making an angular necked blank from round iron, and, irrespective of the claims of the patent, and regarding the state of the art in connection with what was actually done by the patentee, I am of opinion, that his invention, or the new and useful method by which he manufactured bolts, consisted in the manner in which he applied lateral compression to the manufacture of an angular neck, and in the manner in which he permitted the shaping mechanism to become anvil heads upon which the header could operate to form a head upon the bolt. The patentee did not discover that swaging round iron would form an angular neck, and that upsetting would form a head, and that both operations would form a bolt; but he did invent, what was previously unknown, the mechanical means by which swaging would form an angular neck from round iron, which mechanism could be used in connection with upsetting. This opinion is confirmed by the description which the patentee gives of his invention in the specification of his reissued patent, which has been quoted, and in which the mode of operation is clearly described.

Such being the character and extent of the invention, the next question is, as to the construction which shall be given to the reissued patent. The first two claims, upon which the controversy mainly turns, have been quoted. The defendants contend that these claims can only be sustained by a construction which shall limit the process to the use of the specified dies, and that, if the claims are broadly for a process, irrespective of the peculiar mechanism, the reissued patent is for an invention which was not indicated in any part of the original patent or in the drawings attached thereto. The claim in the original patent is as follows: "The combination and use of metallic dies for the purpose of giving angular shape to a portion of a cylindrical bolt, by compression laterally, leaving the remaining portion of the bolt in its original form, and which dies, at the same time, serve the purpose of an anvil, upon which the head of a bolt is formed, by upsetting a projecting portion thereof, substantially as set forth;" and the plaintiff insists, that, inasmuch as the patentee's process involved both the swaging and upsetting operations and possessed the advantages of each, the reissue was properly allowed.

I am of opinion that the reissue was properly granted, and that the patentee had a right either to claim his invention as a process, within certain limitations, or as a part of a machine. But the patentee cannot, by obtaining a reissue for a process, enlarge his right to a monopoly beyond the actual invention; and, when it is insisted that he invented a new process of using his improved dies or any other dies, "which process consisted in the combination of the operation of swaging the blank laterally, with the operation of upsetting the end of the bolt to form the head," such a proposition is broader than the invention will justify. All that can properly be claimed in behalf of the patentee is, that he has invented a new way of manufacturing bolt blanks by the described swaging dies, to be used in connection with upsetting machinery; and his invention may properly be claimed as a method or process, which process consisted in the combination of the operation of swaging the blank laterally by the described dies, or their equivalent, operating in substantially the same way, with the operation of upsetting the end of the bolt upon the anvil ends of the dies, to form the head. The thing invented and patented was not any mode of swaging combined with upsetting, but it was "the employment of specified means, or their equivalents, for the accomplishment of a desired end." Roberts v. Dickey [Case No. 11,899]. By limiting the first and second claims of the reissued patent to the use substantially of the dies described in the specification, or their equivalents, the patent will not be broader than the invention, and no question can be made that it is not for the same matter which is contained in the original patent. But the plaintiff is not limited to the exact form of the dies which is mentioned in the third claim. That form is not particularly relied upon in the specification and is not a material part of the mechanism.

The remaining question is in regard to infringement. The round portion and the square portion of the plaintiff's dies are of similar area, and, by means of this similarity, the swaging operation is performed. The form of the defendants' dies is substantially like that of the dies which were previously used to form bolts by the upsetting operation alone. One of the defendants' dies is solid, the upper part being V-shaped and the lower part cylindrical. The other die is in two separate parts, each portion being the same as the corresponding portion of the solid die. The area of the squaring dies is larger than the area of the round dies, so that there can be no lateral compression by the angular dies until after the intervention of some operation other than the grasping of the iron by the dies. If the ordinary round rod of commerce is placed within the dies, and the two parts of the divided die are placed upon a line with each other, and the dies are brought together, there will be no swaging. Swaging in this machine takes place only after the header has begun to operate. Although the fact that swaging does take place was denied by the defendants, the sharp and well-defined corners of the neck portion of the blank, and the result of the operation, prove that the bolts have been swaged. The swaging must have been effected in one of two ways. Sometimes the separate square part of the necking die is not set in a line with the round or griping portion, and the griping dies come in position and are locked before the squaring dies are locked. Meanwhile, the header has partially filled the matrix with hot iron, and, while the header is within a very short distance from the ends of the dies, the angular dies come completely together upon the iron which has been pressed into the matrix and complete the square by lateral compression. Again, when the separate portions of the die are on a line, the separate angular die is held in its place much less firmly than the round die. The round die is held in place by the whole strength of the frame of the machine, while the angular die is so weakly held that it yields or "gives" a little as the iron is being upset by the header. Then, and before the header has completed its movement by about one-eighth of an inch, a second cam comes into action behind the angular die, for the purpose of locking it, and forces the die laterally, whereby the swaging operation is performed.

Is the swaging operation in the two machines effected in substantially the same way? In one, the iron is swaged in dies which are constructed to swage, in which the different parts of the dies are of similar sectional area. In the other, the angular neck is substantially made by upsetting the iron into a matrix, and is completed by swaging. In the plaintiff's machine, the necks are swaged, and the head is formed by upsetting. In the defendants', the necks are formed by upsetting and by swaging. But the material difference is, that the swaging is produced by dies of a construction radically different from the plaintiff's dies, and, unless swaging by suitable dies, combined with upsetting to form a head, is secured by the plaintiff's patent, it will not be contended that the defendants' machine is an infringement.

The vital point in the case is in regard to the extent of the plaintiff's invention, and the construction to be, therefore, given to his patent. In order to constitute infringement, a broad construction must be placed upon the patent, so as to include any machine for making bolts from round iron, in which machine the two operations of forming the angular neck by dies which will swage, and forming the head by upsetting, are combined. Such a construction, I have already said, is, in my opinion, broader than the actual invention.

"The general terms, and, sometimes, spe-

cial words, in the claims, must receive such a construction as may enlarge or contract the scope of the claim, so as to uphold that invention, and only that invention, which the patentee has actually made and described, where such construction is not absolutely inconsistent with the language of the claim." Estabrook v. Dunbar [Case No. 4,535].

The bill is dismissed, with costs.

CLARK (LANMON v.). See Case No. 8,071.

Case No. 2,827.

CLARK et al. v. LAWRENCE et al.

[Brunner, Col. Cas. 637;[1] 21 Law Rep. 392.]

Circuit Court, D. Massachusetts. 1856.

OFFICERS OF CORPORATIONS—LIABILITY TO CREDITORS FOR NEGLIGENCE.

An action on the case cannot be maintained by a creditor of a corporation against the directors thereof for gross negligence in the management of its affairs, whereby its property has been wasted and its means of paying the plaintiff destroyed.

[Cited in Cleveland v. La Crosse & M. R. Co., Case No. 2,887.]

[At law. Actions by Robert A. Clark and others against Samuel S. Lawrence and others for negligence.]

H. M. Parker, for plaintiffs.

Mr. Merwin, contra.

CURTIS, Circuit Justice. The question raised by the demurrer to the declaration in this case is, whether a creditor of a corporation can maintain an action on the case at the common law in Massachusetts against the directors of the corporation, for gross negligence in the management of its affairs, whereby its property was wasted and its means of paying the plaintiffs destroyed. In Smith v. Hurd, 12 Metc. [Mass.] 371, it was decided that such an action could not be maintained by a stockholder of a banking corporation, and the same law in reference to a manufacturing corporation was laid down in Abbott v. Merriam, 8 Cush. 588. Most of the considerations upon which that decision was rested are equally applicable, and some apply with even greater force to the case of a creditor. They are:—1. That the directors are the agents of the corporation and not of the creditors, and there is no legal privity between them. That for misfeasances and nonfeasances in the execution of their agency, whereby their principals are injured, agents are responsible only to their principals: and that this rule is as applicable to corporate agents, as to agents of natural persons. 2. An injury done to the capital of a corporation is not, in contemplation of law, an injury to each of its creditors. It is true, such injury may prevent the corporation from paying its debts, in whole or in part; and a similar injury to an individual may be followed by the same consequence to his creditors. But compensation for such injuries must be sought by the party on whom they are inflicted; and actions for them cannot be maintained by every one who is so connected with the principal as to suffer consequentially and indirectly through him. 3. If one creditor may have such an action, every creditor may; and thus a vast multiplicity of suits may be brought for one wrong. 4. How can a court of law, in each of such actions, take an account of the corporate property and debts, and decide how far its liability to pay its debts has been destroyed by the acts of the directors, and apportion among the creditors the damages which the directors are liable to pay? and, if not thus apportioned, what is to be done? 5. If a creditor may have such an action, he may compound and release it; and what effect is that to have upon the claims by the corporation for the same damages? and what effect upon the rights of other creditors?

Without pursuing these inquiries, I think it clear that such an action as this cannot be maintained consistently with the principles of the common law. The demurrer must be sustained, and the declaration adjudged bad.

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

Case No. 2,828.

CLARK v. The LEOPARD.

[4 Law Rep. 153.]

District Court, D. Massachusetts. July 7, 1841.

BOTTOMRY BONDS TO CONSIGNEE OF VESSEL.

1. Under the circumstances of this case, the court refused to enforce certain bottomry bonds.

[2. Where the consignee of a vessel employs her as he sees fit, without accounting for her earnings, he cannot enforce bonds on the vessel taken by him for wages, port charges, insurance, and the like.]

This was a libel filed for the recovery of several sums of money, alleged to have been advanced at different times by the libellant in the years 1834 and 1835, and claimed to be secured by different instruments, designated as bottomry bonds. The Ocean Insurance Company appeared as claimant, under protest, as owners of a bottomry bond executed by P. & C. Flint & Co., on the 20th July, 1833, on a loan of $8,000, and excepted to the jurisdiction of the court, on the ground that the bonds stated in the libel were not bottomry bonds, (1) inasmuch as the respective masters of the bark had bound themselves personally and at all events for the repayment of the money; and (2) because the lender took upon himself no maritime risks, although there was a stipulation for maritime interest in the different instruments. A defensive allegation was also made, that if the instruments were to be considered as of the character of bottomry bonds, they ought not to have priority over the bond of the claimant, be-

cause the libellant had wrongfully taken possession of the bark, and the expenses, &c., to secure which the bonds articled were taken, arose during a wrongful detention. There was much evidence in the case, but the most important of it disclosed the following facts: In January, 1834, an arrangement was made in Boston, between the Flints, Clark, and S. Austin, agent for George Wildes & Co., to send the bark to the Havana, to Clark's consignment, to be there loaded for Cowes and a market. In February afterwards the Flints stopped payment, and made an assignment of their property to Cartwright & Train, for the benefit of their creditors: the latter confirmed the arrangement about the bark, but Clark declined to become a party to the assignment; sent out to the Havana to countermand the loading of the bark, and claimed to hold her as security, or rather, as he termed it, to "embargo her," for the amount due to him from Flint & Co. Both the assignees and the Ocean Insurance Company sent out powers to the Havana to demand there the restoration of the bark, but were unsuccessful in the object. Those of the bonds articled in the libel were executed at Havana during the detention, one by the master originally appointed, the others by masters appointed under the direction of Clark. It appeared, that after some detention, the bark was despatched by Clark on various voyages, and without crediting the freights earned against the expenses, he passed them to the credit side of a general account with the Flints, and debited them with a loss on cargo upon one of the voyages. The bonds were taken by his direction, so as to include wages and all port charges, with insurance, &c. Eventually the bark was sent to Antwerp, where a fourth bond of similar character was executed, and from that port she departed for and arrived at Montevideo, where, after legal proceedings of many months' duration, the bark was delivered up by the tribunals to the agents of the assignees. To cover the expenses of these last proceedings, a fifth bond was executed, under which the vessel returned to Boston in the spring of 1837. No sanction to the doings of Clark appeared to have been given at any time by the Flints, the assignees, or the insurance company.

The case was argued at much length more than a year ago, and has since been retained under advisement.

Mr. Washburn, for libellant.
Aylwin & Paine, for claimant.

DAVIS, District Judge, now delivered his opinion. After remarking that the case was peculiar, and having much in the various transactions that was strange, he proceeded shortly to recapitulate the facts. Passing over the exceptions taken to the jurisdiction, and the point raised, whether the libellant was entitled to any relief either in a court of law or equity, he held that Clark, having abandoned his character of consignee, had placed himself in a position that did not permit the court to enforce the instruments articled as bottomry bonds. He gave up the relation of consignee, in which, under proper circumstances, a bond might be taken to himself, and chose to employ the vessel as he saw fit, without accounting for the earnings. It was impossible that these bonds could be sustained here, whatever might be done in any other jurisdiction. The judge then declared that he must dismiss the libel with costs to the claimants.

Case No. 2,829.

CLARK et al. v. MANUFACTURERS' INS. CO.

[2 Woodb. & M. 472.][1]

Circuit Court, D. Massachusetts. May Term, 1847.[2]

INSURANCE — REPRESENTATIONS — WARRANTY — ADOPTION BY RENEWAL — NOTICE OF CHANGE — ACTION ON POLICY — DEFENSES — RECOVERY OF PREMIUMS — NEW TRIAL — PRACTICE.

1. Where a policy in the body of it refers to representations made by the assured, and provides that they are to be true, or the insurance is void, it is competent to show by evidence, dehors the policy, what the representations were.

[Cited in Albion Lead Works v. Williamsburg City F. Ins. Co., 2 Fed. 486.]

2. The usual printed questions and written answers as to cotton manufactories, made before an insurance existed in this case, as to this establishment, are presumed to be those referred to, until the contrary is shown.

3. A warranty is generally a stipulation made and described in the policy itself, and must be complied with, whether material or not; but a representation is generally not given in detail in the policy, but verbally, or in a separate writing, if the property be situated at a distance.

4. After an insurance has been renewed several times, in new names often, but for the same party largely in interest at each time, and no new representations are filed, and it is applied for by that party as agent, and for a continuance or renewal of the former insurance, this is competent evidence to show an adoption or subsequent assent to those representations, as being what is referred to in the policy.

5. Where a material fact is suppressed in such representations, the insurance is avoided, and the policy does not attach, whether the suppression happens by neglect or fraud.

[Cited in Nicoll v. American Ins. Co., Case No. 10,259.]

6. So if a material change happens after in the mode of using the property insured, and notice of this is not given to the insurer, at the time or before a renewal, the old and new policy both become null.

7. In assumpsit to recover for a loss by fire on a policy of insurance, with counts for money had and received, as well as on the policy, the

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

[2] [Reversed in Clark v. Manufacturers' Ins. Co., 8 How. (49 U. S.) 235.]

plaintiff is entitled to recover for any premiums paid, where the policy did not attach; but they must have been paid by the same plaintiff, and within six years.

8. Where the representation was, that no lamps were used in the picking room of a manufactory, and lamps had been suspended and occasionally used there for several years, the policy did not attach. Lamps so suspended, and used when needed, must be considered, in common parlance, as used all the time, and not merely when lighted up.

9. Neglect in trusting to the memory of an agent, rather than examining the written representation on file, will not prevent a recovery back of the premiums in such case; but a fraudulent use of lamps, knowingly contrary to the representation, would prevent it.

10. Where a trial was had on the merits to recover for a loss, and a verdict was ordered for the defendants, and the claim for return of premiums was not tried, but was moved for at a subsequent day in the term, the court considered this as virtually a motion for a new trial.

11. After argument, the new trial pro forma was allowed; but it was ordered that the premiums should be returned, on condition that the plaintiff pay the costs of the first trial, the defendants having prevailed in the chief matter in controversy, viz. their liability to pay the amount of the insurance.

At law. This was an action on a policy by the defendants in favor of the plaintiffs [Eli Clark, William Green, and Hugh McGill], made August 13th, 1845. It was on a cotton factory and machinery, situated in Malone, in the state of New York, for $14,000, and was to run one year from the date. The property was alleged to be under a contract of sale by the Ogdensburg Bank to the plaintiffs, the consideration of which having not been paid, any loss happening was to be paid to said bank. A total loss of the buildings and machinery was averred to have occurred on the 13th of March, 1846. Notice and demand were alleged; and, at the trial here under the general issue of non-assumpsit at October term, 1846, the notice and demand, as well as the loss by fire and the execution of the policy, were proved or admitted. It was further proved, that the title of this property was in the Ogdensburg Bank, derived by mortgage deed and sheriff's sale, from Jonathan Stearns, between 1832 and 1838; and that the bank, January 26, 1842, contracted to sell the same to the plaintiffs, on certain terms; the plaintiffs, in the mean time, to have possession and insure the buildings and machinery, and assign the policy to the bank. Certain payments were proved to have been made on this contract, but the sum of $14,054 was still due.

The evidence showed, likewise, that the fire originated in the picking-room, which was situated in the center of the building, and in which a glass lamp was permanently suspended from the ceiling, and into which room a glass lantern was carried that evening, and placed by the workman on the window-sill while the picker was in operation. Around the top of this lantern he first saw the light and fire, as if the cotton-dust had become ignited through the air-holes, and the fire was communicated with such rapidity to the whole cotton he was unable to extinguish it. The evidence showed further, that when the picking-room had been occasionally used to work in during the night-time, this lantern, or one like it, had, for three years, been carried in; and that the globe lamp had been long used there suspended with a reflector over the top, and was lighted, when they worked at night in the picking-room, as well as the lantern. This appeared to have been the practice soon after 1834 or 1835, but no evidence was offered that it had been before.

It was also shown, in the progress of the case, that the first insurance on this property by the defendants was made July 1, 1834, to J. Stearns, for one year. It was made after previous representations by Stearns in writing, April 24, 1834, in answer to fifty interrogatories concerning the building and machinery and securities against fire. Among them were the 33d and 34th, with the answers annexed, in the following words: "(33.) How is this building lighted? If there be any lights, not inclosed in glass, used in any part of the building, state in which of the rooms such lights are used? (Answer.) No open lamps used in any part of the building except the machine-shop, and those are intended to be kept covered. (34.) Is the picker inside of the building? If within, state where situated and how secured. If in a separate building, state if the passage-way communicating with the factory is secured by an iron door at each end, or how otherwise secured? (Answer.) The picker is inside of the building; but no lamps used in the picking-room. The doors are wood, and not secured."

In that policy to Stearns was the following agreement by him: "The assured warrant that the waste shall be removed as often as once in forty-eight hours, to a safe distance from the mill, and that the lamps in the carding-rooms shall be inclosed in glass." It was further inserted as a condition in the policy, that "being made and accepted upon the representation of the said assured, contained in his application therefor, (to which reference is to be had,) it is fully understood by and between the parties thereto, that if said representation does not contain a full and true exposition of all the facts and circumstances in relation to the condition, situation, value and risk of the property hereby insured, so far as the same are material to the risk; or if the situation of the property or the circumstances affecting the risk shall be, during the existence of this policy, altered or changed by or through the advice, consent or agency of the assured, so as to increase the risk hereby assumed," &c. &c., "then, and in every such case, the risk hereby assumed shall cease, and this policy shall become void." There was an agreement on the back of that policy by the agent for the defendants, assenting to the assign-

ment of it to the Ogdensburg Bank. In July, 1835, the cashier of that bank applied for the renewal of that policy to Stearns for another year, inclosing the premium, and stating that it had been by him assigned to the bank; and a renewal was accordingly made in the same terms as the first policy, except that any loss was made payable to the bank. In August, 1836, a similar application and renewal took place between the same parties, and again in August, 1837. In August, 1838, Stearns informed the agent of the defendants, that the title to the property had become vested in the bank, and the cashier applied for a "continuance of insurance" on the former policy on the factory and machinery, omitting the stock, as the factory was not then in operation, but with liberty to put it in operation; and as the property had been transferred to the bank, the "new policy" was requested to be in its name. The new policy was accordingly issued August 13, 1838, only changing the direct insurance to the bank, with the old warranty and conditions, and the following additional clause: "It is understood that the factory is not in operation, and that the assured have liberty to put the same in operation, agreeably to the representations heretofore made by Jonathan Stearns." In August, 1839, an application was made for "the continuance" of that policy another year, and granted in the same terms, with the omission of the clause last cited. On the 12th of August, 1840, the bank applied for the "continuance" of the policy another year, and on the 14th of the same month wrote again, stating that the clause had been omitted the last year, probably by mistake, about the liberty to put the factory in operation on the representations made by Stearns, and wished it inserted this year. It accordingly was issued, dated 31st of August, 1840, for one year, in the terms used in the policy of August, 1839. On the 27th of August, 1840, the cashier of the bank wrote a letter, of which a copy is annexed:

"Ogdensburg Bank, August 27th, 1840. Parker L. Hall, Esq., Agent, &c. Dear Sir, —Will you do me the favor to send me a copy of the original survey and application, as made by Jonathan Stearns, at the time Stearns effected an insurance on the cotton factory, &c. at Malone; as I observe that the first policy made out for us specifies, 'agreeably to the representations heretofore made by Jonathan Stearns.' This institution does not know what those representations are, and as the factory is soon to be put in operation by Stearns, we having leased the same to him for one year, we wish you to send us a copy of the survey and application, in order to have Stearns's act within those representations. We also wish you to send us your assent of having the factory put in operation by Jonathan Stearns, under the policy that will take effect on the 30th instant, for one year from that time. If, on receipt of a copy of survey and application, it shall not be found sufficiently correct, you will be notified, and shall expect you will consent to have the policy adapted to the corrected application, &c. &c. In the policy of 1839 you say 'contained in their application;' I am not aware that this institution has made any specific application, and suppose you intended the one given as to details by Stearns. Very respectfully, yours, &c. John D. Judson."

To this letter the agent of the defendants replied, August 31st, 1840, stating, among other things, that he had not in his possession Stearns's representations in the "original survey;" but perhaps they could obtain a copy of him, (S.) or he could procure one from the office at Boston; adding, "You will of course see to it that the waste is removed according to the warranty, and that the lamps be enveloped in glass." The bank applied to Stearns, thereupon, and he replied that no copy of the survey had been preserved by him; "but I think," says he, "there is no provision in it but what has, as long as I run the mill, been complied with." Among other things he says, "there is not an open lamp for use in the mill, and never was;" but says nothing specially about the picking-room.

It further appeared in evidence on this, that the bank did not write to Boston for a copy of Stearns's statement, but were advised by their solicitor, in 1841 or 1842, that they were not liable for his representations. On the 4th of August, 1841, the bank applied for another "continuance" of the policy for one year, adding that the factory had been leased to Jonathan Stearns, and put in operation; and, as they might wish to continue to lease it, desired a clause allowing it. Accordingly a new policy was made, as before, with the following clause instead of the special one before named: "It is understood that the mill is under lease to Jonathan Stearns, and may again be leased to him or some other tenant, the assured being answerable for the warranty as above." In August, 1842, the tenant again applied for a further continuance of the policy one year, but having contracted to sell the property to the present possessors, who were carrying on the business, they wished the policy to bear their names, stating these facts, and providing for the payment to the bank of any loss. The policy was thus renewed on the 30th of August, 1842, adding also, "This policy is issued on the representations formerly made by Jonathan Stearns, the former owner, which representation is binding on the assured." In September, 1842, the bank wrote a letter, desiring a mistake corrected in the sum insured on the machinery, separate from that on the building, but said nothing as to any other matter. In August, 1843, another continuance of the policy was desired by the bank, retaining the same clause as to the payment of any loss to the bank. This was done, but no repetition made

in the policy of the above clause as to Stearns's representations. On a like application in August, 1844, a like renewal was made, and so in August, 1845. The plaintiffs offered to prove, further, that it was customary to use inclosed lamps in picking-rooms, and the defendants to prove the contrary, if that usage was deemed material in deciding this case. But the plaintiffs admitted as a fact, that the use of any kind of a lamp in the picking-room would enhance the danger from fire; and that though insurances were often made without written representations, when the property was situated near and its condition known to some of the directors, yet when it was remote written representations were usually required. Various objections were taken to the admissibility of parts of this evidence on both sides, and it was agreed by the parties to have the court consider them, as well as the law of the case on the parts which the court should deem to be legally proved, and direct a verdict to be entered for either party as might be thought proper by the court after such examination.

R. Fletcher and T. P. Chandler, for plaintiffs.

B. R. Curtis, for defendant.

WOODBURY, Circuit Justice. Among the preliminary questions to be decided in this case is the admissibility of some of the evidence on both sides. But that involves much of the merits, and is not free from difficulty. The various pieces of testimony as to Stearns's representations are objected to by the plaintiffs, on the ground that they bring their action on the last policy, in which nothing is said of Stearns or his representations, eo nomine; and that to prove them and make them binding would be to alter or add to this written instrument. It is certain that a written contract cannot, as a general rule, be varied by parol evidence. Some of the leading cases on this are familiar, and may be seen in 1 Greenl. Ev. c. 15, p. 315; 8 Bing. 244; Philips v. Preston, 5 How. [46 U. S.] 291. Their application to policies of insurance as well as other writings, is shown in Duer, Ins. 71; 2 Johns. Cas. 1; Higginson v. Dall, 13 Mass. 96; 8 Wend. 160; 8 Metc. [Mass.] 348; 2 Cranch, C. C. 249 [Bank of Washington v. Way, Case No. 957].

It is not necessary to multiply references on this general principle, or its application to policies, nor to explain the numerous exceptions which do not affect the present transaction; for the testimony here is offered, not with the design to show representations different from those referred to in the policy, or to add to them, but to show what those were which had thus been referred to. The policy itself does not profess to embody into it the representations which had been made and which were to be binding, but merely alludes to them, and makes their truth a condition precedent to any recovery. Such references to other matter, written or parol, are very common in deeds, wills, and other contracts, and it is no violation of the contract to prove, either by writing or verbally, the foreign matter thus alluded to. On the contrary, it complies with the contract when doing this, rather than contradicts or waives it. Most of the descriptions of boundaries in deeds are by such references to other deeds or to monuments and other facts, and showing dehors the matter thus referred to, is carrying the deed into effect and not altering it. 1 Phil. Ins. 47; 1 Durn. & E. [Term R.] 343; 16 Pick. 502. Had certain representations been introduced into the policy itself, as to the condition of this property, stating in detail how it stood in respect to various items affecting the risk by fire, the presumption would be that these were the representations meant to be referred to in the policy, and others, perhaps, could not be shown. But when none such were inserted in it, as here, and when it is usual not to do it in such instruments, but to place on file such written statements as to particular matters affecting the risk, if the property is at a distance, and sometimes to make them verbally, the policy, in speaking generally of the representations, must of course refer to such, and be intended by both parties to rest upon them as binding. [Columbia Ins. Co. v. Lawrence] 2 Pet. [27 U. S.] 47, 10 Pet. [35 U. S.] 515. They are as if a part of the contract. 2 Denio, 75. In showing what they were under such a reference, the general rule, not to change a written contract by parol evidence, or to vary it by other matter not belonging to it, though in writing, cannot be considered as impugned either in form or substance. Houghton v. Manuf'g Ins. Co., 8 Metc. [Mass.] 114; Ellery v. Merchants' Ins. Co., 3 Pick. 350; Foxcroft v. Mallet, 4 How. [45 U. S.] 353; Wig. Ev. 54, 55; 3 Barn. & Ald. 299; 1 Paige, 291; 20 Pick. 121. This conclusion rests on this ground, and not on the admissibility of parol evidence to explain a latent ambiguity, or expression, which, from surrounding and connected facts, may have one of two meanings, and which facts may therefore be shown by parol, if the ambiguity or uncertainty be one as to facts and not as to law. 1 Story, Eq. Jur. 563; Wig. Ev. 176; Colpoys v. Colpoys, Jac. 463. The parol evidence is not to contradict the writing, but in such case is consistent with it. 2 Brod. & B. 553; 4 Russ. 540.

Another objection to the admissibility of some of the evidence here is, that the representations made by Stearns are not binding on the plaintiffs; but it is a well settled principle, that what a party says or does by an agent, is as binding as if said or done by himself; and the doings of a person may be adopted or ratified afterwards as if an agent, no less conclusively than if he was authorized beforehand. This is elementary law in

every text book on agency. Hence, throughout, in this case, the bank was the chief, the real principal; and is now. All said or done by others, or in others' names, was said or done in its behalf. The bank was the party in interest here from the start to the close. It was to receive any payments for losses on any of the policies from the first to the last inclusive. The next objection to the admissibility of evidence was made by the defendants, and related to that offered by the plaintiffs to show what Stearns wrote to them in respect to his representations, and what the bank was advised on this point by their counsel. If the chief question in this case was one of intent, such testimony might be competent as a part of the res gestae, to prove efforts on the part of the plaintiffs to conform to Stearns's supposed representations. But it was unnecessary to show their omission to do more on the subject to obtain a copy of them, under professional advice, because they were not liable on account of their intentions. This evidence may also operate in favor of the defendants, being a circumstance to show the recognition by the bank at that time of their duty to conform to Stearns's representations, in that particular policy where a clause requiring it was expressly introduced, as it had been, at the time one letter was written to the agent of the defendants and one to Stearns on this matter. But it is not evidence to exonerate the bank from its duty to comply with the representations on file on account of what Stearns or their counsel afterwards said, it being the misfortune of the bank, if either of them erred in their statements they made or in their advice; and the only remedy, if any, by the bank for such an error, being against those persons.

Having disposed of these preliminary points, the next inquiry is, what were the representations which the present plaintiffs must in fact and law be considered as having made in respect to their property, as connected with the risk by fire? In order to decide intelligibly, it will be necessary to advert to the fact, that the first nominal insurer of this property at the office of the defendants, was Jonathan Stearns. However the case may be as to insurances, where no representations are made to the insurers as to the risks belonging to the premises, which are great and would sensibly increase the danger; and however in marine policies any omission to make full disclosures on such matters may vitiate the insurance on account of the suppression of a part of the whole truth, rather than a suggestion of what is false, it is to be remembered, that Stearns in this case actually made long and written representations on inquiries put by the defendants. They were his written answers to the printed interrogatories, usually put in the case of distant manufactories applying to be insured. The insurance was effected to him on the faith of the truth of those representations, and on the express stipulation, that the policy should be void, if they were materially untrue, or the condition of the property should become changed so as materially to increase the risk, and notice not be given to the defendants of such change. The representations referred to in this policy, were not then a mere form in the instrument, when none whatever had been really made; but they referred to an actual occurrence between these parties, and an important occurrence, considering the distance of the factory from the office, and the probable want of personal knowledge about its condition by the directors.

Under this view of the facts of the present case, the next inquiry, and one of some complexity and difficulty is, whether the same representations must be considered as made or adopted by the plaintiffs in the insurance for 1846, now in suit. In order to form a correct conclusion as to that, being a matter of fact principally, it will be necessary to advert to the important circumstance before mentioned, that the Ogsdenburg Bank, for whose benefit the present suit is instituted, was the chief party in interest in the first insurance by Stearns, and has been in all the intervening insurances made from 1834 to 1846. That not only the first one was assigned to the bank at its date, but the defendants, informed of the bank's interest, and assenting to the assignment and in every renewal since, any loss happening was to be paid to the bank, and the cashier of it was the agent to effect the renewal and advance the premium; and that the bank now appears to have a claim on the property to a larger amount than the sum insured. All the different persons then in 1834 and since, to whom the insurances nominally run, including the present plaintiffs, were virtually in this transaction but agents for the bank to the extent of its interests. They acted at its request, and in its behalf, and for its security; and generally, the bank itself, rather than they, transacted the business, and saw to its correctness, and had possession of the policies as well as advanced the premiums. The other persons had rights and interests, also, but subordinate. They either had a residuary interest, or a right by contract to the property and insurance after the bank was satisfied. In 1838 the title had become vested entirely in the bank; and the policy was then made in its own name, as well as on its account and for its interest. No new representations had been made since Stearns's original ones on file in 1834; and this the bank doubtless knew, as it not only received the assignment of their policy for that year, referring to those representations, but had itself taken out the subsequent renewals without filing any new representations. In order to remove any doubt, that in the general allusion to representations in the policy as made by the insured, and on which

the policy in 1838 was founded, it was meant to adopt those on which the policy of 1834 and in the intervening years had issued, it was stated separately in A. D. 1838, that though the factory was not then in operation, "the assured have liberty to put the same in operation, agreeably to the representations heretofore made by Jonathan Stearns." If the bank did not know with certainty the extent of those representations, it was the fault and risk of itself to undertake to act on them without such knowledge. In 1839 that special clause was omitted. This was probably done either because deemed unnecessary to repeat it in addition to the general clause referring to representations, or because the factory was not in operation. And in 1840, the bank itself, fearing lest it might not be permissible to resume operations without a special permission, desired it, and this same clause was restored among other things, expressly specifying Stearns's representations as those which were in that event to govern. The bank then, by letter, asked of the agent a copy of those representations, but as he had not the original, applied to Stearns, who also had no duplicate original or copy. But Stearns stated that he had always complied with the representations, saying nothing in particular about the picking-room. Without inquiring further as to their exact contents, unfortunately the bank, under advice of counsel, acquiesced in the policy as it stood, and put the factory in operation under it, through Stearns himself, by a lease to him for that purpose, having stated in their letter that they supposed "the application referred to in the policy was that made by Stearns." Not the least doubt, then, can exist, that the property was used in 1840, under Stearns's representations as originally made, and used by himself under the bank. They either knowingly and deliberately expected to conform to them, and, in case of material variation and a loss, to have the policy void; or relied on advice of counsel that they were not binding. It is likewise clear, that if Stearns misled the bank, either through forgetfulness or design, as to the extent or character of his written representations to the defendants, which seems probable, the consequences must fall on them, the employers of Stearns, and the confiders in him, rather than on the defendants. See Smith v. Babcock [Case No. 13,009]; Mason v. Crosby [Id. 9,234]. The change in phraseology in the policy of 1841 creates some difficulty as to that year, and may have misled their counsel, if his advice was predicated on that, and applied to that year, and not the previous one. It does not omit the special clause entirely, as in 1839, and thus appear to rely on the notice given by it in 1838, and the general reference to representations, which could mean only those made by Stearns originally, and since adopted by the bank, as none others had been made, and Stearns was their agent in interest. But it specially permits the factory to be used, "the assured being answerable for the warranty above," there being immediately above a warranty to remove the waste once in forty-eight hours; and "that the lamps in the carding-rooms shall be inclosed in glass." It may hastily have been inferred from this that these were the only precautions to be observed, and that the insured had no farther concern or liability on account of any of Stearns's representations. But it is to be noticed, that this same warranty was in the original policy in 1834, and a reference also to the representations made by Stearns, and their binding force in all respects was there, as well as here, recognized, so that one had not been introduced for the other. This was the case also in the intervening years, while the factory was in operation, both provisions being often inserted together; and when the special clause was inserted referring to Stearns's representations, eo nomine, it seemed to be only because the factory was not then in actual operation, but might become so in the course of the year, and was then to be used in the manner he had represented. The parties, too, being presumed to know the law, must be considered as aware of the distinction between warranties and mere representations. Both usually exist, though as to different matters. Generally, likewise the former are in the body of the instrument, and are there named as warranties in words or substance, or referred to as such (5 Hill, 101; 2 Hall, 589; Cowp. 785; Doug. 11, note); while the latter are referred to only as representations or statements of facts, and are seldom introduced in detail in the policy itself (3 Hill, 501; 5 Hill, 101, 188). The former, likewise, bind the party to them as a condition precedent, whether material or not; while the latter binds only to a substantial or virtual compliance, and may vary from the exact part, if the variance be not so material as to increase clearly the risk. In 1841, then, the warranty was one thing, and provided for by itself; the representations were another, and provided for by themselves, and in the same manner they had been in 1834. Stearns was the real operator at both periods. The bank was the virtual owner at both. The representations at both were only those originally made by Stearns, and this the bank probably knew, and that they were relied on by the defendants, as being adopted by the bank. The bank, too, had paid the premium, and took out the policy in 1841, as only a "continuance" of the previous policies. It seems to me, then, to be inconsistent with the general character of the whole transaction, and it would be bad faith to suppose that the representations, referred to in the general clause, were not meant by both parties to be those at first made by Stearns, and since continued, or renewed, or in other words, adopted by the bank as its own. If

any aggregatio mentium, any unity of views existed, it must be presumed to have been that. In 1843, the bank desired a renewal of the policy, still running to pay the loss to them, though wishing the policy to bear the names of the plaintiffs, as they had made a contract to purchase and use the factory. The policy was accordingly then renewed; and, perhaps, because a new party was introduced, a special provision was inserted, so that the plaintiffs could not, any more than the bank, plead ignorance of the representations upon which the insurance rested. It was in these words: "This policy is issued on the representations formerly made by Jona. Stearns, the former owner, which representation is binding on the assured." No objection was made to this, though the policy was sent back for correction in another particular. In 1844 and 1845, "continuances" of the policy were granted, in like form, without repealing the special clause, as the nominal or real parties in interest remained the same; and the reason applicable to those representations being in force, and being, in my opinion, in point of fact, adopted by the insured, for the causes which have just been named and explained in respect to the year 1841.

I have been thus particular in tracing through to the close, and assigning various reasons why Stearns's representations must be considered as adopted by the plaintiffs themselves, in the policy itself, and binding on them as a part of the written contract; and not as parol evidence of matter introduced to vary or contradict the written contract. But were this otherwise, it is by no means certain, whether, on the general principles of insurance, the plaintiffs would not be responsible for the use of any lamps in the picking-room, considering either that none were used originally, or that Stearns's statement to that effect was untrue. If an absolute representation is made by the insured in respect to the risk, which is material, and others then interested renew the insurance without varying the statement, and a privity of interest or contract is kept up until a loss occurs, surely the loss ought not to fall on the insurer, when it happens by a departure from that statement and on a particular, which it is agreed increased the risk. Columbian Ins. Co. v. Lawrence, 10 Pet. [35 U. S.] 508; Alsop v. Commercial Ins. Co. [Case No. 262]; 2 Denio, 75. Surely the assured ought not to recover when they were expressly notified that the insurance was founded and renewed on the representations thus made, though the assured may not have examined what they were, but had an opportunity to do it, and unwisely confided in the recollection of the person making them without examining the original on file. If the lamps were used in the picking-room at first when Stearns stated otherwise, such a material misrepresentation would vitiate insurances generally. [Columbian Ins. Co. v. Lawrence] 2 Pet. [27 U. S.] 47, 10 Pet. [35 U. S.] 516. If they were not so used at first, but the lamps were soon after introduced into the picking-room, any material change like this in the risk of property, without communicating it, (before a new insurance, or a further continuance of the old one to the same parties in interest,) renders the new policy void. It clashes with the stipulations of the policy itself, and in all stages of the case there must be neither suppressio veri, nor suggestio falsi. Duer, Ins. 380. There need be no fraudulent intent; but if either of these acts exists without such an intent, it saps the foundation on which the insurance rests, and the latter fails. Id. 506; 1 Phil. Ins. 210; [Columbian Ins. Co. v. Lawrence] 2 Pet. [27 U. S.] 25; 22 Pick. 200; [M'Lanahan v. Universal Ins. Co.] 1 Pet. [26 U. S.] 185; 3 Mass. 103; [Murgatroyd v. Crawford] 3 Dall. [3 U. S.] 491; 6 Mass. 220; 18 Pick. 419; 10 Pick. 535; 5 Hill, 101, 188; [Hazard's Adm'rs v. Marine Ins. Co.] 8 Pet. [33 U. S.] 557; 20 Me. 125; 8 Metc. [Mass.] 114. Another fact, strongly indicating that the bank, the party in interest throughout, must have known and expected, that all the continuances or renewals of the policy were founded on the original representations, was, that these renewals were all made through the agent at Pittsfield, and not at the office at Boston; and that in this case, as in most cases of insurance, the office alone takes new insurances or new risks, and acts on new or different representations, and not the agent.

Regarding the evidence here offered as to the representations to be in law competent, and to show in fact the adoption by the plaintiffs of those made by Stearns, and considering also that this evidence would, independent of the words of the policy in another view, show either a material misrepresentation by the original assured, or a material change in the risk since, not communicated by him or the privies in interest and contract since, the policy must in law be considered void. This is a misfortune to the present plaintiffs as well as the bank; because the latter was probably misled by Stearns's letter as to the extent of his original representations, and may have believed that they extended only to the keeping of no uninclosed lamps in the building, but allowed such in the picking-room as well as in other parts of the building. Had they not believed this, they would probably have discontinued the use of them in the picking-room, or had the original representation altered, or a new one communicated, and paid the increased premium, which such use of lamps would justify and require. The difference is conceded to be material, and well may be, as in this very instance the loss was caused by the use of lamps there, though inclosed in glass. Such is the extraordinary fineness of the cotton fibres and dust which fills the air in that room, in factories in great quantities, that any lamp which has air holes, or an open top and loose cover, (such as are necessary to

continue or preserve the light,) is liable to be filled with them and to ignite them, and, unless the building is detached or secured by iron doors, to cause the almost inevitable loss of the whole establishment. Again, the insured, had they examined the policy carefully, would have seen from the warranty, that the use of any lamps in the picking-room was probably not contemplated. The warranty extends only to "the lamps in the carding-room;" that they shall be "inclosed in glass;" and, had it been represented, or at any time understood by the insurers, that lamps were to be used in the picking-room also, the insured must presume that they would doubtless have required the warranty to cover them, as well as those in the carding-room, it being more necessary for safety to have them so inclosed if in the picking-room. But the original representation was, "no lamps used in the picking-room;" and hence no warranty was required to keep them there inclosed in glass, and no increase of premium asked on account of their being kept there at all, so dangerous as it was in a room not separate from the main building, and not made safe by iron doors. It is to be recollected, that such a room in a cotton factory, thus situated, is almost as perilous as a powder-magazine, to use lamps in. It is full of the material for gunpowder cotton; and all representations concerning it, or changes of risk in relation to it, must be known by all the parties to be vital. It is conceded, that the assured is entitled to a favorable construction, in particulars which are doubtful. Duer, Ins. 132. But this is where the insured is not misled by any erroneous representation, or any material change in the risk not communicated to him. For where either of those occur, whether through the fault or neglect of the assured, or his agent, the policy cannot be enforced. Carpenter v. Providence Washington Ins. Co., 4 How. [45 U. S.] 185. The insurer is entitled, both in law and equity, to all the material information, connected with the risk, which the insured possesses, in order that he may have the fullest means of deciding on the extent of the risk and premium. 1 Wash. C. C. 161 [Kohne v. Insurance Co. of North America, Case No. 7,922]; [Livingston v. Maryland Ins. Co.] 6 Cranch [10 U. S.] 279; [Maryland Ins. Co. v. Ruden's Adm'r] Id. 338. The law is rigorous and unaccommodating, even to forgetfulness, mistake, or neglect of agents on the part of the insured, in respect to matters like these. Jennings v. Chenango Mut. Ins. Co., 2 Denio, 75.

Something has been said in the argument that the word "lamps," as used here in the representation, meant only permanent ones, and not movable lamps or lanterns; and that the latter might be used any where. But as the warranty was to keep them inclosed in glass when used in the carding-room, and by the original representation none were used in the picking-room, the word "lamp" would seem to include any light or blaze in the lamp form, as any such was to be inclosed in glass. The spirit of the provision, as well as the general meaning of the expression, would extend to any thing of the kind that could cause combustion in giving light, whether movable or permanent. Indeed, movable lights or lanterns are in such rooms more dangerous, though inclosed in glass, than permanent ones, as the latter can be fixed more remote from the machinery, while the former are usually employed to aid in closer observations and repairs, and constantly subject to be carried nearer what is most combustible. On the hypothesis of the plaintiffs, as to this point, this inconsistency would follow, that movable lights, the most dangerous, could be used in the picking-room, but not permanent ones, the least dangerous; or that the parties would deem it so important to have lamps covered with glass in the carding-room, as to enter into a warranty to do it, and yet intend or assent that lanterns or lamps should be used in the picking-room, without any warranty to keep them inclosed in glass. It becomes unnecessary, therefore, to go into the evidence, whether it is customary to use lamps in picking-rooms; or if at all, in those situated within the factory, and without iron doors. Because, whatever may be the usage, it is conceded, that they enhance the risk; and the representation here was originally that none were used in the picking-room. If that statement was true, then they were since introduced, without notice, and thus materially increase the risk, and avoided the policy. If that statement was false, then the policy was void, on the ground of a false and important representation. [Columbia Ins. Co. v. Lawrence] 2 Pet. [27 U. S.] 49, 10 Pet. [35 U. S.] 512; [M'Lanahan v. Universal Ins. Co.] 1 Pet. [26 U. S.] 185; [Carpenter v. Providence Ins. Co.] 16 Pet. [41 U. S.] 496; 10 Pick. 535; 1 Wash. C. C. 161 [Kohne v. Insurance Co. of North America, Case No. 7,922]. In either of these aspects of the case, therefore, that evidence becomes of no importance; and a verdict must, according to agreement, be entered for the defendants.

After the above opinion had been delivered, and at a subsequent day in the term, the plaintiffs moved for a verdict and judgment for a return of the premiums that had been paid on these insurances. The grounds assigned were, that the policy did not attach, looking to the opinion of the court, and that a money count was in the declaration, which would cover the premiums. After argument for and against this motion, by the same counsel, the court took time to consider of it, and before the term closed, made the following decision, delivered by

WOODBURY, Circuit Justice. My first impressions were not in favor of this motion, either on its merits or on the adopted form.

On the merits it seemed doubtful whether the policy must not be considered to have attached from the time named in it, till some actual instance of the use of lamps in the picking-room occurred. If it once attaches, the premium is not to be restored, however short the time. Cowp. 668. Certainly not the whole of the premium, and none unless it can be properly divided, and a part of the risk, as in some sea usages, can be considered as never having been incurred. 3 Burrows, 1240; 1 W. Bl. 315. But on consideration that, in this class of cases, the construction more favorable to the insured is the approved one, and seems on the whole most equitable, I think the representations can fairly be regarded as of such a character that the risk never did commence. The representations were on this point, "no lamps used in the picking-room." Now, in fact, lamps were there suspended in that room constantly, and had been for some years, and others carried into it occasionally at the time of the last insurance, and of all the others made to those plaintiffs. This must be regarded as "lamps used" there, in common parlance, during this period, though not really lighted up the whole time, nor on the precise day when this policy commenced. If the lamps had been first introduced after the year began, it would be otherwise. Pim v. Reid, 6 Scott, N. R. 982. What strengthens this view, that they must be considered as used before, is another consideration, that the plaintiffs used them there under a false impression caused by Stearns, the former owner and the original maker of the representation, stating that he had a right to use them there under the policy, if kept inclosed in glass. Hence they were placed there to be used long before, were used when needed, and must be regarded as a violation, though undesignedly, of the terms of the policy during the whole period, after introduced. It is well settled, that where the risk never attached, the premium must be returned, if there was no fraud. Feise v. Parkinson, 4 Taunt. 641; Colby v. Hunter, Moody & M. 81; 3 Car. & P. 7; 2 Phil. Ins. 526. It must be returned, though there was "neglect and even fault," by the assured. Stevenson v. Snow, 3 Burrows, 1240; Tyrie v. Fletcher, Cowp. 668. Here neglect existed in relying on Stearns's memory, but probably no designed departure fraudulently from what the policy was supposed to be. If the lamps were fraudulently used there, in disregard of the representations, the premiums should be retained by the company. 4 Taunt. 641; 1 Park, Ins. 329; 2 Marsh. Ins. 661. It will be seen, however, that the circumstances just referred to, showing how these parties were misled into their use, repel any presumption of such fraud.

All that remains, then, are some questions of form. How many of the premiums can be recovered back in this action, in the name of these plaintiffs? Manifestly none, except those paid on policies executed to these plaintiffs. Any others, paid on policies to others, must be recovered, if at all, in suits in their names; and the statute of limitations would bar all except those paid by these plaintiffs, and perhaps one other, if an action is ever instituted for that. Again, in respect to form, this suit, looking to the count for money had and received, can, in my view, properly cover all premiums between these parties paid within six years, and is not confined to the premium paid on the last policy, named in the special count. The other premiums are in cases where the risk did not attach as well as this. The parties are the same. The form of the count applies to all; and all of them rest on the same basis of not being ex aequo et bono, retainable by the office, when the risk never attached. The first premium paid by these plaintiffs on an insurance to them was in August, 1842, and the last one in August, 1845; making four in all to be returned.

The remaining point to be considered, in respect to form, is the time and manner of moving "for the return" of the premiums. At the trial of the cause, no claim of that kind was understood to be urged. In the testimony submitted to me, and in the argument, my attention was not called to any claim of this kind. It was not till an opinion on the merits of the action for a loss under the policy had been given by agreement, on both the facts and the law, and a verdict directed for the defendants, that this claim on a subsequent day was presented. If allowed now, unless by consent, it must be virtually, by granting a new trial. That was the course pursued under like circumstances, in Feise v. Parkinson, 4 Taunt. 641.

What should be the terms which are just for allowing this new trial, under all the circumstances, or, which is the same thing in substance, for changing at this time the verdict, so as to be for the plaintiff instead of the defendants, and throwing the burthen of costs in the cause on the latter, rather than where it now is, on the former? It seems to me that the just terms should be the payment to the defendants of the costs of the trial, in which they succeeded, which was upon the great point in controversy, and the fruits of which, so far as regards costs, are now asked to be taken from them by allowing this motion. As another illustration, showing that these terms are the proper ones, if this claim for a return premium had been set up at the former trial, the defendants might have paid the amount into court, with costs to that time; and then, if the plaintiffs failed to recover any thing for losses, they would have to pay the defendants the costs of that trial. See, also, 4 Bing. 676.

Let then the former verdict, ordered for the defendant, be considered as set aside, and a new trial granted, on the payment to the defendants of the cost of the former trial. Then on the new trial let a new ver-

dict be entered for the plaintiffs for the four last premiums and costs of suit, except those incurred at the former trial, and which we now allow to the defendants, as the prevailing parties in that trial.

NOTE [from original report]. By agreement of counsel, the opinions of the court on the law of the case, as originally presented, were turned into rulings and instructions, and a bill of exceptions filed so as to carry the case to the supreme court.

[NOTE. Plaintiffs brought error, and the supreme court, without overruling the law of this case, reversed the judgment for the purpose of having the defective record corrected. Clark v. Manufacturers' Ins. Co., 8 How. (49 U. S.) 235.]

Case No. 2,830.

CLARK v. MARX.

[6 Ben. 275.][1]

District Court, S. D. New York. Dec., 1872.

VOID ASSIGNMENT — EXPENSES OF ASSIGNEE — DEPRECIATION OF PROPERTY.

1. In March, 1869, the firm of R. B. & A., made an assignment to M., of all their property in trust for all their creditors. In April, 1869, a petition in bankruptcy was filed against them, and they were adjudged bankrupts. An injunction was issued against M., to prevent his selling the assigned property. The assignee in bankruptcy commenced a suit against M., to set aside the assignment to him, and compel an accounting by him. In May, 1870, the injunction against M. was modified so as to allow him to sell parts of the property. In May, 1871, on final hearing, a decree was made setting aside the assignment to M., and directing an accounting, which was had. On the report of the master, exceptions were filed by the plaintiff to various allowances to M., as reported. *Held*: That the effect of the decree, was to declare the transfer to M. to have been void, and to substitute the title of the plaintiff for any title in M., as of the day of the filing of the petition.

2. That M., therefore, could not be allowed for any disbursements or expenses which he made or incurred by virtue of such transfer, or to maintain his title or possession thereunder.

[Cited in Hunker v. Bing, 9 Fed. 279.]

3. That, in so far as M. acted with the permission of this court in making sales of the property, he ought to be allowed such expenses as were necessary and proper in so acting.

[Cited in Hunker v. Bing, 9 Fed. 282.]

4. That, as the plaintiff furnished no evidence as to any definite loss or depreciation of the property, by reason of the interference of M. with it, or that its value was greater than the price it brought on sale, the court could not speculate as to what such loss was.

[Action by Lester M. Clark, assignee in bankruptcy of Rosenthal and others, against Marcus Marx].

Charles H. Smith, for plaintiff.

W. A. Coursen, for Marx.

BLATCHFORD, District Judge. The petition in bankruptcy against Rosenthal, Black & Alexander was filed April 7th, 1869. On the 2d of March, 1869, they made to the defendant Marx an assignment, wherein they declared that they were unable to pay their debts in full, and whereby they transferred to Marx all their property, in trust to convert it into money, and therewith to pay the expenses of making and carrying into effect the assignment, and then to pay all their debts in full, if possible, and, if not, then pro rata. Marx accepted the transfer and took possession of the property. On the 7th of April, 1869, the usual injunction in involuntary cases was issued and served on Marx. On the 21st of April, 1869, this court modified such injunction, so as to permit Marx to sell certain fixtures and property, and retain the proceeds thereof to abide the further order of this court. This suit was commenced on the 4th of November, 1869, to set aside the assignment to Marx, as fraudulent and void as against the plaintiff, and to compel an accounting to the plaintiff therefor. Marx answered the bill, and therein maintained the validity of the assignment, and demanded to be permitted to proceed with the execution of the trusts created by it, and denied the plaintiff's title to the relief asked, and prayed for the dismissal of the bill, with costs. The property transferred to Marx embraced a quantity of cloths and ready made clothing, which continued in his possession, boxed up and unsold, until May, 1870, when this court relieved Marx from the operation of the injunction in respect to it, so far as to permit it to be sold by him. Proceeds of sales of property were deposited by Marx in the United States Trust Company, under the direction of this court, and subject to its order, as follows: May 28th, 1870, $1,325 63, and September 28th, 1871, $470 87. On the 6th of May, 1871, on final hearing, a decree was made herein, adjudging that Marx should account to the plaintiff for all of said property, and that the plaintiff became vested with it, by operation of law, through his appointment as such assignee, and was entitled to recover it from Marx, and appointing a master to take (1) an account of all the property which passed to Marx; (2) an account of the moneys received by Marx from the property; (3) an account of the property and proceeds remaining in the hands of Marx; (4) a debit and credit account, charging Marx with the value of all the property which passed to him, and crediting him the value of so much as had been sold, and the proceeds deposited, under the order of this court, and with the present value of any property remaining in his hands, and with all sums properly allowable in account to him, as against the rights of the plaintiff.

The master now reports the accounts so taken, and further, that Marx has delivered to the plaintiff all the property which passed to Marx, and the proceeds thereof, except the sums "necessarily expended by him in the collection, care and preservation" of the

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

property, and except the proceeds deposited in the United States Trust Company; that there is no property, nor any proceeds thereof, in the hands of Marx, to which the plaintiff is entitled; that no money is due from Marx to the plaintiff; that the whole value of the property is correctly set forth in the account of Marx; that Marx is not chargeable with any damages or other loss in regard to the property, or its proceeds; that Marx ought to be credited with $3,015 10, and debited with $2,540 73, showing a balance due him of $474 37; and that Marx is not entitled to be allowed the further sum of $500, claimed by him to be an indebtedness incurred by him in the care and preservation of the property. The plaintiff excepts to the report in respect to each one of 53 items credited to Marx, amounting to $1,218 60, being all the items credited to him by the master except the two, amounting to $1,796 50, for moneys deposited in the trust company. He also excepts to the report because the master has not charged Marx with any loss or depreciation of the property, by way of damages, for his interference therewith.

By the express provision of the 14th section of the bankruptcy act [14 Stat. 522] the assignment to the assignee, in its conveyance to him of the title to the property and estate of the bankrupt, relates back to the commencement of the proceedings in bankruptcy, which is (section 38) the filing of the petition for adjudication, and such title, by operation of law, vests in the assignee as of the time of such filing. The title to the property transferred to Marx, if it was the property of the bankrupts, vested in the plaintiff as of the 7th of April, 1869. The effect of the decree in this case is, to declare the transfer to Marx to have been void, and to substitute, for any title in Marx, the title of the plaintiff, on the ground that, notwithstanding the transfer to Marx, the property still remained the property of the bankrupts, as against the plaintiff, if he successfully challenged such transfer within the time, and on the grounds, prescribed in the bankruptcy act. While the title of Marx might have ripened into a good title, if it had not been questioned by the plaintiff, yet Marx took such title at the risk of the result of such a suit as this. The transfer to Marx being now adjudged to have been void, he cannot, under such transfer, claim to be allowed for any disbursements or expenses which he made or incurred by virtue of such transfer or to maintain his title or possession thereunder. The result of the litigation, is that he is adjudged to have been in default in not surrendering to the plaintiff the property in question. It ought to have been so surrendered when the assignment to the plaintiff was made, which was July 8th, 1869. In so far as Marx acted with the permission of this court, given in its orders, in making sales of the property, he ought to be allowed such expenses as were necessary and proper to enable him to so act in compliance with the terms of such orders.

On these principles, there are many items allowed which are inadmissible. The items, in March, 1869, for stationery, cases, 2 days' work, books, stamp, copying schedules, 4 weeks' work, postage, premium on insurance, and cartage, would seem to be not allowable. They all seem to have arisen out of the acting of Marx under the unlawful transfer to him. It may be that something ought to be allowed as rent or storage, in respect of the goods, from April 7th, 1869, to July 8th, 1869, but there is no evidence to warrant the allowance of the two items of $141.66 each, for rent, or of the items of $150 and $10, for storage. The items, in April, 1869, for work and preparing stock for auction (the latter being for a sale under the unlawful transfer) cannot be allowed. The items for moving and cartage of fixtures may be allowable, if necessary in respect of the sale of fixtures authorized by this court. The items which follow thereafter, for insurance, taking care of stock, cartage, repacking stock, camphor, and 4 cases, must be disallowed. The items, in May, 1870, for auction invoices, cartage and labor, 2 days' work, and preparing stock, &c., may be allowable, if necessary in respect of the auction sale of the goods authorized by this court. The items for copy schedule, copy auction sales and making accounts, do not seem to be allowable. The item of $250 paid to counsel cannot be allowed. It is stated to have been for services rendered in May, 1870, in respect of the sale of the property. It was not a necessary or proper expense of the sale, and a surrender of the property to the assignee, which Marx was at liberty to make at any time, would have rendered that expense, and all other expenses which he incurred after July 8th, 1869, unnecessary.

This case is an illustration of the manner in which estates of bankrupts would be frittered away, if such expenses incurred by wrongdoers in regard to them were to be allowed. Marx receives, as the avails of sales, $2,540 73. Out of this he claims to retain, as expenses, the $1,218 60 before named, and $500 in addition, for the services of counsel in drawing the void assignment and defending it against the plaintiff—in all $1,718 60, or nearly 70 per cent. of the avails. The master disallowed the $500.

The plaintiff furnishes no evidence as to any definite loss or depreciation of the property by reason of the interference of Marx therewith, or that its value was greater than the price it brought on sale. The court cannot speculate as to what the loss was. There must be evidence.

The first exception of the plaintiff is so far allowed as to refer the case back to the master for a new report on the principles and views hereinbefore set forth, with leave to either party to put in further testimony, as

to any of the items allowed by the master in Schedule G to the report. The second exception is disallowed.

CLARK (NIETO v.). See Cases Nos. 10,261 and 10,262.

CLARK (NORTH v.). See Case No. 10,308.

CLARK (PACKWOOD v.). See Case No. 10,656.

Case No. 2,831.

CLARK et al. v. PEASLEE.

[1 Cliff. 545;[1] 26 Law Rep. 609.]

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

CUSTOMS DUTIES — STORAGE OF IMPORTATIONS IN PRIVATE STORE—HALF-STORAGE—CONSTRUCTION OF STATUTES—EFFECT OF REPEAL.

1. Where importations were deposited by the importer in his own store, under the act of March 28, 1854 [10 Stat. 271], *held*, that the collector correctly required the importer to pay half-storage, under the treasury regulations, February 17, 1849.

2. The regulations of July 2, 1855, did not have the effect to repeal those of February 17, 1849.

3. Where there is no repealing clause, subsequent regulations only have the effect to repeal those previously existing, to the extent that the last issued are clearly repugnant to the former.

4. Under the regulations of February 17, 1849, the importer, before he can use his own store for the deposit of importations, must indorse on the entry an agreement to pay the collector an amount equal to the salary of an inspector, or one half storage, and the importer must make his election in advance.

5. In the treasury regulations of July 2, 1855, the alternative provision for the payment of half-storage is dropped.

6. The regulations of 1857 provide that the importer shall pay monthly to the collector such sum as the collector deems proper for the service, not less, however, than the pay of the officer in attendance.

7. Where an importer, under the act of March, 1854, elected to deposit the goods in his own store, *held*, that he was not deprived of that right by being required to pay half-storage, and that such requirement by the collector was properly made, as the store was "a private bonded warehouse," and the owner as importer was bound to pay "appropriate expenses."

[Cited in U. S. v. Macdonald, Case No. 15,668, 5 Wall. (72 U. S.) 658.]

8. When the interpretation of the revenue laws and regulations is invoked, considerable weight should be given to the practice of the government as a contemporaneous construction of the provisions under consideration.

9. Goods deposited in private stores by the importer are to be taken possession of by the collector, at the charge and risk of the owners; consequently the goods are in the custody of the United States, and in charge of an inspector.

At law. Action of assumpsit to recover back certain duties on imports, paid under protest. The goods, consisting chiefly of fish and oil, were imported and duly entered for warehousing. The first entry was made January 23, 1855. Application in writing was made by the plaintiffs [William R. Clark and others], to the defendant [Charles H. Peaslee], collector of the customs in Boston, for leave to warehouse the importation in their own store, which was granted; and on withdrawing the same for consumption, they paid twenty-five dollars and twenty cents as half-storage, in addition to the regular duties. Various other entries were made by them of similar goods, and in all cases similar exactions were made of them, and were all paid under protest. All of the entries were made under the acts of congress concerning the warehousing of imported goods, and the half-storage was claimed by the defendant under those laws, and the regulations of the treasury department. Suit was commenced April 1, 1859, and the declaration [as amended][2] embraced sums paid by the plaintiffs from March 31, 1854, to August 14, 1855. Defendant pleaded non-assumpsit [and at the October term the parties went to trial on that issue. Testimony was introduced by both parties],[2] and a verdict was taken for the plaintiffs for $1,813.35, subject to the opinion of the court, upon questions of law, and with authority to amend the verdict or enter a general verdict for the defendant. [Sufficient has already been remarked to show that the main question in this case is whether the charge of half storage was a proper one to be made, under the circumstances disclosed at the trial. It is insisted by the plaintiffs that the charge was unauthorized and illegal, and consequently that the verdict is right. On the other hand it is insisted by the defendant that the charge was a legal and proper one, and consequently that the whole claim of the plaintiffs is invalid and without foundation.][2] Amount was the only question to be settled if the plaintiffs were right; but if they were wrong, then the verdict was to be set aside and judgment entered for the defendant.

S. J. Thomas, for plaintiffs.

The plaintiffs, as importers, were by law entitled to the option to deposit their goods, at their expense and risk, either, 1. In any public warehouse owned or leased by the United States; or, 2. In their own private warehouse used exclusively for the storage of warehoused goods of their own importation or to their consignment; or, 3. In a private warehouse used by the owner, occupant, or lessee, as a general warehouse for the storage of warehoused goods.

In either case they were bound to bear the expense of depositing and keeping deposited; that is, the expense of storing. More than this the collector had no lawful authority to exact. He could not, nor could the treasury department for him, adopt such

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

[2] [From 26 Law Rep. 609.]

rules or rates as to deprive the plaintiffs of the benefit of the warehouse system. The authority conferred on the secretary by the act of 1854 was to make rules and regulations to give effect to the act, not to deprive importers of the benefits of it. In the first and last cases, the rates must be reasonable. In the second case, the storage is the importer's own concern. If the importer elect to deposit in a public warehouse of the United States, he pays storage to the United States. But those rates must be reasonable. Foster v. Peaslee [Case No. 4,979], Oct. term, 1856, Curtis, J. If, on the contrary, he elect to deposit in a private warehouse used by the owner, occupant, or lessee as a general warehouse, he pays such storage to such owner, occupant, or lessee, and not to the United States. But such storage, too, must be reasonable. If, instead of depositing in a public warehouse of the United States, or in a general warehouse provided by another, he elect as he may, to deposit in a store provided by himself, of which he is the owner, or for which, as lessee, he already pays rent, then, of course, he is not to pay storage to another who does not provide it, and no more to the United States, who is not the owner and does not provide the place than to an individual who does not. The expense contemplated in the section under consideration, it is submitted, is plainly the expense of storing,—the expense of providing a place of deposit for the goods until they are withdrawn,—and that alone.

In this case, the goods were not deposited in either of these classes of stores. They were deposited in the plaintiff's own stores, but not stores used for the storage of warehoused goods exclusively, but stores used by the plaintiffs for goods warehoused by them, and goods not warehoused,—some of the latter which belonged to them, and others of which belonged to others. They were not under the lock of the customs, nor in the charge of any officer of the customs, nor in the joint custody of the owner and any officer of the customs, but in the actual custody of the plaintiffs, and at most only the constructive custody of the collector.

The regulation invoked by the defendant, under which it is claimed importers had the option whether to pay the salary of an inspector, or half-storage, it is submitted, had no application whatever to this case. In the first place, it will be observed, this regulation was made in 1849. The exactions of which the plaintiffs complain were all made after March, 1854. The regulation purports to be made under the authority of the act of August 6, 1846 [9 Stat. 53], and has reference, of course, to then existing laws. Now the provisions of the act of 1846 are quite different from those of the act of 1854. By the former the importer had no option; by the latter he had the option to warehouse his goods, at his own expense, in his own store. It was solely on the ground of this material difference that Judge Sprague, who first tried this case, granted a new trial. The new trial was granted for the reason that that distinction had in the first trial been overlooked, and expressly on the condition that the plaintiffs should waive all claim on account of exactions prior to the passage of the last-mentioned act; and all such were stricken out. Under the act of 1846, the goods were to be deposited in public stores or in other stores to be agreed on by the collector or chief revenue officer of the port and the importer.

By the act of 1854, as before stated, the goods were to be deposited, at the option of the owner, in either a public warehouse of the United States, a private bonded warehouse, or the importer's own store, as he, the importer, might prefer and determine. By the act of 1846, the "other stores to be agreed on" were "to be secured in the manner provided by the first section of the act" of April 20, 1818 [3 Stat. 469]; that is, they were to be under the joint locks of the inspector and the importer. Not so, of course, the importers' private store mentioned in the act of 1854. In the second place, the regulation of 1849 purports to relate to bonded warehouses, and only those. It says: "All bonded warehouses under the act of August 6, 1846, will hereafter be known and designated as follows." It then proceeds to speak of three classes: 1. Stores owned or leased by the United States prior to that time; 2. Stores in the possession of an importer and his sole occupancy, "which he may desire to place under the customs lock"; and 3. Stores in the occupancy of persons desirous to engage in the business of storing.

By the act of 1846, the secretary of the treasury was authorized to make such needful rules and regulations, not inconsistent with the laws of the United States, as he might deem necessary to give effect to that act. In pursuance of that authority the secretary made the above three classes of warehouses; the law had suggested but two. They were all to be bonded. The classes spoken of in the regulation of 1849 were the secretary's classes. In 1854 the law made the classes. We have seen what they were. The first class was, stores owned or leased by the United States; the second, the importer's own store, the goods bonded, but not the store; the third, private bonded warehouses.

The difference between these acts was not wholly overlooked by the department. I find it noticed in a general regulation, by the secretary of the treasury, under date of March 30, 1854. "There are," he says, "several important provisions of this act, which require a modification of the warehouse regulations of the 17th of February, 1849." No regulation touching the terms of storing in the importer's own store was, however, made, I believe, until the general regulation of 1855. Meantime, the practice of exacting half-stor-

age, which had its origin even earlier than the warehouse system, was continued. At the former trial of this cause, a circular was introduced by the defendant, bearing date October 9, 1845, the substance of which was, that "where, at the instance and for the accommodation of the merchants, goods may be allowed by the proper officer of the customs in pursuance of law to be deposited in other than the regular public stores, it is deemed but just and reasonable that a charge of half-storage should be exacted on all such goods, to reimburse the United States to some extent for the expense of hiring public stores, and in which the collector might insist on such goods being deposited, subject to the full charge for storage." This is undoubtedly the origin of half-storage. It was instituted when the importer had no option secured to him by law, whether to use the public stores or his own, and when, therefore, the collector might perhaps impose terms as the condition of such option, and the importer as matter of convenience assented; and thus having grown up, it was continued, in derogation of the importer's right and against his will, after such option had been secured to him. It will be observed this circular does not rest the claim for the exaction upon any legal right.

If it be said the plaintiffs never applied to pay the salary of an officer instead of half-storage, there are two answers: First, the evidence shows there was but one condition on which the deputy collector was allowed to permit the plaintiffs to warehouse their goods in their own stores, and that was the payment of half-storage, and the plaintiffs had been repeatedly so told and so understood. Second, the option to store their goods in their own store, on condition of paying half-storage or the salary of an inspector, is not the option the law gave. The paragraph relied upon in the regulation of 1849 is as follows: "Before any importer shall be permitted to use his own store for class two, he shall indorse upon the entry for warehouse his written request to use such store as the place of deposit, and also indorse thereon an agreement to pay to the collector an amount equal to the salary of the inspector or one half storage, to be determined in advance by the inspector."

It will be observed that, unlike the regulation of July, 1855, this regulation does not provide that the importer may pay a just proportion of the salary of the officer, but the whole salary. Applied to a case like this, the rule is simply absurd. A merchant desires, for example, to warehouse one hundred barrels of fish. Having complied with the forms of law, he has the right, under the act of 1854, to warehouse these fish, at his own expense, in his own store; that is, he is to bear the expense of storing. There is no occasion for the services of an officer. He has given the required bond. The government is secured. There can be no conflict between him and the owners of other warehoused goods, for he has no other.

The plaintiffs were bound to bear the expense of storing; that is, the actual expense. The case was similar to cases under the debenture acts. There, as in this case, the importer gave bond, and took his goods to his own store, and then kept them till he was prepared to export them. No charge was ever made or claimed for the service of an officer, and of course none for storage. And if there had been any right to charge for the service of an officer, the charges in this case were wholly disproportionate. The money was paid under a controlling necessity arising from the circumstances under which the money was demanded, and it may be recovered back. Elliot v. Swartwout, 10 Pet. [35 U. S.] 137.

C. L. Woodbury, for defendant.

Was the regulation of the secretary of the treasury referred to in accordance with existing laws? As to the authority of the secretary to regulate the warehouse system. 10 Stat. 273. He was to make such regulations, not inconsistent with the laws of the United States, as he might deem necessary for the due execution of this act. The rates of storage were to be fixed by the secretary of the treasury, and were left to his regulations by this act. 10 Stat. 270. "Goods subject to duty * * * may be deposited at the option of the importer, at his expense and risk in," &c. The option given the importer in this statute was between the three classes of warehouses described in the section, and did not concern "his expense and risk." There is no pretence that this option was denied to the plaintiffs in fact or in theory; it is only insisted by the plaintiffs that they had a right to use their own stores without paying anything. The privilege of warehousing goods in bond has always been coupled with the condition that it should be at the expense and risk of the importer. Warehouse Act 1846 says, "at the charge and risk of the importer." Revenue Act 1799, § 56, says, "at the charge and risk of the owner." The act of 1841, § 6 [5 Stat. 432], authorizes the secretary of the treasury "to regulate the rates of storage." The power here granted was extended with the enlarging of the warehousing system in 1846 (section 5), "to make regulations not inconsistent with the laws, to give full effect to the provisions of this law, and to secure a just accountability." These several acts are to be construed together to constitute the whole warehousing system of the United States, and only those parts which are repugnant to later statutes are to be regarded as repealed.

The right to regulate the rates of storage granted in 1841 is not repugnant to any of the other powers given the secretary by subsequent statutes, and exists in full force. The revenue from storage is apportioned by the United States. See Act March 3, 1849, §

4 [9 Stat. 398]. The fact of the expense of the warehousing being a charge on the owner of the goods, and the right of the secretary to regulate the rates of storage being thus shown to exist, there only remains to be considered, whether the government was put to any expense whatsoever in the case at bar, so as to justify the levying of a rate where the store class two was used. The custody of the goods is in the United States during the period of warehousing. Act 1846, § 1. Duties to be paid in cash. Whenever the owner shall make entry for warehousing, "the goods shall be taken possession of by the collector and deposited in public store or other stores, &c., there to be kept, at the charge and risk of the owners, &c., and subject to their order on payment of proper duties and expenses." The mode of keeping is prescribed in various acts, the objects being safe-keeping, prevention of frauds, and the retaining of the actual goods until the duties are paid. Act 1818, § 5, and Act 1846, § 3, describe offences which may be committed as to these goods, and from which they are to be protected; Act 1846, § 5, "to secure a just accountability" for the goods. The treasury regulations of June 26, 1854, direct the mode of doing this, all of which are distinctly part of the expense of the warehousing in that division which relates to custody, and occurred in the case at bar. There is no pretence that custody and delivery service were not performed as to the plaintiffs' goods by the warehousing department of customs. The jurisdiction of the secretary to establish a rate of storage, and the rate being shown, and the fact that there was a custody service performed in consequence of the warehousing of plaintiffs' goods, the further fact remains that under the term "half-storage" the secretary classified and collected the expenses of custody and delivery of the goods. See Treasury Regulations, Feb., 1849, where the option given to the importer is to pay an absolute officer or custodian's salary, or "half-storage," as a composition; and, again, see Treasury Regulations, July 2, 1855, where half-storage is disused as a composition, and a division of the officer's salary among the private stores substituted. The term "storage" always has been held wider than the word "rent," and certain responsibility for care and safe-keeping devolves on warehousemen, not known or connected with those who rent stores to others. The word "half-storage," therefore, literally expresses a custody fee,—the safe-keeping. See Sim. Dict. Com. Terms; Webst. Dict. "Storage;" Brissac v. Lawrence [Case No. 1,888].

Again, had the duties been paid in cash, then no custody would have been required from the government; it was the use of the privilege of warehousing which put the government to the expense of custody in order to execute the existing laws; and by statute this expense was to be at the expense of the importer. The secretary of the treasury having jurisdiction, and there having been a custody service performed by the customs at the warehouse of the plaintiffs, there was no exaction in compelling the plaintiffs to make their election under the Treasury Regulations, Feb., 1849; and the fees were legally received by the collector.

CLIFFORD, Circuit Justice. Considering the nature of the question, it is evident that it cannot be satisfactorily solved without a careful review of the acts of congress concerning the warehousing of imported goods, and of the principal regulations and circulars of the treasury department upon the subject.

Warehousing, as a system, was established in the United States by the act of 6th of August, 1846. 9 Stat. 53. Among other things, the first section provides, that upon the failure or neglect to pay the duties within the period allowed by law, or whenever a warehouse entry shall be made in the prescribed form, the importation "shall be taken possession of by the collector," and be deposited in "the public stores or in other stores," to be agreed on by the collector and the importer, owner, or consignee; and by the same section, such stores are required to be secured in the manner provided for by the first section of the act of the 20th of April, 1818, entitled "An act providing for the deposit of wines and distilled spirits in public warehouse." Such goods are not only required to go into the possession of the collector, and be thus deposited under his control, but they are also required to be kept in the place of deposit at the charge and risk of the owner, importer, or consignee. Goods so deposited are at all times subject to the order of the owner, importer, or consignee, upon payment of the proper duties and expenses; but those are required to be secured by a bond to the satisfaction of the collector, in double the amount of the duties. Duties upon such goods are required to be paid within a prescribed period; and in case the goods remained in public store beyond that time, without payment of the duties and charges thereon, they were to be appraised and sold by the collector at public auction, and the proceeds, after deducting the usual rate of storage at the port, with all other charges and expenses, including duties, were to be paid to the owner, importer, or consignee. Whether the merchandise is deposited in the public stores, or in the other stores therein described, there is not one of the provisions here referred to which does not assume that the goods are in the possession and under the control of the collector; and whether deposited in a public or private warehouse, it is clear that the goods cannot be withdrawn for consumption without the payment of the duties; nor for transportation or exportation, except by paying the appropriate expenses. Most of the provisions of the act are general in their phraseology, and doubtless were made so, because the system was new

and untried in this country; and they were necessarily framed and passed without the light of experience. Details, for the most part, were apparently avoided, but the fifth section authorized the secretary of the treasury, from time to time, to make such regulations, not inconsistent with the laws of the United States, as might be necessary to give full effect to the provisions of the act, and secure a just accountability under the same. By virtue of the authority conferred under that provision, the secretary of the treasury, on the 17th of February, 1849, promulgated an extended circular of instructions and forms, in place of those previously issued, with a view to enlarge the benefits of the warehouse system in this country. Treas. Cir. & Dec. (Ogden) p. 118. Those regulations greatly advanced the system by supplying important details, and prescribing the mode in which the system was to be carried into effect.

Some few details, however, were prescribed in the act itself, which must not be overlooked in this investigation. Importations in warehouse were assumed to be in the possession and under the control of the collector, and were to be kept at the charge and risk of the owner, importer, or consignee, and when withdrawn from warehouse, the appropriate expenses were to be paid by such owner, importer, or consignee. "Appropriate expenses" are the words of the act, but the expenses are in no way defined, except by necessary implication, arising from the obligation imposed of keeping the merchandise. Custody and control of merchandise in warehouse necessarily involve the expense of storage, superintendence, cartage, and drayage. All of these elements of charge are obviously included in the term "appropriate expenses," but the amount is not prescribed, and was necessarily left to be ascertained under the regulations of the department.

Moneys derived from that source are recognized by the act of the 3d of March, 1841, as public moneys, and collectors are required to pay the same into the treasury of the United States. 9 Stat. 349; U. S. v. Walker, 22 How. [63 U. S.] 313. Bonded warehouses, under the regulations of the 17th of February, 1849, were divided into three classes: 1. Public stores, or stores owned by the United States, or leased by them prior to the date of the regulations; 2. Stores in the possession and sole occupancy of the importer, and placed under a customs lock and that of the occupant, for the purpose of storing importations of the importer; 3. Similar stores in the occupation of persons desirous of engaging in the business of storing dutiable merchandise. Such classification was not, in terms, required by the act under consideration; but, in view of the explanations already given, it may be assumed that it was fully authorized by the fifth section.

Looking at the details of those regulations, and comparing them with the provisions of the act of the 28th of March, 1854, it will be seen that many of the latter were substantially borrowed from those regulations. Changes, undoubtedly, were made, and some entirely new provisions were enacted; but, in many respects, there is a marked similarity between the old regulations and the new law upon the same subject. All merchandise subject to duty might be warehoused under the act of 6th of August, 1846; but the regulations contained a provision that perishable articles and gunpowder, firecrackers, and other explosive substances, should be sold forthwith, or at the earliest day practicable, which rendered the privilege valueless in respect to all such articles; and the first section of the new law accordingly excluded those articles altogether from the benefit of the system. Other imported goods subject to duty, and which have been duly entered and bonded for warehousing, may be deposited, at the option of the owner, importer, or consignee, at his expense and risk, in any public warehouse owned or leased by the United States, or in the private warehouse of the importer, the same being used exclusively for the storage of warehoused goods of his own importation or to his consignment, or in a private warehouse used by the owner, occupant or lessee, as a general warehouse for the storage of warehoused goods, subject to the express conditions stated in the act, and such as are necessarily to be implied from other provisions. Such selected place of storage must be designated on the warehouse entry at the time of entering the merchandise at the custom-house.

But there are other and more material conditions expressly or impliedly annexed to the option given to the owner, importer, consignee, or agent, which it becomes important to notice. Warehouses for the deposit of imported goods are divided into two classes, public and private; but of the latter class there are two kinds, as already described. Importers, under that act, can have no option to deposit any importation in a public store unless such a store be owned or under lease by the United States, because one of the main purposes of the act was to discontinue the use of all such stores for warehousing, and to provide for the establishment of private bonded warehouses. Existing leases were to be cancelled at the shortest period of their termination, and new leases were forbidden at ports where there existed private bonded warehouses. Right of option, therefore, so far as public stores are concerned, must be considered as limited to cases where such stores were owned or under lease by the government. Conditions more express, however, in respect to the right of option to deposit imported goods in private warehouses, are to be found in the proviso annexed to the provision conferring the right. Stores must be first constituted private warehouses for the storage of ware-

housed goods within the meaning of the act, before any such option exists at all in respect to such stores.

Private warehouses, according to the first proviso of the section, must be used solely for the purpose of storing warehoused goods, and must have been previously approved as such by the secretary of the treasury, and have been placed in charge of a proper officer of the customs, who, together with the owner and proprietor, shall have the joint custody of all the merchandise stored in the warehouse; and all the labor on the goods so stored must be performed by the owner or proprietor under the supervision of the officer of the customs in charge of the same, at the expense of the owner or proprietor. Cellars and vaults of stores for the storage of wines and distilled spirits only, and yards for the storage of coal, mahogany, and other woods and lumber, may, at the discretion of the secretary of the treasury, be constituted bonded warehouses for the storage of such articles under the same regulations and conditions as are required in the storage of other merchandise; but the cellars or vaults must be exclusively appropriated to the storage of wines and distilled spirits, and have no opening or entrance, except from the street, and be under the separate locks of the custom-house and of the owner or proprietor.

Subject to these conditions and qualifications, the right of option undoubtedly is conferred by the act, but it is a mistake to suppose that it exists in the unrestricted and unqualified sense set up in the argument. Government had no public stores, except such as were already filled with imported merchandise; and in order to secure the right to deposit their importations in private warehouse; but the third sec- it necessary to comply with the conditions annexed to its enjoyment. Other differences exist between the act of the 6th of August, 1846, and that of the 28th of March, 1854, and one or two more of them may be profitably mentioned in connection with the question involved in this case.

Private warehouses might be agreed on between the collector and importer, under the former, subject only to the condition that the same should be kept under the joint locks of the custom-house and the importer, not in terms forbidding the use of the building for other purposes; but the latter expressly requires that private warehouses shall be used solely for the purpose of storing warehoused goods, and the application must not only have been previously approved by the department, but the store must be under the charge of a proper officer of the customs. Provision is wanting in the act of the 6th of August, 1846, to save the government harmless from risk, loss, or expense in keeping the importation in private warehouse; but the third section of the latter act provides, that before any store or cellar, owned or occupied by private individuals, shall be used as a warehouse for other merchandise, the owner, occupant, or lessee shall enter into bond exonerating and holding harmless the government and its officers from any such risk, loss, or expense.

Authority to establish, from time to time, such rules and regulations, not inconsistent with the laws of the United States, as he might deem to be expedient and necessary, was also conferred upon the secretary of the treasury by the ninth section of this act. Pursuant to that authority, additional regulations and forms were framed on the 2d of July, 1855, and promulgated on the same day, to give effect to the provisions of the several acts of congress establishing and extending the warehouse system. Some alteration is made in the classification of warehouses, under these regulations, which must be briefly noticed. Class one is stores owned by the United States, or hired by them prior to the date of the instructions, the leases of which have not yet expired or been cancelled. Classes two and three are the same as in the previous regulations, and need not be further noticed. Class four consists of yards and sheds of suitable construction, which, by the regulations, are allowed to be bonded in the manner prescribed for other depositories, and used for the storage of wood, coal, dye-woods, molasses, sugar in hogsheads and tierces, railroad, pig, and bar iron, chain cables, and other articles specially authorized. Bonded yards must be enclosed by substantial fences, with gates provided with suitable bars and other fastenings, so as to admit of being secured by customs locks, and must be used exclusively for the storage of the above-named goods. Sheds, also, must be provided with suitable fastenings, and be secured by the different and separate locks of the occupant and of the customs. Cellars and vaults of stores occupied for general business purposes may, under certain prescribed conditions, be used by the owner or lessee as bonded warehouses of class two, for the storage of wines and distilled spirits only and exclusively of his own importation. Neither stores, yards, sheds, cellars, nor vaults are private bonded warehouses, within the meaning of the act of congress, until they are constituted such by the sanction of the proper authorities.

Merchants or other persons desirous of having any building constituted a private bonded warehouse of the second or third class must apply to the collector of the port in writing, describing the premises, the location and capacity of the same, and setting forth the purpose for which the building is proposed to be used; as, whether for the storage of merchandise imported or consigned to himself exclusively, or for the general storage of merchandise in bond. Examination of the premises is then directed,

and a report of the particulars required to be made by the proper officers in writing. On the receipt of the report, it is the duty of the collector to transmit the same to the department, together with the application of the party, and certain required certificates, and a statement of his own views and opinion. Decision is then made by the secretary of the treasury, and, if the application is granted, the owner or occupant is then required to enter into a bond, of a prescribed form, in such penalty and with such security as the collector may deem proper. Applications for the bonding of yards and sheds as warehouses must be made in a similar manner, and under like regulations. Reg. July 2, 1855, p. 9. Express stipulation is contained in the prescribed form of the bond that the obligor will pay the salary of the officer in charge of the goods, or such part of the salary as may be required in pursuance of the regulations of the treasury department.

Merchandise in warehouse was covered by a bond, under the act of the 6th of August, 1846; but the place of deposit was only secured by the joint locks of the customs and of the owner or occupant, under the superintendence of the officer in charge. Places of deposit now, as well as the goods deposited, must also be covered by a bond, so that all such depositories, before the goods are placed within them, are in point of fact private bonded warehouses, as described in the act of congress. Foreign merchandise received into public stores is declared, by the act of the 3d of March, 1841, to be subject, as to the rates of storage, to regulations by the secretary of the treasury; but the charge on that account cannot exceed the usual rate at the port. 5 Stat. 432; Treas. Cir. & Dec. (Ogden) p. 132, § 35; Reg. July 2, 1855, p. 3; Foster v. Peaslee [Case No. 4,979]. Rate of storage allowed to be charged under the regulations of the 17th of February, 1849, for the privilege of warehouse in stores of classes two and three, and for the time of the inspector in superintendence, was a sum equivalent to the pay of such officer, or one half of the amount which would accrue as storage on the goods, if stored at regular rates in a public store. Other regulations and instructions upon the same general subject have been issued since those were promulgated.

Special reference is made by the plaintiffs to the regulations of the 2d of July, 1855, and they insist that the last-named regulations had the effect to repeal those that previously existed, so far, at least, as respects the rate of storage allowed to be charged in cases of this description. Direct repeal is not pretended; and the rule is, where there is no repealing clause, that the subsequent regulations only have the effect to repeal those previously existing, to the extent that those last issued are clearly repugnant to the former. Dwarris, Stat. 533; U. S. v. Walker, 22 How. [63 U. S.] 311. Half-storage, it is admitted, was a proper charge, under the regulations of the 17th of February, 1849; and the admission is a very proper one, because the regulations expressly require the importer, before he can use his own store for such deposit, not only to request such use, but also to indorse on the entry an agreement to pay the collector an amount equal to the salary of the inspector, or one half storage, and the importer was required to make his election in advance. Under the regulations of the 2d of July, 1855, the provision for store class two is, that for the time of the customs officer necessarily required in attendance at such store, the proprietor shall pay monthly to the collector of the port a sum equivalent to the pay of such officer, but the alternative provision for the payment of half-storage is dropped. Unexplained and separated from the other regulations in pari materia, the provision would seem to imply that the collector must in all cases exact a sum equal to the full salary of the officer in charge, which, in most conceivable cases, would be much greater than half-storage. That provision is made more stringent in the regulations of the 1st of February, 1857, which provide that the proprietor shall pay monthly to the collector of the port such sum as he (the collector) may deem proper for the service, not less, however, than the pay of such officer. Gen. Reg. p. 211. Appropriate expenses were authorized to be charged, and required to be paid, under the act of the 6th of August, 1846; but the charge is described in the regulations of the 17th of February, 1849, as one "for the privilege" and for the "time of the customs officer necessarily employed in attendance at such store." Goods duly entered for warehousing under bond may, according to the act of the 28th of March, 1854, continue in warehouse without the payment of duties, for a period of three years, and may be withdrawn for consumption on due entry and payment of the duties and charges, or upon entry for exportation within the same period, without the payment of duties; and the provision is, that in the latter case the goods shall be subject only to the payment of such storage and charges as may be due thereon.

Storage and charges, therefore, are the words of the last-named act, but the language of the regulations is, "for the time of the customs officer necessarily required in attendance at such store." Those regulations, however, expressly recognize half-storage as a proper charge in cases where liberty is granted to the importer after entry to take the whole or any part of the goods from the vessel by paying the duties on a withdrawal entry for consumption. Payment of one half storage for one month is expressly required under those circumstances, and the same regulations provide that charges for storage, labor, and other expenses, accruing on the goods, shall not exceed the regular rates for

such objects at the port. Unless the charges for storage can be allowed to exceed the regular rates at the port, it is difficult to see how an arbitrary rule requiring the collector to exact in all cases a sum equal to the full salary of the officer in charge could be sustained. One officer, under the regulations first issued, might have as many cellars in charge as in the judgment of the collector he could superintend efficiently, not exceeding six, and the same provision is retained in the subsequent regulations in the same words. Stores of class three were expressly excluded from that rule under the first regulations, and the prohibition was retained in those subsequently adopted, and made to include classes three and four. Class two was not within the prohibition, but the regulations of 1855 provided that, where one officer had charge of more than one warehouse of the second class, or more than one cellar or vault, the amount to be contributed by each must be agreed on by the owners or occupants and the collector. Authority to make such agreements was not conferred by the regulations of 1849, and the provision was changed in those of 1857, so that the amount to be contributed by each must be determined by the collector; and an agreement in writing must be made in all cases for the payment of the compensation of the officer.

Collectors are authorized to accede to these arrangements when the circumstances render the arrangements reasonably practicable, and the public interest will not be prejudiced by it; but it is necessarily in their discretion to determine those preliminary inquiries.

Comparing the acts of congress touching the matter in question, and the several regulations upon the same subject, one with another, it is quite obvious that the several provisions were all intended to accomplish the same general purpose. Warehoused merchandise is required to be kept by the government, and the keeping involves appropriate expenses, and the object of those provisions was to supply the means to defray those expenses and save the government harmless. Differences of phraseology undoubtedly are noticeable; but those differences have respect to matters of detail, and not of principle or substance. Importers, under the first regulations had, in express terms, an election whether to pay a sum equivalent to the salary of the officer in charge, or one half storage at regular rates, in the public stores; and, taken as a whole, I am of the opinion that the subsequent regulations do not repeal that provision. Expressions are certainly to be found in the subsequent regulations which, if taken separately, would strongly support the view that collectors are required in all cases to exact an amount equivalent to the salary of the officer in charge; but it is not possible to support the regulations at all, if that be their proper construction, for two reasons. Regarding the charge as storage and as an arbitrary exaction, then it would be contrary to law, because in most cases it would exceed the regular rates at the port; but if regarded as payment of the salary of the officer in charge, then the officer receiving it would incur a penalty of two hundred dollars. 1 Stat. 680. Difficulties so formidable cannot be overcome, and consequently the construction assumed by the plaintiffs must be rejected. Where the interpretation of the revenue laws and regulations are involved, considerable weight should be given to the practice of the government as a contemporaneous construction of the provision under consideration When the subsequent regulations were issued, the practice was not changed, but continued the same; and, as a general remark, it may be said that it has never been changed to the present time. Full confirmation of the last remark, if any be needed, is found in the abstract of decisions forwarded to the collectors of the customs on the 30th of June, 1857, by the secretary of the treasury. On that day certain additional instructions were issued to the collectors, and the secretary took occasion to subjoin an abstract of decisions on questions under existing revenue laws. Among the abstract of decisions is one in respect to "storage in private stores"; and the instructions say, "It has been decided that, in cases where goods are stored under bond in a private store, the importer shall either make monthly payment of a sum equivalent to the pay of an inspector placed in charge of the same, or one half of the amount which would accrue as storage on the goods so stored if placed in public store, the importer to make his selection at the time of placing the goods in store." All of the collectors, it is believed, have conformed to that decision since it was made, and, in view of all the provisions upon the subject, it is difficult to see what other rule can consistently be adopted, except when the arrangement is made for one officer to have charge of more than one warehouse, as before explained. Warehouse Manual (Bruce) p. 205.

Several grounds are assumed by the plaintiffs to show their right to recover, but it is clear, from the explanations already given, that none of them can be sustained. 1. They insist that, under the act of the 28th of March, 1854, they had a right to elect to deposit the importations in question in their own store, and that they were virtually deprived of that right by being compelled to accept the condition to pay half-storage to secure the enjoyment of the right. Sufficient answer to this complaint has already been made in the previous explanations. Government had no public stores which were not full, and the plaintiffs had to comply with the regulations in order that their own stores might be constituted "private bonded warehouses." Election was made by them, and they have enjoyed the right, and, in the language of the law, must pay the appropriate expenses. 2. In the second place, they deny

that there were any expenses, but the error of this assumption has already been shown, and the explanations need not be repeated. 3. Lastly, they insist that, if the collector had a right to demand anything, it was a sum equivalent to the salary of the officer in charge, and not half-storage, and that no such demand was ever made. Half-storage, it is admitted, is much less than the salary of the officer, but the proposition is, that half-storage could not be exacted under the regulations; and, although the collector might have demanded a much larger sum, still, as the sum received could not be legally exacted in that form, they have a right to recover it back in an action for money had and received. After full consideration, I am of the opinion that no part of the proposition can be sustained. Half-storage was properly demanded under the regulations; but if the collector accepted a less sum than he was entitled to receive, the plaintiffs in this form of action could not recover it back merely because the sum paid was characterized by a wrong name. In view of the whole case, I am of the opinion that the plaintiffs are not entitled to recover; and, under the agreement, and notwithstanding the verdict, there must be judgment for the defendant.

Case No. 2,831a.

CLARK v. PHILLIPS.

[Hempst. 294.] [1]

Superior Court, D. Arkansas. Jan., 1836.

VARIANCE—"WRITING OBLIGATORY"—ASSIGNMENT.

1. A trivial variation in describing a deed or written contract is fatal, and the variance may be taken advantage of on demurrer in arrest of judgment, or on error.

2. The term "writing obligatory" imports a sealed instrument.

3. To enable a person, by assignment of a bond, to vest the legal title in the assignee, it must appear that he has the right to make the assignment.

In error to Pope circuit court.

[At law. Action by Thomas Phillips against Josiah Clark upon a bond assigned to plaintiff. There was a judgment for plaintiff, and defendant brought error.]

Before YELL and CROSS, Judges.

CROSS, Judge. This cause comes up on a writ of error to the Pope circuit court, and has been submitted without argument. At the return term in the court below, Clark, the plaintiff in error, appeared by his attorney, and craved oyer of the writing declared upon, which was given in the words and figures following, namely: "The first day of October next, we or either of us promise to pay to John Rossman & Co., or order, eight hundred and fifteen dollars and fifty cents, for value received of them, this 29th day of October, 1830. (Signed) Josiah Clark, B. D. Johnson." On the back of which was the following indorsement, namely: "I assign the within note to Thomas Phillips for value received, this 22d day of October, 1832. (Signed) A. Dilerac." Whereupon he filed a general demurrer to the plaintiff's declaration, to which there was a joinder, and on submitting it, the circuit court gave judgment for the plaintiff, overruling the demurrer. Phillips alleges in his declaration "that Josiah Clark and one B. D. Johnson, otherwise Bolus D. Johnson, who is not sued in this case, by their certain writing obligatory signed with their own proper hands, and sealed with their seals, promised to pay," and then goes on to state "that John Rossman & Co., to whom, or to whose order, the payment was to be made, indorsed and assigned the said writing obligatory, by which said indorsement and assignment they, the said John Rossman & Co., then and there ordered and appointed the sum of money specified in said writing obligatory to be paid to Thomas Phillips, and then and there delivered the same to Phillips." There being an obvious variance between the writing described in the declaration, as well as the assignment, and that exhibited on oyer, we shall consider the question only as to whether this variance ought to have been regarded in deciding upon the demurrer. The rule of law is that a trivial variation in setting out a deed or written contract is fatal. 1 Chitty, Pl. 304. And such variation may be taken advantage of after craving oyer, and setting out the writing by demurrer. 2 Saund. 366, note 1; 1 Chit. 416. The same authorities also show that the variance will be available on the trial, in arrest of judgment, or on a writ of error.

In the case before us, the declaration alleges, in describing the written contract, that it was sealed with the seals of Clark and Johnson, when the instrument shown on oyer is without seals. There is also a discrepancy in the assignment, as the declaration states it to have been made by John Rossman & Co., when it appears, from the oyer given, to have been made by A. Dilerac. To designate a written contract in a declaration or plea as a writing obligatory would doubtless be equivalent to an allegation that it was sealed, as the words "writing obligatory" are technical, and imply a sealing. 4 Com. Dig. tit. "Fact;" 1 Saund. 290; 1 Chit. 348. It follows, therefore, that if the allegation as to sealing had been entirely omitted, the misdescription would have been in legal contemplation and effect the same, by describing the instrument as a writing obligatory. It may be proper to remark, in relation to the assignment, that, from anything on the record, it does not appear that Phillips, the plaintiff below, had any transfer of the written contract vesting the title in him, so as to authorize a suit in his name. Certainly "A. Dilerac" could not

[1] [Reported by Samuel H. Hempstead, Esq.]

assign it, because he had, to all appearances, no legal interest in it. As well might Richard Roe or John Doe have assigned it, so far as we can perceive. Believing that a misdescription of a writing declared on after oyer may be taken advantage of on demurrer, and the misdescription being obvious in the case before us, we are unanimous in the opinion that the demurrer was improperly overruled by the circuit court, and that the judgment rendered thereon ought to be reversed. Judgment reversed.

Case No. 2,832.

CLARK et al. v. PROTECTION INS. CO.

[1 Story, 109.][1]

Circuit Court, D. Massachusetts. May Term, 1840.

INSURANCE ON SMUGGLED PROPERTY—DIVISIBILITY OF POLICY—FORFEITURE—PENALTY.

1. A policy of insurance is not divisible, so as to be good in part and bad in part. If, at its inception, it is founded in any illegality, in which one only of the owners participated, it is utterly void as to all.

[Cited in Blandy v. Griffith, Case No. 1,530.]

2. Where a ship was insured on a voyage to Liverpool, and took on board in the port of New Orleans a chain cable, smuggled by another vessel, and was lost upon the voyage to Liverpool, by the perils of the seas, it was *held*, that she was not subjected to a forfeiture in rem, but that the master was personally liable to the pecuniary penalties prescribed by law therefor, and that the underwriters were liable for a total loss on the policy. *Held*, also, that the insurance on the chain cable was good; the title being in the owner of the vessel, and the illegality not attaching to the voyage, on which it was used.

3. When property is forfeited, it does not vest in the government until after a seizure, which then relates back to the time of the forfeiture.

4. The 27th and 28th sections of the duty collection act of 1799, c. 128 [1 Story's Laws, 597; 1 Stat. 648, c. 22], are not applicable to such a case as this; but it is covered by the 50th and 59th sections of the act, which provide a penalty for unlading goods without a special permit or license from the collector, or for knowingly receiving or concealing goods, liable to seizure. But the vessel receiving smuggled goods is not liable to forfeiture.

[Cited in U. S. v. Distilled Spirits, 14 Wall. (81 U. S.) 61.]

5. Every statute, imposing a penalty, imports a prohibition, and makes the prohibited act illegal.

[Cited in Hatch v. Burroughs, Case No. 6,203.]

6. A mere intention to do any act, which would avoid a policy, if done, but which has never been consummated, does not vitiate the policy. The voyage, to avoid the policy, should be originally either wholly or in part illegal as to trade and objects.

7. If a voyage as originally insured be valid, any subsequent illegality in the course of the voyage will not affect the policy, so far as concerns losses on property not tainted with such illegality, though connected with the res gestae.

8. If the illegal act is followed by a forfeiture and seizure of the thing insured, the underwriters are not liable for the loss. But the mere liability to forfeiture, does not avoid the insurance, or prevent a recovery for a loss by any independent peril.

At law. Assumpsit on a policy of insurance underwritten by the Protection Insurance Company, on the 10th of November, 1837, whereby they insured the plaintiffs, "Means & [Joseph] Clark, for whom it concerns, payment to them to be insured, lost or not lost, twenty thousand dollars on the ship Avon, at sea and in port, for and during the term of one year from the 12th day of November, 1837, at noon; and if at sea at the expiration of said term, the risk to continue until her arrival at the port of destination, at a pro rata premium." The vessel was valued at $28,000, and the premium was four per cent. per annum. The policy in other respects was in the common form of the Boston policies.

The parties agreed upon the following statement of facts: The defendants, on the 10th of November, 1837, made a policy of insurance, whereby they insured Means & Clark, for whom it might concern, in the sum of twenty thousand dollars on the ship Avon, valued at $28,000, for one year. The vessel was owned by Joseph Clark, James R. Groton, George Sproul, Arthur Child, who was master, and Thomas Johnson, all of Waldoborough, in the state of Maine, and the plaintiffs, and the policy was made for them and by their orders. She sailed from Waldoborough, Maine, on her first voyage, in November, 1837, for New Orleans, arrived there in December, thence went to Natchez, and sailed thence for Liverpool, about February 1st, 1838, and was totally lost by the perils of the seas on her passage. When she sailed from Waldoborough, she had on board, besides her stream cable, one hempen and one iron cable. The master was employed for the owners to obtain the rigging and part of the equipments of the ship, and it was his intention to change the hempen cable for the iron one hereinafter mentioned. At New Orleans, the hempen cable was taken out, and an iron one substituted, of the value of more than $400, which was purchased, and put on board in the following manner:—In September, 1837, the said Arthur Child requested his brother, Samuel, then about to sail for Pictou, in the province of Nova Scotia, to purchase an iron cable there for said vessel. The cable was bought there, shipped on board of a vessel belonging to citizens of the United States, concealed under a cargo of coal, thence carried to the port of New York, not entered or landed there with the rest of the cargo, but concealed on board, and thence carried in the same vessel to New Orleans, and there secretly taken out, without any license or authority of any officer of the customs, and put aboard the Avon at night, long after sunset, and kept there concealed, while the Avon remained in the United States; the object being to evade the payment of the duties, to which such

[1] [Reported by William W. Story, Esq.]

cable was liable on importation into the United States. There is no evidence, that any of the plaintiffs except the said Arthur Child were privy to, or had any knowledge of these doings or of his intentions. The Avon without the hempen cable, or the iron cable substituted for it, was unseaworthy. The insurance company, in ignorance of these facts, on June 25th, 1838, paid Means & Clark, on account of said loss, the sum of ——; but, on coming to a knowledge of these circumstances, conceive themselves not to be liable at all, and claim to recover back the amount paid. The case is submitted to the court on the above statement of facts. If the court shall be of opinion, that the plaintiffs are entitled to recover, judgment is to be rendered for $3995.54, with interest from May 11th, 1840, and costs, and otherwise the defendants to have judgment for costs.

F. C. Loring, for plaintiffs.

The facts admitted show a prima facie case for the plaintiffs. The defence consists in one single fact, that the ship insured had on board a cable, which, having been smuggled into the United States, was by law liable to be seized and forfeited to the government. From this fact, it has been suggested, that the following conclusions may be drawn. First. That by the 27th and 28th sections of the act of 1799, c. 128, the vessel was liable to forfeiture, by reason of being the recipient of smuggled goods, and therefore not capable of being insured. Second. That the cable, being liable to forfeiture, was not capable of being insured; and that being part of the ship, its infirmity infected the whole ship, and rendered it also incapable of insurance. Third. That as the cable was liable to be seized and removed, and the vessel to be detained, in consequence of such seizure, it was thereby exposed to an additional risk, either from the want of the cable, or the delay, which would discharge the insurers from any subsequent loss. Fourth. That the concealing the cable on board the Avon was an illegal act, by which the policy was avoided.

To the first point, without admitting the conclusion, it is sufficient to say, that the provisions contained in the 27th and 28th sections of the act do not apply to vessels, which have arrived at the usual places of loading and discharge. The Industry [Case No. 7,028].

To the second, that the liability of an article to be forfeited, does not render it incapable of being the subject of insurance, until it is seized. And the better opinion is, that, in cases of seizure, the forfeiture does not relate back to the time of the committal of the offence, but to the time of the seizure. When there is no seizure, the use, possession, and property remain in the owner, and constitute an insurable interest The Mars [Id. 9,106]; U. S. v. The Anthony Mangin [Id. 14,461]; Id., 3 Cranch [7 U. S.] 356; Polleys v. Ocean Ins. Co., 13 Pet. [38 U. S.] 157; Lockyer v. Offley, 1 Term R. 260.

To the third, that no detention actually took place; that if the cable had been seized, detention was not necessarily a consequence; that the seaworthiness of the ship did not depend upon the ownership of the cables and anchors on board, but on their sufficiency in number and quality for the ship and voyage; that while actually on board, the ship could not be unseaworthy in that respect; and that the possibility of a detention, like an intention to deviate, could not have the effect of avoiding the policy.

To the fourth. The 60th section of the same act provides, that the concealing of goods liable to seizure, shall subject the offender to a penalty. But it does not enact, that the vessel or warehouse, in which the goods may be placed, shall be forfeited, or liable to any penalty.

If the position assumed be correct, then the commission of any offence against law, even a common assault, would avoid a policy on the vessel or house, in which it occurred. To avoid a policy on the ground of illegality, it must be shown, that the insurance is void, as against law, from matters appearing on the face of the policy, or that the insurance was intended to aid in effecting some illegal object. The former cannot be pretended. There is no illegality apparent on the face of the policy. Of the latter, there is no proof. The voyages, on which the ship was employed, were legal; the perils insured against were such as were legal risks; the parties to the contract contemplated nothing illegal when the policy was made. If at that time, the master expected to use a smuggled cable, he did not intend to smuggle it in this vessel; and the policy would not cover the cable, till the illegal act was consummated, and the cable became an appurtenance of the ship. There was no illegality in carrying a smuggled cable to sea, nor in using one. Armstrong v. Toler, 11 Wheat. [24 U. S.] 258; Polleys v. Ocean Ins. Co., 13 Pet. [38 U. S.] 157.

B. Rand, for defendants, argued in substance as follows:

By the act of 1799, c. 128, § 27, it is made unlawful to unlade any goods, imported from a foreign port, before the ship shall have come to the proper place for the discharge of her cargo or some part thereof, and shall be duly authorized to unlade the same; and in such case the goods are to be forfeited, which are thus unlawfully unladed. By the 28th section of the same act, it is made unlawful to put or receive any goods so unladen into any vessel, and the commander, and those who aid therein, forfeit thereby treble the value of the goods, and the ship, into which they are put, is thereby forfeited. By the 50th section of this act, no goods can lawfully be unladen between sunset and sunrise,

nor at any time without a permit therefor, and the commander of the ship, and others aiding therein, forfeit $400 each; the goods also are forfeited, and the ship, if, as in this case, the goods are over $400 in value. By the 68th section of the act, it is made unlawful to conceal goods, on which the duties are unpaid, in any ship or vessel, and the goods are forfeited thereby. And by the 69th section it is declared, that if any person shall buy or conceal any goods, knowing them to be liable to seizure, he shall forfeit double the amount thereof. The iron cable was forfeited, therefore, under the provisions of the 27th, 50th, or 68th sections of the act. The vessel, that is, the Avon, into which the iron cable was so unladen from the other vessel, without a license, was also forfeited by virtue of the 28th section. The putting, receiving, and concealing the iron cable on board the Avon were unlawful acts, by the 28th, 68th, or 69th sections. The defendants, therefore, insist, that the plaintiffs are not entitled to recover, because,—

1. The contract of insurance is illegal and void. Whether we regard the cable only, or the ship and cable, the policy covered property, which was dealt with illegally during the voyage, or during the time mentioned in the policy. It is quite immaterial, what part of the voyage, or time, the ship, or cable, which became a part of her, was so illegally dealt with, or for how long or short a space of time. If it were the last moment only of the voyage or time, it would be just as fatal to the policy, as if it were the first, or for the whole time. Story, Ag. p. 184, § 195, last paragraph; 3 Marsh. Ins. (3d. Eng. Ed.) 52; Wilson v. Marryat, 8 Durn. & E. [Term R.] 31; 1 Bos. & P. 430; Bird v. Appleton, 8 Durn. & E. [Term R.] 562; Bird v. Pigou, Selw. N. P. (8th Eng. Ed.) 994, note i.

It seems to be a general principle, established by decisions quite too numerous to admit of citation, that a contract immediately connected with, in aid of, or countenancing a violation of the law, such as a policy of insurance covering property, and intended by the owner to protect himself against loss in respect of it, while he is dealing with it contrary to the law, is utterly void. Policies upon goods afterwards, during some time in the course of the voyage or risk, smuggled into or out of the country, contrary to the provisions of the revenue laws, form only one class of cases, coming under the general rule. But they may well be referred to, as exemplifying the principle, on which all the decisions referred to seem to depend. 3 Marsh. Ins. (Eng. Ed.) 52. For other exemplifications, see Bensley v. Bignold, 5 Barn. & Ald. 335; Stephens v. Robinson, 2 Cromp. & J. 209; Bartlett v. Vinor, Carth. 251, approved in De Begnis v. Armistead, 10 Bing. 110, per Tindal, C. J. Inasmuch as the policy was intended to attach to the cable, without regarding the illegal use of the rest of the ship, it seems, that the whole policy is void. It was a valued policy. And the contract in this case certainly must be considered as indivisible. It is a much stronger case than many in the books. Parkin v. Dick, 11 East, 502, 2 Camp. 221; Camelo v. Britten, 4 Barn. & Ald. 184; 3 Marsh. Ins. 52 et seq.; Shiffner v. Gordon, 12 East, 294. But the whole ship was violating the law, whether we regard merely the 28th section of the act, or the general tenor and spirit of the revenue laws, while she was receiving on board and concealing the cable. This was clearly an unlawful use and employment of the ship. Not merely a part of the property covered by the policy, but the whole of it, was dealt with illegally during the risk, or voyage. The ship was aiding in a violation of the revenue laws, for the benefit solely of the owners. It is clearly immaterial in what form of words the act is rendered illegal, whether it be expressly forbidden, or the doing it be attended with a penalty or forfeiture, or however otherwise. 10 Bing. 110.

2. There was no insurable interest in the Avon at the time, when the loss happened. Both the ship and the cable were forfeited by the illegal transactions referred to. The property in them was so vested in the government, that the owners could afterwards have maintained no action for the ship, or any of her appurtenances. The owners could have made no valid transfer or abandonment of her to the insurance office; the forfeiture being declared by statute to take place immediately on the doing of the forbidden act. Gelston v. Hoyt, 12 Wheat. [25 U. S.] 311; McLane v. U. S., 6 Pet. [31 U. S.] 427; Fontaine v. Phoenix Ins. Co., 11 Johns. 293, also cited and approved 15 Johns. 25; U. S. v. 1,960 Bags of Coffee, 8 Cranch [12 U. S.] 404.

3. The policy is void by reason of the concealment of a material fact. The insured knew, when they smuggled the cable on board, that they should have, to say the least, no more than a defeasible title to the ship, including the cable; that they could almost give no other title to the wreck, to the insurance office, in case of shipwreck afterwards; and that the ship would be liable to be arrested, taken out of her course, detained, and deprived of her cable, if nothing worse. These, especially in the case of a valued policy, were matters material for the defendants to know. Parkin v. Dick, 11 East, 502.

4. The vessel was unseaworthy. It is admitted, that, without the iron cable, she would be unseaworthy. But the title to the iron cable, as we have seen, was vested in the government from the moment it was put on board, and dealt with contrary to law. It was liable to be taken at any moment. It did not belong to the owners of the ship, and could not be considered, under the circumstances, as making a part of her for the purpose of rendering her seaworthy. Nor can

the plaintiffs be permitted to show and insist upon this illegal transaction as rendering their ship seaworthy. It is to be remembered, that the hempen cable, which the Avon had on board, when she sailed from Waldoborough, was not intended to be kept on board but for a short time, and until the iron cable should be substituted. It was not intended to, and did not render her seaworthy for the whole voyage, or the whole time of the risk, or insurance. Unless the iron cable can be taken into view for this purpose, she was, therefore, unseaworthy.

STORY, Circuit Justice. The present policy was underwritten for all the owners upon their joint account; and under such circumstances I agree, that if the policy at its inception, was founded in any illegality (in which one only of the owners (the master,) who is said to be the owner of one eighth, participated, it is utterly void as to all; for the policy is not divisible, so as to be good in part, and bad in part. It must then stand in toto, or not at all. The case of Parkin v. Dick, 2 Camp. 221, is not exactly like the present; but it may serve to illustrate the principle. The policy here is a joint contract for all the owners; and no recovery can be had, unless it is legal as to all of them; for whatever is recovered must go for the joint account. If all the plaintiffs had sued on the policy in their own names, we should see at once, that the objection would be fatal. It can make no difference, that the suit is brought in the name of their agents; for if the principals could not recover, by reason of any illegality, their agents cannot. In Parkin v. Dick, 2 Camp. 221, the policy was on different articles, each package of which was to pay the same average, as if it were separately insured; and some of the articles specified on the back of the policy were naval stores, the exportation of which was prohibited, without a license from the crown. No such leave was obtained for the voyage; and Lord Ellenborough first, and afterwards the court of king's bench, held the policy utterly void, as to all the other articles insured, as well as the naval stores. Lord Ellenborough, in delivering the judgment in the court of king's bench (11 East, 502, 503), said: "The policy is one entire contract on goods to be thereafter specified, to which the underwriters subscribed; and the subsequent specification, by the assured, cannot alter the nature of the contract with respect to the underwriters, so as to sever that, which was originally one entire contract. It has been decided a hundred times, that if a party insure goods altogether in one policy, and some of them are of a nature to make the voyage illegal, the whole contract is illegal and void." Now, this language applies, a fortiori, to a joint contract, where one party, by reason of his own illegality, is incapable of recovering See, also, De Begnis v. Armistead, 10 Bing. 107, 110, 111.

But the main questions in the present case are, first, whether there is any illegality in the transactions, which affected or could affect the owners personally, or could justify proceedings in rem against the vessel insured; and secondly, if there was, whether that illegality was of a nature, which affected or could affect the present policy, or the voyages thereby insured. In respect to the first question, the material facts are, that before the ship sailed from Waldoborough, the master being, as before stated, a part owner, was employed by the other owners to procure the rigging and a part of the equipments of the ship. The master employed his brother, who was about to sail for Pictou in Nova Scotia, to procure there a chain cable for the ship, which was afterwards intended to be brought into the United States, and placed on board of the ship (as I think the subsequent circumstances show) without the payment of duties upon the importation thereof. The chain cable was accordingly bought and shipped on board of an American vessel, concealed under her cargo. The vessel afterwards arrived at New York without the cable's being entered or landed there; and the cable was thence carried in the same vessel to New Orleans, where it was secretly and without any license, and without the payment of any duties, put on board of the Avon, then lying in that port, and kept concealed on board until her departure from the port, on the voyage for Liverpool, during which she was lost. The statement of facts further admits, that there is no evidence, that any of the owners, except the master, were privy to, or had any knowledge of these doings, or of the master's intention.

The question, then, is, whether the taking on board of this chain cable, at New Orleans, under the above circumstances, was an illegal act, for which the owners were immediately liable by a suit in personam, or the vessel herself was subject to forfeiture. The argument for the insurance company is, that the transaction was within the provisions of the 27th and 28th sections of the duty collection act of 1799, c. 128, and also against the provisions of the 50th and 69th sections of the same act. It seems to me, that the twenty-seventh and twenty-eighth sections of the act may at once be laid out of the case. The former applies only to vessels, which unlade a part of their cargo within the limits of some district of the United States, or within four leagues of the coast thereof, and before such ship or vessel shall have come to the proper place for the discharge thereof. The 28th section applies only to the vessel, which shall have received the same goods so unladen. So that it is apparent, that the forfeitures and penalties do not cover a case, like the present, where the cable was unladen after the arrival of the vessel at her proper port of discharge, and there taken on board of the Avon. This construction has nothing new in it. It was many years ago adopted

by this court in the case of The Industry [Case No. 7,028].

The 50th section of the act is, however, directly in point. It prohibits the unlading of any goods brought in any vessel from a foreign place, without a special license or permit of the collector, or other proper officer of the customs; and if they are unladen without such a license or permit, and are of the value of four hundred dollars, the vessel, from which they are unladen, is forfeited. But this forfeiture attaches only to the unlading vessel, and not to the receiving vessel. The Industry [supra]. So that under this section of the act the Avon was not subject to any forfeiture. But there is a clause in the same section, which imposes a pecuniary penalty of four hundred dollars upon the master, and any other persons, who shall knowingly be concerned or aiding in such unlading, or in removing, storing, or otherwise securing the goods. The master of the Avon was clearly within the reach of this prohibition and penalty; for he was knowingly concerned in the unlawful unlading of the iron cable. The sixty-ninth section of the same act, also, seems to me clearly to cover the present case, and to inflict a pecuniary penalty on the master of the Avon. It provides, that if any person shall conceal, or buy any goods, knowing them to be liable to seizure under the act, he shall forfeit and pay a sum double the amount in value of the goods so concealed or purchased. The state of facts shows a most studied concealment of the iron cable by the master of the Avon, and, therefore, brings him clearly within the reach of the penalty. But then, there is no forfeiture inflicted upon the vessel, or other vehicle, or the store, in which the concealment takes place.

The result, therefore, is, that in the present case the Avon was not subjected to any forfeiture whatsoever in rem; but the act of smuggling and concealing the iron cable was illegal, and the master of the Avon was concerned in such smuggling and concealment, and personally liable to the pecuniary penalties prescribed therefor. I adopt the doctrine of Lord Holt, in Bartlett v. Vinor, Carth. 252, and of Lord Chief Justice Tindal, in De Begnis v. Armistead, 10 Bing. 107–110, that every contract made for, or about a matter or thing, which is prohibited, and made unlawful by statute, is a void contract, although the statute does not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, although there are no prohibitory words in the statute. In other words, every statute, imposing a penalty, imports a prohibition, and makes the prohibited act illegal.

So that, in this view, we are driven to the consideration of the other question in the case; and that is, whether this illegality was of a nature, which affected, or could affect the present policy, or the voyage or voyages thereby insured. Now, it is material to state, that the question is not, whether, if a seizure of the ship had taken place, on account of this illegal conduct of the master, the underwriters would have been liable for any loss or injury consequent thereon, or whether, if the iron cable had been seized and confiscated by a regular sentence of condemnation for the illegal unlading thereof, the underwriters would have been liable for such a loss, as an appurtenance of the ship. There is no doubt whatsoever, that in neither case would the underwriters have been liable on the policy; for the proximate cause of the loss would have been the illegal or fraudulent act of the master, from which, under our policies, the underwriters are ordinarily exempted. The present loss was by the peril of the sea,—a peril clearly insured against; and if we are to regard the maxim, "Causa proxima, non remota, spectatur," the plaintiffs are entitled to recover for that loss, unless the policy itself, or the voyage was illegal.

I confess myself wholly unable to perceive upon what ground the policy itself is void, or the voyage, during which this transaction took place, is illegal. The policy was on time, for the term of one year; and, of course, covered all legal voyages, which might be undertaken during that period. At the time, when it was underwritten, there is no pretence to say, that it was in the contemplation of the insured to engage in any illegal voyages whatsoever. The voyage from Waldoborough to New Orleans, and from thence to Liverpool, was in all its objects and ends perfectly legal. The only possible suggestion, which, upon the state of the facts, can be made, is, that the master about that period contemplated the procurement of a chain cable for the ship from the British provinces, which might at a subsequent period be illegally taken on board at another port, and which was in fact taken on board, long after the policy was underwritten and had attached upon a voyage then in progress. Now, I am unable to see, how the validity of a policy can be affected by a mere contingent future contemplated illegal act in the progress of a voyage, the voyage itself being otherwise in its origin, concoction, and accomplishment perfectly legal. Suppose, in the present case, the chain cable never had been carried to New Orleans, or taken on board the Avon, it would certainly be difficult for a moment to maintain the doctrine, that the policy was utterly void. A mere intention to do an illegal act, or other act, which would avoid a policy, if done, but which has never been consummated by any act, has never, as far as I know, been deemed per se to vitiate the policy. There is in all cases of this sort a locus poenitentiae; there must be the act and the intent coupled together. If, when a policy on a ship is underwritten, the owner has in contemplation a deviation from the voyage insured, but, from a change of purpose

or otherwise, no deviation in fact takes place, we all know, that the policy is good, and covers all losses insured against. Put the case much stronger, and indeed one, which reaches in its scope the present; suppose, at the time when a policy on the ship is underwritten on a voyage perfectly lawful, out and home, the owner has it in contemplation to smuggle a part, or even the whole of the cargo on the return voyage, but it is a mere contingent intention, and not absolute; and, in point of fact, he afterwards in the course of the voyage changes his intention, or, without changing his intention, no smuggling ever takes place; would the policy be utterly void in its concoction, so as not to cover any losses occurring in the course of the voyage by the perils of the sea? I know no case, that goes to such an extent. In order to produce such an effect, as to make the policy utterly void in its origin, it is necessary, that the plan of the voyage itself, and the main purposes of the enterprise should be absolutely illegal. The voyage should be originally and absolutely, in whole or in part, illegal, as to trade and objects; such as a voyage to and from an enemy's port, or a voyage for the purpose of smuggling goods out and home; or a voyage in the violation of some other public law, such as the breach of an embargo or non-intercourse edict (see 1 Phil. Ins., 2d Ed., 1840, pp. 85, 91, 92); and not merely a contingent intention to do some collateral act in the course of a legal voyage or trade, which might itself, if done, be illegal. The illegality should not only be contingently contemplated; but there should be some overt act put in progress, as by sailing in furtherance and accomplishment of the illegal voyage.

The case of Parkin v. Dick, 2 Camp. 222, 11 East, 502, 503, was a case, where the insurance was on goods, a part of which were by law prohibited from exportation; it was held, that the voyage, as to such goods, was illegal in its origin; and that, therefore, the whole policy was void. The queston in Wilson v. Marryat, 8 Term R. 31, 1 Bos. & P. 430, was, whether a policy on a circuitous voyage from America to the East Indies was prohibited by the British laws. It was held, that such a circuitous voyage was not so prohibited; and consequently the policy was valid; but otherwise it would have been void. In Bird v. Pigou (see 2 Selw. N. P., London Ed., 1831, p. 991; Id., Wheat. Ed., p. 191, note; 1 Phil. Ins., 2d Ed., 1840, p. 91) Lord Kenyon held, that if any part of an integral voyage be illegal, a policy upon the integral voyage is void. I see no reason to doubt the correctness of this decision. It seems founded in a plain principle of law, that a contract is an entirety, and cannot be good in part and bad in part. It is true, that Lord Kenyon is reported in Wilson v. Marryat, 8 Term R. 31-46, to have gone further, and to have said, that if there were any infirmity or illegality in any part of the integral voyage, it would have made the whole voyage illegal, so that the assured could not recover on a policy on any part of it, even a policy on that part alone, which was legal. This was a mere obiter dictum, not called for by the case; and it is certainly somewhat shaken, although not overturned, by the decision in Bird v. Appleton, 8 Term R. 562. On that occasion Mr. Justice Lawrence said; "In order to render the insurance illegal, the illegality should exist during the course of the voyage insured." It will be found exceedingly difficult, in point of principle, to distinguish between an illegality in a former voyage, and that in a prior part of a sound voyage, where the policy covers only the part of the voyage, which is legal.

There are, moreover, other cases (on which I shall presently have occasion to comment), in which a doctrine has been asserted, which is perhaps not easily reconcilable with that in Parkin v. Dick, unless upon the ground, that the policy in that case was made upon the illegal goods, as a part of the specification on the policy. But, certainly, these cases go far to invalidate the broadness of the argument, which has been addressed to the court upon the present occasion. That argument goes to this extent, that if the policy covered any property, which was dealt with illegally during the voyage or time mentioned in the policy, it avoided the policy. It would hence follow, that if a ship was insured upon a lawful voyage, and afterwards, during the course of the voyage, she should be engaged in any transaction, which was illegal, and a fortiori, if she should be engaged in a transaction, which would subject her to seizure, and she should afterwards be lost by a mere peril of the seas (no seizure having been made), no recovery could be had for the loss. Now, I am not ready to accede to that proposition. On the contrary, as I understand the law, although the underwriters would not be liable for a loss by such a seizure; yet a loss occasioned by any other peril would be recoverable; because the policy itself would originally be valid at its inception, and the voyage would be lawful, when the risk attached. I agree, that if there was an illegality attaching to a part of the voyage insured at the commencement of the risk under the policy, it would avoid the policy. So it was held, in regard to the insurance on the ship in Bird v. Appleton, 8 Term R. 563, 566. But in that very case, there was another policy on goods; and the objection taken was, that the insured could not recover on the policy on goods belonging to the owner of the ship, because the ship was liable to seizure on account of an illicit traffic in the anterior part of the voyage. Mr. Justice Lawrence, on that occasion, said, that he did not think the objection well founded. "Here (said he) the illegality commenced by the captain's taking

on board a cargo at Bombay in order to carry it to Canton for sale (the insurance being on a cargo at and from Canton). But the doctrine relied upon by the defendant is perfectly new, that the insured cannot recover on a policy against the underwriters, because the ship, on a prior voyage, had been guilty of some transgression, for which she was liable to seizure. That is not a risk within the policy. If the ship had been seized for this cause during the voyage, the underwriters would not have been liable. They are only liable for risks in the course of the voyage insured." The same doctrine was held by Mr. Justice Le Blanc, in the same case. So that we see, that past illegality in the voyage will not affect a policy, which is otherwise legal. Neither should a future contingent illegality. There must be a present, actual illegality attaching to the very policy, at the commencement of, and as a part of, the risk.

But, then, it may be said, that here the illegal intent was completely carried into effect at New Orleans; and, therefore, there is both act and intent; and then the policy is utterly void ab initio. But we must take the present case according to the truth of the whole circumstances. The first question is, whether the policy ever attached as a valid contract to the ship. If it did, then the question is shifted. It is no longer, whether the policy had any original validity; but whether an intended subsequent illegal act, consummated long after it attached to the ship, in the progress of a lawful voyage, would avoid it ab initio, or only exempt the underwriters from any losses occasioned by that illegal act.

Now, it is here, that the cases, to which I have already alluded, may be deemed to apply. They in effect decide, that if the voyage, as originally insured, was valid, any subsequent illegality in the course of the voyage will not affect the policy, so far as concerns losses on property, not tainted by such illegality, although connected with the res gestae. In Butler v. Allnutt, 1 Starkie, 222, the policy was on a cargo, on a voyage from an enemy's port, with a clause for a return premium of 4 per cent. on the safe arrival of the vessel in London from Bordeaux, the enemy's port. The voyage was undertaken under a license from the crown; but it was for the importation of certain specific articles; and others were taken on board, not included in the license. The suit was brought for the return premium, the vessel having safely arrived; and one objection taken was, that the articles taken on board, and not included in the license, vitiated the whole license and policy. But Lord Ellenborough held, that under the license the voyage was lawful, and although the ship took on board other articles, that only removed the protection pro tanto. The same point was held in Keir v. Andrade, 6 Taunt. 498, which was the case of a policy on goods at and from London to Madeira, valued at £1,000, to pay average on each package. The goods were 300 barrels of gunpowder, of which the exportation of 150 barrels only was authorized by a license from the crown; and the plaintiff claimed for a loss by capture. One objection taken was, that the exportation of the second 150 barrels was prohibited, and by statute the same barrels, as well as the ship, were thereby forfeited; and that, therefore, the whole adventure was illegal, and the insurance also illegal for the whole. But the court held, that the policy was valid, and covered the 150 barrels, the exportation of which was lawful, but not the other 150 barrels. Now, here, we see, that there was not only an original intention to make an illegal exportation of the second 150 barrels, but that it was carried into effect by an actual exportation; so that there was intent and act. But the court thought, that as the voyage was, under the license, in itself legal, the illegal exportation of a part of the property insured, did not affect that, which was within the license. See, also, Camelo v. Britten, 4 Barn. & Ald. 184. This is certainly a very strong case, since it may well be presumed, that the whole enterprise, in its origin and concoction, was for the whole 300 barrels; and the policy was made to cover the whole; and the voyage was commenced and prosecuted with the same intent. The case of Sewell v. Royal Exchange Assur. Co., 4 Taunt. 856, approaches very near to the present. In that case there were two policies of insurance, one on the ship, and another on the ship and freight; the first on a voyage at and from Ramsgate (England) to St. Michaels; the second on a voyage at and from St. Michaels to London. The ship was Norwegian built, and owned in Denmark, then hostile to England, and was purchased by the plaintiffs under a license from the king. The ship was chartered by the master, as agent for the plaintiffs, to the freighter of the cargo, for a voyage from London to St. Michaels, and there to take on board a full cargo of fruit, and bring the same to London. The vessel was seized at St. Michaels, and carried to Tercera, and there sequestered. The loss was averred to be by a public seizure and capture. At the trial, one objection taken was, that, under the British navigation act, an importation in the vessel of such a cargo was prohibited; and that, since the charter party was for the entire voyage out and home, the illegality vitiated, as well the policy on the outward voyage as that upon the homeward voyage. The jury found a verdict for the plaintiffs upon the policy on the outward voyage; and this verdict was afterwards confirmed by the court. On this occasion, Sir James Mansfield, in delivering the opinion of the court, stated the ground of the decision to be, that it did not necessarily follow, that the master might not have obtained a license for the importation from the crown, which was authorized to

grant one, before the actual importation; and therefore the homeward voyage was not necessarily illegal. But the court intimated very strongly, that if the homeward voyage had been illegal, the outward voyage being legal, there was a locus poenitentiae for the party not to perform the latter, and therefore a recovery might be had on the policy on the outward voyage. The language of Sir James Mansfield was: "Much of the argument was, that this was an illegal voyage, not only in the contemplation of the master; but that he was bound by the charter party, which he had entered into, to pursue it at all events. It is not necessary now to decide, what would be the consequence of a person entering into a charter party for a voyage out and home, the voyage home being illegal, and of his separating it into two voyages, by insuring the outward voyage separately, and the homeward voyage separately. The court are not called upon to decide, whether in that case the outward voyage is part of the homeward and illegal voyage. If there were a clear locus poenitentiae, it would be unnecessary to decide, that the outward voyage was illegal; for if the captain, getting out thither, discovered, that he was on an illegal charter party, and that he could not enforce the payment of his freight, he might go off to any other part of the world." Now, this language is applied to a case far more stringent, than that now before this court. There, the original voyage, out and home, was absolutely fixed and in progress under the charter party. Here, the whole voyage contemplated by the policy was legal; and there was only a contingent future act of illegality contemplated to be done by the master, and which might never be done. There was not only a locus poenitentiae, but there was a contingency as to the future purchase and arrival of the chain cable.

The case of the Ocean Ins. Co. v. Polleys, 13 Pet. [38 U. S.] 157, 163, 164, clearly shows, that although a vessel insured has been previously guilty of an illegality, which subjects her to forfeiture, that circumstance will not affect any contracts touching her future employment in a legal trade, or on a legal voyage, or a policy on her for such a voyage. Nay, as was said in Bird v. Appleton, 8 Term R. 562, 569, 570, the antecedent character of the property insured or the title, by which it has been obtained, whether illegal or not, makes no difference. It still may be insured on a legal voyage. Suppose goods, smuggled on a former voyage, were afterwards embarked on a new, and lawful voyage, never having been seized, it seems clear, that they would be insurable. The contract is one degree removed from the illegality. See Armstrong v. Toler, 11 Wheat. [24 U. S.] 258.

We have seen, according to the reasoning and authorities already stated, that, where the voyage is legal, a future contemplated illegality in the course of that voyage does not make it void ab initio. Then does it make any difference, that the future illegal act is consummated, if the act does not contaminate the voyage itself? I think not. If the illegal act is followed by a forfeiture and seizure of the thing insured, I agree, that the underwriters are not liable for the loss. But the mere fact of liability to forfeiture does not avoid the insurance, or prevent a recovery for a loss by any independent peril. The fact is, that a ship or other property does not lose its insurable character by being liable to seizure and forfeiture for an antecedent act or for a subsequent act, by which she is by law forfeitable. Until seized, and forfeited, the owner retains his original ownership thereof. Here, as has been already suggested, the voyage from New Orleans to Liverpool was a legal voyage; the taking on board the chain cable there was a collateral act, illegal, indeed, but no more touching the legality of the voyage, than if there had been taken on board some illegal ship-stores, or smuggled wines for the voyage. It would be an alarming doctrine, if once established, that any collateral act of illegality in the course of a voyage, not an original practical ingredient in the voyage itself, should avoid a policy ab initio. A single bale of goods, smuggled by the master or owner of the cargo, in the course of the voyage, might, under such circumstances, defeat the whole insurance upon the ship and cargo, or both, although there was no illegality otherwise directly attaching to them. When the chain cable was taken on board at New Orleans the act of illegality was complete, and ended. It had nothing to do with the further prosecution of the voyages of the ship for the remaining term of time, covered by the policy. Suppose the chain cable had been smuggled on a former voyage by the owners, and put on board at Waldoborough or New Orleans, would that illegality have infected the subsequent voyage of the ship, while it remained on board? Suppose a ship's sails are made of smuggled canvass, illegally smuggled into the country, will that avoid an insurance on her on any subsequent voyages? Certainly, upon authority and principle, not.

But, then, it is suggested, that the insurance, as to the chain cable itself, is void at all events. It seems to me not, upon the ground, that the title was in the owner, and the illegality did not attach to the voyage, on which it was used. It is like an insurance on goods already smuggled. The chain cable did not become an appurtenance of the ship, until taken on board and concealed. The act of illegality was then, as has been already suggested, consummated before it attached to the ship as a part of her equipment. The time, when the antecedent liability to forfeiture took place, under such circumstances, is of no consequence, whether it be a day, or a year.

Again, it is suggested, that here the policy is void ab initio by reason of the concealment from the underwriters of the original inten-

tion to smuggle this chain cable on board of the ship during the voyages and term of time insured. Reliance seems to be placed for this suggestion upon an obiter dictum of Mr. Justice Bayley, in Parkin v. Dick, 11 East, 504, where he said, that the ship being liable to seizure in consequence of having the naval stores on board, was thereby subjected to an extra risk, which ought, therefore, to have been communicated to the underwriters; and the omission of such communication would alone have avoided the policy. I meddle not with that proposition, with reference to circumstances, like those in Parkin v. Dick, although it is open to much observation. It is sufficient to say, that in that case the insurance was directly in part on property exported for an illegal voyage. Here there was in contemplation only a contingent future act of illegality. Has it ever been held, that the nondisclosure of a contingent intention of future deviation, or even a present positive intention of future deviation from the voyage by the insured, was such a concealment, as would avoid a policy? Certainly, such a doctrine could hardly be maintainable. Again, it is suggested, that the ship and chain cable were both forfeited to the government, and vested eo instanti in the government by operation of law, as soon as it was taken on board; and consequently the owners had nothing to abandon to the underwriters; and at all events, the chain cable was forfeited, so that it was no lawful appurtenance of the ship, and she was not seaworthy for the voyage. The argument, so far as concerns the ship, has been already answered, by showing, that she was not liable to forfeiture. But if the case were otherwise, the argument is founded on a fallacy. It is not correct to say, that property forfeited is vested in the government at the very moment of forfeiture, and the title of the owner immediately devested. On the contrary, the established doctrine is, that, notwithstanding the forfeiture, the property remains in the owner, until it is actually seized by the government, and then by the seizure the title of the government relates back to the time of the forfeiture. In the case of U. S. v. 1,960 Bags of Coffee, 8 Cranch [12 U. S.] 404, and Gelston v. Hoyt, 3 Wheat. [16 U. S.] 247, 311, there had been a seizure and prosecution for the forfeiture by the government. The case of The Mars [Case No. 9,106], in this court, as to this point, has never, to my knowledge, been doubted or denied. The case of Lockyer v. Offley, 1 Term R. 252, 260, manifestly proceeded upon the ground, that until seizure the property of the owner was not devested. Mr. Justice Wilies, in delivering the opinion of the court in that case, said; "But it has been said, that under St. 24 Geo. III. c. 47, and the excise laws, the forfeiture attaches, the moment the act is done; and that the barratry (smuggling) was committed during the voyage. It may be so for some purposes, as to prevent intermediate alienations and incumbrances. But I think the actual property is not altered, till after the seizure, though it may be before condemnation." The same doctrine was taken for granted by the supreme court in Ocean Ins. Co. v. Polleys, 13 Pet. [38 U. S.] 157. I am aware of the bearing of the cases of Fontaine v. Phoenix Ins. Co., 11 Johns. 293, and also of the incidental confirmation of the doctrine thereof, in Amory v. McGregor, 15 Johns. 24. But I am not prepared to accede to the doctrine there stated, opposed, as it is, to the other authorities and doctrines already stated. In short, I have been long accustomed to lay it up as an elementary axiom that, in all cases of forfeiture of personal chattels, the property of the owner is not devested, until there is an actual seizure thereof by or for the use of the government. This view of the matter disposes of this part of the argument in both of its branches, viz. as to the abandonment, and as to the seaworthiness of the ship.

Upon the whole, my judgment is, that the plaintiff is entitled to recover for a total loss on the policy.

CLARK (REED v.). See Case No. 11,643.

Case No. 2,833.

CLARK et al. v. SCOTT.

[9 Blatchf. 301; 5 Fish. Pat. Cas. 245; 2 O. G. 4; Merw. Pat. Inv. 129.][1]

Circuit Court, S. D. New York. Jan. 16, 1872.

PATENTS — "HAND-MIRRORS" — VALIDITY — INFRINGEMENT—CONSTRUCTION OF ASSIGNMENT.

1. The letters patent granted to W. U. Dudley and Lawrence W. Clark, as assignees of W. U. Dudley, the inventor, July 27th, 1869, for an "improved hand-mirror," are valid.

2. The claim of said patent, namely, "A hand or portable-toilet mirror, constructed, substantially as described, of a base-piece, P, with its handle-extension piece or stiffener, C, glass, A, and outer back and handle, D, made of any suitable composition or cement, substantially as specified," covers a hand-mirror made of a cement applied in a plastic state and afterwards hardened, and which has in it two flat wires or strengtheners, made of metal, embedded in the cement and concealed from view, and running, from the body of the mirror part, through the neck and into the handle, and serving to stiffen and strengthen the article, particularly at the junction of the handle with the body.

[Cited in Florence Manuf'g Co. v. Boston Diatite Co., Case No. 4,882.]

3. The brush described in letters patent granted to J. S. Parsons and George A. Scott, as assignees of Alanson C. Estabrook, June 19th, 1866, for an "improved brush," namely, a brush in which the bristles, inserted through a perforated plate, are embedded and held firmly in a suitable cement, which cement, at the same time, in combination with the plate, and an extension of the plate into the handle, forms the back and handle of the brush, is not,

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. Merw. Pat. Inv. 129, contains only a partial report.]

as a structure, substantially the same thing as the hand-mirror covered by the patent to Dudley and Clark. Such hand-mirror, as an article of manufacture, was patentable, as distinguished from a brush, even though the backs and handles of the two were made in the same way, there having been a point of utility and adaptability, in applying the non-warping property of the back and handle to rendering the glass of the mirror free from liability to fracture, which constituted sufficient invention to support a patent for a mirror, even though a brush with a like back and handle had existed before.

4. Dudley, at the time he applied, in August, 1866, for a patent for the hand-mirror, also applied, as inventor, for a patent for an "improvement in brushes," with this claim, namely, "A brush, in which the bristles are inserted through a perforated plate or holder, embedded in a composition or cement of any suitable substance, as described, which cement shall, in combination with a base-piece and stiffener of metal, or other material, form the back and handle of the brush, substantially as specified." Both of the applications were rejected. In December, 1866, he assigned to a corporation, who were the real defendants in this suit, all his inventions "in the manufacture of composition brush backs and handles, with suitable strengtheners," and all applications for a patent "therefor," and certain apparatus used by him "in said manufacture," with all his useful information "for making and selling said composition brush backs and handles," "meaning hereby to transfer" all his rights "to the manufacture and sale of said composition brush backs and handles." The applications for both of the patents were pending at that time: *Held*, that the assignment was one only of the invention of the brush, and of the application for the brush patent, and did not carry a right to the invention of the hand-mirror.

5. Dudley, from August, 1866, until May, 1869, did nothing further towards obtaining a patent for the hand-mirror. The said corporation put into the market, in the fall of 1867, hand-mirrors made in accordance with Dudley's invention. Dudley did not know that fact. His co-patentee, Clark, obtained no interest in the invention until April, 1869: *Held*, that these facts constituted no objection to the validity of the patent.

[Cited in Goodyear Dental Vulcanite Co. v. Willis, Case No. 5,603.]

[In equity. Bill by Thomas Clark, Jr., trustee of W. U. Dudley, and Lawrence W. Clark, and the said W. U. Dudley and the said Lawrence W. Clark, against George A. Scott, agent of the Florence Manufacturing Company, to enjoin infringement of letters patent No. 92,942, granted to said Dudley and L. W. Clark, and for an accounting.]

Frederic H. Betts, for plaintiffs.
Daniel W. Bond, for defendant.

BLATCHFORD, District Judge. This suit is founded on letters patent granted to W. U. Dudley and Lawrence W. Clark, as assignees of W. U. Dudley, the inventor, July 27th, 1869, for an "improved hand-mirror." The specification, signed by the inventor, says: "My improvement relates to that description of hand-mirrors for toilet use and other purposes, in which the frame that holds the glass is elongated at one end, to form a handle, or it may be similarly shaped at both ends. The usual mode of constructing such mirrors is to mount the glass in a solid frame or thin block of wood, either naturally of ornamental character, or afterwards made so by veneering, cut or shaped so as to be of similar contour to the glass, and with a projecting end formed to constitute a handle. Apart from the expense of hand-mirrors so constructed, where a very ornamental appearance is required, there is not only a general want of strength, especially at the neck or junction of the handle with the body, but a great liability to fracture of the glass by the twisting or warping of the wood of which the frame or holder is made. This latter defect is not merely at first, or peculiar to any greenness of the wood or newness of the article, when fracture of the glass from such causes frequently occurs, but is induced at any time by sudden and violent changes in the temperature of the atmosphere, exposure to damp and extreme heat. My improvement obviates such defect, being non-absorbent as regards damp, and free from any liability to warp, at the same time combining beauty with strength at a comparatively trifling cost; and the nature of my invention consists in mounting the glass on a base piece, of wood or other material, having a stiffening extension running into the handle, and embedding the whole in a composition or cement of suitable description, that, on hardening, forms the back, edges and outside handle of the mirror." The manner of constructing the article is then described, with references to the drawings: "A, is the glass; B, a base-piece, of wood or other suitable material, preferably of similar contour to the glass which is designed to be mounted on it, but elongated at one end, which extension, with a strip of metal or other stout material at its back, forms a handle-stiffener, C, to the mirror. This base-piece, with its handle extension or stiffener, C, is then laid in a mould or on a block, face downward, with or without the glass, A, in its place, and a composition or cement of any suitable plastic material, applied in sufficient quantity to cover the back and extend beyond the edges of the base-piece, B, and so as to surround the handle-stiffener or end extension of the latter, when an upper mould, of suitable configuration, and having its interior embellished with any ornamental device or devices, is pressed down upon the cement, which, when hard or dry, on removing the upper mould and lifting the article from the lower one, constitutes a smooth or finished, and, it may be, highly ornamental outer back and handle, D, impervious to damp, exempt from warping, with its consequent liability of fracturing the glass, and preservative of the wooden or other base-piece, which may be of a cheap and rough construction; and that, by its end extension, with strengthening strip at its back, gives not only a general stability to the whole article, but especially stiffens the handle at its junction with the back or body, where it is naturally weakest or most liable

to break. The under mould or block may also be embellished with any ornamental device. The glass may either be laid on a cushion of the lower mould, so as to be embedded at its edges, simultaneously with the forming of the outer back and handle, in the plastic composition or cement, or it may be afterwards inserted and restrained to its place on the base-piece, either by an ornamental bead around the edges of the glass, and formed of the same composition or cement of which the outer handle and back are made, or of different material afterwards run around and applied thereto. As I do not desire to confine myself to any particular composition or cement of which to form the outer handle and back, but design to use any plastic substance or compound of suitable character, it will here suffice to state, that a mixture in equal parts, more or less, of paint, sifted sawdust and shellac, forms a very desirable composition for the purpose, and one which readily admits of the color being varied to suit different tastes or demands." The claim is in these words: "I claim, as a new article of manufacture, a hand or portable-toilet mirror, constructed, substantially as described, of a base-piece, B, with its handle-extension piece or stiffener, C, glass, A, and outer back and handle, D, made of any suitable composition or cement, substantially as specified."

The hand-mirror of the defendant is made of a cement applied in a plastic state, and afterwards hardened, and embedded in the cement and concealed from view are two flat wires or strengtheners, made of metal, and running from the body of the mirror part through the neck and into the handle, and serving to stiffen and strengthen the article, particularly at the junction of the handle with the body.

The defendant insists that the claim of the patent must be construed as being for a hand-mirror made by means of a glass mounted on a piece of wood shaped for the glass, and a handle, the handle being strengthened by a strip of iron, and the whole covered with a cement; that the defendant's mirror is a hand-mirror with a composition back, the composition being strengthened by the two wires; that the only office of the wires is to give strength to the back, and they are not, in any sense, the base-pieces or foundation on which the cement is pressed; that, in the defendant's mirror, the composition is the base or foundation, while, in the patent, the wood is the base or foundation; that the defendant's mirror has nothing corresponding to the base-piece, B, of the patent, the two wires corresponding only to the stiffener, C, of the patent; that the base-piece, B, is an essential part of the article claimed, and is claimed in the patent as such part; and that, therefore, the defendant's mirror does not infringe the patent. But, the patent is not fairly susceptible of this limited construction. According to the description, the glass is to be mounted on a base-piece of any suitable material, which base-piece is, at its end, to be elongated or extended through the neck and into the handle, the extension being made sufficiently strong not only to give general stability to the whole article, but especially to stiffen the handle at its junction with the body, and the whole being embedded in a suitable cement, applied in a plastic form, and which, when hardened, forms the back, edges and outside handle of the mirror. The defendant's wires act as a base-piece or support for the glass, and the wires extend through the neck and into the handle, and act at the neck and in the handle as stiffeners, and there is an outer back and handle of cement. There can be no doubt that the defendant's mirror is, in its construction, substantially the same as the patented mirror.

Various defences are set up in attack on the validity of the patent. To understand them, it will be necessary to give a history of certain events. The application for the patent sued on was filed on the 6th of August, 1866, the oath to the specification having been made by W. U. Dudley, on the 1st of August, 1866. The specification presented was in the same language as that attached to the patent. The application was rejected on the 23d of August, 1866, as being anticipated by a patent granted to Alanson C. Estabrook, June 19th, 1866. Nothing further was done towards procuring the patent until the 1st of May, 1869, when an argument in favor of granting the patent, notwithstanding the Estabrook patent, was sent to the patent office by the attorneys for Dudley. The office, on the 8th of May, 1869, decided to grant the patent; but, through accident, it was not issued till the 27th of July, 1869.

On the 6th of August, 1866, Dudley filed an application for a patent for an "improvement in brushes," the oath to the specification being made by him August 1st, 1866. The specification said: "In the manufacture of toilet and other brushes, it is customary to insert the bristles in a block or stock, which, by its extension, may be made to form the frame or handle of the brush, and afterwards to cover by veneer the unfinished and usually perforated and wired back that holds the bristles. This is a slow and expensive process, and the article, when completed, is but slightly ornamented by the veneer or outer covering to the back. My present invention constitutes a great improvement upon such articles, combining strength with a high degree of ornament, at a cheap cost of manufacture; and the nature of it consists in inserting the bristles through a perforated plate, which is united, by cement, or otherwise, to a back frame of wood, having attached to it a strip of metal or other stiffening material, that runs into the handle of the brush, and that, together

with the back frame, is covered by any suitable composition or cement, which, after being moulded, hardens, and forms a compact mass, that constitutes the stock and handle of the brush." The mode of constructing the brush is then described, with references to drawings. A suitably perforated plate or holder, of, say, corresponding configuration to the brushing surface, is taken, and in it are inserted the hairs or bristles, which may be bound and held therein by the usual wire-threading at the back, or otherwise. This perforated plate holding the bristles is afterwards connected, by cement, or otherwise, with a frame and handle constructed as follows: A wooden back, or other suitable base-piece, mainly of similar contour to the perforated plate, but longer, so as to form an extension into the handle of the brush, and having lashed to its back and handle end a strip of metal, or other stiffening material, is inserted in a mould, the form of which embodies the frame or body and handle of the brush, and may include any fanciful design or ornament to the back and handle. In the mould is put any suitable composition or cement, that, after receiving the impression of the mould, hardens into a compact mass, such, for instance as that used in photographic picture frames or cases, including the many well-known combinations of coal tar admixed with various materials, or composition or cement having shellac as a basis. The base-piece, with its stiffener, is so embedded and pressed in this composition, as that it is not only backed by it, and the composition made to project beyond the edges thereof, so as to form a border to the edges of the bristle holder, but the handle end of said base-piece is entirely covered by said composition or cement, which constitutes the outside frame, back or body, and exterior part of the handle of the brush. There is a drawing representing the base-piece with its stiffener before being coated with the cement; and another drawing representing the same after being coated, and, when ready to receive the bristle holder, which, being united by cement with the base-piece, forms one with it. The stiffening strip serves to strengthen the brush where it is naturally weakest, namely at the junction of the handle with the frame or body, and prevents the cement or composition, which, conjointly with the base-piece and stiffener, forms the back and handle, from fracturing at such part, to which it otherwise would be liable. The claim applied for was in these words: "I claim, as a new article of manufacture, a brush constructed substantially as described, that is to say, a brush in which the bristles are inserted through a perforated plate or holder, embedded in a composition or cement of any suitable substance, as described, which cement shall, in combination with a base-piece and stiffener of metal, or other material, form the back and handle of the brush, substantially as specified." This application was rejected August 23d, 1866, as being anticipated by the said patent granted to Estabrook June 19th, 1866. On the 15th of December, 1866, W. U. Dudley and his father executed to the Florence Manufacturing Company the following assignment: "Be it known, that we, W. J. Dudley and W. U. Dudley, brush makers, in the city of New York, under the firm of W. J. Dudley and Son, in consideration of three thousand dollars, to us paid by the Florence Manufacturing Company, of Florence, Massachusetts, the receipt whereof is acknowledged, do hereby bargain, sell, assign, convey and transfer unto said company, its successors and assigns, all the inventions and improvements in the manufacture of composition brush backs and handles, with suitable strengtheners, made, contemplated, or hereafter to be made, by us or by either of us; also, all applications for a patent now pending or hereafter to be made therefor, by us or either of us; also, one press, three dies and one heater, used by us in said manufacture, with all our useful information for making and selling said composition brush backs and handles, in the best way known to us or either of us, meaning hereby to transfer to said company all our rights to the manufacture and sale of said composition brush backs and handles, and all our implements therefor, and hereby agreeing not to continue the same ourselves, nor to authorize or instruct others so to do; and we covenant that we have good and exclusive right to convey and transfer the aforesaid invention and property, and that no other person has any right or interest therein, and that we, and each of us, will, at the request and sole expense of said company, its successors and assigns, do all further acts and things necessary and proper to secure any patent or patents, for said inventions and improvements, which patents, if allowed, are to be granted to said company for its exclusive benefit."

Before proceeding further it is proper to refer to what is before spoken of as the patent granted to Estabrook June 19th, 1866. It was granted to J. S. Parsons and George A. Scott, as assignees of Estabrook, as inventor, for an "improved brush." It describes a brush in which the bristles, inserted through a perforated plate, are embedded and held firmly in a suitable cement, which cement, at the same time, in combination with the plate, and an extension of the plate into the handle, forms the back and handle of the brush. As a structure, such brush was not substantially the same thing as the hand-mirror of Dudley. The patent office so decided, necessarily, in granting the patent for Dudley's mirror, and the decision was proper. The removal from Estabrook's brush, of the plate and bristles, removes also the extension of the plate, which forms the strengthening piece in the handle, and, if a mirror were inserted, in lieu of the plate and bristles, the

article would be without a strengthening piece. The cutting off of the bristles would leave no cavity for the glass. The specifications of the Parsons and Scott patent give no suggestion as to how to construct a mirror like Dudley's.

The hand-mirrors sold by the defendant are made by the Florence Manufacturing Company, and they are the real defendants in this suit. The defendant contends, that the company, by the assignment of December 15th, 1866, acquired a right to use the invention covered by the patent sued on. The ground taken is, that the entire invention embodied in that patent is embraced in Dudley's "improvements in the manufacture of composition brush backs and handles, with suitable strengtheners," and in his application for a patent for such improvements; or, in other words, that, as the company have the right to make such brush backs and handles as are described in the application of Dudley, filed August 6th, 1866, for a patent for an "improvement in brushes," they have also the right to make and sell such mirrors as have been sold by the defendant, on the ground that the assignment of December 15th, 1866, embraces the latter right as well as the former right. It is claimed, on the part of the defendant, that the only invention involved in making the mirror covered by the Dudley patent, is in the manner in which the back and handle are made; that the back and handle, when made, are equally ready and suitable for the insertion, in the recess, of a plate with brush bristles or of a mirror glass; that there is no invention in inserting a mirror glass in the recess, or in removing the plate with brush bristles from the recess and inserting in its place a mirror glass; and that the back and handle, with a mirror glass inserted in the recess, cannot properly be treated as a distinct article of manufacture from the article of manufacture consisting of the same back and handle with a plate with brush bristles inserted in the same recess. The sum and substance of these propositions is, that Dudley ought to have applied for and obtained a patent for the back and handle, consisting of the base-piece, handle-extension piece or stiffener, and cement outer back and handle, with a recess, such recess admitting of the insertion in it of a mirror glass, or of a plate with brush bristles, or of anything else; and that he ought not to have covered by his patent the back and handle with the mirror glass in the recess. If such back and handle with the recess had clearly existed before the invention of Dudley, the question as to whether he could insert a mirror glass in the recess, and claim a patent for the article thus formed, would arise; or, if such back and handle, with a plate with brush bristles in the recess, had clearly existed before the invention of Dudley, the question as to whether he could remove the plate with brush bristles and insert in its stead a mirror glass, and claim a patent for the article thus formed, would arise. But no such questions arise on this branch of the case. And, if Dudley had patented the back and handle, with a recess unfilled, and had then conveyed to the Florence Manufacturing Company the exclusive right to the invention so far as it could be applied to making brushes, such conveyance would not have carried any right to apply the invention to the making of mirrors or of anything except brushes.

What was the actual state of things when the assignment to the Florence Manufacturing Company was made? Dudley had not only invented the back and handle, consisting of the base-piece, handle-extension piece or stiffener, and cement outer back and handle, with a recess, but had demonstrated its applicability to the making not only of brushes but of hand-mirrors. He had applied for a patent for a brush, embodying such back and handle, and had claimed such brush as his invention. He had also applied for a separate patent for a hand-mirror, embodying such back and handle, and had claimed such hand-mirror as his invention. It is stated, in the specification of the mirror patent, and is manifest, and the evidence shows, that, where the glass in a hand-mirror is mounted in a wooden frame, it is liable to be broken by the warping of the wood; and that, in the mirror of Dudley, there is no liability to warp in the frame, and no danger of the fracture of the glass from such cause. It is also shown, that this point of advantage in the mirror does not exist in the brush. Consequently, there is a special function exerted by the mirror back, in protecting the glass from fracture through the warping of the frame, which is not exerted by the brush back. A wooden brush back and handle may be warped and disfigured to the eye, yet its usefulness not be materially impaired, while an equal extent of warping in a wooden mirror back and handle would fracture the glass and render the mirror useless. The applications of Dudley were both of them rejected in August, 1866. Less than four months afterwards, the Florence Manufacturing Company, which was at the time making cement brushes but not cement hand-mirrors, applied to the Dudleys and paid them the sum of $3,000 for the assignment in question. It is limited, on its face, to "brush backs and handles." It only conveys improvements in the manufacture of "brush backs and handles," and applications for a patent "therefor," and information for making and selling "said brush backs and handles," and states that the assignors mean to transfer to the company all their rights to the manufacture and sale of said "brush backs and handles," and agree not to continue the same themselves, or to authorize or instruct others so to do. At that time, the application by Dudley for the mirror patent, as well as his application for the brush patent, were both of them pending. Subse-

quently, the Florence Manufacturing Company applied to Dudley to execute a paper having reference to mirrors, but he declined to do so. I am entirely satisfied, from the evidence, and the tenor of the assignment made by the Dudleys, that it was in fact, and was intended at the time as, an assignment only of the invention of the brush and of the application for the brush patent.

The mirror, as an article of manufacture, was, in my judgment, patentable, as contradistinguished from the brush, even though the backs and handles of the two were made in the same way. There was, as before explained, a point of utility and adaptability in applying the nonwarping property of the back and handle to rendering the glass of the mirror free from liability to fracture, which constituted sufficient invention to support a patent for the mirror, even though a brush with a like back and handle had existed before. Whether, if the mirror had existed before, a patent for a brush with a like back and handle could be sustained, and whether, the Dudley mirror being patented, a patent for the Dudley brush could be sustained, are questions which do not here arise. The Dudley mirror has been patented. The Dudley brush has not been patented.

It is contended, by the defendants, that the neglect of Dudley to prosecute further his application, after it had been rejected, until a period of two years and eight months had elapsed, constitutes an abandonment of the application, or an abandonment of the intention further to prosecute the application. It is not alleged in the answer, that this constituted an abandonment of the invention to the public. The answer only avers, that, after the rejection of the application, for want of novelty in the invention, the plaintiffs "abandoned said application for over two years, well knowing that said Florence Manufacturing Company were making and using this pretended invention, and that the patent afterwards granted was obtained upon false and fraudulent representations by the plaintiffs, or some of them, made to the commissioner of patents, and is wholly void in law." The answer does not set up any abandonment of the invention to the public, nor does it set up the defence that the invention was in public use or on sale, with the consent or allowance of Dudley, for more than two years prior to his application for a patent for it. The answer, in the averment cited, is entirely frivolous. The abandonment of an application amounts to nothing, unless it is in such wise as to become an abandonment of the invention to the public; and the allegations as to false and fraudulent representations are too general to raise any triable issue. But the answer does not even aver an abandonment of the application. It avers that the plaintiffs abandoned the application for over two years. It does not set up a conclusive or final abandonment. It implies that the abandonment was only temporary and was made with the intention of resuming the application. The proofs, however, show, that there was no abandonment of the application, or of the invention, and no obtaining of the patent on false or fraudulent representations. Hand-mirrors made by the Florence Manufacturing Company in accordance with Dudley's invention, were first put into the market in the fall of 1867, which was less than two years prior to the time when Dudley, in May, 1869, again pressed his application. Nor is there any evidence that Dudley had any knowledge, prior to the granting of the patent, that any mirrors made in accordance with his invention had been made by the Florence Manufacturing Company; and, although his co-patentee, Clark, may have known of the making of such mirrors by the company, Clark obtained no interest in the invention until April 30th, 1869.

The only other defence set up in the answer is, that Dudley was not the first inventor of what is patented. It is not set up that he was not its inventor, or that he stole it from another. It is not set up that one Dane invented it, and that Dudley stole it from Dane. That defence was urged at the hearing; but the answer does not suggest it, nor does the evidence sustain it. The defence in the answer is, that the same thing was, before Dudley's invention, known to and used by the Florence Manufacturing Company, A. C. Estabrook, Isaac S. Parsons, and William Gerhard, at Florence, Massachusetts.

Without discussing the details of the evidence, which is quite voluminous, it is sufficient to say, that Dudley fully conceived and described his invention in May, 1865; that he at that time, or a month later, ordered the construction of dies with which to make the mirrors; that the dies were cast in the summer of 1865, and proofs taken from them in plaster of paris by November, 1865; that, prior to November 27th, 1865, Dudley took the dies into his possession, and removed them from Newark, New Jersey, where they were made, to the city of New York; and that, soon afterwards, and during the month of November, he exhibited some backs made in the dies, which backs were complete, and constructed entirely in accordance with the description in the patent. On the 12th of March, 1866, he employed attorneys to procure the patent. He made some samples of finished mirrors in accordance with the invention, but he did not prosecute the business, for want of means. The only date in this series which the defendant undertakes to controvert with any show of reliance, is the date of the making of complete backs by Dudley. That date is claimed to have been not in November, 1865, but in January or February, 1866. Then the defendant undertakes to carry back the existence of the same invention at Florence, as made by Gerhard, Estabrook and himself, all or some of them,

to December, 1865. But the attempt fails. There was no such invention in the Parsons and Scott patent of June 19th, 1866, taken out on Estabrook's brush, as has been already shown. There was no suggestion of a mirror in connection with the first die made at Florence, which was a die for the brush of the Parsons and Scott patent; and there is no satisfactory evidence that the invention of a mirror like Dudley's was made at Florence earlier than the latter part of February, 1866, if even as early. The burden is on the defendant to make out clearly an anticipation of Dudley's invention. The evidence fails to do this, and there must be a decree for the plaintiffs, for a perpetual injunction, and an account of profits, with costs.

[NOTE. For another case involving this patent, see Florence Manuf'g Co. v. Boston Diatite Co., Case No. 4,882.]

Case No. 2,833a.

CLARK v. SHELTON.

[Hempst. 190.] [1]

Superior Court, D. Arkansas. July, 1832.

JURISDICTION OF SUPERIOR COURT, ARKANSAS.

The superior court, since the act of 22d October, 1828, has appellate jurisdiction only, and cannot entertain jurisdiction in a case certified to it from the circuit court.

[In equity. Bill by Benjamin Clark against Jesse Shelton. Motion by defendant to dismiss the suit for want of jurisdiction.]

Before JOHNSON and ESKRIDGE, Judges.

OPINION OF THE COURT. This suit was originally commenced in the circuit court of Hempstead county, on the —— day of March or April, in the year 1832. At the April term, 1832, the judge of that court, having been personally concerned as counsel for one of the parties, certified the cause up to this court, that it might be here tried. The counsel for the defendant have moved the court to dismiss the suit for want of jurisdiction, and to remand the same to Hempstead circuit court.

The only question presented by the motion is whether the court can entertain jurisdiction of the cause. The decision of this question must depend upon the acts of congress and the legislature of this territory. By an act of congress passed on the 17th April, 1828 (section 3), "the legislature of the territory of Arkansas shall be authorized in all cases, except where the United States is a party, to fix the respective jurisdictions of the district and superior courts." In the acts of the legislature of this territory, on the 22d of October, 1828, we find the following provisions: "That from and after taking effect of this act, the superior court of this territory shall, in all cases of law and equity, be exclusively an appellate court, and shall not have original jurisdiction, in any civil case, unless such as may arise under the laws of the United States, or take cognizance of any criminal cases, alleged to have been committed within this territory, provided that nothing in this section shall be so construed as to prevent said superior court from deciding all cases, civil or criminal, at law or in equity, that are now pending in said court, or returnable thereto." Section 13: "Be it further enacted, that in all cases where a judge of the superior court is concerned or interested in any suit or action now pending, in any of the circuit courts, the parties in such suits may cause the same to be certified to the superior court to be there tried and determined; and all suits or actions that may hereafter be brought by any of said judges against others, or to which either of the said judges is a party, shall be returnable to, and tried in the superior court; provided, that no judge shall be compelled to hear and determine any criminal case wherein the defendant or defendants are related to him; but shall cause the same to be certified to the superior court, to be there tried and determined." These are all the provisions of the act of 1828, relative to the jurisdiction of the superior court. It is material to observe that the judges of the superior court are also judges of the circuit courts. From the foregoing provisions just recited, it is manifest that all original jurisdiction which the superior court had theretofore possessed is taken away, excepting such as may arise under the laws of the United States, and a few other specified cases. It is admitted this case does not arise under a law of the United States, nor does it fall within any of the cases specified in the act of 1828. How, then, can this court entertain jurisdiction? The only ground relied on by the counsel for the complainant is that an act of our legislature, of 1821, and an act of 1823, confer the jurisdiction upon the court. The conclusive answer to this argument is that the provisions of these acts of 1821 and 1823 are inconsistent with the provisions of the statute of 1828, and consequently the latter repeals the former. By the act of 1828, the previous original jurisdiction of this court is abrogated, annulled, and taken away, with the exception of a few cases provided for in the act. No statute, anterior to 1828, can have any operation upon the subject of the jurisdiction of this court. By the act of congress, and of the legislature of this territory, both enacted in 1828, the question of jurisdiction must be decided. According to the provisions of these acts, it is placed beyond doubt that this court cannot entertain jurisdiction of the present suit. Suit dismissed.

[1] [Reported by Samuel H. Hempstead, Esq.]

Case No. 2,833b.

CLARK v. SHELTON.

[Hempst. 207.] [1]

Superior Court, D. Arkansas. Jan., 1833.

APPEAL—WHEN LIES—FINAL DECREE.

1. Appeals only lie from final decrees. An appeal from an interlocutory decree dissolving an injunction will not be entertained. Young v. Grundy, 6 Cranch [10 U. S.] 51.

2. Appeals and writs of error at common law adverted to. Act of 1807 (Geyer, Dig. 261), and fifth section of act of congress of 17th April, 1828 (Acts, p. 46), construed.

Appeal from Hempstead circuit court.

[Benjamin Clark against Jesse Shelton.]

Before JOHNSON, ESKRIDGE, and CROSS, Judges.

OPINION OF THE COURT. The object of the motion submitted to the court is, to dismiss the appeal in this cause, upon the ground that no appeal lies from an interlocutory order dissolving an injunction. In England, appeals are allowed from interlocutory orders, as well as from final decrees. 1 Har. Ch. 454. But such appeals do not stay the execution of the order appealed from, nor suspend the proceedings in the court from which the appeal is taken, without a special order granted to that effect. This is the rule in regard to appeals from the rolls to the lord chancellor, as well as to appeals from the chancellor to the house of lords. Warden, etc., of St. Paul's v. Morris, 9 Ves. 316; Gwynn v. Lethbridge, 14 Ves. 585; Willan v. Willan, 16 Ves. 216; Macnaghten v. Boehm, 1 Jac. & W. 48. The analogy is thus preserved to the doctrine at law that a writ of error does not operate as a supersedeas without a special direction for that purpose. Entwistle v Shepherd, 2 Term R. 78; Kempland v. Macauley, 4 Term R. 436. The only check ever imposed to prevent the party from proceeding to enforce the decree is, to require bond and security to repay, in the event of a reversal of the decree.

In the United States a different course of practice has prevailed very extensively, to prevent the inconvenience of having a cause pending in the original and appellate court at the same time. The rule has been adopted that appeals should only be allowed from final decrees, and then the whole cause is considered to be open, and every order subject to revision and correction. In the case of Young v. Grundy, 6 Cranch [10 U. S.] 51, the supreme court of the United States decided that "no appeal or writ of error will lie to an interlocutory decree dissolving an injunction." A similar decision has been made by the court of appeals of Virginia, and the same doctrine is settled in the courts of Kentucky and Tennessee. In New York it was regarded, so late as the year 1823, as an open question, whether an appeal would lie from an order dissolving an injunction. But it was deemed to be settled that the order must be carried into execution, and could not be suspended by an appeal. Wood v. Dwight, 7 Johns. Ch. 295. By a statute passed at a subsequent period, the right to appeal from an interlocutory decree, under special circumstances, was granted. This statute may be seen. 7 Johns. Ch. 316, note a. With this view of the law, let us proceed to the consideration of the statutes in force here bearing upon the subject.

The first is the act of 1807 (Geyer, Dig. p. 251, § 54), which provides in substance, that if any person shall feel himself aggrieved by any final decision or judgment given in any of the courts in any cause wherein the amount in controversy exceeds one hundred dollars, he may appeal to the superior court, and after such appeal the court below shall not proceed any further in such case. If this provision stood alone, there could be no ground to dispute that no appeal will lie from any other than a final decision. But it is contended in argument, that the 5th section of the act of congress, passed the 17th day of April, 1828 (Acts, p. 46), repealed the clause above referred to. It is our opinion that it does not have such effect. The two laws form part of the same system. They are in pari materia. They do not of necessity conflict with each other, but may and will stand together. The first act is not inconsistent with the last, and, in our opinion, they are both in force. Yet, if the former were repealed by the latter, the consequence to the appellant would be the same, because, but for the provision in the act of 1807, that after an appeal no further proceedings shall be had in the court below, the appellee in this case might have gone on to enforce his judgment at law, notwithstanding the appeal. Warden, etc., of St. Paul's v. Morris, 9 Ves. 316; Hoyt v. Gelston, 13 Johns. 139.

If this were not the case, the evil so forcibly depicted by Lord Eldon would ensue. If a petition to stay proceedings were refused, the party would only have to appeal from that order, thus carry his point, and produce interminable delay. The only protection which the court can extend to the complainant in a bill for injunction when the injunction is dissolved, is to require bond and security from the defendant in equity, to refund the amount, in the event of a different decision upon final hearing. This is consistent with the practice of the English courts. Monkhouse v. Bedford, 17 Ves. 380; Way v. Foy, 18 Ves. 452. And it is in accordance, entirely, with the course pursued in some of the state courts of the Union. In conclusion, we believe that no greater latitude in regard to appeals was intended to be given, by the act of congress referred to, than had previously been given by the act of 1807, and that no repeal of the act of 1807 was intended. We are, therefore, of opinion that no appeal lies from an interlocutory decree

[1] [Reported by Samuel H. Hempstead, Esq.]

dissolving an injunction, and that this appeal was improvidently granted, and must be dismissed. Dismissed accordingly.

CLARK (SHERMAN v.). See Case No. 12,763.

CLARK v. SICKEL. See Case No. 2,862.

Case No. 2,834.

CLARK v. SKILTON et al.

[20 Int. Rev. Rec. 175.]

District Court, D. Massachusetts. Sept. Term, 1874.

BANKRUPTCY—DEALINGS WITH INSOLVENT—PREFERENCE.

[Creditors receiving from an insolvent a larger per cent. of their debts than the apparent assets would give to all are bound to be very careful that they do not obtain preference.]

[Cited in Re Hamilton, 1 Fed. 807.]

This action was brought, under section 35 of the bankrupt act of 1867 [14 Stat. 534], to recover money alleged to have been paid to the defendants [William E. Skilton and —— Dole] by Black, Currier and Osgood, insolvent debtors, (as a preference). The case was tried by jury, and, after verdict for plaintiff [A. B. Clark, assignee], came up on motion for a new trial.

E. P. Nettleton and S. K. Hamilton, for plaintiff.

Edward Avery, for defendants.

LOWELL, District Judge. The motion for a new trial is made on the ground that the verdict is against the evidence and the weight of evidence. The case was a very unusual one. The bankrupts had failed, and sold out their stock under suspicious circumstances, and offered their creditors forty per cent. of their debts. Some of the creditors insisted that they ought to pay more, and they then offered fifty per cent. A paper was drawn up and signed by most of the larger creditors, agreeing to take fifty per cent. of their respective debts in fourteen days. The defendants and two or three others received their dividends, and then it was found that the debtors either could not, or would not, pay the others, and within four months they were forced into bankruptcy. Here was an admitted insolvency, and knowledge of it by the defendants, and a payment that was in fact a preference. This may have come about in several ways. It may be that the bankrupts had honestly offered more than they were able to perform; or they may have offered not intending to perform, or circumstances may have changed after the offer was made. I ruled that the bankrupts having been admittedly insolvent, and to the knowledge of the defendants, the intent to prefer would be shown by evidence that they were either knowingly unable or unwilling to pay fifty per cent. to all their creditors, and that if the defendants had reasonable cause to believe such inability or unwillingness, if such there were, they would be bound to refund the payment, but, if there was reason to believe that they were both able and willing to treat alike, the intent and notice would not be made out. Neither party objected to this ruling. The jury found for the plaintiff.

I am not prepared to say that the verdict can be set aside. There are many cases in which a verdict either way cannot be said to be against evidence, in the sense of a motion of this kind. This is one of them. There was evidence which, I think, would warrant the jury to infer that the traders could not pay so large a dividend as they had offered, and that the defendants had their doubts about it. Two or three of the preferred creditors insisted upon a better offer than the showing of the debtors warranted. There was some ground for the inference that they believed that somewhere or other were assets from which this amount could be furnished. This was not enough. If they insisted on a larger payment than the apparent assets would give, they were bound to be very careful that they were not obtaining a preference. The defendants took no pains about the matter, but took their fifty per cent. and went their way with facts before them which would warrant the jury to find that they had reason to believe that the transaction would operate as a preference. Motion for new trial denied.

[NOTE. The preference was thereafter paid to the assignees on execution, and subsequently the defendants were allowed to prove their debt against the bankrupt estate. See In re Black, Case No. 1,459.]

CLARK (SMITH v.). See Case No. 13,027.

Case No. 2,835.

CLARK v. SOHIER.

[1 Woodb. & M. 368.][1]

Circuit Court, D. Maine. Oct. Term, 1846.

NEW TRIAL—PRACTICE—AMENDMENTS TO PLEADINGS—STATE STATUTES—PROCEEDINGS AT COMMON LAW.

1. Where a party in an action to recover a note had never enjoyed one trial in this court, but was defaulted, supposing the case was agreed to be continued, he is entitled to a trial on petition within three years, under a statute of the state of Maine, and on proof of a probably good defence.

2. That statute is not repugnant to the provision in the judiciary act of 1789 [1 Stat. 83], authorizing a new trial on motion after a verdict. But it confers an additional right, not inconsistent with the other, and not merely a new remedy for an old right.

[Cited in Conrad v. Griffey, 11 How. (52 U. S.) 491.]

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

3. This court is empowered to enforce rights under the statutes of states, as well as under acts of congress, when they are not hostile to the latter, and are asked to be enforced in relation to proceedings at common law.

[Cited in Upham v. Brooks, Case No. 16,797; Perry Manuf'g Co. v. Brown, Id. 11,015; Moan v. Wilmarth, Id. 9,686; Ex parte McNeil, 13 Wall. (80 U. S.) 243.]

4. Such proceedings mean any litigation at law, as distinguished from equity or admiralty.

5. A new trial in such case is usually had by a writ of review sued out and served, rather than by bringing forward the old action, and serving a notice on the opposite side to defend.

6. In either case, all proper amendments in the pleadings will be allowed on the new trial, and the service must be on some administrator of the deceased, who has taken out letters in this state.

7. Quere, whether if one appears as administrator and defends against the petition for a new trial, he is not estopped to deny that he is an administrator in this state.

This was a petition for a new trial. The original action was a proceeding to recover a balance alleged to be due Tuckerman, a citizen of Massachusetts, from [Jonathan Clark] the executor of D. Clark, who had been a citizen of Maine. There had been a mortgage given originally to Tuckerman to secure the debt, which had been foreclosed by Tuckerman, and who averred that the premises in the mortgage so foreclosed were not worth the whole debt, and therefore presented a claim to the commissioners on Clark's estate, for about $2000 more. The commissioners decided against Tuckerman. The estate of Clark was supposed not to be in fact insolvent, and an action at law was then instituted for Tuckerman's demands, in this court, under a statute of the state of Maine allowing an action in such case, and after an appearance and one continuance, a judgment was rendered on default for Tuckerman against Clark's executor, for $2092 debt, and $34.71 costs, at the October term, 1842. Tuckerman has since died [and William D. Sohier qualified as his executor]. The petitioner avers that said action was defaulted by mistake; that there was a good defence to the same, and therefore prays that this court will grant a new trial therein.

The petition was filed September 30th, 1844, and was argued on the evidence adduced, October term, 1845.

Mr. Appleton, for petitioner.

Mr. Hobbs, for respondent.

WOODBURY, Circuit Justice. It is hardly necessary to go into a very minute examination of the evidence in this case, though I am satisfied upon it that a new trial, if it can in this way be legally granted, would be proper and judicious. The testimony on some points is conflicting, yet this much is rendered certain—that the petitioner never really had a trial of the claim against him in this court; that when he did have one before the commissioners, a decision was made in his favor. Thus that he has a defence, and had grounds to expect success in it, is placed beyond any reasonable doubt. It is equally certain, that he and his counsel intended to set up the defence; but a negotiation having been entered into for a settlement, they understood the cause would be continued till the settlement was made, or the negotiation abandoned. The other side admits the pendency of the negotiation, but denies any agreement for a further continuance. However this fact may have been, it will be seen, that the petitioner acted under a different impression, and has thus lost an opportunity of laying his defence before a court and jury, unless a new trial can be obtained.

The objection made to a new trial on account of the delay to petition for two years after the default, is no legal bar, as the statute of Maine allows three years, and in an equitable view, is answered by the fact of the continued pendency of the negotiation for a settlement up to the time of filing the petition. But another difficulty which occurred to me at the hearing, and was named to the petitioner's counsel, has not, I regret to say, been removed entirely; but still it is so far overcome as to induce the court to grant a new trial. It was, that the 17th section of the judiciary act of congress, of September, 1789, which empowers us to grant new trials, does it only in cases "where there has been a trial by jury." 1 Stat. 83. Here there has been no such trial by a jury. Hence it cannot be granted under that act. But in some states, by special laws, though in technical language it is hardly correct to speak of a new trial in case of a default, where there was no old trial, courts are permitted to set aside the default for proper reasons, and grant a trial; and this is sometimes, in popular language, called "a new trial." Such is the special law in Maine on a petition filed. See Revised Statutes. But I am aware of no act of congress to that effect, nor of any formal adoption in practice or otherwise by the United States or their courts, of the statute of Maine on this subject. The words of the judiciary act seem to contemplate only motions as at common law for new trial, and before judgment is rendered after a verdict. See post.

In this situation of that act, and the practice under it in the courts of the United States, so far as it has come to my knowledge, it requires some careful discrimination to see how a new trial can be legally granted in the present case, on a petition, and after the lapse of so long a time as two years between the default and the filing of the petition, and where in the mean time judgment has been rendered and carried into effect. The form of asking it by petition probably did not exist when the act of May 8th, 1792, passed (1 Stat. 275), and of course not being then or previously adopted,

has not by any action of congress since, or by any judicial decisions on former acts, been put in force in any particular case, cited at the bar, or found by the court.

The question then remains to be settled, whether it can be allowed as a right under the state laws, and not inconsistent with any legislative action had by congress. The law of Massachusetts passed since, allowing partition of lands on petition between tenants in common in that state, has been considered by this court as binding on it in Ex parte Biddle [Case No. 1,391]. I have no doubt that decision was correct under the 34th section of the judiciary act of 1789, providing "that the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." A new trial is a proceeding at common law, quite as much as a petition for partition, and a hearing to obtain it may be regarded as a hearing at common law on a common law question. The subject-matter, also, to which it relates here, was a suit at law which may have been what was meant by the expression, "Trials at common law," as distinguished from trials in equity. "Suits at common law," in the 7th amendment of the constitution, has been held to mean merely "cases in law." 1 Baldw. 405 [Baker v. Biddle, Case No. 764]; 1 Baldw. 554 [Bains v. The James & Catherine, Case No. 756]; [Kendall v. U. S.] 12 Pet. [37 U. S.] 634. That is, cases not in equity or admiralty. Parsons v. Bedford, 3 Pet. [28 U. S.] 433, 447. And "suit" means a right litigated between parties in a court of justice. Kendall v. U. S., 12 Pet. [37 U. S.] 524, 645; [Plowden v. City Council] 2 Pet. [27 U. S.] 449; Holmes v. Jennison, 14 Pet. [39 U. S.] 540, 566. As in a habeas corpus or mandamus as well as in a common action. But if that expression, "at common law," meant only a "litigation in court," instead of a direction purely ministerial or as to process only, which seems to have been the idea of some, this was of that character likewise. Conkl. Pr. 95. The only difficulty, then, remaining is, whether the statutes of the United States have not legislated on this subject fully, and by that have excluded any subsequent legislation of the states as applicable to the same subject. I have no doubt that the clause in the 17th section of the judiciary act, providing "that all the said courts of the United States shall have power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law," would justify the grant of a new trial in such case, though it should be prohibited by the laws of the state where the application is made. Picquet v. Swan [Case No. 11,134]. But whether the states may not pass laws granting such trials in different or additional cases and in new modes, and which the courts of the United States ought to enforce in cases coming before them, is a distinct question.

After careful consideration, I am inclined to the conclusion that the act of congress is a provision for only one class of cases, and to that extent cannot be modified or limited by the states. But that in other classes of cases, if the state laws give merely other and additional remedies, they must be regarded as not conflicting nor inconsistent, but in harmony with the other remedy by act of congress, leaving that as before, and merely providing a further and new remedy in certain specified cases. In such cases, to adopt the new form and right is only to conform to the state statutes, where no act of congress applies, and is doing this under the authority of the 34th section. But it is not to nullify or disregard the 17th section in instances coming within its purview of motions, where there have been verdicts, because it leaves that in such cases in full force. Finally, as the state statute purports to confer an additional right or power, and not one in conflict with what is conferred by the judiciary act, I feel a reluctance to deny a claim made under it, and the more especially as by granting a new trial, the merits of the parties in their original controversy will not be decided on, but left open for a full and just hearing and disposition on the new trial.

It seems to be well settled in Robinson v. Campbell, 3 Wheat. [16 U. S.] 212, 222, that the laws of the states must govern as to rights, when the acts of congress do not provide exclusively on the subject. 5 Mason, 39 [Picquet v. Swan, Case No. 11,134]. See, also, U. S. v. Ames [Case No. 14,441]. But mere remedies remain as at common law, and as in the states when adopted originally, from 1789 to 1793, except as altered since by congress or the United States courts. 3 Wheat. [16 U. S.] 222. If state laws operate on new trials, they of course must govern if no act of congress interferes and forbids it. There is none which is repugnant, and like two statutes on the same subject by the same legislature, one does not repeal or annul the other, unless words of repeal are used, or the provisions in one are opposed or repugnant to those in the other. Beals v. Hale, 4 How. [45 U. S.] 37; Washington, J. [Houston v. Moore] 5 Wheat. [18 U. S.] 22. So if any state law makes that legal which was before only equitable, it must prevail. [Robinson v. Campbell] 3 Wheat. [16 U. S.] 223. The petition given in this case is not merely a new remedy or form, but a new right; and that right can be recognised or adopted without any act of congress, except the 34th section of the judiciary law before quoted. That 34th section makes the state laws a rule to govern future decisions, in a trial at common law; and when they do not give merely a new form of prosecuting for an old right, they must be complied with. Way-

man v. Southard, 10 Wheat. [23 U. S.] 1, 10. The mere forms of proceeding standing alone, are governed by the other acts of 1789 and 1790, made permanent 8th May, 1792. [Wayman v. Southard] 10 Wheat. [35 U. S.] 24. And a change of them only by the states, is not binding on this court till adopted by congress or the supreme court. Beers v. Haughton, 9 Pet. [34 U. S.] 330. But here new rights, rather than new forms for old ones, are conferred by the Maine statute. A new trial is given in new cases—in those where it did not exist before, and a mode to enforce them is provided.

I am disposed to sustain these new rights, not as new forms for rights before existing, as none did before exist under the present circumstances, but as new rights allowed to be prosecuted in a way specially pointed out there. In such cases parties have a claim to the protection of such rights in this court when residing, so that we have jurisdiction as fully as they have it in the state courts. Thompson v. Philips [Case No. 13,974]; [Satterlee v. Matthewson] 2 Pet. [27 U. S.] 413; [Lewis v. Marshall] 5 Pet. [30 U. S.] 470; Lorman v. Clark [Case No. 8,516]. In U. S. v. Knight, 14 Pet. [39 U. S.] 301, 315, is a strong illustration on this point, allowing a debtor of the United States to swear out of jail under a state statute, though no such privilege had been granted by congress. This 34th section of the judiciary act is a very important one, and reaches all rules as to civil rights by state statutes within their jurisdiction, where congress have not regulated the case, but probably does not include criminal matters. 2 Burr's Tr. App. 185. It includes rules of evidence altered by state statutes. McNeil v. Holbrook, 12 Pet. [37 U. S.] 84, 89. It reaches usages in states, that have the force of laws. Swift v. Tyson, 16 Pet. [41 U. S.] 18. And liens by judgments. [Case No. 13,974.] And all statutes of states regulating most rights, and especially local laws as to real estate, not inconsistent with the laws and rights of the United States. The Orleans v. The Phoebus, 11 Pet. [36 U. S.] 175. But, as before remarked, it does not reach mere changes of process by state statutes. [Wayman v. Southard] 10 Wheat. [23 U. S.] 24. Nor give jurisdiction under them, which did not before exist in the United States courts. [Barron v. Baltimore] 7 Pet. [32 U. S.] 243; [U. S. v. Knight] 14 Pet. [39 U. S.] 315. Nor include mere judicial decisions on general questions and commercial topics at large. [Swift v. Tyson] 16 Pet. [41 U. S.] 19.

A new trial of the merits is therefore to be had at the next term. The default must of course be allowed to be stricken off; and if appropriate pleadings were not made before, amendments be allowed to make them. Garland v. Davis, 4 How. [45 U. S.] 154. The form of having the new trial seems by the Maine statute to be by a writ of review, sued out and served on the opposite party. But if any other form has been adopted in this state or in this court, as by bringing the old action forward, it can be followed.

NOTE [from original report]. At May term, 1847, this action was brought forward, and a notice served on the attorney of Sohier, the executor of Tuckerman, to appear and defend. The attorney declined to defend, but stated in court, that Tuckerman had not taken out letters of administration in Maine, and was not bound to defend this cause; and further suggested, that no practice existed in Maine, under the statute, as to granting new trials on petition, which allowed them in this form, but only by a writ of review. It seemed doubtful how the question stood, and a further inquiry into it was instituted. But in the mean time the court expressed no doubt that the service of the motion or of a writ of review must be on some administrator, whose letters are taken out in this state. See cases in Aspden v. Nixon, 4 How. [45 U. S.] 467.

The presiding judge observed, that as Tuckerman was stated to have left property still unsold in this state, some other person could take out letters here and administer on it, if Mr. Sohier declined, and then a good service could be made on him. Sohier, or his attorney, might be willing to appear to resist a new trial, but not be required to defend the original suit on a trial of the merits, until administration had been granted to Sohier in this state. Whether, however, he is not now estopped, and his attorney for him to deny he is an administrator in this state, after appearing and defending the petition for a new trial, is a graver question, and will be considered hereafter, if necessary.

Case No. 2,836.

CLARK v. SPARHAWK et al.

[2 Wkly. Notes Cas. 115.]

Circuit Court, E. D. Pennsylvania. June 17, 1875.

SET-OFF—NOTICE TO JOINT OWNER OF SALE OF COLLATERALS.

1. A., having purchased stock on joint speculation with B., pledged it to secure his own debt. Becoming insolvent it was sold by the pledgees at a loss, without any notice to B. A. and B. then agreed that the balance due A. by B. for his share of the loss should be set off against a larger debt due by A. to B.'s firm. A. then made a general assignment for creditors, and subsequently was adjudged a bankrupt. After the general assignment (but before the bankruptcy), the other members of B.'s firm concurred in the agreement for set-off, with the exception of one absent partner, who afterwards also concurred. In an action by A.'s assignee in bankruptcy to recover from B. the balance originally due A., held that, B.'s partners not having agreed to the set-off until after the rights of A.'s creditors had become fixed by the assignment, the set-off could not be allowed.

2. B. was, however, entitled to notice from A., and an opportunity to redeem the stock before its sale, in default of which he was entitled, by way of set-off, to the benefit of a subsequent rise in the market, within a reasonable time, which was a question for the jury.

Error to the district court for the eastern district of Pennsylvania.

Assumpsit by Sparhawk, and others, assignees in bankruptcy of Yerkes, against Clark.

It appeared from the evidence that in pursuance of an agreement between Clark and

Yerkes to enter into a joint speculation, Yerkes purchased (and paid for) certain stock which he then pledged, mingled with other similar stock of his own, and afterwards, on October 16, 1871, became insolvent. On October 20, the larger portion of the pledged stock was sold by the pledgees at a loss, of which sale Clark received no notice from either Yerkes or the pledgees, whereupon Yerkes rendered Clark an account charging him with the difference between half the cost and half the proceeds of the stock. Clark made no objection to the account, or to the transaction, but agreed with Yerkes that the said balance should be set off against a larger debt due by Yerkes to the firm of E. W. Clark & Co., of which firm Clark was a member. On October 24, Yerkes made a general assignment for the benefit of creditors, under the state law, and in November following proceedings in bankruptcy were commenced. After the general assignment (but before the proceedings in bankruptcy), the other members of B.'s firm concurred in the agreement for the set-off, as above recited, with the exception of one absent partner, who subsequently also concurred. The course of dealing employed by Yerkes was a common one among brokers, and of this Clark was aware. It further appeared that the stock rose in value after the said sale, and that in December, 1871, a remaining portion of the pledged stock was sold by the pledgees thereof at a higher rate than the portion first sold, and that Clark did not know, when notified of the sale, that Yerkes had this stock on hand. [Clark brought error.]

THE COURT (CADWALADER, District Judge) instructed the jury as follows: The stock was sold by Mr. Yerkes without any notice to Mr. Clark although a crisis in the market had occurred, causing a loss and a derangement in rates and prices. I am of opinion that Mr. Clark was entitled to notice, and to an opportunity to redeem the stock before it was sold, and also of opinion that the fact, which is undisputed, that Mr. Yerkes had, by pledging this and other stocks put it out of his power to control the sale of them, would make it the more necessary to consider Mr. Clark's interest. Therefore, Mr. Clark is not chargeable with the actual loss on the day of sale; but you may look at the subsequent state of the market for such reasonable time as might be allowable for the redemption or taking up of the stock. I do not think he was entitled to an indefinite delay, and it seems that within the limits of a reasonable time his loss would not have been reduced more than $875. Another objection is to the whole of the demand in dispute. It seems that Mr. Yerkes was indebted to E. W. Clark & Co., of which defendant was a member, in a larger amount than the present claim. It appears that there was at some period an agreement among all the partners that he might make use of that by way of set-off. (I should hold that if all the partners of E. W. Clark & Co. had agreed that these debts should be set off before Yerkes' assignment to his voluntary assignee in bankruptcy, the debts could be set off; but it is not contended that all the members of the firm had agreed to this before the assignment to Mr. Pile October 24, nor that all had agreed before proceedings in bankruptcy. Therefore, I instruct you that this defence can not be maintained, and that the assignment vested the rights of creditors which could not be disturbed by any subsequent agreement. I am requested to say to you that under the circumstances of the case the defendant is entitled to have the account liquidated according to the highest price of any one thousand shares of such stock as included the stock in question, and which was on hand at the time of failure. This would be true, and might be applicable if Mr. Clark had not been notified, as he was, of the sale on the 20th of October, and had not omitted to object. Nor was this omission to object to stand in his way if he did not know that the course of business between the parties excused Mr. Yerkes from setting apart any particular one thousand shares. Notwithstanding this circumstance, the proposition is correct, so far as the highest price within a reasonable time is in question.)

Verdict for the plaintiffs for the full amount claimed, less $875 deducted as suggested by the judge, and judgment thereon. The defendant took this writ of error, assigning therefor that portion of that judge's charge inclosed in brackets.

Samuel Dickson, for plaintiff in error.

Set-off should have been allowed, notwithstanding Gray v. Rollo, 18 Wall. [85 U. S.] 629, because the right depends upon the law of this state. Ratification is retroactive. The subsequent assent of the other members of E. W. Clark & Co. was sufficient. "Omnis rati habitio," etc. But Clark was entitled to the best discretion of Yerkes, his partner in this transaction in selling the stock. No discretion was exercised, and it was sold by a pledgee at a forced sale. Yerkes took the good sale to himself, while the bad one was put upon Clark. The partnership, in such cases, should always be credited with the best bargain. See the cases in 1 Lindl. Partn. (2d Ed.) 595-613. His ratification of the sale, when notified by Yerkes, cannot bind him, as he was not told that there was other stock of the same kind still on hand, and knowledge of all the facts is necessary to make a ratification final.

Mr. Junkin, contra.

Gray v. Rollo, supra, rules this case, and agrees with the law of this state. The ac-

tual consent of all the partners was necessary, but here this was not obtained until after a general assignment which fixed the rights of all parties, and that of F. H. Clark not till after proceedings in bankruptcy. Clark knew the course of dealing employed, and is presumed to have contracted in accordance therewith. Moreover he was notified of the sale and afterwards accepted it.

June 18. McKENNAN, Circuit Judge. Judgment of district court affirmed.

NOTE [from original report]. The rule laid down in this case, as to the measure of damages on a wrongful conversion of stock was adopted by the New York court of appeals in Baker v. Drake (1873) 53 N. Y. 211, where the cases are reviewed by Rappallo, J., overruling Markham v. Jaudon, 41 N. Y. 235. In Pennsylvania, however, it has been frequently said that the measure of damages is the highest price of the stock between the time of contract to return, or the time of conversion, and the date of the trial. See Bank of Montgomery v. Reese, 2 Casey [26 Pa. St.] 143; Reitenbaugh v. Ludwick, 7 Casey [31 Pa. St.] 131; Musgrave v. Beckendorff, 3 P. F. Smith [53 Pa. St.] 310; Persch v. Quiggle, 7 P. F. Smith [57 Pa. St.] 247. This rule has been limited, however, to cases where it is the duty of the defendant "to deliver the stocks at a particular time, and that duty has not been fulfilled." Phillips' Appeal, 18 P. F. Smith [68 Pa. St.] 130; Neiler v. Kelley, 19 P. F. Smith [69 Pa. St.] 403; Work v. Bennett, 20 P. F. Smith [70 Pa. St.] 487.

CLARK (THOMAS v.). See Case No. 13,894.

Case No. 2,837.

CLARK v. UNITED STATES.

[2 Wash. C. C. 519.][1]

Circuit Court, D. Pennsylvania. April Term, 1811.

SEIZURE FOR VIOLATION OF NON-INTERCOURSE ACT—ADMIRALTY JURISDICTION—TRIAL BY JURY—CONFESSION AS EVIDENCE.

1. The Sea Nymph and her cargo, were seized for a violation of the non-importation laws, in importing the goods seized into the port of Philadelphia. The vessel and part of her cargo were seized in the river Delaware, and part of the cargo after it had been landed.

2. The ninth section of the judiciary act of the 24th of September, 1789 [1 Stat. 76], assigns to the district courts jurisdiction of all cases, purely of admiralty maritime jurisdiction, if they arise under the laws of impost, navigation, and trade; where the seizure is made in waters navigable for vessels of ten tons burthen from sea. In all other cases, where the seizure is on land, or waters of less depth, the jurisdiction is on the common law side of the court.

3. An information in rem against the thing itself, in a case of admiralty and maritime jurisdiction, is not a suit at common law, but an admiralty proceeding, and does not require a trial by a jury.

4. Informations in rem, on the admiralty side of the district courts, for forfeitures incurred under the laws of impost, have been sanctioned by the supreme court of the United States.

5. If a party, charged with a forfeiture under the laws of the United States, shall, in his answer, on oath, to the information, furnish evidence against himself, the court, in an action of debt brought against him for a penalty under the same law, would reject his confessions, if offered in evidence.

Appeal from a sentence of the district court [for the district of Pennsylvania, unreported], condemning the Sea Nymph and her cargo, for a violation of the non-importation law (volume 9 Laws, p. 243.) The ground of forfeiture is, that the goods in question were imported in this vessel into the port of Philadelphia, from Port-au-Prince, a possession of France, contrary to law. The Sea Nymph and part of her cargo were seized at the port of Philadelphia, on the river Delaware, and part on land; and the question made in the district court, and insisted upon in this, is, whether the trial of the vessel and cargo, wherever seized, ought to have been by jury.

WASHINGTON, Circuit Justice. It has been contended for the appellant, that this is not, upon general ground, a case of admiralty and maritime jurisdiction, nor is it assigned to that jurisdiction by the judicial law; and if it be so assigned, still, the act under which the forfeiture was incurred, prescribes a common law remedy for enforcing it. The two first grounds of objection to the mode of trial in the district court, will be considered together; the last will require a distinct examination.

The ninth section of the judicial law, gives to the district court cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures on waters navigable from the sea, by vessels of ten or more tons burthen, as well as upon the high seas, under the laws of impost, navigation, and trade. This section, we consider as assigning to the district court all cases, purely of admiralty and maritime jurisdiction, as well as cases not properly belonging to that jurisdiction, according to the decisions of common law courts of England, if arising under laws of impost, navigation, and trade, where the seizure is made on waters of a certain depth, from the sea, and all other cases of the latter description, that is, cases not strictly of admiralty jurisdiction, where the seizure is on land, or on waters of a less depth than are above, to the common law side of the same court. If cases of seizure, under laws of impost, &c., were necessarily and indisputably cases of admiralty jurisdiction, strictly speaking, then it would seem to have been unnecessary to class them with admiralty cases, because they would, without such a provision, arrange themselves with those cases, and be triable in the same mode, and before the same tribunal. Cases

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

may arise under a law of impost, &c., which are purely of admiralty jurisdiction, where the whole transaction is at sea, or on waters out of the body of a county; and there may be others not proper for the admiralty, which would not belong to that jurisdiction, and which, therefore, are intended by this law to be assigned to that jurisdiction. In the former case, we conceive it to be unimportant where the seizure is made, whether on land, or on waters of a depth less than a vessel of ten tons could navigate; in the latter case, the jurisdiction, according to this law, must be decided by the place where the seizure is made. In this way only, can the dictum of the supreme court of the United States, in the case of The Betsey, be reconciled with former decisions, and with established principles of law; for surely the court never intended to say, that the jurisdiction of the admiralty, in a case of strict admiralty jurisdiction, would depend upon the place where the seizure was made. There was nothing in that case to call for such a decision.

The case of U. S. v. La Vengeance [3 Dall. (3 U. S.) 297] is the leading one on this subject, and is referred to in the case of The Betsey [4 Cranch (8 U. S.) 442] as governing that; and the decision in the former case, appears to us conclusive as to that now under consideration. It was an information in rem, in the district court, for exporting from the United States to a foreign country, arms and ammunition, contrary to law. It was contended, upon the broad ground of the admiralty jurisdiction, that it was not a case belonging to that jurisdiction, because it did not arise wholly upon the sea; exportation being an act arising partly on land, and partly on the sea. The operation of the ninth section of the Judicial Law, which assigns to the admiralty, cases of seizure under laws of impost, &c., was not hinted at in the argument, and the court decided that it was a case of admiralty and maritime jurisdiction, because exportation is entirely a water transaction. If that was a case of admiralty jurisdiction, because it was a water transaction, is not this, too, a water transaction? What is the offence created by the non-intercourse law? It is the importation of goods into the United States, from French or English possessions. But to complete the offence, it is not necessary that the goods should be landed, if they are brought from those countries with intention to be landed. For we find that even the putting of goods on board of a vessel, with intention to import the same into the United States, is an offence against the law, and subjects the vessel and goods to forfeiture; and, consequently, they may be seized before the vessel has arrived at her port of destination, or even before she has entered the river. This, then, is a stronger case of admiralty jurisdiction, than that of the Vengeance. Even in the case of The Sally [2 Cranch (6 U. S.) 406], where the seizure was at Nottingham, within the body of a county, the court considered the question of jurisdiction settled by the case of the Vengeance, and thereby pronounced it to be a case of admiralty jurisdiction. If, then, this be a case of admiralty jurisdiction, because wholly a water transaction, it can hardly be contended, that the offender, by landing the cargo, can oust the jurisdiction of the court, and convert a maritime into a common law cause. The rule is clear, that if the original cause arise at sea, and other matters happen on land, depending thereon, as if a thing be taken at sea, and afterwards brought to land, the admiralty retains its jurisdiction over the subject. See 2 Bac. Abr. 178. So, too, if the cause of forfeiture arise at sea, the bringing of the thing forfeited to land, will not oust the admiralty of its jurisdiction.

This brings us to the consideration of the third point, which is, that the eighteenth section of the law, under which this forfeiture is claimed, has prescribed a common law mode of recovery; and, consequently, that the trial must be conformable to that practised in the courts of common law. If the premises be correct, the conclusion must be granted. The recovery is to be by action of debt, by indictment, or information. It is admitted, that the two first of these remedies are inapplicable to cases where the thing forfeited is demanded, although they are quite proper for the recovery of the penalties, or for enforcing personal punishment. The question then is, whether a trial by jury is indispensable, where the proceeding is by information against the thing itself? Because, if the object be to punish the offender in his person or property, generally, it is not questioned but that the trial of an information must be by jury. What is there in the constitution or laws of the United States, which requires the trial to be by jury, in the case of an information in rem, on the admiralty side of the district court? The former preserves that mode of trial in suits at common law. But an information in rem, in a case of admiralty jurisdiction, is not a suit at common law, but an admiralty proceeding, where the trial never is by jury. As to the latter, the saving clause in the ninth section of the judicial law, obviously means, that in cases where the jurisdiction of the admiralty is not exclusive, a party may, at his election pursue his common law remedy, if the common law be competent to afford him redress. It has no allusion to the mode of trial, in any case; for that would, without any provision of law, adapt itself to the remedy to which alone the saving refers. But what places this subject beyond all doubt, is, that informations in rem, on the admiralty side of the district court, for forfeitures incurred under laws of impost, navigation, and trade, of the United States, have been common in the practice of our courts as an admiralty proceeding, as much so as the proceeding by libel. The correctness of this practice has been brought di-

rectly into the view, and received the sanction of the supreme court of the United States, in the case of The Vengeance, when it was decided that the information in rem, is in the nature of a libel, and to be tried, according to the course of the admiralty, without jury. The mode of trial is here settled by the highest tribunal in the United States, and the term information, in respect to admiralty proceedings, had received a precise meaning, before it was used by congress. We think we are warranted in presuming, or are rather bound to conclude, that this decision was known to the legislature, and that the term was used in this law, in reference to the practice of the courts thus solemnly recognised. If, then, the information in rem in a civil suit of admiralty and maritime jurisdiction, be of the nature of a libel, we are compelled to say that the use of the expression in this law, does not vary this case from those of The Vengeance, The Sally, and The Betsey [supra].

Another objection made to the mode of trial in this case, is, that the defendant may be compelled to give evidence against himself, contrary to a well-established principle of law, which excuses a man from answering, upon oath, any thing which may subject himself to a forfeiture. If forfeiture of the thing, which forms the subject of the suit, be meant, that point is settled by the decisions which have been mentioned; and if, in an action of debt, or an indictment for the penalty, the confession should be offered in evidence against the defendant, and he is entitled to the benefit of the rule which is contended for, the court would, of course, reject the evidence for that reason; and in this way the difficulty would be got rid of.

Upon the whole, we are of opinion that, as to the mode of trial, there is no error in the sentence of the district court.

Cases cited by the appellant: Fitzg. 66; Cro. Jac. 643; 1 Show. 118; 4 Bl. Comm. 304, 305; 6 Mod. 143; 7 Mod. 99; 3 Bac. Abr. 635, 636; [U. S. v. The Betsey] 4 Cranch [8 U. S.] 446, 452; 3 Atk. 276; 2 Ves. 245, 456; 3 Bl. Comm. 262; 4 Bl. Comm. 308; 2 C. Rob. Adm. 245; [U. S. v. The Sally] 2 Cranch [6 U. S.] 406; 1 C. Rob. Adm. 271.

Cases by appellee: 6 C. Rob. Adm. 341, 347; Priestman's Case, 4 Dall. [4 U. S.] 28; [U. S. v. The Union] 4 Cranch [8 U. S.] 216; [Peisch v. Ware] Id. 347; [U. S. v. La Vengeance] 3 Dall. [3 U. S.] 297; [Murray v. The Charming Betsey] 2 Cranch [6 U. S.] 64; [Hallet v. Jenks] 3 Cranch [7 U. S.] 217; [Maley v. Shattuck] Id. 459; 3 Bl. Comm. 68, 106; 1 Wood. El. Jur. 137, 138; 2 Browne, Civ. Law, 123, 124; Doug. 615; Yel. 135; Burrows, 74; [James' Claim] 1 Dall. [1 U. S.] 48; Reeve, Shipp. 255; Peake, 8, 9; 4 Bl. Comm. 281; [Keane v. The Gloucester] 2 Dall. [2 U. S.] 37; [Henderson v. Clarkson] Id. 175.

Case No. 2,838.

CLARK v. UNITED STATES.

[3 Wash. C. C. 101.][1]

Circuit Court, D. Pennsylvania. Oct. Term, 1811.

NON-INTERCOURSE ACT—TRANSFER OF SOVEREIGNTY—ST. DOMINGO.

1. The island of St. Domingo is a dependence of France, and within the act of congress of March 1, 1809 [2 Stat. 528].

2. It is for the government of the United States to decide, whether this island is independent or not; and until such a declaration is made, or France shall relinquish her claim, the courts of the United States must consider the ancient state of things as remaining unaltered, and the sovereign power of France over the country as still existing.

[Cited in The Hornet, Case No. 6,705.]

3. The surrender of a town to an invading enemy, does not divest the sovereign of more country than that which has submitted to the conqueror. If the whole island of St. Domingo had been conquered by the British, and given up to the blacks, the right of France would have revived; since the conqueror gains nothing but the temporary right of possession and government, until a pacification; and cannot, in the mean time, impair, by any transfer, the rights of the former sovereign.

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

WASHINGTON, Circuit Justice, delivered the opinion of the court. These cases arise under an act of congress, passed on the 1st of March, 1809, which prohibits the importation into the United States, of any goods, &c., from any place situated in France or Great Britain, or in any of the colonies or dependencies of either; and the question is, whether the island of St. Domingo, in October 1809, when the importation charged in this information was made, was a colony or dependence of France, or not?

On the part of the United States, it is contended, that in point of fact, this island, at the time above mentioned, was, and still continues, a dependence of France; and that even if this were not the case, according to the principles of the law of nations, still, it is not for this, or any other court, to decide on the ground of her independence, until the government of the United States has so declared, or France has relinquished her claim.

On the part of the claimant, it was insisted, that the people of this island had not only declared themselves independent, but have thus far shown themselves able to maintain it; having, ever since the declaration, exercised without interruption from the armed force of France, the rights and powers of self-government, under a constitution framed by themselves. That neutral nations are bound, by the law which ought to govern nations, to consider St. Domingo as a government separate from, and independent of

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

France; and the war, if any there be between them, as being equally just on both sides. That the law of nations, is as much obligatory, as a rule of decision, upon courts, as of conduct on sovereigns; and consequently, in all questions coming before these tribunals, where the relations between the dismembered part and the mother country, are incidentally brought in question, and must be decided, the former must be considered equal in all respects with the latter, although the sovereign power may have made no declaration upon the subject. As an illustration of these principles, the case of a seizure and condemnation in a court of the new government, as prize, or for breach of a municipal law of that government, was mentioned, which a foreign court would clearly be bound by the law of nations to consider as valid. These arguments, on the side of the appellants, had great weight with us, when they were urged; and we must candidly confess, that they lost nothing by the examination which we have given the subject during the vacation. But they seem to us to be so completely borne down by the opinion of the supreme court, pronounced in the case of Rose v. Himely [2 Cranch (6 U. S.) 241], that it is impossible, we think, to sustain them, without disregarding principles most clearly expressed in that opinion. That was the case of an American vessel, which, after trading with the brigands of St. Domingo, as they were termed, sailed with a cargo; and when at the distance of ten leagues from the island, on the high seas, she was captured by a French privateer, on the 23d of February 1804, was conducted into the island of Cuba, was sold, and afterwards condemned, in July 1804, at St. Domingo, under an arret of the Captain-General Farrand, issued on the 1st of March, 1804.

The chief justice, in delivering the opinion of the court, whilst considering the particular character in which the court at St. Domingo acted, in condemning this vessel and cargo, says, "the relative situation of St. Domingo and France, must necessarily be considered." He then proceeds to lay it down, that "St. Domingo had declared herself independent of France, and was by arms asserting her sovereignty;—a war de facto existed. Vattel, who has been quoted to prove that St. Domingo, having declared herself independent, and so far maintained it by arms, must be treated by other nations as such, in fact, and entitled to maintain the same intercourse with the world, as is maintained by other belligerent nations, addresses himself to sovereigns, not to courts. It is for governments to decide, whether they will consider St. Domingo as an independent nation; and till such decision is made, or France shall relinquish her claim, courts must consider the ancient state of things as remaining unaltered, and the sovereign power of France over the colony as still subsisting." In that case, the arguments urged in behalf of these appellants, were stronger than when applied to this case; because in that, the dependence or independence of St. Domingo, was only incidentally involved; whereas, in this, the court is called upon, in construing an act of congress, to decide directly, that she is independent; for, if not so, then, the case is clearly within the law. The authority of the opinion just quoted, can lose nothing of its weight, from the circumstance, that, at the time when the vessel in that case was seized and condemned, the city of St. Domingo was in possession of the French; and that no efforts have been made, since its surrender to the arms of Great Britain and Spain, to recover the possession of the island, or any part of it. The superior maritime strength of Great Britain, accounts for this circumstance, and precludes all presumption of an implied abandonment by France, of her claim of sovereignty over the island. In the words of the chief justice, in the case quoted, "France has not relinquished her claim, nor has the government of the United States acknowledged the independence of the island."

One of the counsel for the appellants, sensible of the difficulty of clearing this case from the authority of Rose v. Himely [supra], endeavored to avoid it, by considering the island of St. Domingo as a conquered country, belonging first to Great Britain, and by her ceded to Spain. But this ground is as difficult to be maintained as the other; because, it was never yet pretended, that the conquest of a town, or even of a province, divested the original sovereign of more than the country which had submitted to the conqueror; and consequently, no other part of the island passed by the surrender into the hands of Great Britain and Spain, but the town of St. Domingo; and even that is now possessed by the blacks. We are inclined, indeed, to think, that if the whole island had submitted to the arms of Great Britain and Spain, and had by those powers been afterwards surrendered to the blacks, the rights of France would have revived; since the conqueror gains nothing but a temporary right of possession and government, until a pacification; and cannot, by any transfer in the mean time, impair the rights of the former sovereign. But, admitting the soundness of the arguments urged by the appellant's counsel, and that they stood uncontroverted by the decision in Rose v. Himely; still, we apprehend, that in relation to the island of St. Domingo, they would be inapplicable. The court is called upon to construe an act of congress, and to say, whether, within the meaning of the legislature, this island was to be considered as a dependence of France? Although there is nothing in the law itself, to decide this point, yet it is not improper to refer to the acts of our government, in relation to this island, in order to discover the light in which congress viewed it. In pursuing this investigation, we deem it unnecessary to go fur-

ther back into the revolution of St. Domingo, than to the 8th of July, 1801, when a constitution was framed by the people of this island, which was subsequently administered by Toussaint, as governor, and captain-general, under the French government; the supremacy of which, was repeatedly acknowledged by him, as chief of the colonial government. Subsequent to that period, a civil war raged between this colony and France, which was carried on with various success until July 1809, when, by the surrender of the city of St. Domingo, the French army was entirely expelled the island; which has ever since remained in the possession of the blacks, arrayed under different chiefs, contending with each other for the sole command. Previous, however, to this forced abandonment by France, this island was, in 1804, declared by the people to be independent; and the supreme executive power was placed in the hands of Dessalines, with the title of governor-general.

Let us now see what has been the conduct of our government in relation to this island, since the period when it was claimed by France, as a colony, and acknowledged as such, by the colony. On the 28th of February 1806 [2 Stat. 351], congress passed a law to suspend the commercial intercourse between the United States and such parts of the island of St. Domingo, as were not in the possession, and under the acknowledged government of France; which was continued in force until the 4th of March 1808. In the mean time, however, viz. in December 1807, the embargo laws, interdicting the commerce of the United States with all foreign nations, were passed, and consequently, rendered a further continuance of the former law unnecessary. This general interdiction of commerce continued until March 1809, when the embargo laws were repealed, except as to England and France; and a non-importation law, as to those nations, their colonies, and dependencies, and places within their actual possession, was enacted; to take effect from the 20th of May following; which continued in force against France until a late period.

When the non-intercourse law passed, in February 1806, the island of St. Domingo was in a state of open public war with France; having declared herself independent, framed a constitution of government, and shown herself able to maintain that independence. As an independent nation, the United States had an unquestionable right to carry on a commercial intercourse with that island. The attempt of any foreign nation to interdict such commerce, and still worse, a demand upon the government of the United States, to enforce such prohibition by law, would have been an insult, to which no nation ought, and to which our government most certainly would not have submitted. But it is well known, that the law of 1806, was passed in consequence of a remonstrance of the French government, made upon that of the United States, through her minister. The United States were at liberty to acknowledge the independence of St. Domingo, and to treat her as a sovereign power, or to refuse such acknowledgment, and to consider her as a colony and dependence of France. We view the law of 1806, under the circumstances which produced it, as a clear acknowledgment of the sovereignty of France over the island, which no subsequent act of our government, has in any respect impaired. When congress, therefore, by the law on which this information is founded, interdicted the importation into the United States, of goods, &c., from the colonies and dependencies of France, we feel ourselves compelled to say, that St. Domingo was considered by that body as included. So that the government has not only not acknowledged the independence of this island, but has very plainly declared the contrary.

As to the evidence, we shall only observe, that the depositions of Elisha Kane, James Handy, and W. Hunt, together with the acknowledgment of one of the claimants, in his petition to the secretary of the treasury, sufficiently prove, that the cargoes of both vessels, the Sea Nymph and the Emma, were imported from Port-au-Prince, to require exculpatory evidence from the claimants; which no where appears in the record. Sentence of the district court affirmed.

CLARK (UNITED STATES v.). See Cases Nos. 14,801–14,808.

CLARK (WALLACE v.). See Case No. 17,098.

Case No. 2,839.

CLARK v. WASHINGTON.

[2 Cranch, C. C. 502.][1]

Circuit Court, District of Columbia. Dec. 11, 1824.[2]

LOTTERIES—SALE OF RIGHT TO CONDUCT—LIABILITY TO TICKET-HOLDERS.

The corporation of Washington, under the power given by their charter to authorize the drawing of lotteries, sold to one Gillespie, for $100,000, a right to draw a certain lottery. *Held*, that a person who bought a ticket of Gillespie could not recover from the corporation of Washington the prize drawn against that ticket.

[See note at end of case.]

At law. Assumpsit [by Chastein Clark against the mayor, aldermen, and common council of the city of Washington] for $100,000, the amount of a prize drawn against the ticket No. 2,929 in class No. 5 of the National Lottery.

The case was elaborately argued on the 7th, 8th, 9th, and 10th of December, 1824, by Mr. Swann and Mr. Wirt, for plaintiff, and Mr. Jones, for defendants.

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

[2] [Reversed in Clark v. Washington City, 12 Wheat. (25 U. S.) 40.]

CRANCH, Chief Judge (THRUSTON, Circuit Judge, absent). The declaration in this case contains four counts, one of which is for money had and received; the other three are special counts, setting forth the special circumstances, and averring a resulting liability on the part of the defendants to pay the amount of the prize.

The counsel for the defendants, after stating the evidence and testimony, prayed the opinion and instruction of the court to the jury, that if they "find the said evidence so offered on the part of the defendants to be genuine and true as above stated, and that the lottery ticket in the declaration mentioned and offered in evidence as aforesaid was sold to the plaintiff by the said Gillespie as the purchaser of the said lottery, and for his own account and risk, the evidence so offered on the part of the plaintiff is not admissible, competent, and sufficient to charge the defendants in this action." This prayer involves two questions: 1st. Is the plaintiff's evidence admissible notwithstanding the defendants' evidence? 2d. Is it sufficient to support the action notwithstanding the defendants' evidence, and notwithstanding the fact that the ticket was sold to the plaintiff by the said Gillespie as the purchaser of the lottery, and for his own account and risk?

1. Upon the first question we can see no valid objection to the admissibility of the plaintiff's evidence. It consists of acts of congress; by-laws and resolutions of the corporate government of the city of Washington; the acts of the managers appointed under those by-laws; the scheme of the lottery; the advertisement of that scheme; the ticket which drew the prize in question; sundry depositions proving the purchase and lawful possession of the ticket by the plaintiff; the manager's official list of prizes, showing that that ticket drew the prize of $100,000; and the letters of the plaintiff and his agent demanding payment of the prize from Gillespie, and from the mayor of the city, and their refusal to pay it; and the testimony of Mr. Webb, who was admitted to be a competent witness. There seems to be nothing, in the nature of this evidence, to render it inadmissible; and if the declaration sets forth a good cause of action, this evidence tends to support it, and therefore seems to be admissible. If the plaintiffs' evidence, by itself, is admissible, we do not see how it can be rendered inadmissible by any evidence which the defendants can offer. The defendants' evidence may counteract the plaintiff's, but cannot render it inadmissible.

2. The question is, whether, if the jury should find that the ticket was sold to the plaintiff, by Gillespie as the purchaser of the lottery, and for his own account and risk, the plaintiff's evidence is sufficient to support his action, notwithstanding the defendants' evidence. The principal question, upon this branch of the prayer, as we understand it, is, whether the plaintiff can recover in this action, if the jury should be satisfied that Gillespie sold the tickets in his character of purchaser of the lottery with all its benefits and responsibilities, and the sales were for his own benefit and he was to receive the proceeds thereof to his own use, and not as agent of, or for the use of, the corporation, although the jury should be also satisfied, by the evidence, that the plaintiff, at the time of purchasing the ticket, did not know that Gillespie was selling it in the character of purchaser of the lottery as aforesaid, but, in fact, believed he was selling it in the character of agent for the managers, and was led to that belief by the declarations and acts of the managers themselves as well as of Gillespie. This leads to the question, upon what grounds can the defendants be made liable in this action? Their liability must be the consequence of an undertaking, either express or implied. If the undertaking be express, it must be by some corporate act, or by the intervention of some agent authorized to bind them to such an undertaking. No corporate act is shown by which they have expressly undertaken to pay this prize; nor is there evidence of any authority given by the corporation, to any agent, so to bind it. If there be an implied undertaking on the part of the corporation to pay the prize, it must result from some equitable principle of the common law. But what equitable principle is there that will oblige a party to pay money without a valuable consideration? The corporation have received no valuable consideration for such an undertaking. It is true that they received $100,000 from Gillespie; but that was for the license to draw the lottery; which license they were empowered by the act of congress, to grant. The receipt of that sum of money was no consideration as between the defendants and the plaintiff, upon which the law will raise an assumpsit to the extent of the plaintiff's claim. An implied assumpsit can only be coextensive with the consideration. If the defendants had received the money arising from the sales of the tickets, they would have received the fund out of which the prizes were to be paid, and would therefore have received money to the plaintiff's use, and the law would raise an implied assumpsit, on the part of the defendants to pay it.

Whether the defendants did, in law, receive the proceeds of the sales of the tickets, may depend upon the question whether Gillespie acted as the agent of the corporation, and received them to its use, and for its benefit; or whether he received them to his own use as the purchaser of the whole lottery. This question of fact is, by the instruction prayed, left open for the consideration of the jury. Mr. Gillespie may have been the agent of the managers to conduct the drawing, yet if he was not the agent of the

corporation in the receipt of the proceeds of the sales of the tickets, but received them to his own use, as the purchaser of the whole lottery, the corporation cannot be considered, in law, as having received them. We do not think it necessary to say more upon the construction of the ticket, than that it does not import an express undertaking, by the corporation, to pay or to guarantee the payment of the prizes. Upon the whole, the court is of opinion that the plaintiff's evidence is admissible, notwithstanding the defendants' evidence; but that if the jury should find that the evidence so offered as aforesaid on the part of the defendants is genuine and true as stated, and that the lottery ticket, in the declaration mentioned and offered in evidence as aforesaid, was sold to the plaintiff, by the said Gillespie as the purchaser of the said lottery, and for his own account and risk, the evidence so offered on the part of the plaintiff is not sufficient to charge the defendants in this action.

THE COURT refused to instruct the jury, as prayed by Mr. Jones, that, upon the whole evidence in the cause, the plaintiff was not entitled to recover; but, upon the further prayer of Mr. Jones, instructed the jury, in substance, that if they should find, from the evidence, that the lottery was sold to Gillespie, (as stated in the testimony of Mr. Webb,) and that he sold his ticket to the plaintiff, and received the purchase-money therefor, and for all the other tickets in the said lottery, to his own use and benefit, then the plaintiff cannot recover upon the said evidence.

Verdict for plaintiff, $35,000, and interest from 17th March, 1823.

The defendants moved for a new trial, which THE COURT granted. And at April term, 1825, a case was agreed, upon which THE COURT rendered judgment for the defendants, which was reversed by the supreme court. 12 Wheat. [25 U. S.] 40.

[NOTE. Complainant brought error, and the supreme court reversed the judgment and remanded the cause, with directions to enter judgment for the plaintiff.

[The charter of the corporation required that the lotteries authorized by it should be drawn under its superintendence and on its own account. The contract with Gillespie was no more than a sale of the profits of the lottery, and did not, under the circumstances of the case, relieve the corporation from responsibility. The ticket, having been satisfactorily proved to have been issued and sold under authority of the corporation, was properly admissible in evidence, and amounted in fact to the promise of the corporation, made by its authorized agent, to pay the prize. (Synopsis of opinion by Chief Justice Marshall.) Clark v. Mayor, 12 Wheat. (25 U. S.) 40.]

Case No. 2,840.

CLARK v. WILSON.

[Nowhere reported; opinion not now accessible. See next following case, No. 2,841.]

Case No. 2,841.

CLARK v. WILSON.

[3 Wash. C. C. 560.][1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1819.

FOREIGN ATTACHMENT—PARTIES—FORMER ATTACHMENT.

1. Motion to dissolve a foreign attachment. The cause of action stated in the affidavit, which was made by one Smith, as the agent of the plaintiff's testator, was the non-performance, by the defendant, of the stipulations in a charter party, made with the plaintiff's testator, the owner of a ship; the defendant having refused and wholly renounced the employment of the ship on the voyage described in the contract; by which damages were sustained to a large amount. The amount of the plaintiff's claim cannot with propriety be averred or sworn to; and being entirely for unliquidated damages, to determine which no known standard can be referred to, a foreign attachment cannot be sustained.

2. The charter party having been entered into by Smith and the defendant, although in the body of it he states himself the agent of Clark, yet, as all the covenants are made with Smith, and he executed the instrument in his own name, without reference to Clark, the action cannot be sustained in the name of Clark.

3. It is no objection to a foreign attachment, that the plaintiff had sued out an attachment, in another state, for the same cause of action.

4. Quere. If the defendant had given bail in the first attachment, whether a second could be sustained.

This was a rule upon the plaintiff [Clark's executor] to show his cause of action, and why the foreign attachment, which had been issued, should not be dissolved. The plaintiff showed cause, by producing the affidavit of John E. Smith, in which he swears; that, on the 31st August, 1805, a covenant was entered into between the defendant and the deponent as agent of James Clark, the testator, at London, a copy of which is annexed to the affidavit; and that, in pursuance thereof, the ship Portsmouth, therein named, took on board, at Portsmouth, from the defendant, such lawful goods as the defendant thought proper to ship, and proceeded on her voyage for Montevideo, and touched, agreeably to said covenant, at the coast of Africa, for passengers for Montevideo; and, on her voyage thence, the ship, before her arrival at Montevideo, was, without any fault of the owner or his agents, seized on the coast of Africa and sent to London, where she was detained for a long time, and then liberated, and restored to the deponent, as agent of Clark. That, with all possible despatch, he caused the said ship to be repaired, and then proposed to the defendant to cause the said ship to prosecute and complete the aforesaid voyage, and to do and perform every thing incumbent on him to do by the terms of the

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

said covenant; and that he was willing and ready to perform the same. But the defendant did not, and would not, permit the ship to perform the voyage, and refused so to do; and absolutely violated his contract therein, and wholly renounced the charter party, and the farther prosecution of the transaction connected therewith. That, if the said voyage had been proceeded in, agreeably to the covenant, and the deponent's offer as agent as aforesaid, the ship would have been employed during her said voyage 24 months, as the defendant believes; which, agreeably to the terms of the covenant, would have yielded a freight of £16,080 2s., and which, with the exception of a small credit, has been lost to the plaintiff, by the breach of the said covenant by the defendant. He firmly believes, that damages, including interest, have been sustained by the plaintiff, by said violation, to the amount of 102,000 dollars. The material parts of a charter party similar to that referred to in this affidavit, are well stated by the judge in 8 East, 437.

WASHINGTON, Circuit Justice, delivered the opinion of the court. Various reasons have been assigned why this attachment should be dissolved, of which two only will be particularly examined. The first is, that this action is brought to recover unliquidated damages, which, it is contended, cannot be the subject of a foreign attachment under the law of this state. This subject was very much considered in the case of Fisher v. Consequa [Case No. 4,816], cited at the bar; and although we do not think that the court, in that case, gave too liberal a construction to the attachment law, we should nevertheless examine the ground with great caution, before we make any further advance. The principle decided in that case was, that a demand arising ex contractu, the amount of which was ascertained, or which was susceptible of ascertainment by some standard, referable to the contract itself, sufficiently certain to enable the plaintiff, by affidavit, to aver it, or a jury to find it; might be the foundation of a proceeding by way of foreign attachment, without reference to the form of action, or to the technical definition of debt, the expression used in the law.

The cause of action shown in this case was, in substance, that the defendant, in the attachment, agreed to deliver to the plaintiff teas of a certain quality, and suited to a particular market; and, on failure to do so, to pay the difference between teas of the stipulated quality, and such as should be delivered; that teas of inferior quality to that stated in the agreement, were delivered; and the plaintiff swore, that the difference amounted to a precise sum, in which the defendant was justly indebted to him. The standard, therefore, was the difference in the quality of two articles, and all that remained to be ascertained, was the value or amount of such difference; which was as easily ascertained, as the value of goods sold, where no price was agreed upon. The standard was fixed by the contract itself; and the amount of the claim, in reference to it, was so plainly to be ascertained, that the plaintiff was enabled to aver it in his affidavit, and he did so.

This action is founded on a charter party, by which the defendant covenants to pay to John E. Smith, his executors, &c., £670 per month; during the time the ship shall be employed by the freighter, during her intended voyage; and so in proportion for any time less than a month, in full of the freight of the said vessel; and he covenants also, to pay two third parts of all pilotage and port charges, during the voyage; and also two third parts of all expenses of storing the ship's cargo at Montevideo—such freight, pilotage, and port charges, to be paid on the arrival and discharge of the ship at her destined port in Great Britain. He further covenants to furnish sufficient water and provisions, for all passengers she may take on board, during the voyage to Montevideo. These are all the covenants in this instrument, on the part of the defendant; and it is obvious, that he is not liable for a breach of any of them, inasmuch as his performance depended upon the completion of the voyage, and the arrival and discharge of the ship at her destined port in Great Britain.

Whether the plaintiff can maintain any action upon this charter party, by reason of the refusal of the defendant to take on board a cargo, and to prosecute the voyage, is a question which has not been considered by the court; nor is it necessary that it should be decided. For, if an action can be maintained upon it, it still remains to be inquired, by what standard are the damages, which the plaintiff has sustained on account of the refusal of the defendant to perform the voyage, to be ascertained? That furnished by the contract, was a certain sum per month, during the voyage, to be ascertained at its termination; but that event never took place; and consequently, no rule can be deduced from this source, to fit the present case. The affidavit, showing the cause of action, refers to the same standard; and must necessarily be equally defective. The plaintiff's counsel is therefore compelled to go out of the contract; and there, finding himself perfectly at large, he has suggested a scheme for ascertaining the amount of the plaintiff's loss; which he considers to be so entirely unexceptionable, that there could not be two opposing opinions respecting it, entertained by legal minds. This rule is, to deduct from the ordinary time consumed in performing such a voyage as that described in this charter party, estimated at the rate of £670 sterling per month, the usual expenses incident to it; and to give to the plaintiff the difference. We must be permitted to dissent from such a standard as this;

because, if it be such a one as deserves the appellation of a legal rule, it would apply as well to the case of an original refusal of the freighter to proceed on the voyage, as to the subsequent refusal, after the fruitless attempt which was made in this case; and then it would happen, that the plaintiff would be entitled to the stipulated freight, as if it had been earned; and yet the ship might be employed, during the whole period of the supposed duration of the voyage, in earning other freights for the owner. This would be most unjust; and yet it would result from the proposed rule:—discard it, and then it is not easy to perceive any other which affords a solitary landmark to guide, either the plaintiff, in stating and swearing to the amount of his demand, or the jury in ascertaining it. Smith swears, that he believes the plaintiff has sustained damages, including interest, equal to the sum of 102,000 dollars; and this belief is obviously founded on another, that the freight would have amounted to that sum, if more contingencies than we have time to enumerate, had not happened. But, it has been already observed, that this witness assigns a very unsatisfactory reason for his belief; and consequently, it is entitled to very little respect.

This, then, is a case, in which unliquidated damages are demanded;—in which, the contract alleged as the cause of action, affords no rule for ascertaining them;—in which, the amount is not, and cannot, with propriety, be averred in the affidavit; and which is, and must be, altogether uncertain, until the jury have ascertained it; for which operation, no definite rule can be presented to them. In our opinion, it has not one feature of resemblance to the case of Fisher v. Consequa [supra]. In the latter, there was a promise by the defendant, alleged and supported by oath, to pay the difference between two articles of different value; in the former, there is no promise or covenant of any kind, verified by oath, or even stated, to pay anything in the event which took place. 2. We are of opinion, that this attachment cannot be supported; because the plaintiff has shown no cause of action whatever. In answer to this rule, calling upon him to show his cause of action, the plaintiff exhibits a charter party, entered into between the defendant and John E. Smith, the only parties who executed it, and between whom all the covenants are made. John E. Smith styles himself, it is true, in this instrument, agent of James Clark; and in his affidavit, he states, that he acted in this transaction as agent. But notwithstanding these allegations, it is too much to contend, that James Clark, who, by himself, or by his attorney, did not execute the deed, who is not even stated in the body of it to be a party, and with whom no one covenant is made, can support this action.

It is admitted, by the plaintiff's counsel, that, if the action were in the name of a total stranger to this transaction, advantage might be taken of it upon this rule; but it is insisted that the plaintiff is beneficially interested in this covenant, and consequently, that the defendant should be put to his plea, to bar the plaintiff's right to maintain the action. We cannot accede to this distinction. The question is not whether the plaintiff is a stranger in interest, but whether he shows a probable cause of action in himself? and if by his own showing he is not entitled to bring the action, the defendant ought not to be subjected to the inconvenience of giving special bail; in order to release his property from the attachment, and to enable him to defeat the action by plea. In a doubtful case, depending either upon the law or the evidence, the court will not interfere in this summary mode to take from the plaintiff the security he has obtained. But where the defect is apparent from the plaintiff's own showing, we take the rule to be otherwise. The defendant assigned another cause for dissolving this attachment, which the court does not think sufficient:—this was the record of an attachment, sued out by this plaintiff against this defendant, in the state of Maryland, for the same cause of action, with a capias claim against the garnishee, who, it is sworn by the plaintiff, has effects in his hands belonging to the defendant, and who, it appears by the sheriff's return, has been arrested. The mere pending of an attachment by the plaintiff against the defendant, for the same cause of action, in another state, affords no ground for dissolving this attachment, although that was the first laid; since the funds found in one state may be quite insufficient to discharge the debt. The case might be different, if the defendant had given bail on the first attachment, unless under very special circumstances, addressed to the sound discretion of the court. The rule must be made absolute for dissolving the attachment.

CLARK, The JULIET C. v. WELSH. See Case No. 7,580.

CLARK, The W. H. See Case No. 17,482.

Case No. 2,842.

In re CLARKE.

[2 Ben. 72;[1] Bankr. Reg. Supp. 41; 1 N. B. R. 188; 6 Int. Rev. Rec. 206.]

District Court, E. D. New York. Dec., 1867.

BANKRUPTCY—REGISTER'S FEES—ADJOURNED MEETINGS.

[Where, on application of an opposing creditor, the register orders the bankrupt to appear for examination, and on his appearance the examination is adjourned at the instance of the creditors, the register is not entitled to a fee of five dollars as for a "day's service while actually employed under the especial order of the court."]

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

[In this case Register Winslow certified [Nov. 22, 1867], that G. A. Seixas, attorney for a creditor who had proved his claim, applied for an order for examination of bankrupt, which was granted. Upon the return of the order the bankrupt appeared for examination with his attorney, but the attorney for the creditor was not ready, and at his request the examination was postponed.

[The attorney claimed and insisted that the register's fees for services in taking examination of bankrupt under an order for that purpose, and granted upon the application of a creditor, were paid out of the bankrupt's deposit, under section 47, eleventh paragraph [Act 1867; 14 Stat. 540]; that an adjournment of an examination without taking any testimony was merely a meeting under 3d paragraph of same section, and $3 are the fees therefor instead of $5, under the 8th paragraph of same section; that the meeting at which testimony is taken is only to be charged for under same section, 3d paragraph, $3.

[The register claimed that this was a day's service under a special order,—the order for the examination,—and that the register's fee was (5) five dollars. Section 47, subd. 8.

[1. Section 47 prescribes the register's fees, and when paid by the bankrupt he is to pay according to those rates, and when the services are rendered for creditors and others they are to pay according to the same rates. Section 4 provides that "the fees of said registers as established by this act and by the general rules and orders required to be framed under it, shall be paid to them by the parties for whom the services may be rendered, in the course of proceedings authorized by this act." This service was not rendered for the benefit of the bankrupt, and upon no pretence can he be called to pay for it. The service is for the benefit of the creditor; he is in search of concealed assets, or is endeavoring to show that his claim is of such a nature that a discharge in bankruptcy will not wipe it out, or is searching for facts to defeat the proceeding altogether; so his claim may stand until barred by the statute of limitations if not paid.

[2. The fee for this service is chargeable under the 8th subdivision, and not under the 3d.

[Judge Blatchford has held in MacIntire's Case [Case No. 8,821] that the meeting referred to in the 3d subdivision and elsewhere means a "meeting of creditors" such as is spoken of in section 12, pp. 27 and 28.][2]

BENEDICT, District Judge. A register is not entitled to five dollars upon the adjournment of an examination, as for "a day's service while actually employed under the especial order of the court," where, on the application of an opposing creditor, an order has been made by the register that the bankrupt attend and be examined before him, and on the day fixed the bankrupt appeared, but the opposing creditor was not ready, and accordingly the examination was adjourned.

[2] [From Bankr. Reg. Supp. 41.]

Case No. 2,843.

In re CLARKE et al.

[2 Hughes, 405;[1] 10 N. B. R. 21.]

District Court, E. D. Virginia. March 28, 1874.

BANKRUPTCY—PREFERENCE — SURRENDER—PROOF OF DEBT—INSOLVENCY—NOTICE OF—MISTAKE—CORRECTION IN EQUITY.

1. The provisions of section 5084, Rev. St. U. S., must be construed in connection with the clause in section 5021, which prohibits certain creditors to prove their debts, so as, if possible, both may stand.

2. Where the trustee of an illegally preferred creditor surrenders the trust property to the assignee without suit, the preferred creditor may prove his debt.

3. If a deed of trust by mistake describes a note secured as signed by the maker and indorsed by an indorser, it may be corrected in equity, so as to cover a bond signed by the principal and signed by a surety as such.

4. The section 5128 does not require that the debtor should know that he is insolvent, but only that the fact should exist.

5. It does not require that the creditor should be aware that reasonable cause existed for believing the debtor insolvent, but only that the reasonable cause should exist. (This decision was before the amendment of June 22d, 1874, requiring knowledge on the part of the creditor.)

[Cited in Alderdice v. State Bank of Virginia, Case No. 154.]

6. The existence of a financial crisis constitutes of itself reasonable cause to believe men, otherwise in doubtful circumstances, to be insolvent.

In bankruptcy. This was a case of involuntary bankruptcy. The adjudication was on the 9th day of January, 1874. A deed had been given by the firm of Clarke & Daughtrey, on the 19th of September, to A. C. Withers, trustee, to secure certain debts to T. W. Smith, a merchant of Suffolk, to the amount of $1,500. By this deed the firm granted to the trustee all their estate, both real and personal, of every description, then owned and enjoyed by them, consisting of a steam sawmill and fixtures, teams, tramroad, tools, wagons, and all other appliances and appurtenances of the mill; also two tracts of land connected with their operations as lumber manufacturers, and all timber, logs, or lumber then on hand, or that might be on hand at any time before sale under the deed, including all the personalty or realty of every sort and description owned by them up to the time of foreclosure. The debts secured were evidenced by promissory notes to the amount of $1200, and the deed also secured a prospective store account, which the firm was to

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

be at liberty to run up to the amount of $300 in addition. The grantors also stipulated in the deed to waive the benefit of their homestead exemption as to the notes and the accounts secured. Thus, the instrument not only covered all property of every description which the firm then owned, but all they should own up to the foreclosure of the deed, and not only secured existing debts, but a future debt of open account besides. The preferred creditor in the deed declined to put the assignee to his bill in equity to test the validity of the deeds, and after having surrendered the property to the assignee, voluntarily made himself party defendant to a petition filed in bankruptcy submitting the question of the validity of the deed. The general creditors, through the assignee, John R. Kilby, assail this deed, as one which if not void by common law and the statute law of the state, as designed to secure advantages to the debtors in fraud of other creditors, was at least void as a deed of preference made in fraud of the purposes of the bankrupt act of 1867 [14 Stat. 534].

Thomas R. Kilby, for general creditors.

A. C. Withers, and Thomas R. Borland, for preferred creditors.

HUGHES, District Judge. I need not advert to the law of Virginia relating to fraudulent acts. The first clause of the 35th section of the bankrupt act virtually embodies the state law, and, adding to its provisions, declares that if any person, being insolvent within four months before the filing of the petition against him, with a view to give preference to any creditor, makes any transfer or conveyance of any part of his property, absolutely or conditionally (the person to be benefited by such transfer having reasonable cause to believe the grantor to be insolvent, and that such transfer is made in fraud of the provisions of this act), the same shall be void, etc., etc. In order to succeed, it is incumbent on the creditors who assail this deed to show four things, viz.: 1st. That on the 19th of September last the bankrupts were insolvent. 2d. That the trust deed was intended to give a preference to T. W. Smith. 3d. That T. W. Smith had reasonable cause to believe that Clarke & Daughtrey were insolvent, and 4th. That Smith had reasonable cause to believe that the trust deed was made in fraud of the bankrupt act. [Toof v. Martin] 13 Wall. [80 U. S.] 46.

The essential questions are, whether the bankrupts were insolvent on the 19th day of September last, and whether Smith had reasonable cause to believe them so. If they were insolvent, and he had reasonable cause to believe they were, the second and fourth requirements follow as corollaries from these two facts. For, in regard to the fourth requirement, it is held—[Toof v. Martin] 13 Wall. [80 U. S.] 51—that the bankrupt act, having been designed to secure an equal distribution of the property of an insolvent debtor among his creditors, any transfer made with a view to secure his property or any part of it to one creditor, is a transfer in fraud of the act, every one being presumed to know the necessary and unavoidable consequence of his acts.

The questions for decision are, therefore, whether Clarke & Daughtrey were insolvent in September, and whether Smith had reasonable cause to believe they were. It is not necessary that Clarke & Daughtrey should have known or believed themselves to be insolvent, but only that they were in fact insolvent. It is not necessary that Smith should have believed they were insolvent, but only that he should have had reasonable cause to believe they were. As to the insolvency the facts were as follows: Clarke & Daughtrey had previously executed a deed of trust on all their existing property, on the 11th April, 1873; and this deed had not been recorded until the 4th September, 1873, two weeks before the execution of the deed of trust for the benefit of Smith. This deed was known to Smith when he took the deed for his own benefit on the 19th September. The deed of April was made for the benefit of Jones & Riddick to secure $1500, nearly all of which debt was still due and unpaid in September; and Smith knew the fact. Clarke testified by items in February to debts which he then recollected to have been owing by the firm on the 11th of September to the amount of $4,041.65. It is reasonable to suppose that their entire indebtedness in September was greater. The amount of their debts scheduled in bankruptcy in January was $5,915.72. Clarke testifies that before going to T. W. Smith in September for a loan of $500 in addition to what his firm already owed Smith, he had tried Jones & Riddick for a like loan without success, and had also tried the firm of Smith & Clark in vain. T. W. Smith knew of the application to Jones & Riddick and of its rejection before he took the deed in question. He also knew of the application to Smith & Clark, and of its failure. Several witnesses testify that these occurrences took place at the beginning of the financial crisis of last fall, when the solvency of all men engaged in trade was put to test, and when all business men were more or less pressed for money; a state of things calculated to put everybody on inquiry as to the solvency of others; a state of things tending itself to produce insolvency in doubtful cases, and itself constituting reasonable cause for believing doubtful men to be insolvent.

It is plain, from all the evidence in the cause, that, in the sense of not being able to meet their obligations as they matured in the ordinary course of business, this firm of Clarke & Daughtrey were insolvent. There is cogent evidence to the effect that they had been so during the whole summer. Even their laborers had been put off, and the wages were in great part overdue and unpaid in September. They were then and

had been quite unable to meet current payments. Whether the firm were absolutely insolvent or not in September depends upon a comparison of their debts and assets. Clarke itemizes from memory debts due in September to the amount of $4041. They were not probably less than $5000. The schedules show, as of January, that they were $5915. The debts being somewhere between five and six thousand dollars, what was the value of their property in September? We have no exact data for that date. The firm scheduled its value in January, embracing very nearly the same property which they had held in September, at a gross estimate, made by themselves, of $3565. If we add some $600, due them from sales in Baltimore, their assets do not show a value of more than $4200. Their assets actually sold (except the Baltimore credit) at what the assignee reported as a remarkably good sale (which was made on time) for the gross sum of $3275.28. These facts show that the cash value of the assets of the firm must have been materially short of the amount of their debts in September, and there is no reasonable doubt that these men were in fact insolvent at that date, whether they or their friends knew it or not. This conclusion is strongly corroborated by the additional fact that the bargain which they made with Smith, set forth in the trust deed which they gave for his benefit, was one which no man in solvent circumstances would be likely to give at all, or could give without instant destruction to his credit.

The firm of Clarke & Daughtrey being insolvent when they gave this deed of preference to Smith, the next question is, Did he have reasonable cause to believe they were? The extreme financial pressure which had then just set in must have suggested the question of solvency in a very cogent manner as to such a firm as Clarke & Daughtrey, who had already given a trust deed which remained unsatisfied. The stringent and sweeping provisions of the deed which Smith exacted of them implies, in its whole tenor, that Smith distrusted their solvency, and was providing for its probable development. He certainly knew that the firm were unable to meet the two notes already due to himself. He certainly knew that the debt of some $1400 due to Jones & Riddick, secured by the first deed, was unsatisfied, and that they could not pay it. He certainly knew that, without selling out the property covered by the two deeds, it was not possible for Clarke & Daughtrey, on the 19th of September, 1873, to pay their debts, or even to pay that portion of their debts secured by the two deeds. He, therefore, had reasonable cause not only to believe but to know the fact of insolvency, and he had reasonable cause also to believe that if the firm were then required to liquidate their debts, his deed would operate in fraud of that equal distribution of their estate among creditors which is sought to be secured by the bankrupt act. He not only had cause to believe these facts, but he is morally precluded from denying them. For no creditor has a right to claim, after exacting an assignment so stringent as to destroy the credit of an insolvent debtor and force him into bankruptcy, that he had no reasonable cause to know that the debtor was insolvent, and that the assignment would operate in fraud of a pro rata distribution of the effects in bankruptcy. This deed, interpreted by the proofs in the case, is as clear a violation of the provisions of the first clause of the thirty-fifth section of the bankrupt act as is ever likely to come for question before a court of law. It is accordingly set aside and annulled.

It is further insisted, on behalf of the general creditors, that this being a case of involuntary bankruptcy, and the adjudication having been founded upon this deed as one of the acts of bankruptcy charged to have been committed, therefore, the final clause of section 39 of the bankrupt act applies to this claim of Smith, which clause provides that a creditor who has received a conveyance such as the deed in question, having reasonable cause to believe that a fraud on the act was intended, shall not be allowed to prove his debt in bankruptcy. The provisions of this section must be construed in connection with those of section twenty-third, which allows a creditor who has accepted a deed of preference, and who has voluntarily surrendered the advantage given by such deed, by allowing the trustee to surrender the property conveyed to the assignee in bankruptcy, to share pari passu with other creditors. It has been held in many cases that where the creditor avails himself of the provisions of section 23, by voluntarily surrendering the property to the assignee, he ceases to be a party to the fraud and may prove his debt. The trustee here did surrender the property to the assignee in bankruptcy without demur. The creditor in this deed, T. W. Smith, is therefore allowed to share in the distribution of the estate on the footing of a general creditor.

Another question, which has been argued in this cause, is upon the power of this court, as a court of equity, to correct a mistake which was made in the description of one of the debts secured by the deed of 11th April. The amount secured in that instrument was $1,500. A part of that amount was represented by a bond for $250 dated February 5th, 1873. This bond was partly in the form of a promissory note, yet concluded with words, "witness our hand and seals," and was signed and sealed by Clarke & Daughtrey, and by Jones as surety. It was described in the trust deed as a note of Clarke & Daughtrey, indorsed by Jones. All parties to the note, and to the trust deed admit the mistake, and that this bond was the obligation referred to in the deed as a note indorsed. There can be no doubt of the power

of this court to correct this mistake of description, by allowing the bond to be paid out of the trust fund, all parties admitting that this was the paper intended to be provided for by the deed. It was an error made by the scrivener, which was not detected by the parties to the deed when executing it, in consequence of the bond being written in the form of a note. The authorities for the exercise of this power of correction are so numerous that they need not be cited. Besides those adduced in argument by Judge Garnett, others are given by Kerr in his book on Injunctions, p. 55. The reasons are given by Story in his chapter on "Mistake." The bond must be paid as part of the amount secured by the trust deed of 11th April.

Case No. 2,844.

In re CLARKE.

[2 N. B. R. 110 (Quarto, 44).][1]

District Court, S. D. New York. Sept. 22, 1868.

BANKRUPTCY—FRAUD IN CONTRACTING DEBT—DISCHARGE.

1. An objection to the discharge of bankrupt, grounded upon the fact that the debt was created by fraud, is not a valid one.

2. Debts created by fraud are excepted from the operation of the discharge.

[Cited in Re Wright, Case No. 18,065.]

BLATCHFORD, District Judge. The specifications filed by the creditor as grounds of objection to the discharge, go entirely to the point that the debt due to the creditor was created by the fraud of the bankrupt. This is not a ground, under section twenty-nine [Act 1867; 14 Stat. 531], for withholding a discharge. If the debt was in fact created by the fraud of the bankrupt this will (sections thirty-two and thirty-three) except the debt from the operation of the discharge, and in that way, as to that debt, a discharge will be really withheld. A discharge is granted.

CLARKE (BANK OF ALEXANDRIA v.). See Case No. 844.

CLARKE (BOONE v.). See Case No. 1,641.

CLARKE (CASE v.). See Case No. 2,490.

Case No. 2,845.

CLARKE et al. v. CHASE et al.

[Brunner, Col. Cas. 638;[2] 21 Law Rep. 34.]

Circuit Court, D. Massachusetts, 1856.

REMOVAL OF CAUSE FROM STATE COURT—EFFECT ON ATTACHMENT—ATTACHMENT—EFFECT OF ASSIGNMENT ON.

1. On the removal of a cause, an attachment will have the same effect as if the cause had remained in the state court.

2. Rights under an attachment depend on the state of the property when the attachment was levied, and cannot be affected by a transfer of the securities for the debt by the assignee under a void assignment.

This was a question whether the Manufacturers' Insurance Company were chargeable as the trustee of Franklin Chase. The plaintiffs [J. W. Clarke and others], being citizens of Massachusetts, brought an action against Chase, a citizen of the state of Rhode Island, in the supreme judicial court of the commonwealth of Massachusetts, and summoned the Manufacturers' Insurance Company as his trustee, under the trustee process provided by the law of that state. The defendant removed the suit to this court pursuant to the twelfth section of the judiciary act of 1789 (1 Stat. 79). It appeared from the disclosures of the trustee that on the 3d day of January, 1854, one Henry Parks procured a policy of insurance, to be underwritten by the Manufacturers' Insurance Company, on machinery and stock in a cotton mill; and in case of loss $2,500 of the amount insured was, by the policy, made payable to the defendant Chase. That before the service of the trustee process, a loss had occurred which made the sum of $2,500 due and payable, and that the trustee was ready to pay it to its rightful owner; but that the trustee was informed that one George W. Butts claims to be the owner of the said sum of money by assignment from the defendant Chase. Under provisions of the law of Massachusetts, Butts intervened, and made allegations, from which, being admitted to be true, it appeared that on the 6th day of January, 1854, before the service of the trustee process, Chase, being insolvent, conveyed to Butts, a citizen of the state of Rhode Island, by a voluntary assignment, all his property, including his rights under the policy of insurance above mentioned, in trust, to pay, first, certain preferred creditors, and secondly, to pay, pro rata, all such of his creditors as should release the assignor from their claims. That Chase was the creditor of Parks, who procured the policy, in the sum of $5,699.65, and the sum of $2,500 was made payable to Chase as security therefor. That after the assignment was made to Butts, this indebtedness of Parks was consolidated and liquidated, and Parks gave his promissory note for the amount, payable to Butts as assignee, and as security therefor executed a mortgage on real property. That Butts, after the service of the trustee process, assigned this note and mortgage, and the assignee afterwards acknowledged payment thereof on record; and afterwards Parks assigned to Butts all his right and interest in the said sum of $2,500; and that all these transactions took place within and between citizens of the state of Rhode Island.

Mr. Hillard, for plaintiffs.

Mr. Ball, contra.

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[2] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

CURTIS, Circuit Justice. The first question is, whether the title made by Chase to Butts, by the voluntary assignment for the benefit of creditors, can prevail over the attachment. It is admitted at the bar that it is settled law in the supreme court of Massachusetts, that the assignment could not prevail over the attachment. The cases of Ingraham v. Geyer, 13 Mass. 146, and Zipcey v. Thompson, 1 Gray, 243, and Edwards v. Mitchell, Id. 239, are decisive on this subject. And if the attachment was valid by the laws of Massachusetts, the express words of the twelfth section of the judiciary act, under which this suit was removed to this court, make that attachment equally valid here. Its language is: "And any attachment of the goods or estate of the defendant by the original process shall hold the goods or estate so attached, to answer to final judgment, in the same manner as by the laws of such state they would have been holden to answer the final judgment, had it been rendered by the court in which the suit commenced." I have been referred to the decision of Mr. Justice Grier, in Caskie v. Webster [Case No. 2,500]. But this is purely a question of the local law of Massachusetts, and that being settled, the judiciary act requires me to administer it precisely as it would have been administered in the supreme court of Massachusetts, if the suit had not been thence removed.

The next question is, whether the consolidation of the debt, as security for which the $2,500 was made payable to Chase, and the giving of a promissory note secured by a mortgage to Butts, the assignee, put an end to any attachable interest of Chase, the assignor. As respects any title acquired by Butts, as assignee, by means of this transaction, it is open to precisely the same objection as his original title under the deed of assignment; for it was but a mode of perfecting that same title. Nor can it be maintained that what was thus done amounted to a payment of the debt for which the $2,500 stood as security, and so released that security. It is not alleged that the new note was negotiable; and if it were, the taking of a negotiable note is not presumptive evidence of payment in Rhode Island; and there is no allegation that it was intended as a payment. The old evidences of debt were relinquished; but there was no reason for retaining them after the debts they evidenced had been consolidated, and new evidence of the liquidated sum given.

Neither can it be maintained that the discharge of the mortgage by the assignee after the service of the trustee process destroyed the attachment. The plaintiffs' title depends on the state of things existing when the attachment was made. Chase was the legal owner of this sum of money, which was absolutely due to him. If he had received it, so much of his claim against Parks would have been paid. In contemplation of law, as between him and Parks, Chase does receive it when it is appropriated by law to pay the debt due to the plaintiffs. And while the plaintiffs are seeking for this appropriation, and the money is sequestered, it would not be competent for Chase and Parks to defeat Chase's title. And what Chase and Parks cannot do to this effect, Butts, or his assignee, and Parks cannot do.

It inflicts no injury on Parks, and deprives him of no right to require him to consider the $2,500 in the hands of the insurance company as so much money already paid by him; and to hold that if he chooses to pay that sum to Chase or his representative, it is a voluntary payment so far as the rights of the plaintiffs are concerned. It is a voluntary payment; for while this process is pending Parks could not be compelled to pay; nor would he be allowed in any event to lose anything by force of this attachment. I hold the trustee chargeable.

Case No. 2,846.

CLARKE et al. v. CLARKE et al.

[3 Woods, 408.][1]

Circuit Court, S. D. Georgia. April Term, 1877.

STATE TAXATION OF EXPORTS.

Logs which were the property and in possession of persons engaged exclusively in exporting timber from the United States to foreign countries, which had been purchased from citizens of Georgia for the purpose of exportation, were in a port of Georgia and of the United States awaiting shipment, though not on shipboard, which had been inspected according to the laws of Georgia and were afterwards exported by the owners, were, while so awaiting shipment and still on land, "exports" within the meaning of section 1, article 10, of the constitution of the United States, and as such were protected from imposts or duties or any taxation by the state of Georgia by whatever name it might be called, except such as was absolutely necessary for the execution of the inspection laws of the state.

[Cited in Kidd v. Flagler, 54 Fed. 369.]

Heard on demurrer to the declaration. The declaration averred in substance: That the plaintiffs [James E. Clarke & Co.] were aliens and subjects of Great Britain and partners in business; that on the first day of April, 1875, at the city of Darien in the state of Georgia, the plaintiffs, as such partners, were merchants engaged exclusively in exporting timber from the port of Darien to Great Britain and to other foreign countries, and had in their possession in said city a large quantity of timber as exports which had been purchased and fully paid for to citizens of Georgia, and inspected according to the laws of the state of Georgia before the said April 1, 1875, and at the time was being shipped and awaiting shipment to Great Britain, and which, before the trespasses of the defendants complained of, was

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

in fact exported. That the plaintiffs were required by defendant, S. E. Clarke, to return said timber for taxes, which they declined to do. That said Clarke, pretending to act as receiver of tax returns for the county of McIntosh, assessed said timber at a valuation of $16,000, and assessed a state and county tax thereon of $240. That said Clarke, after said timber had been exported as aforesaid, placed the said assessment in the hands of the defendant Allen McDonald, who claimed to be collector of taxes for McIntosh county, and said McDonald, after demanding said tax of plaintiffs, which they refused to pay, issued an execution and delivered the same to the defendant Thomas B. Blount, sheriff, commanding him to enforce the payment of said tax out of the property of the plaintiffs. Thereupon Blount levied said execution on one hundred square logs, the property of plaintiffs, and sold and disposed of, at public sale, forty-four of said logs of timber, of the value of one thousand dollars, for which they bring suit. To this declaration the defendants [S. E. Clarke and others] filed a general demurrer.

Julian Hartridge and W. S. Chisholm, for plaintiffs.

Rufus E. Lester (who filed a brief of N. J. Hammond, lately attorney general of Georgia), for defendants.

WOODS, Circuit Judge. The plaintiffs claim that the logs of timber mentioned in the declaration on which the said tax was levied, were exports, and therefore exempt from state taxation under section 10, article 1, of the constitution of the United States, which declares: "No state shall, without the consent of the congress, levy any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws." Section 799 of the Code of Georgia declares that "all real and personal estate, whether owned by individuals or corporations, resident or nonresident, are liable to taxation unless specially exempted," and section 798 of the same Code exempts from taxation "all property specially exempted by the constitution of the United States."

The defendants claim, first, that the timber logs of the plaintiffs on which the tax was levied were not "exports" in the sense in which that word is used in the constitution of the United States; and, second, that the tax levied was neither an "impost" nor a "duty," and therefore the said tax was not prohibited by the constitution of the United States. The logs on which the tax was levied were the property of, and were in possession of persons engaged exclusively in exporting timber to foreign countries, they were purchased from citizens of Georgia for the purpose of exportation, they were in a port of the United States awaiting shipment, they had been inspected according to the laws of the state, and the purpose of the owners to export the logs was, after the levy of the tax thereon, actually carried out and the logs were exported. It is clear, and it seems to be conceded by defendants, that if the logs had actually been on shipboard when the tax was levied, they might have well been considered exports. Is the fact that they were still on land, though awaiting shipment, such a circumstance as deprives them of their character as exports? The reasoning of the court in the case of Brown v. Maryland, 12 Wheat. [25 U. S.] 419, demonstrates that it is not. The court in construing section 10, article 1, of the constitution, says: "The limitation is, 'except what may be absolutely necessary for executing the inspection laws.' Now, the inspection laws, so far as they act on articles for exportation, are generally executed on land before the article is put on board the vessel; so far as they act on importations, they are generally executed on articles which are landed. The tax or duty of inspection, then, is a tax which is frequently if not always paid for services performed on land, while the article is in the bosom of the country. Yet this tax is an exception to the prohibition on the states to lay duties on imports or exports. The exception was made because the tax would otherwise have been within the prohibition." Mr. Madison, in defending the clause under consideration, in the convention of Virginia called to adopt the constitution, said: "Some states export the produce of other states; Virginia exports the produce of North Carolina; Pennsylvania those of New Jersey and Delaware, and Rhode Island those of Connecticut and Massachusetts. The states exporting wished to retain the power of laying duties on exports to enable them to pay expenses incurred. The states whose produce was exported by other states were extremely jealous, lest a contribution should be raised of them by the exporting states by laying heavy duties on their own commodities. If this clause be fully considered, it will be found to be more consistent with justice and equity than any other practicable mode." These views show that, in the opinion of Mr. Madison, the commodities of the producing states were considered exports even before they reached the port of shipment. It seems clear, then, from these authorities, that these logs were, when the tax was laid upon them, even though they were still on land, exports within the meaning of the constitution of the United States, and as such protected from imposts or duties by the state. But the defendants claim that the tax upon the logs was a tax levied upon the general mass of property in the state, and does not therefore fall within the constitutional prohibition, being neither an "impost" nor a "duty." This construction would defeat the purpose for which section 10, article 1, was adopted. It would put it in the power of the state, by changing the manner of levying the tax, and

by giving it another name, to evade the prohibition of the constitution.

In the case of Low v. Austin, 13 Wall. [70 U. S.] 29, the supreme court of the United States, having the subject under consideration, said: "The supreme court of California appears from its opinion to have considered the present case as excepted from the rule laid down in Brown v. Maryland [supra], because the tax levied is not directly upon imports as such, and consequently the goods imported are not subjected to any burden as a class, but are only included as a part of the whole property of its citizens, which is subjected equally to an ad valorem tax. But the obvious answer to this position is found in the fact which is in substance expressed in the citations, made from the opinions of Marshall and Taney, that the goods imported do not lose their character as imports and become incorporated into the mass of the property of the state until they have passed from the control of the importer or been broken up by him from their original cases. While retaining their character as imports a tax upon them in any shape is within the constitutional prohibition. The extent and character of the tax are mere matters of legislative discretion." This authority is directly opposed to the claim of defendants under consideration.

These views dispose of the main questions in this case. In the case of Brown v. Maryland, supra, Mr. Chief Justice Marshall remarks: "The constitutional prohibition to levy a duty on imports may certainly come in conflict with their acknowledged power to tax persons and property within their territories. The power and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between black and white, approach so nearly as to perplex the understanding as colors perplex the vision in making a distinction between them, yet the distinction exists and must be marked as the cases arise. Till they do arise it might be premature to state every rule as being universal in its application." Profiting by this caution, all I undertake to decide in this case is, that under the circumstances set out in the declaration, the logs of the plaintiffs were exports and exempted from state taxation by the constitution of the United States. As they are exempted by the federal constitution they were exempted from state taxation by express provision of the Code of Georgia. Code, § 798, par. 1; Act 1875, § 9; [Laws Ga.] 117. The defendants, in enforcing the tax levied on plaintiffs' property, were acting without authority of law. The assessor and collector were clearly without jurisdiction to assess and collect the tax, and the execution issued to the sheriff is no protection to him. They are all trespassers alike, and this action is well brought against them. Wise v. Withers, 3 Cranch [7 U. S.] 331.

Demurrer overruled.

Case No. 2,847.

CLARKE et al. v. CRABTREE.

[2 Curt. 87.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1854.[2]

BREACH OF CHARTER-PARTY.

1. Where a charter-party contained a covenant to furnish a full cargo of salt at Bonaire, and no salt could be obtained there, it was *held* to be broken, though it was also stipulated, that the master was to "use the vessel's funds in payment for the salt which he is to purchase."

[Cited in brief in The B. J. Willard, Case No. 1,454.]

2. If the master ascertained on his arrival, that no salt could be obtained, he was not bound to wait, but might sail immediately, and recover empty for full.

[Cited in Hart v. Shaw, Case No. 6,155; The Maria White, Id. 9,083.]

[Appeal from the district court of the United States for the district of Massachusetts.

[In admiralty. Libel by Enoch Crabtree against Albert P. Clarke and others. There was a decree for libelant in the district court, and the respondents appealed.]

Goodrich and Lathrop, for appellants.

Mr. Dodge, contra.

CURTIS, Circuit Justice. This is a libel in the admiralty filed by the appellee against the appellants to recover a sum of money alleged to be due for the hire of the bark Carniola. The charter-party was entered into by the appellee, as master and agent for the owners, of the first part, and the appellants of the second part, on the 23d day of June, 1853; and it is thereby declared that the whole of the bark, except the cabin, and room necessary for the crew, stores, &c., is let to the party of the second part, for a voyage from Bonaire to Boston, after discharging at Demarara, cargo taken on board at Machias in the state of Maine. The charterers covenant to provide and furnish to the bark at Bonaire, a full cargo of salt, and to pay for the freight of the vessel fourteen cents per bushel, customhouse measure, for each and every bushel delivered at Boston, payable on the discharge of the cargo. The charter-party also contains at its close the following written clause: "It is further understood and agreed, that the master is to use the vessel's funds in payment for salt, which he is to purchase at the lowest cash price, and, on the vessel's arrival at Boston, the charterers are to pay the master, or his agent, the invoice cost of the salt, export duty, if any, and insurance on amount invested in purchase of salt from Bonaire to Boston, and Boston wharfage, all in addition to the freight." The vessel went to Bonaire; the

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

[2] [Affirming Case No. 3,314.]

master was unable to purchase salt, owing to a failure of the supply, and returned to Boston in ballast. And the principal question is, whether, under the provisions of this charter-party, he can recover for dead freight.

If the charterers covenanted to furnish to the vessel a full cargo of salt at Bonaire, and broke this covenant, and, in consequence, the vessel returned empty, it is not denied, that according to the settled law, the charterers must pay the same freight as if a full cargo had been provided and brought; or, as it is generally expressed, empty for full. But it is denied that this is the effect of this charter-party. To decide this question, it is necessary to put an interpretation upon its very peculiar provisions; and in order to do so, the whole instrument must be examined, due effect allowed to each part so far as it qualifies, restricts, or explains other parts, and the light of surrounding circumstances applied to it, to enable me to see what the parties intended. The latter is particularly important in this case. It is always proper for the court, as much as practicable, to place itself in the condition of the parties to written instruments, so far as to know what they knew, and contracted in reference to, before construing such instruments. And it is more than commonly needful to do so, when the instrument contains provisions, manifestly adapted to and influenced by peculiar circumstances of the trade and business to which it relates.

I proceed, therefore, in the first place to state what the most material of those circumstances are. It appears, that the trade in salt, between Bonaire and Boston, is usually carried on in vessels which go to the Windward Islands with lumber, staves, ice, &c., and having discharged their cargoes, proceed to Bonaire. The salt is sold by the government directly to the exporter, for specie; the governor of the place being the seller. There are no mercantile houses established there to act as agents; and masters of the vessels which take the salt, usually purchase it. Sometimes specie is sent out from here to buy the salt; but, usually, an arrangement is made to use for that purpose, the proceeds of the outward cargo. It is thus apparent that the provisions of this charter-party are in accordance with the usual course of the trade. When the charter-party was made, the vessel was lying at Boston, having a cargo taken on board at Machias, to be delivered at Demarara: after delivering that cargo, the bark was to proceed to Bonaire. The vessel's funds, that is the proceeds of that outward cargo, were to be used in payment for salt, to be there purchased; and the master was to make that purchase. Thus far there can be no doubt. But it is strongly urged that, in substance and effect, the whole charter-party taken together, amounted only to an agreement by the charterers, to receive and pay for the salt in Boston, adding to its prime cost and charges, fourteen cents per bushel. To this I cannot accede. In the first place, it converts what is plainly a charter-party of affreightment into a mere contract to buy a cargo on arrival; and it is inconceivable, if this had been the intention of the parties, that they should not have said, in four lines, "If you will go to Bonaire and get a cargo of salt for your bark, and bring it to Boston, we will buy it of you there, and pay you therefor its prime cost and charges, and fourteen cents per bushel in addition." To suppose that merchants, of ordinary intelligence, would have resorted to a charter-party, containing all the usual provisions of such an instrument, to make a contract to buy a cargo of salt on arrival, is wholly inadmissible. Nor can such a contract be reconciled with the particular stipulations, any more than with the general frame and nature of the instrument. The charterers covenant, expressly, to furnish a cargo of salt to the vessel at Bonaire, and to pay for bringing it to Boston. The cargo contemplated was therefore to be their property, unless there is something in the instrument which controls these plain provisions, and shows that the cargo was not to belong to the charterers until arrival in Boston. I perceive nothing which can have this effect. The fact that the master was to buy the salt with the funds of the vessel, is consistent with the covenant of the charterers to furnish a cargo, and with the ownership of it by them from the moment of its purchase. If he advanced the money for them and acted as their agent in the purchase, they would own and furnish the cargo as truly as if one of them being at Bonaire should buy it, and deliver it on board. It is provided that insurance may be obtained, at the cost of the charterers, on the amount of the vessel's funds invested in the salt; but if the master made advances to buy the cargo, the owners of the vessel would have a lien on it for those advances, and an insurable interest to that extent; and, it is to be observed, it was only to that extent, insurance was contemplated. It has no tendency, therefore, to show the owners of the ship owned the cargo.

It was also argued, that the covenant of the charterers to furnish a cargo at Bonaire, was qualified by the subsequent provisions of the charter-party that the vessel's funds should be used, and the master should make the purchase; that this was the only mode of furnishing the cargo contemplated by the parties; and that inasmuch as providing the funds and buying the cargo, necessarily preceded the furnishing it to the vessel, the covenant of the charterers to furnish it, was dependent on the covenant of the master to provide funds and buy it; and therefore the latter were conditions precedent, the non-performance of which would excuse the charterers from keeping their covenant. This position requires careful examination. The

fact that the master executed this charter-party for the owners, does not change its legal effect. But it may simplify the case, to suppose the owners themselves had executed it. Thus viewed, it would contain an agreement by the owners, that the funds of the vessel should be used in purchasing the salt, and also a declaration that the master was to purchase it. But in what character, and on whose account would the master act? So far as he was to advance funds belonging to the owners, he would act as their agent, and they may properly be understood as covenanting, that they will thus advance the vessel's funds through him, as their agent; but so far as he should act in buying the cargo, he would act as the agent of the charterers; they would buy through him, and the fair interpretation of the instrument would seem to be, that the master had the permission of the owners so to act, and that they agreed he should not voluntarily neglect to act in that capacity. From the nature of the case, it cannot be supposed they intended to covenant that he should, at all events, act as the agent of the charterers in buying a cargo. Such an agency is, of necessity, revocable, and its execution must depend upon the will of the principals. From the nature of the case, too, if its execution depend upon conditions of the market, or other circumstances, the principals must be understood to take those risks. The business to which the risks belong being theirs, the risks of failure to accomplish it are theirs also; and a third person cannot be considered as assuming them, simply by agreeing that his servant may act in their behalf in the matter. Such exposition of the charter-party makes it amount to this: the owners agree that the vessels' funds shall be advanced at Bonaire, and that the master shall act as agent of the charterers to buy the cargo; the charterers covenant that they will buy the cargo at Bonaire through the master; the funds are offered, the master is ready to act as the charterers' agent, and buy the cargo, but there is no salt there. The charterers fail to keep their covenant, not because of any non-performance by the owner, but because their business cannot be done. And this interpretation seems to me to be in accordance, not only with the entire language of the charter-party, but with the nature of the contract, and the relations of the parties growing out of it. In my judgment, it would lead to much confusion and difficulty in practice, if the rights and duties of the owner were considered as affected, as claimed in this case, by a stipulation that the master should act as supercargo. We must consider for whom he acts, to whom the risk of that business properly belongs; and if found to attach to the charterer, by virtue of his character as charterer, or by his express covenants, or both, it must rest with him. In this case, the charterer covenanted to furnish a cargo. The risk of failure belonged to him. And its burden was not shifted upon the owner, because the charterer having no agent at Bonaire, obtained the privilege of employing the master to buy the cargo.

The remaining questions do not seem to me to be attended with much difficulty.

It is objected that the master waited but twenty-four hours at Bonaire; that if a master sails away, without waiting the stipulated number of lay days, if the number is stipulated, or a reasonable number, if there be no stipulated number, he cannot recover for dead freight. Lawes, Chart. Part. 34, 35; Abb. Shipp. 463. And that the evidence shows three to five days is the usual, and therefore the reasonable number at Bonaire. But the evidence only proves three to five days, the ordinary time occupied in taking a cargo of salt on board there; not to wait to find a cargo; and if the master ascertained in less than twenty-four hours, that by waiting three to five days he could not obtain a cargo, he was not only not bound to wait, but he had no right to wait and impose the charge of lying there on the charterers. Moll. de J. Mar. bk. 2, c. 4, § 3, p. 255; Kleine v. Catara [Case No. 7,869]. I am satisfied by the evidence, that the master found his further delay there would be useless, that he did remain a reasonable time, and not being bound to wait any specified time, his departure did not deprive the owners of their right to the charter money.

It was also insisted that if the covenant of the charterers to provide a cargo was broken, the damages were but nominal, because the effect of the charter-party was to take up the vessel at Bonaire, not to send her there. I cannot accede to this view. Looking at the course of the trade, and the facts of this case, I consider the charter money was to be paid for going from Demarara to Bonaire, and coming thence to Boston with the cargo on board. The vessel went to Bonaire, and came thence to Boston; the owners performed all that on their part was to be done, and the fact that there was no cargo on board on her homeward voyage, was the fault of the charterers, for which the owners are not to suffer.

A question was also made respecting the authority of the master to enter into such a charter-party, and the jurisdiction of admiralty over a libel upon it. As to the authority of the master, it being proved that, in point of fact, such a charter-party is within the usual limits of the trade and employment of the vessel, he has an implied authority, which is sufficient. And although admiralty would not have taken jurisdiction over the contract to use the vessel's funds to buy the cargo, it is not necessary to do so to sustain this libel, which is only to recover the freight money under the charter-party. The covenant as to the funds having been fully kept, by the readiness to advance them at Bonaire, does not in any way affect the jurisdiction of the court.

Decree of the district court affirmed, with interest at the rate of six per centum per annum and costs.

Case No. 2,848.

CLARKE v. CRAMER.

[1 MacA. Pat. Cas. 473.]

Circuit Court, District of Columbia. Dec., 1856.

PATENTS—PRIORITY—CONFLICT OF EVIDENCE.

[Where the evidence as to priority of invention is conflicting, its weight must govern.]

[Appeal from the commissioner of patents.

[Interference. Eneas P. Clarke, as assignee of Joseph W. Henery, and James P. Cramer, claimed priority of invention for an improved cultivator tooth. The commissioner of patents decided in favor of Cramer, and Clarke appeals.]

J. Dennis, Jr., for appellant.

DUNLOP, Chief Judge. In this case the closing argument of Clarke's counsel was presented to me during the present session of the circuit court of the District of Columbia, and the appeal submitted for my decision. I have carefully read and considered the mass of testimony taken in this controversy, much of which is confused and contradictory, and subject to exception, on the ground of interest in the witnesses, and have also read and considered the arguments of the counsel of the parties litigant submitted to me in writing.

I think the commissioner of patents has properly decided to award the priority of invention of the "improved cultivator tooth" to James P. Cramer, upon the admissions of Mr. Henery, Eneas P. Clarke's assignor, made before his assignment to Clarke, and proved by the depositions of Osborne, Follick, Welsh, Mott, and Whitman. These witnesses are unimpeached, and in the argument of Clarke's counsel the admissions proved by them are not denied, but attempted to be explained. This explanation will be noticed hereafter. It is true Shaw and Clarke, witnesses for E. P. Clarke, assignee, who are also unimpeached, prove admissions by Cramer inconsistent with his claim as inventor, and assigning the discovery and merit of the contrivance to Mr. Henery. Supposing these admissions of Cramer, so proved by Shaw and Clarke, not to be reconcilable with the idea that Cramer, in making them, meant only to ascribe to Henery the mechanical merit of perfecting the machinery of the improved cultivator tooth according to his (Cramer's) suggestion, still, in this conflict of testimony, the commissioner of patents and the judge on appeal must be governed by the weight of evidence, which certainly preponderates on Cramer's side. I have not referred to Henery's testimony given on the present interference between Cramer and E. P. Clarke. Upon his cross-examination, it appears that the only consideration paid to him for the assignment to E. P. Clarke was the sum of one dollar, and that he advanced his own money to pay the expenses of the officers (Boice and Bryon) in summoning witnesses for E. P. Clarke, his assignee. It would seem, therefore, that the assignment is only colorable, and that Henery is the real plaintiff in the case, and not a competent witness. But if I am wrong in this, and Henery is to be received as a witness, it would not alter my opinion as to the weight of testimony in this controversy.

I will now allude briefly to the attempted explanation made by E. P. Clarke's counsel of Henery's admissions. It is urged in the argument of the counsel before me and in the examination of Henery as a witness that Cramer deceived Henery, and induced him to believe that he (Cramer) intended to apply at Washington for a patent in his (Henery's) name, and that, relying on the good faith of Cramer, he (Henery) had made the admissions proved against him. But if Henery knew himself to be the true inventor of the improved cultivator tooth, and had authorized Cramer to apply for a patent for it in his (Henery's) own name, it is altogether in conflict with all the principles of action which would govern a reasonable man that he should make false admissions to five different people, the only effect of which would be to defeat the object he had in view, to wit, the getting of a patent in his own name. Besides, Henery seems to have been well aware that to get the patent the inventor must himself swear to his invention. He well knew that he had taken and furnished to Cramer no such oath, and therefore that Cramer could not at Washington obtain the patent in his (Henery's) name. The untenable excuses thus made only serve to fortify the truth of the admissions proved by the five witnesses above referred to.

As to the reasons of appeal, to which my revision is by law limited, the first, third, fifth, and sixth reasons of appeal are answered together in the aforegoing remarks. The second reason of appeal is immaterial in this controversy, and need not be decided, if I am right in the conclusion that the commissioner of patents did not err in awarding priority of invention to Cramer on the proved admissions of Henery. The fourth reason of appeal is also immaterial, because I have not relied at all on French's evidence, but have treated him as an incompetent witness. I therefore affirm the judgment of the commissioner of patents awarding priority of invention of the improved cultivator tooth to James P. Cramer.

[NOTE. Patent No. 16 364, for the improvement in question, was granted to J. P. Cramer, January 6, 1857.]

Case No. 2,849.

CLARKE et al. v. The DODGE HEALY.

[4 Wash. C. C. 651.][1]

Circuit Court, E. D. Pennsylvania. April Term, 1827.

SALVAGE—PLEADING AND PROOF.

1. The allegations in a libel, not admitted or denied by the claimants, are not to be taken as true, but must be proved.

2. Quaere, whether the forcible taking possession of a vessel exposed to danger, against the will of the commander; can entitle the persons so acting to the merit and reward of salvors, although they should contribute to save the vessel.

[Cited in The John Gilpin, Case No. 7,345; The John Perkins, Id. 7,360; The Choteau, 9 Fed. 211; The C. D. Bryant, 19 Fed. 606; The Cherokee, 31 Fed. 170.]

3. Unless the property be saved in fact by those who claim as salvors, salvage will not be allowed; be their intentions however good, and their exertions however heroic and perilous.

[Cited in The Narragansett, Case No. 10,020; Edwards v. Thirty-Five Boxes of Gold Dust, Id. 4,299a; Montgomery v. The T. P. Leathers, Id. 9,736; The Williams, Id. 17,710; The Cleone, 6 Fed. 525.]

[4. Cited in Bean v. The Grace Brown, Case No. 1,171, to the point that in determining the intention of a master and crew in leaving their vessel, great weight must be given to their subsequent acts.]

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

In admiralty.

C. J. Ingersoll, for libellants.

J. R. Ingersoll, for claimants.

WASHINGTON, Circuit Justice. This case comes by appeal from the district court, where a pro forma decree, dismissing the libel, was given. The libel states that on the 24th of January last, the libellants, whilst in their oyster boats in the mouth of Back creek, in Delaware bay, saw the brig Dodge Healy drifting down the bay in a solid cake of ice, of about four acres in extent, from Cohanzey cove, about ten miles higher up the bay. In about three hours after they first observed her, she had drifted down opposite Back creek, and was proceeding in the direction of the Cross Ledge shoals, when she was abandoned by her pilot, officers and crew, who came on shore at Ben Davis's point; bringing with them, in their boats, their colours, compass, quadrants, clothes, bedding, cabin furniture, and other articles, as many as the boats would stow. That seeing the brig in this situation, threatened by the danger of running on the shoals, where she must inevitably have been either cut to pieces, or overwhelmed by the ice; they put off in their boat, with the intention, if possible, to save her. In about half an hour after they got on board, the mate, with some men employed for the purpose, returned to the brig; but being informed by Clark, one of the libellants, that they had, and should retain possession of, and endeavor to save the brig, he returned to the shore, taking with him the papers belonging to the brig. After his departure, a consultation was held as to the best mode of saving the vessel, which resulted in efforts to cut a channel for the brig through the ice, so as to extricate her from her confinement in the mass; in which they, with great labour and peril, succeeded; the ice snapping in half from its great weight, as soon as the channel was cut through. The vessel was nevertheless driven on to Cross Ledge, and was in imminent danger, but finally she drifted off the ledge with the flood tide; but she was again encircled in a large cake of ice, from which she was again extricated by the libellants, by cutting the ice from around her; finally, they got her into water clear of ice, and by using the sails, ran her into a place of safety, where she remained in possession of the libellants; who intended to bring her to Philadelphia; until they were dispossessed by a writ of replevin issued by a court in New Jersey, under which possession was restored to the captain.

A claim was interposed by the owners and consignees of the vessel and cargo, and by the master; which does not admit that the vessel was saved by the exertions of the libellants, and professes entire ignorance of all the circumstances in relation to the alleged acts of the libellants to save her; none of the claimants having been present until the captain boarded her on the day she was conducted into a safe harbor.

The facts in this case, which are not disputed, are the following: After the Dodge Healy had ascended the bay as high as Cohanzey, or Ben Davis's point, finding that the ice was collecting in such a manner as to endanger her, she was forced ashore in Cohanzey cove, within about a half a mile of the shore, where she was soon encompassed by ice, and remained for about five days confined in a body of ice, from twelve to eighteen inches thick, and from two to four miles in extent up and down the river, and on her stern. During this time, the captain left the brig under the command of his next officer, and came to Philadelphia. In consequence of a very high tide, the ice lost its hold on the shore, and a cake some miles in extent, floated with the ebb tide down the bay, carrying with it the brig which was firmly fastened in it. In this situation, and believing from the direction the brig was taking, that she would drift upon the Cross Ledge shoals, where she would probably be cut in pieces, or be overwhelmed by the ice, the pilot ordered the boats out, that the officers and crew might avoid the apprehended danger by reaching the shore. After stowing away in the boats the articles stated in the libel, the officers, the pilot and crew, left the brig, whilst yet drifting towards the shoals, under

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

a confident belief that she would be driven on them and be lost. After they reached the shore, the mate with some of his men returned to the brig, and brought away other articles belonging to the crew which had been left on board. When within about half a mile from the shore on his return to it, he observed a boat pushing out of Back creek, and proceeding apparently for the brig: and apprehending that the persons in this boat intended to take possession of the brig, which it was his wish to prevent, he hastened on shore, and having engaged four or five volunteers to assist him, he returned to the brig, and got alongside within ten or fifteen minutes after the persons whose visit he had endeavoured to anticipate had boarded her. He found them on board, engaged in an attempt to extricate one of the cables from the ice: he told them they had better cut the ice from around the vessel; but was answered by Clark, one of the libellants, that he (the mate) had nothing to do with the brig, and that he (Clark) was then master. Whether the mate was ordered to leave the vessel, or whether he determined to do so in consequence of the assumption of the command of her by Clark, is by no means certain, the evidence being both ways, and nearly balanced. The fact is, that the mate having taken from the cabin some of the papers, departed with two of the men whom he hired to accompany him to the brig, the other three having deserted him and joined Clark's party, and are now numbered with the libellants. The captain returned the same evening, and was anxious to board the brig immediately, but was dissuaded by the mate from making the attempt before the next morning, when two efforts were made to get on board, and were defeated by the unfavourable state of the ice. He succeeded the next morning, and the persons on board continuing to assert their right to the possession of the brig, he prevailed upon them to take her into Cohanzey, where she was secured, and possession of her delivered to the captain under a writ of replevin.

The material facts disputed are: 1. Whether the brig was abandoned by the officers and crew, and was in a state of derelict, when she was taken possession of by the libellants or not; and 2. Whether the brig was saved by the exertions of the libellants from the imminent peril which, it is acknowledged by all, threatened her, at the time the mate first left her, as well as during the greater part of the time that she was in the possession of the libellants?

As to the abandonment, there are four witnesses who swear, that they heard the mate declare, upon his first landing from the brig, that she was abandoned, and that those who should save her would be well rewarded. The pilot states, that when he left the brig, nothing was said about returning, nor did he expect it was the intention of the mate to do so. Two other witnesses give it as their opinion that she was abandoned, but form their judgment from what they saw, and not from any declarations by the mate or pilot to that effect. On the other side, the two mates swear positively that, although, when they left the brig, their expectations were that she would be lost on the shoals, towards which she was then drifting; yet it was their intention to return to her the next morning, in case she should escape the threatened danger. The same witnesses, together with William Bennet, concur in the statement that when the pilot had ordered out the boats for the purpose of quitting the brig, he expressed his apprehensions that she would drift on the shoals, and be lost; but added, that if she should escape that danger, she would return with the tide the next morning, nearly to the same place where they then were, when the officers and crew could return to, and again take possession of her. That the reason he assigned for advising the measure of leaving the brig, was, that, by no human exertions could they prevent her from going on the shoals, and being there cut to pieces, or overwhelmed by the ice, if the tide should force her on them; and that of consequence, it would be useless to remain in her. But he anticipated the possibility, at least, that she might take a different direction; in which event, the mate and crew might return with some advantage. But in judging of the mate's intention at the time he left the brig, I depend much more upon his subsequent acts, than upon declarations made by him to the other witnesses, or when he was himself examined, after this controversy had arisen. If his intention was to leave her to her fate, and to use no further exertions to save her, he could have no motive for remaining on the shore for the purpose of watching her motions, and of discovering her situation the next morning; as is testified by one of those very witnesses, who says he heard the mate declare that the brig was abandoned. When within a few hours after he had first left the brig, he discovered the libellants moving towards her, and suspected that their design was to take possession of her; what but a sense of duty, as commanding officer in the absence of the captain, could have induced him to hire another crew to assist him in regaining the possession, before it could be taken by others? The declaration attributed to him by some of the witnesses, that he expected to come in as a salvor; is not only denied by himself, but is incredible, as he must have known that he could not abandon as mate, and, in violation of his duty to the owners, claim the merit of a salvor. When he returned to the brig for the avowed purpose of anticipating the libellants in taking possession of her, why did he take with him his compass and quadrant, unless for the purpose of navigating her, in case she should be driven to sea? It is further in proof, that, when he engaged the men to accompany him to the

brig, it was under an express engagement on their part to stick by the vessel, and to obey his orders. I am, in short, quite satisfied that an abandonment of the brig, without the intention to return to her in case she should escape the danger that threatened her, was, at no period of time, in the contemplation of the mate; and that when he spoke of her being abandoned, he was far from annexing a technical meaning to the phrase, but merely intended to express the danger he apprehended her to be in, and his abandonment of the possession of her, until the danger should be over, or should appear to be less imminent. I consider the brig as having at no period of time been out of the constructive possession of the agents of the owners; if by continual claim, or acts in the nature of it, it could be retained. She was deserted on account of an immediate danger, and only during the continuance of such danger, but animo revertendi, if the danger should pass away. She was watched by the mate, and was always in his view whilst on the shore. The moment that he observed an attempt was making to take possession of her, he endeavoured to anticipate and prevent it, and asserted his right to the possession, which was retained against his will by the libellants. The same day that possession was taken by the libellants, the captain returned, used every exertion to board the brig immediately, and succeeded in doing so the day but one after. His right to the possession was denied and resisted by the libellants, but yet he remained on board until she was got into a place of safety; and he immediately applied to the civil magistrate, and succeeded in removing what, under all the circumstances of this case, I must consider as the tortious possession of the libellants.

The only remaining and the all-important inquiry is, whether the brig was rescued from the danger which impended over her at the time the libellants took possession of her, by any acts or exertions of theirs? Her extreme danger is admitted by all. She was fast locked in an immense field of floating ice, from twelve to eighteen inches in thickness, and her danger consisted in being drifted by the tide on the shoals below her, and being there cut to pieces, or overwhelmed by the ice, which, being thus resisted in its course, would probably accumulate and run over her. If the ice had been cut away, and a passage made for her extrication from it, she might have been saved; and if this was performed by the libellants, she owed her safety to them. This is agreed by all the witnesses who speak upon that subject. But unless she was so extricated, they all concur in saying, that no human force could have prevented her running on the shoals. She avoided the danger, however, as is stated by David Jones one of the libellants' witnesses, by the circumstance, providentially interposed, of her taking another direction than towards the shoals, and drifting to the eastwards of Ben Davis's shoals; by which circumstance, to use the expression of this witness, "she escaped." The impracticability of cutting a passage for the brig through so extended, and so firm and thick a body of ice, is proved by William Bennet one of the libellant's witnesses, Jonas Mason the second mate, and the other William Bennet, one of the claimants' witnesses. Whether the mere act of cutting away the ice around the brig would have saved her, or even diminished her danger, is uncertain from the testimony, the witnesses appearing to entertain different opinions upon that matter. It would seem to me that the pressure of the ice would have filled the opening almost as soon as it was made. But be this as it may, there is not one witness who proves that even that, or any other act, was performed, which did, or could by any possibility tend to the saving of this vessel. The libel, it must be admitted, makes out a case of some merit, and if it were proved would entitle the libellants to some compensation in the nature of salvage. It is not proved; but the counsel for the libellants has contended, that the facts alleged in the libel, not being denied by the claim and answer, must be taken for true. This is a doctrine as novel as it is untenable.

The respondents state in their answer that they were not present at the time of this transaction, nor can they of course admit or deny the facts stated as concerns this part of the case. As honest men, regardful of the sanctity of an oath, how could they deny the allegations of the bill, however extravagant or untrue they might be? But to argue that they must either do so, or subject themselves to the legal consequences of impliedly acknowledging them to be true, cannot for a moment be maintained. If the answer does not acknowledge the truth of the allegations of the libel, it must be proved by those who assert it. The maxims of the civil law—"ei incumbit probatio, qui dicit, non qui negat," and "nullus idoneus testis in re sua intelligitur;" are equally the maxims of the admiralty, equity, and common law courts. I am willing to allow to the libellants the merit of good intentions when they first boarded this brig. How far they continued to merit this praise, when, by the return of the mate with a crew, they perceived they were mistaken in their impression that she was abandoned, and persisted after that in holding the possession, and either expelling the mate from her, or denying his right to the possession and command, need not now be decided. If the question turned solely upon that point, I should have a word or two to say upon that subject; and I shall merely observe, for the present, that I am not to be considered as admitting that a forcible taking or retaining possession of a vessel by strangers, against the will of the officer who, with his own

crew, is capable of saving her without the forced assistance, if she can be saved at all, will entitle such strangers to the merit of, and to the reward due to salvors, although they should afterwards contribute to save her. Had the mate never left the vessel, but remained in the actual possession of her, it could not surely be contended that the libellants might, under the impressions, however honestly entertained by them, that she was in danger, and that their assistance to save her might be necessary, force themselves upon the mate in the character of salvors, against his will, and without the necessity for their aid being made apparent; and thus entitle themselves to the merit, and to the reward of salvors.

Without however pursuing that inquiry further, it may confidently be laid down, as an undisputed principle upon which a claim for salvage at all times rests, that unless the property be in fact saved by those who claim the compensation, it cannot be allowed, be their intention however benevolent, and their conduct however heroic. If providence kindly aids their exertions, by which the object is attained, so much the better for them; nor would that circumstance deprive them of merit, although it might diminish the rate of compensation; but exertions must be made, and the probability that they contributed, or might contribute to save the property should appear by some proof, although, from circumstances, slight proof only could be expected. I will not say that where the danger is proved, and the vessel is conducted by the asserted salvors into a place of safety, every presumption, in the necessary absence of other evidence, may not be made in their favour. But where it is proved by other evidence, as it is in this case, that no human force could have averted the danger unless a particular act was done, which act the same evidence shows was nearly impossible to have been accomplished, the court cannot say that the vessel was saved by the exertions of these libellants.

The general principle before stated is too firmly established by authorities to admit of controversy. "Salvage," say the court in the case of The Amelia, 1 Cranch [5 U. S.] 1, "is a compensation for actual services rendered to the property charged with it." And in the case of The Alerta, 9 Cranch [13 U. S.] 367, it is said, "salvage is allowed as a reward for the meritorious conduct of the salvor, and in consideration of a benefit conferred on the person whose property he has saved." It is also stated in the first of these cases, that not only must the service rendered be meritorious, but the possession taken of the thing saved must be lawful.

I am, upon the whole, of opinion that this is not a case of merit; and that the libellants have not shown that the brig was saved by their instrumentality. I have the pleasure to add that the venerable and learned judge of the district court of this district, concurs entirely in this opinion. The pro forma decree of the district court must therefore be affirmed, but without costs.

Case No. 2,850.

CLARKE et al. v. DRUET.

[4 Cranch, C. C. 142.][1]

Circuit Court, District of Columbia. May Term, 1831.

ACCOUNT—PRACTICE.

An affidavit, annexed to an account, that it "is just and true as stated, and no part thereof has been paid, except what is credited," is sufficient to hold the defendant to bail.

Motion to rule the defendant [James Druet] to special bail, on the affidavit of Briscoe, one of the firm of Clarke & Briscoe, at the bottom of an account, "that the above account is just and true as stated, and that no part thereof has been paid, except what is credited."

THE COURT (THRUSTON, Circuit Judge, absent) was of opinion that the affidavit was sufficient, within the rule laid down by this court in the case of Smith v. Watson [Case No. 13,124].

Mr. Morfit, for plaintiffs.

Mr. Wallach and Mr. Coxe, for defendant.

The following cases were referred to: Smith v. Watson [supra]; Jolly v. Rankin [Case No. 7,440]; Bartleman v. Smarr [Id. 1,074]; Traverse v. Hight [Id. 14,151]; Way v. Selby [Id. 17,302]; Dawson v. Boyd [Id. 3,667]; 1 Sell. Pr. 105, 108.

Case No. 2,851.

CLARKE v. The FASHION.

[2 Wall. Jr. 339.][2]

Circuit Court, E. D. Pennsylvania. Oct. 30, 1852.

ABANDONMENT IN ADMIRALTY.

1. Where a vessel is injured and sunk by collision in such a place, or under such circumstances, that for a small sum of money in comparison with the value of the vessel and cargo, she can be raised and repaired and the cargo recovered with slight damage, her owners have no right to abandon her and claim for a total loss.

[Distinguished in The D. Newcomb, 16 Fed. 277.]

2. The doctrine of abandonment as connected with cases of insurance, has not been imported into courts of admiralty.

The steamer Fashion had run very negligently into a small river sloop, the Syrian, of 43 tons, owned by Clarke, and had injured her hull and stranded her in the mud near one of the Philadelphia docks. As she lay keeled over, the damaged side of her

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

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

was partially above water even at high tide, and at very low water a part of her keel fore and aft was exposed. Not having been much injured, she was thus in a position capable of being raised and repaired without great difficulty or cost. She was a common coal sloop, with a cargo of coal worth at most $225, which was not essentially injured by the submersion; though rendered dirty and less saleable; a small part also, which had been on deck, being lost. The owners of the steamer raised and repaired her; the cost of the raising being $150, and that of repairing her $50: and this, with the loss of $20 in bank notes which had been in the cabin; the injury or destruction of her sails, (not new) and whatever damage such a vessel and cargo would suffer from being "from four to seven days" under water as it came and went with the tide, and whatever loss might occur by the detention—all which the owners of the steamer asked to have ascertained and were willing to pay—appeared to constitute the whole loss resulting from the accident. The value of the sloop before the accident was about $1,600. Clarke, her owner, would not take her, thus repaired; but insisted upon abandoning her to the steamer as a total loss. She was accordingly now lying idle at the wharf; and whether she could be thus abandoned by Clarke insisting on her value, was the question before the court. The district court was of opinion and decreed that she might be.

Mr. Donnegan and Mr. Kane, for sloop.

The Columbus, 13 Jur. 285, is in point. There, the Tryal, a fishing smack, had been run down by the Columbus, and the last vessel having been condemned generally in damages and the matter referred to the registrar to assess them, the whole value of the smack was allotted by that officer and his merchants; but nothing was allowed by them for wages and victualing, nor for net profits for the employment of the smack. After the collision, the smack had been raised at the expense of the Columbus, and part of her stores, apparel and furniture saved; and she was now lying in harbour repaired. No exception appeared to have been taken originally by the owners of the Columbus to the registrar's report allowing full value; but the owners of the smack having excepted to the report because there was no allowance for wages, victualing and profits, the owners of the Columbus in turn excepted to being made to accept an abandonment at all, and to pay full value as for one. They insisted that under a decree of general condemnation merely the registrar had made a mistake in forcing the smack upon them and allowing as for a total loss, "and without regard to the hull of the smack or the stores," &c.: "that the smack might have been repaired, and put into a fit and serviceable condition in all respects, 'within a month after the collision at a moderate expense;' and that they were not liable, under the decree of the court for any other charges or expenses in respect of the damage than the charges and expenses which would have been incurred in repairing her and obtaining possession of her stores, &c.: and that all further loss and expenses were incurred by the owners' not taking possession of and repairing the smack, as he ought to have done." The reply made by the owners of the smack alleged that the owners "had a right to renounce and disclaim all title to the smack and stores." The exact point now before us was therefore raised on the pleadings, and directly in issue.

The court, Dr. Lushington, after casting out some speculations not very relative to his decree, says "On the whole I think the registrar and merchants have come to a just and equitable conclusion." And the reporter considered the point now before us as decided, for he says in his syllabus: "The owners of the ship doing the damage, raised, at their own expense, the vessel sunk, and offered her to her owner, who claimed as for a total loss; he refused to take her:—Held, that the owner of the sunken vessel was not bound to take her, and might proceed and recover as for a total loss."

John Fallon, for steamer.

The Columbus [supra] is really an authority in our favour, though cited with some apparent show against us. In the 1st place: the vessel appears from Dr. Lushington's opinion, to have been "sunk at sea," or on the sea coast. The extent of the injury as compared with her value, is not stated, but it must have been large, for it was not alleged even by the Columbus, that the smack could have been put into a serviceable condition in less than "a month after the collision;" and Dr. Lushington's opinion would indicate that it was so bad a case, that she was in danger, after the accident of being "utterly destroyed." He refers to the "state she was in," after raising, as obviously bad: and states that it was alleged she could have been repaired "at much less than the sum allowed;" i. e. much less than her whole value. 2nd. The owner of the Columbus seems to have been content with the registrar's decree, as it was made by that officer and the merchants. "He would not," says Dr. Lushington, "have disputed the report unless it had been objected to in the first instance by the owner of the smack." He had disputed it, therefore, only to have it stand. He disputed it as a defence against the smack's attempt to disturb it: and to balance the alleged error of the registrar in his favour, if there was one, by another not alleged, which was certainly against him. Dr. Lushington seizes this fact, and it is manifest that he did not mean to decide, as on a common law demurrer, the point which it may be admitted the pleadings technically raised, and was so far, "in issue." Ancient,

common law, technical pleadings are not the forms of the admiralty, nor are the doctrines derived from their character applied as of course to the forms of this court. Dr. Lushington decides his case upon a natural equity; and somewhat as this court did in Stimpson v. The Railroads [Case No. 13,456], where they refused to disturb a verdict, because a blunder in one way was balanced by another blunder, in another. "On the whole," he says, "I think the registrar and merchants have come to a just and equitable conclusion." The processes by which they reached it were obviously not so satisfactory, and the difficulty was in regard to the point for which the case is cited on the other side as an authority. Speaking of "the objection by the owners of the smack," he says, "I have no desire to disturb the report on that ground." But speaking of the objection by the owners of the Columbus, he speaks differently; and there it is that he indulges "in speculations" which, though "not very relative to his decree," are very relative to the grounds of it, and to this and other cases in which his opinion might be cited. "With regard to the other branch of the case," he says, "I mean the objections taken by the owners of the Columbus—I admit the case to be one of great difficulty, in which it is impossible to lay down any general principles; and I am reluctant to make remarks that might lead to litigation in future cases, but I entertain no doubt whatever, as to the true principle on which we ought to act. I have no intention of importing into this court the principles that apply to insurance cases, with regard to abandonment. The rule on which I must proceed is this: if a vessel is sunk at sea, it is not incumbent on her owners to go to any expense whatever, for the purpose of raising her, thus incurring the risk of failure in bringing her to a place of safety. But I apply this only where a vessel is sunk, not where there is a chance of bringing her safe into port; for where a vessel is only partially damaged, and there is the slightest chance of bringing her into port, provided the expense does not exceed the value of the ship, the effort must be made." And while he says that on the whole, the registrar and merchants had come to an "equitable" conclusion, which he would not refer back; he says also, that he is not without doubt, what course either or both parties ought originally to have pursued. And he argues and speculates thus: The vessel having been "sunk at sea," her owner was under no obligation to raise her. The owner would, however, have run the risk of failing in a suit, if he chose to leave her, to sue here. But the owners of the Columbus did raise her, and then offered her to her owner, in "the state she was then in." And his honour thinks that if they had proceeded formally, each party would have applied for a sale, and that the proceeds might have been brought into court. Going back, however, to a general, though irregular, equity, reached by the registrar, he will not disturb it.

GRIER, Circuit Justice. The doctrine of abandonment, as connected with cases of insurance, has never been imported into courts of admiralty, and has no application to cases of collision. Where a vessel is injured by collision at sea, and then sunk, the owners are not bound to risk a greater loss than that of the vessel and cargo, on the mere possible chance or speculation of saving something, by endeavours to raise her, and are entitled to recover to the whole extent of their loss. But where she is only partially injured, and there is the slightest chance of bringing her into port, the effort must be made. The injured party cannot increase his claim for damages by a voluntary abandonment of his property, and make a profit on his own negligence. He cannot compel the owners of the colliding vessel to become the purchasers of his injured vessel, where she is only partially injured. His abandonment of his own property, confers no title on the offending party, who has no right to take possession or assume any ownership over a vessel, because he has injured it by collision. It is true, it would be his duty and policy to assist the injured vessel, if in his power, and to help save her, whether he should be ultimately liable for the injury or not.

The measure of damages in cases of collision, is the sum it would take to restore the injured vessel, and make her as good as she was before the collision. To this may be added, the loss of the daily hire of the boat during the time it would necessarily take to repair her, in the nature of demurrage. This amount is not to be decreased by introducing the rule of insurance cases, of a deduction of new for old, nor increased by consequential speculative damages, much less for those which are the consequence of the libellant's own negligence or voluntary dereliction of his property, and endeavours to convert a partial into a total loss. Collisions are daily occurring in our crowded ports, in which small sailing vessels are injured by steamboats. In such cases the steamboats are generally held liable for the damage. But I cannot countenance the doctrine, that if by such collision a hole is knocked in the side of a sloop or schooner, which causes her to sink in port, within a few feet of the wharf, where assistance can be obtained and the vessel raised and restored for a sum not exceeding eight or ten per cent. of her value, that the owner of such vessel shall abandon her, and convert a small injury into a total loss, and thus sell his vessel to the owners of the steamboat, or leave her to perish, without the slightest endeavour to save her.

Yet such is the case before us. The sloop is partially sunk, in port, close to the wharf, where persons are ready and willing to raise her for $150, and repair her for $50 more;

nevertheless, the libellant, instead of endeavouring to save his vessel, runs off to the admiralty and files his libel for a total loss, under pretence of abandonment. And when the respondents raise the vessel for him, and when she can be repaired for less than fifty dollars, he refuses to have anything to do with her, and leaves her tackle to the mercy of thieves, and her hull to rot from the effects of the weather. If a case could be produced which affirms the doctrine, that under such circumstances, the libellant should recover the whole value of his vessel, I should not hesitate to dissent from it. The case of The Columbus, 13 Jur. 285, relied on at the bar, supports no such doctrine. There the vessel was sunk at sea—the mariners could not bring her into port, and were forced to abandon her. And although the defendants did afterwards raise her, the court decided that, although the libellants were bound to use every endeavour to bring her into port, yet they were not bound to risk money, in uncertain attempts to raise a wreck at sea. The case is no precedent for the conduct of the libellant in this case; nor can he be permitted to speculate on the accident or misfortune, and compel the respondents to pay damages incurred by the libellant's negligence and folly. It is enough if the owners of the steamboat have to pay the damages consequential on the negligence of their servant, without being liable for those voluntarily and unnecessarily caused by the libellant. This case is therefore referred to the clerk of this court, to assess the damages according to the principles we have stated, with directions to examine and report any further testimony which may be produced on the subject.

Case No. 2,852.

CLARKE v. FOSS et al.

[7 Biss. 540;[1] 17 N. B. R. 261; 10 Chi. Leg. News, 211.]

District Court, W. D. Wisconsin. March, 1878.[2]

CONTRACTS FOR FUTURE DELIVERY—SECRET INTENTION—MUTUAL INTENT.

1. A contract for the delivery at a future time of personal property, which the seller has not on hand when the contract is made, nor any means of getting it, is not void for illegality.

2. The secret intention of one of the contracting parties not to fulfill his contract, uncommunicated to the other, is not enough to make the transaction illegal.

[Approved in Ward v. Vosburgh, 31 Fed. 14.]

3. The intent that such a transaction should be a mere betting on the market, without any expectation of actual performance, must be mutual, and constitute an integral part of the contract, in order to render it invalid.

[Approved in Ward v. Vosburgh, 31 Fed. 14.]

4. If the contracts were valid in their inception and not tainted with any gambling intent or device, a subsequent mutual settlement by the parties, by payment of differences, instead of by actual delivery, cannot make them void for illegality.

[Approved and applied in Gilbert v. Gauger, Case No. 5,412; Ward v. Vosburgh, 31 Fed. 15, 16; Cited in Third Nat. Bank v. Harrison, 10 Fed. 250; Jackson v. Foote, 12 Fed. 41; Hentz v. Jewell, 20 Fed. 593.]

5. Many authorities cited and commented upon.

[In bankruptcy. Bill by Charles Edward Clarke, assignee, etc., against Sylvester D. Foss and others.]

Thomas & Fuller, and H. M. Lewis, for complainants.

Dent & Black and Burr W. Jones, for defendants.

William P. Black, for defendants, cited the following authorities: In this case the lex loci contractus determines the rights of the respective parties. These contracts were made and to be performed in Chicago, and are therefore to be governed by the laws of the state of Illinois. Edw. Bills & N. §§ 177, 185; Stacy v. Baker, 1 Scam. 417. These contracts were valid under the decisions of Illinois. Pixley v. Boynton, 79 Ill. 351; Logan v. Musick, 81 Ill. 415; Wolcott v. Heath, 78 Ill. 433; Lyon v. Culbertson, 83 Ill. 33 (dissenting opinion of Mr. Justice Dickey). Such contracts are also held valid by the courts of other states of the United States, and by the English decisions. Rumsey v. Berry, 65 Me. 570; Hibblewhite v. McMorine, 5 Mees. & W. 462; Petrie v. Hannay, 3 Term R. 418; Owen v. Davis, 1 Bailey, 315; Porter v. Viets [Case No. 11,291]; Lehman v. Strassberger [Id. 8,216]; Knight v. Fitch, 80 E. C. L. 566; Rosewarne v. Billing, 109 E. C. L. 316.

BUNN, District Judge. This is a suit in equity begun by the assignee of C. B. Stevens & Sons, bankrupts, to set aside and cancel six certain promissory notes for the sum of one thousand two hundred and thirty-one dollars and ten cents each, aggregating seven thousand three hundred and eighty six dollars and sixty cents, and a mortgage upon real estate in De Soto, in Vernon county, Wisconsin, to secure the same, executed by C. B. Stevens & Sons to the defendants, December 1, 1874, on the ground that the same are void as being given to secure a consideration arising out of certain option contracts for the sale and delivery of grain, which it is claimed were wagering contracts, under the laws of Illinois in force at that time.

The bankrupts were and for many years prior to the fall of 1874, when these transactions occurred, had been merchants and dealers in grain and produce upon the Mississippi river at De Soto, Wisconsin, and, as such, had for several years purchased and shipped wheat and other grain to the defend-

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

[2] [Affirmed by circuit court (opinion orally delivered, and nowhere reported).]

ants, who were commission merchants at Chicago, and members of the board of trade for twenty years or more, doing business under the firm name of S. D. Foss & Co., and had, also, from time to time speculated in grain in the Milwaukee market, and also in the Chicago market, through the defendants, acting as their factors and commission men at that place. They were then in good financial circumstances, though with small capital; had a running account, and were in good credit and standing with S. D. Foss & Co. In October, 1874, the bankrupts ordered defendants, at different times, by telegraph, to make sales of grain for them upon the Chicago market for November delivery, amounting in the aggregate to seventy thousand bushels of corn, and five or ten thousand bushels of wheat. The defendants, upon receiving these orders, went upon the market in Chicago and executed them, by making, as was the custom, contracts, generally in writing, and in their own name, with different parties, for the sale of the grain for November delivery, in lots of five thousand, or multiples of five thousand bushels, and immediately and from time to time, notified bankrupts, by telegram and by letter, of what they had done, and their acts were fully ratified and approved by the bankrupts. No "margins" were required to be put up by C. B. Stevens & Co., as they had an account with defendants, and were accounted by them responsible.

At about the time or a little before these contracts matured, as they did on the last day of November, the defendants performed a part of them on the behalf of C. B. Stevens & Sons, by a purchase and actual delivery of the grain to the parties to whom the sales were made. The evidence shows that, as to twenty thousand bushels of corn, there was an actual delivery of the grain, and as to ten thousand more, a delivery of warehouse receipts for that amount. As to the balance of the grain contracted to be sold, the defendants went upon the market and purchased it of different parties and had it ready for delivery; and then finding other parties who had similar deals for November purchases and sales, formed rings, or temporary clearing houses, through which, by means of a system of mutual offsets and cancellations that had grown up on the board, the contracts were settled by an adjustment of differences, saving an actual delivery and change of possession. It so happened that there was a considerable rise in the market price of corn during the month of November; and it was found that, after these transactions were closed out, there had been a loss to C. B. Stevens & Sons of something over ten thousand dollars, and which the defendants, having paid in cash for them on the purchase of the grain, debited to their account, according to the previous course of dealing between the parties.

The notes and mortgage in suit were soon afterwards given by the bankrupts to secure a portion of these sums so advanced by the defendants for them, including also about three hundred and seventy-five dollars, charged by S. D. Foss & Co. as their commissions. Unsecured notes were also given for three thousand dollars, balance of the ten thousand three hundred and eighty-six dollars and sixty cents indebtedness, which were afterwards paid by C. B. Stevens & Sons.

Two years afterwards, on November 19th, 1876, C. B. Stevens & Sons filed their petition in bankruptcy in this court, and were on the same day adjudged bankrupts. The assignee in bankruptcy brings this suit to set aside the notes and mortgage, and in substance claims that C. B. Stevens & Sons, at the time the orders for the sale of grain were made and executed in October, 1874, had no corn to sell, and no expectation of having any, with which to fill these contracts. That these facts were known to both parties, that is to the bankrupts and to the defendants, S. D. Foss & Co., and that it was understood by and between them at the time, that no grain was in fact to be delivered by C. B. Stevens & Sons, but that the contracts were to be settled by the payment or receipt of differences, according as the market should rise or fall in the month of November, and that they were thus mere wagers upon the November market, and, as such, contrary to law, and void, and that the notes and mortgage confessedly given to secure cash advances made by defendants, as the factors of the bankrupts, and with their approval, to pay the losses sustained upon these sales, should be cancelled and delivered up.

The question is whether this should be done. The question is, of course, a mixed question of fact and law. But I regard it as more a question of fact than of law; and I cannot help thinking, in looking through the cases on the subject, that more confusion and discrepancy has crept into them, from a failure to determine precisely the facts, than from any essential difference of opinion upon the abstract propositions of law applicable to them. This seems to be notably the case in Rumsey v. Berry, 65 Me. 570, where, in the trial court, instead of submitting the question of fact as to what the contract really was, it not being in writing, to the jury, instructions were asked, that, as a matter of law, the contract was a wagering contract. This instruction was properly refused, but there was a total failure to fairly submit the question of fact to the jury. It is not to be wondered at, that on an appeal to the supreme court, the facts not being fairly determined, the opinion sustaining the transaction as legal should have been given by a divided court, four judges concurring in the decision of the court, one judge delivering a dissenting opinion, one judge concurring in the dissenting opinion, and still another judge "inclined to concur" in it. If there

had been an eighth judge, it might not be improbable that he would have been "inclined to concur" in both opinions. And all this simply because the facts themselves not having been determined, there was no tangible, well-defined question of law before the court.

The testimony in the case at bar is quite exhaustive and voluminous. It is confined, however, to a few points, and though somewhat conflicting, I have had no great difficulty in determining the facts to my satisfaction. It is proven that, at the time these contracts were made, C. B. Stevens & Sons had not the grain on hand at De Soto, where they purchased grain, or elsewhere, nor any expectation of having it, with which to fill the contracts.

Chas. B. Stevens, the active member of the bankrupt firm, testifies that at the time he telegraphed to defendants to purchase the corn, they had not a bushel on hand, and did not expect to have any to deliver on the orders; that they were not then dealing in corn at De Soto, or anywhere else, and never did except "scalping" in it at Chicago; that they had no agreement with defendants to ship corn to fill the orders, and that the understanding was that they were merely "scalping" or option deals, and were to be settled by paying or receiving the difference at the maturity of the contract, or before; that they never did deliver any corn on these sales; that defendants claimed that they bought in the options at different times and charged the difference to C. B. Stevens & Sons.

He says, also, that he had no conversation with defendants until after the transactions were closed up; that he then had a talk with both of them in relation to these deals; that it was on the board of trade at Chicago; that he asked M. H. Foss how they settled these options or "scalps," and if there was any wheat or corn delivered, and he said, no; that it was done generally by forming rings among members of the board, by clerks that they employed; that these clerks settled the deals between parties in the ring whom they may have sold to, or bought of, and by paying or receiving differences, as the case may be; that he thinks he asked him about the delivery of grain, and he said no grain ever passed. Witness says this was the kind of transaction he was operating in, as he understood it, and that no grain was to be delivered or received on these contracts, and that he understood them to be mere wagers on the future price of grain, and that defendants regarded them in the same light. That they continued this kind of deal with defendants until the fall of 1876.

On cross-examination he says, he commenced sending orders to defendants before he had any conversation with them; that it was a month after these transactions that he had the talk with them in Chicago; that defendants were their agents and commission merchants in Chicago; that he understood that Foss & Co. were liable for the damages for the non-fulfillment of the contracts they made for C. B. Stevens & Sons, and that they expected to make good to them the losses which they might incur in their behalf; and that if defendants failed to comply with the contracts they made for the bankrupts they would be deprived of their privileges on the board of trade; that Foss and he never talked about their agreement with one another in respect to these transactions, and that their conversation only related to the general course of business on the board of trade; that he (witness) understands that all contracts where wheat is sold, and not actually delivered, are wagering or betting contracts; and that all option contracts are betting contracts. The other Stevenses testify substantially in the same way as to their understanding of the transaction, but not as to the conversation with defendants in Chicago. And this is the substance of the testimony for the complainant. The defendants positively deny the conversation testified to by C. B. Stevens. They swear (in substance) that they had no understanding about these contracts, different from what might be inferred from what appears on the face of the transaction itself; that they were executed in their usual course of business, in the same manner that all the business on the board of trade relating to option contracts for future delivery of grain is transacted; that instead of understanding that no wheat or corn was to be delivered, their understanding was just the contrary; that the grain must be delivered according to the terms of the contract in all cases; that there was no option in the matter except as to the day in November on which the delivery was to be made; that if not delivered before, it must at all events be delivered on the last day of the month; they did not know whether Stevens & Sons had the grain to ship from De Soto, and did not stop to inquire, but supposed they might have it; that if they did not ship it, they (Foss & Co.) were bound to deliver the grain for them; that the contracts, according to universal custom on the board of trade, were made in the name of S. D. Foss & Co.; the name of their customer not being disclosed to the other party, or even inquired after. They testify that they have never dealt in what are called "puts" and "calls," such as are described in Ex parte Young [Case No. 18,145]; [In re Chandler, Id. 2,590],[3] and that such contracts, which give the option to deliver or receive, or not, are prohibited by the board of trade as well as by the laws of Illinois; that they made these contracts with various members of the board of trade, for and on behalf of the bankrupts, at their request, and for their benefit, in entire good faith, without any understanding that they

[3] [From 10 Chi. Leg. News, 211.]

were not to be performed, and that Stevens & Sons not shipping the grain, they performed their contracts by going upon the market and purchasing the wheat and corn; that as to thirty thousand bushels of corn they made a delivery, and as to the balance they closed out the deal in the manner before indicated, by mutual offset and adjustment of differences; that this adjustment of differences is a mere matter of convenience to the members of the board, and to their customers; that no person is under the least obligation to settle in that way, and that dealers may and often do insist upon an actual delivery of the grain, and that settlement frequently saves to their customers the cost of insurance and storage. That the object of forming these rings or clearing-houses, is to close out the transactions and get them off their books; and this is what they call "ringing it out." But that it frequently cannot be done in that way; as if, for any reason, one whose assistance is essential to complete the circle, prefers an actual delivery, in which case the ring is "burst;" and then each must perform his contract by actual delivery of the grain. Their testimony is full, and fair, and intelligent upon the questions at issue, and they are corroborated by several other witnesses, ex-presidents, ex-directors, ex-commissioners of appeals, and present members of the board of trade, and some of the persons with whom these contracts were made. The testimony is conclusive that this business was done much in the same manner that all the other business on the board of trade is done respecting contracts for the future delivery of grain. They all agree that there is no option except the option to deliver on any day of the month; and that the seller is bound, not only by the contract but by the rules of the board, to which it is made subject, to perform his contract by an actual delivery, unless excused from the performance by the act of the other party; and for a violation of this rule he is subject to the discipline of the board, and to be dismissed therefrom if he insists upon the violation of his contract.

Now, which party is best corroborated in their understanding of the contract by the admitted facts of the case?

It is clear to me, by all odds, that the defendants are best corroborated.

It is very easy for either party to swear to what his own understanding of the contract was, but that standing alone is manifestly immaterial. The secret intentions of one party contrary to what appears on the face of the contract, and not communicated to the other party, cannot prevail to make a contract illegal which is otherwise valid. The real question is, what was the contract? and that implies an inquiry as to the mutual understanding and meeting of the minds of the parties. What was that? It is easy for a party to swear what his own understanding and intentions were, but when he comes to swear to the intentions and understanding of the other party, the consideration due to his testimony stands on an entirely different footing. He may be presumed to know his own intentions, but the evidence of the intentions of the other party should not be of a merely subjective character, but should consist of tangible facts and circumstances outside of his own consciousness, and a knowledge of which would be capable of satisfying other minds.

The conversation with the defendants testified to by Stevens, besides being denied by them, if proven, is not very strong evidence, for Stevens admits that this was a month after these transactions occurred, and was a general conversation relating to the general manner of doing business upon the board, and not to the transactions in question. But aside from the testimony as to this conversation, what is there in the case to show that S. D. Foss & Co. had any intention in regard to these contracts different from what is fairly evidenced by the contracts and transactions themselves, as they appear upon their face? The telegrams were orders in writing, and gave positive directions to sell grain; not to sell a privilege to deliver or not. The evidence shows at the time they were made there had been no previous communications or understandings in regard to these purchases. When received, Foss & Co. went upon the market and executed the orders by making written contracts of which the following is a blank copy, or verbal contracts to the same effect:

"Grain Contract. Chicago,—1874. We have this day sold A. B. & Co. ten thousand bushels of No. 2. corn, in store, at —— cents per bushel, to be delivered at sellers' option during the month of November, 1874, —— in lots of 5,000 bushels each. This contract is subject, in all respects, to the rules and and regulations of the Board of Trade of the city of Chicago. M—at—cts. S. D. Foss & Co. Per ——."

When these contracts matured, the defendants performed them by a delivery of the grain, except when, by the mutual arrangement of the parties concerned, the contracts were taken up and cancelled, and then they invariably paid in cash the damages which the law would have obliged them to pay upon a failure to perform their agreement; that is to say, the difference between the contract price and the market price on the day when delivery should have been made.

Now, in the absence of more convincing testimony, what the parties actually did is pretty good evidence of what they intended to do; and I must conclude that upon the face of the transaction, as shown by the acts and conduct of the parties, the evidence is very strong that these sales were bona fide sales, and not made with any intent, mutual between the parties, to violate the law.

The notes and mortgages sought to be set aside (as well as the original contracts for

the sale of the grain, both as between the bankrupts and S. D. Foss & Co., and between S. D. Foss & Co. and the parties with whom they contracted), being in writing and perfectly fair on their face, and given for a full money consideration without any pretense of fraud or unfair dealing, the burden of making a clear case for setting them aside for illegality, lies with the complainant. There should be in his favor a clear preponderance in the weight of the evidence. Pixley v. Boynton, 79 Ill. 351. Contracts made and so deliberately entered into upon adequate consideration, without fraud, should not be set aside for light or transient reasons, or mere suspicion of being contrary to law. But instead of there being a preponderance of proofs in favor of the complainants, I am obliged to believe that the weight of evidence is the other way, and I must find as facts:

1. That C. B. Stevens & Sons, when they gave the orders for the sale of the grain, had no grain to deliver, no contracts made by which they expected to obtain it, and no expectation of ever having it delivered, by shipping it to the defendants.

They did expect and intend, however, that S. D. Foss & Co. would make these contracts much as they did, in fact, make them, and that they would, at their maturity, take care of them for C. B. Stevens & Sons in about the same manner they did take care of them, by a delivery of the grain, or by a settlement and adjustment of differences according to circumstances; and that whatever the profits were, they were to be credited with them, and if there were losses, such losses were to be borne by them.

2. That the defendants did not know that C. B. Stevens & Sons had not the grain, but had no reason to expect that they had or would obtain it to ship to Chicago in sufficient amounts to fill the orders, but intended that if C. B. S. & Sons did not ship the grain, they (defendants) would perform their contracts with the parties with whom they were severally made in C. B. Stevens & Sons' behalf, in good faith, by a delivery of the grain, unless delivery was dispensed with by the parties who had a right to insist upon a fulfillment of the contracts, and that there was no mutual understanding that the contracts were mere wagers on the price of grain for the November market, or that there was to be, in fact, no delivery, but only an adjustment of differences.

3. The understanding of the other parties to these contracts, to whom sales were made, as to their being performed, was the same as that of the defendants.

Having determined the facts, the law applicable to the case is not difficult.

1. The contracts sought to be set aside are written contracts, and the mortgage is under seal. Nevertheless, the weight of authority, and I think that of doctrine is, that you may go behind the writing and show what the real intent and meaning of the parties were; and if it appears that the writing does not express the real intent of the parties, but is merely colorable, and used as a cloak to cover a gambling transaction, the court will not lend its aid to enforce the contract, however fair on its face; or if securities are given, as in this case, will interfere on grounds of public policy and for the public good, rather than for the purpose of relieving a party who is himself particeps criminis in an inhibited transaction, to set aside such securities. In re Green [Case No. 5,751], and the cases there cited.

2. A contract for the future delivery of personal property, which the seller has not got when the contract is made, nor any means of getting it, is not void for illegality.

That was held in Porter v. Viets [Id. 11,291], and is the settled law. See Logan v. Musick, 81 Ill. 415; Hibblewhite v. McMorine, 5 Mees. & W. 462.

The seller is bound by the contract to deliver the goods, and if he fails he must pay damages.

Such contracts, though entered into for pure purposes of speculation, however censurable when made by those engaged in ordinary mercantile pursuits, and who have creditors depending for the payment of their just claims upon their prudent management in business, are nevertheless not prohibited by law.

As said in Porter v. Viets, supra, "People might differ about the propriety of making such a contract by one who did not know certainly where he was to acquire the property, but, having made it, the courts will compel him to abide by it." That case was on demurrer, and was in many essential respects similar to the one at bar.

3. The substance of the contract itself is what must control. The secret intention of one of the parties uncommunicated to the other party, not to fulfill his contract, is not enough to make the transaction illegal. The intent that it should be a mere betting upon the market, without any expectation of actual performance, must be mutual, and constitute an integral part of the real contract, in order to vitiate it.

Furthermore, supposing it had been the mutual intention of S. D. Foss & Co. and the bankrupts, that these contracts were not to be performed, I do not see that that would make them illegal, so long as the other parties to the contract did not participate in that illegal intention. S. D. Foss & Co., and C. B. Stevens & Sons did not constitute the parties to the contract. There was no contract for the sale and delivery of grain made between them. As between them the relation existed of principal and agent. S. D. Foss & Co. made the contract in their own name, but for, and in behalf of C. B. Stevens & Sons; and S. D. Foss & Co. and C. B. Stevens & Sons constitute but one party to the contract, whether it be considered as a contract between S. D. Foss & Co. and the parties in

Chicago, with whom they dealt, or as a contract between C. B. Stevens & Sons and those same parties; and there is no evidence, whatever, to show that those other parties had any notice or knowledge of this gambling intent. On the contrary, they knew that Foss & Co., as the evidence shows, and some of these same parties testify, were men of high standing and responsibility on the board of trade, and would perform their agreements. Lehman v. Strassberger [Case No. 8,216], and Wolcott v. Heath, 78 Ill. 433, are directly in point.

4. If the original contracts for the sale of grain were liable to the taint of illegality, as charged, it does not necessarily follow that the notes and mortgage executed by one of the principals in the transaction, to secure the payment of moneys previously advanced by their agent to pay losses springing out of, and resulting from those original transactions, are contaminated with the same vice.

This question is fairly presented by this record, though the decision of the point is not necessary to the case, and I do not care to decide it. I shall, therefore, content myself with reference to some few high authorities, which hold such a contract valid. The leading English case, decided by Lord Mansfield, is Faikney v. Reynous, 4 Burrows, 2069. Following this are Petrie v. Hannay, 3 Term R. 418; Farmer v. Russell, 1 Bos. & P. 296.

The first case cited is a strong case, and though seemingly questioned by Lord Kenyon in Petrie v. Hannay, supra, has never been overruled, I believe, in England. Marshall, C. J., cites it approvingly in Armstrong v. Toler, 11 Wheat. [24 U. S.] 258. See, also, Owen v. Davis, 1 Bailey, 315, and the recent case before cited of Lehman v. Strassberger [supra], which is very much in point, I think. This, I believe, is undoubtedly the result of the English cases. How far the rule has been changed by statute, or by decisions in the several states, I do not care to inquire.

5. Whatever might be the judgment of discreet men as to the propriety of such purely speculative transactions as are disclosed by this record, undertaken by men in mercantile pursuits, I am unable to see, on general principles, any objection to them in point of law. The law does not undertake to prevent speculation. It does not undertake the Quixotic task of nicely governing men in all the relations of life, and compelling them to do, under all circumstances, what is prudent and reasonable. The truth is, men are speculative creatures as certainly as they are eating and sleeping ones. And, although it is undoubtedly true that much harm comes to the community from over speculation, it is more than doubtful if the world would be better off without speculators; or, if it would be, that the law can do much in the way of abolishing them.

As a common thing, business men are prone to regard their own judgment of the market as a part of their capital, and to a certain extent they have a right so to do. It is only with the more manifest abuses of the privileges of citizens in their dealings with one another, and when the evil touches and infects the public welfare, that the law assumes to interfere. In the main, commercial transactions must be left to be regulated by the higher and more inexorable laws which govern the trading world. If the transactions disclosed by this case are illegal, then, undoubtedly, a great part of the banking and clearing-house transactions in our great commercial centres are illegal also.

I am persuaded that to hold them so would be trenching too severely upon the business of the commercial world, without any corresponding benefit to be expected from it.

It might be a difficult task to lay down any single rule or draw a straight line which should define or divide all merely speculative from all pure gambling transactions, for it must be admitted that the same prime element of risk is common to both. But it has seemed to me that, according to any reasonable rule which it would be practicable to enforce, these transactions must fall on the side of legal speculations. They were carried on in good faith, and in the usual and ordinary course of business, upon the board of trade, which it seems undertakes to exercise a salutary control over its members; it appearing in evidence that if any member fails or refuses to perform his contract by delivery or receiving grain which he has agreed to deliver or receive, he is subject to the discipline of that body; and if the offending member is still refractory or contumacious, he is suspended or finally dismissed from the board; thus adding to the penalties which the law attaches to a violation of contracts, the sanction of a wholesome family discipline. The witnesses agree that what are called "puts" and "calls" are not allowed to members of the board, and that "scalpers" cannot live in that atmosphere, they bearing the same relation to that fraternity of commercial gentlemen that shysters do to full-bred lawyers. If that be so, certainly they are far enough asunder.

Then again, if we look at the equities of this case, aside from the special head of equity, under which the court, in the interest of the public good, will interfere to set aside and cancel securities given upon a gambling consideration, the general equities and intrinsic justice of the case are largely with the defendants. The whole business was originated and carried on at the instance and for the benefit of the bankrupts. Whatever of legal turpitude attaches to these transactions, it is evident that C. B. Stevens & Sons were not merely particeps criminis, but the principal offenders. When profits ensued, as they frequently did, they put them down in their own pockets. On one occasion it is in evidence that they represented to defendants that they made quite large amounts, something like ten thousand dollars out of these

deals. Why then, if it was their deal, and they enjoyed the profits when there were profits, should they not bear the losses when the market turned against them and these fell to their lot, and not shuffle them off upon their agents who, it is not denied, had acted fairly and honorably with them?

Foss & Co. had no interest in these transactions, except their commissions, and instead of leading the bankrupts on in this business, the evidence of the bankrupts is that they discouraged them on every occasion. Their letters, introduced in evidence by the complainant, show that S. D. Foss & Co., from time to time, dissuaded the bankrupts from these speculating deals—told them they were taking too much risk, both in respect to wheat and corn; that there was a small stock of old corn in the market; that the new crop had not yet been moved; that there was danger of a "corner" being run, and sending prices up, and on one occasion protested that if they insisted upon taking such risks, they must employ other commission men. These letters were relied upon to show that the defendants understood these deals to be gambling transactions; but to my mind they simply show a proper appreciation, on the part of the defendants, of the risks which men, in the circumstances and business of the bankrupts, were taking on themselves, and a due consideration for the interests of their principals in that behalf. But C. B. Stevens & Sons, relying confidently on their own judgment and sources of knowledge, as men are inclined to do, continued the business until the tide turned against them. Under these circumstances, one would say that the commonest kind of honesty that passes current among men should require C. B. Stevens & Sons to pay these losses, and not shift them off upon their factors. Of course the assignee stands, as far as legal right goes, in no better case than the bankrupts; and it is due to the bankrupts to say that, as far as they are personally concerned, they have never objected to the payment of these claims, though they are now the main witnesses for the complainant, and in their testimony say they want him to succeed. The assignee, of course, in the interest of the creditors, has only done his duty in bringing these matters before the court for adjudication.

I have not undertaken to review the decisions upon this subject. I have not thought it essential. Those of the highest tribunal in Illinois, though not perhaps entirely reconcilable, I think are so in the main, and go to support the transaction disclosed by the case at bar. Whatever discrepancy there is, as I have before remarked, arises more from the facts than from the law. The most that can be said is, that different courts have come to different conclusions upon different states of facts. This cannot be wondered at, and is unavoidable. How far the judgment of the court, in a given case upon the facts, may be influenced by its opinion of the law and the essential justice of the case, cannot always be known. I confess I have a strong predilection in favor of holding men of full age and right mind to their contracts deliberately entered into upon full and adequate money considerations, without deceit or imposition, and when the consequences of their contracts, however ill-advised, are mainly personal to themselves.

I think the cases cited of Wolcott v. Heath, 78 Ill. 433, Pixley v. Boynton, 79 Ill. 351, and Logan v. Musick, 81 Ill. 416, express the law of that state on the subject, and are authorities in the case at bar.

The case of Lyon v. Culbertson, 83 Ill. 33, in which Justice Dickey delivers a rigorous dissenting opinion, I am told was decided before the cases in the 79th and 81st Illinois Reports. However that may be, and whether the decision be good law or not, I do not see that it is necessarily at variance with the other cases, nor that it attempts to overrule or qualify them in the least. That seemed to turn on a question that is not presented in this case.

There is no failure to perform, or of offer to perform, on the part of S. D. Foss & Co., on any of the contracts which they made; nor anything in the contracts dispensing with an offer to perform.

Again, it must be incontestible, that if the contracts were valid in their inception, and not tainted with any gambling intent or device, a subsequent mutual settlement by the parties, which took the place of actual performance, cannot have the retroactive effect of making them void for illegality. If the contracts were void at all, they must have been void when made. The subsequent conduct of the parties may, and should be considered as evidence tending to show what the real contracts were when entered into; but if they were originally valid, no subsequent act of the parties can have the effect to render them obnoxious to the taint of illegality as being gambling contracts.

I have not overlooked the case of In re Green, supra, decided by my learned and lamented predecessor.

I have not had occasion to review the evidence from which the conclusions of fact in that case were drawn; and it is enough to say that upon the findings of fact made, the law is undoubtedly correctly stated.

Bill dismissed.

[NOTE. It is stated by Dyer, District Judge, in Ward v. Vosburgh, 31 Fed. 15, that an appeal was taken from the judgment herein to the circuit court, and that in an oral opinion delivered by Drummond, Circuit Judge, the contracts involved in the foregoing case were sustained, and the decision of the district court affirmed.]

Case No. 2,853.

CLARKE v. HEMPSTONE.

[Cited in Brook v. Brown, Case No. 1,931. Nowhere reported; opinion not now accessible.]

Case No. 2,854.

CLARKE v. JANESVILLE.

[1 Biss. 98:[1] 4 Am. Law Reg. 591.]

District Court,[2] D. Wisconsin. May Term, 1856.

RAILROAD BONDS AND COUPONS.

1. A bond under seal given by a city to a railroad company located in the same state cannot be sued in the federal courts, even by an assignee.

2. Interest coupons annexed to such a bond, and referring to it have no independent vitality, and, even though made payable to bearer, come under the same rule.

3. Such coupons are not negotiable paper. They are merely evidences of interest, and it is upon the bonds alone that the interest is recoverable, and action of assumpsit will not lie.

Declaration in assumpsit upon the common counts; to which the general issue was pleaded. In support of the issue on the part of the plaintiff were offered in evidence several bonds of the city of Janesville to the Rock River Valley Union Railroad Company, with coupons or interest warrants annexed. The bonds were issued in the year 1853, for one thousand dollars each, payable in twenty years, with interest at the rate of eight per cent. per annum, payable semi-annually, at the city of New York, signed by the mayor of the city, with the seal of the city annexed, and countersigned by the treasurer of the city. They are payable to the said railroad company or assigns, and on the day of their date they purport to have been assigned by the president of said company to ——, or bearer. Printed on the same sheet of paper, with each bond, are forty coupons, or interest warrants, each for forty dollars, for semi-annual interest, according to the condition of the bond. These coupons are signed by the treasurer of the city, and are made payable to the bearer, in regular succession of every six months, for twenty years. This suit is to recover the interest that had accrued on these bonds since their date.

To this evidence the defendant's counsel objected for several reasons, of which the following are here noticed. 1. These coupons or interest warrants have no legal validity independent of the bonds to which they are annexed, and they pass to the assignee of said bonds. 2. There is no law in this state empowering an assignee of a bond or specialty to maintain a suit in his own name. 3. This court has no jurisdiction of this cause, the jurisdiction being excluded by section 11 of the judiciary act of 1789 (1 Stat. 78). These bonds were issued in pursuance of an act of the legislature of Wisconsin, entitled "An act to incorporate the city of Janesville," approved March 19, 1853 (P. & L. Laws 1853, c. 93). By section 7 of said act, "the common council shall have power to submit to the legal voters the question, whether said city shall take stock in any railroad running to, or passing through said city. And if a majority of the votes cast on any such question be in favor of taking stock, then the common council shall, by resolution to be entered on the city records, authorize the mayor to subscribe for the city the amount of stock voted to be taken." And by section 9, "the common council shall have power to issue the bonds of the city, with coupons or interest warrants attached, drawing not more than ten per cent. interest, to pay the stock so subscribed, and shall have power to levy a special tax on the taxable property in said city, to pay the interest on such bonds, and also the principal, when the same becomes due. But the common council shall not have power to dispose of such bonds for less than the face thereof." The Rock River Valley Union Railroad Company and the city of Janesville are corporations created by the laws of Wisconsin; and they are located and doing business in said state.

Browne & Ogden, for plaintiff.
Noggel & Rexford, for defendant.

MILLER, District Judge. The clause of the eleventh section of the judiciary act, in regard to the jurisdiction of the federal courts, is this: "Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or chose in action in favor of an assignee, unless a suit might have been prosecuted in such court, to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange." This section is restrictive of jurisdiction contemplated by the third article of the constitution of the United States, which provides that the judicial power shall extend to controversies between citizens of different states. The constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the circuit or district courts. These courts were created by statute, in pursuance of the constitution, and can have no jurisdiction but such as the statute confers. Sheldon v. Sill, 8 How. [49 U. S.] 441. It is well understood, by those experienced in the jurisprudence of the United States, that congress has conferred upon the federal courts but a portion of the jurisdiction contemplated by the constitution. This prohibition was inserted in the law for the purpose of relieving the federal courts, as much as possible, of enforcing local contracts; and also of preventing assignments of choses in action to non-residents, for the purpose of rendering a defense upon the merits or a set-off less available to defendants.

A suit might be sustained in this court, by the plaintiff against the defendant, to recover possession of these bonds in specie, or

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

[2] In Wisconsin, the United States district court had, until the regular organization of the circuit court, in 1862, circuit court jurisdiction.

damages for their wrongful caption or detention; for this law has no application to such a suit by the assignee of a chose in action, but only to a suit or action to recover the contents. Deshler v. Dodge, 16 How. [57 U. S.] 622. So in Smith v. Kernochen, 7 How. [48 U. S.] 198, an assignee of a mortgage between parties of the same state, maintained ejectment against the mortgagor to recover possession of the mortgaged premises.

In Sheldon v. Sill, supra, it is decided, that a bond for a debt with a mortgage to secure it, is a chose in action; and that the assignee of a mortgage between citizens of the same state, cannot maintain a bill in chancery to foreclose, when the mortgagee cannot, because it is a suit to recover the contents of a chose in action. Nor have the federal courts cognizance of a suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such courts to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange. This restrictive clause is literally construed. Gibson v. Chew, 16 Pet. [41 U. S.] 315; Dromgoole v. Farmers' & Merchants' Bank, 2 How. [43 U. S.] 241.

It is contended that these bonds were intended for negotiation as promissory notes, and that they were so put in circulation by the assignment. In pursuance of the act of incorporation of the city of Janesville, these bonds were given to the railroad company, in payment of stock in said company, subscribed for by the city. The law did not require the railroad company to accept these bonds in payment of the stock; nor did it authorize them to be given to any particular person or corporation, or to be put in circulation as negotiable paper. The bonds might either be given to any person or corporation who would furnish their amount at par, as a loan to the city, or to the railroad company in payment of the stock. The act prohibited the common council from disposing of them for less than their face; thereby placing the city of Janesville, as a stockholder by means of these bonds on an equality with the other stockholders who paid in cash. And whether the assignment of the bonds is equitable or legal, the effect thereof, as to the assignee, in regard to the jurisdiction of the court, is the same. Sere v. Pitot, 6 Cranch [10 U. S.] 332. The assignment of these bonds is not to the plaintiff by name, but to ——, or bearer, leaving the space for their or any other names to be inserted. This may be proper in a financial point of view, to save the necessity of a formal assignment at each transfer. But these bonds are made to the railroad company or its assigns; and an assignment is necessary to pass them. The railroad company being a corporation created by the laws of this state, and located and doing business therein, cannot maintain a suit upon these bonds to recover their contents or the interest accrued on them, either in its own name or in that of an assignee.

When the plaintiff has a legal right to sue, the court will not inquire into the residence of those who may have an equitable interest in the demand, as in Bonnafee v. Williams, 3 How. [44 U. S.] 574, where it is decided that the court has jurisdiction where a note is made by a citizen of one state, and payable to another citizen of the same state or bearer, and the party bringing the suit is a citizen of a different state, although upon the face of the note it was expressed to be for the use of persons residing in the state in which the maker and payee lived. But in its inception, a bond should be made payable to some certain obligee, and cannot be made payable like a note or bill to bearer. [Ann. Dig. 1851, p. 70, § 63;][3] Marsh v. Brooks, 11 Ired. 409. And the legal right to recover on a bond is in the obligee. Irish v. Johnston, 1 Jones [11 Pa. St.] 483. These bonds are under the seal of the corporation of the city, and are specialties, and not negotiable as bills of exchange and promissory notes, either by the law merchant or by statute. All interest in them, either legal or equitable, must pass from the obligee by assignment or endorsement. By the assignment of these bonds, the plaintiff may have acquired an interest in them sufficient to control them, and to receive their contents, but he cannot sue in his own name. There is no statute authority in this state for the assignment or transfer of a bond or specialty, whereby the assignee or holder may become the legal owner, and be enabled to sue in his own name. The law authorizing the execution, and delivery of these bonds, and the consideration expressed show the railroad company to be the legal obligee, which can be the only plaintiff in a suit upon them, either for principal or interest, in the absence of a law enabling an assignee to become a legal party. In the case of Irvine v. Lowry, 14 Pet. [39 U. S.] 293, the note in suit was made by Lowry, payable to Irvine or order, in the notes of the Lumbermen's Bank, and was endorsed to the bank. The supreme court in the opinion say, "The paper on which the suit is brought is not negotiable by the usage or custom of merchants. It is payable to order. The promise is to pay so many dollars, but not to pay any certain sum of money. It is a promise to pay the amount 'in the office notes of the Lumbermen's Bank at Warren,' which are not money, and, at most, a chattel. Not being a promissory note, either by the law merchant, or by the statute of Anne, or the kindred act of assembly of Pennsylvania, it is not negotiable by indorsement; and not being under seal, it is not assignable by the act of assembly on that subject relating to bonds. The bank, therefore, cannot sue in

[3] [From 4 Am. Law Reg. (O. S.) 591.]

their own name, by virtue of the endorsement of Irvine in blank; nor could they so sue if it was specially endorsed to them, because the legal right of action would still remain in Irvine, though the equitable interest in the thing promised may have passed to the bank."

So it is in this case, in the absence of a statute providing for an assignment of bonds, and for the assignee maintaining suit in his own name. The legal right of action remains in the railroad company, the obligee, though the equitable interest in the contents of the bonds may have passed to the plaintiff.

It may be said, that, although these obligations have been issued by a corporation having a seal, and which is thereto annexed, they should be considered as negotiable choses in action. But it is now well understood, that corporations can issue promises in writing to pay money, and can contract debts, without the use of their seal. The coupons call these papers certificates; but the law, authorizing the council to issue them, terms them bonds, and on their face they have the form of bonds. But let them be technically bonds or not, they can only be transferred by assignment.

This suit is in assumpsit upon these coupons, for the semi-annual interest payable before the date of the summons. The plaintiff has proceeded upon them as promissory notes or negotiable paper payable to bearer; and he contends that the law restrictive of our jurisdiction is not applicable to them. It is well settled, that this provision of law does not extend to notes payable to bearer; upon the ground, that the original promise is to pay any person, who may happen to be the bearer; and that as the interest in such a note passes by mere manual delivery, the holder cannot therefore be said to claim by virtue of an assignment, and is not affected by the disabilities of the nominal payee. Bullard v. Bell [Case No. 2,121]; Bank of Kentucky v. Wister, 2 Pet. [27 U. S.] 318. But is the original promise or obligation of the city of Janesville in these coupons? The charter of the city authorized the common council to issue bonds, with coupons or interest warrants annexed. In pursuance of that law, and a resolution of the common council, bonds were executed by the mayor, as the head and president of the council and corporation, under the corporate seal, for one thousand dollars each, payable in twenty years, with interest at the rate of eight per cent. per annum, payable semi-annually at the city of New York, with forty coupons or interest warrants attached to each bond, representing the interest condition of the bond.

The bonds are signed by the mayor and countersigned by the treasurer of the city. The coupons or interest warrants are signed by the treasurer alone; and they do not purport to be obligations of the city through the common council, but have a direct reference to the bond, using the word certificate, to which it is attached. There is no question, that by the face of the bonds, in connection with the coupons, the interest is recoverable semi-annually, as it becomes payable. The coupons are appendages to the bonds for convenience in receipting for interest paid, and also as evidence to the purchaser of the bonds of the non-payment of any previous interest; and they pass by assignment of the bond to which they are attached. They had no legal force or validity at their inception independent of the bonds; and it is upon the bonds alone that the interest is recoverable. They draw the attention of the court directly to the bond, to which they are attached, as the original contract. The bonds are special contracts of a city, in pursuance of a local law, for a local and specified purpose, which the court must disregard in pronouncing the coupons negotiable paper payable to anybody, and recoverable by the holder, while they continue annexed to the bonds.

For these reasons the evidence is rejected and the suit dismissed.

NOTE [from original report]. If the coupons are so made as to be separable from the bonds and negotiable, the owner can sue on them without producing the bonds, or being interested in them. Thomson v. Lee Co., 3 Wall. [70 U. S.] 327; Clark v. City of Janesville, 10 Wis. 136; City v. Lamson, 9 Wall. [76 U. S.] 477. Coupon disconnected from bond is not negotiable, unless such intention appears on its face. Myers v. York & C. R. Co., 43 Me. 232; Crosby v. New London, etc., R. Co., 26 Conn. 121. Coupons may be detached from the bonds which they accompany, and transferred or recovered on, without production of the bonds or showing title to them. National Exch. Bank v. Hartford, etc., R. Co., 8 R. I. 375; McCoy v. Washington Co. [Case No. 8,731]; Com. of Virginia v. Chesapeake, etc., Canal Co., 32 Md. 501; Burroughs v. Richmond Co., 65 N. C. 234; Knox Co. v. Aspinwall, 21 How. [62 U. S.] 539; Murray v. Lardner, 2 Wall. [69 U. S.] 110; Thomson v. Lee Co., 3 Wall. [70 U. S.] 327. All persons must inquire into power of corporation to make contract and authority of its officers. Hodges v. Buffalo, 2 Denio, 110; Taft v. Pittsford, 28 Vt. 286; City of Leavenworth v. Rankin, 2 Kan. 357; Mayor, etc., of Baltimore v. Reynolds, 20 Md. 1; Wallace v. City of San Jose, 29 Cal. 180; State v. Kirkley, 29 Md. 85, 111; State v. Haskell, 20 Iowa, 276; City of Bridgeport v. Housatonic R. Co., 15 Conn. 475; Mayor, etc., of Baltimore v. Eschbach, 18 Md. 276; Dill v. Inhabitants of Wareham, 7 Metc. [Mass.] 438. Consult Mygatt v. City of Green Bay [Case No. 9,998]; Luling v. Racine [Id. 8,603]; Goedgen v. Supervisors of Manitowoc Co. [Id. 5,501], to appear hereafter in this series; and for a full citation of authorities on the question of municipal bonds, see Schenck v. Supervisors of Marshall Co. [Id. 12,449], to appear in subsequent volume of these reports.

Case No. 2,855.

CLARKE v. JOHNSON.

[16 Blatchf. 495;[1] 4 Ban. & A. 403; 17 O. G. 1401.]

Circuit Court, E. D. New York. July 21, 1879.

PATENTS—"ELASTIC PACKING"—CONSTRUCTION.

The first claim of the reissued letters patent, No. 3,579, granted, August 3d, 1869, to Nathaniel Jenkins, for an "improvement in the manufacture of elastic packing," namely, "an elastic packing composed of at least four-tenths of finely pulverized refractory earthy or stony material, intimately mingled with, and held together by, rubber prepared for vulcanizing, and then vulcanized, as and for the purpose described," includes only soft vulcanized rubber, and does not include hard rubber, or vulcanite, so called, made of rubber mingled with 25 per cent., or over, of sulphur, and then vulcanized.

[In equity. This bill was filed by Thomas W. Clarke, trustee, etc., against John Johnson.]

Thomas William Clarke, for plaintiff.

Alexander Cameron and James H. Gilbert, for defendant.

BENEDICT, District Judge. This action is brought to obtain an account and also an injunction to restrain the defendant from manufacturing and selling a certain kind of rubber disc used as packing for steam joints. The bill sets forth letters patent owned by the plaintiff, issued to Nathaniel Jenkins, and known as reissue No. 3,579, dated August 3d, 1869, for an "improvement in the manufacture of elastic packing." It also sets forth a decree rendered by the circuit court of the United States for the southern district of New York, in the year 1871, rendered in an action brought by the plaintiff against this defendant, upon this same patent. 9 Blatchf. 516 [Jenkins v. Johnson, Case No. 7,271]. It also sets forth a decree upon pleadings and proofs, rendered by the circuit court of the United States for the district of Massachusetts, on the 22d of March, 1872, in an action brought by this plaintiff upon this same patent against George W. Walker and another. 1 O. G. 359 [Jenkins v. Walker, Case No. 7,275]. General acquiescence is also averred, and infringement by the defendant.

The first claim of the patent sued on, which is the only claim here involved, is in the following language: "An elastic packing composed of at least four-tenths of finely pulverized refractory, earthy or stony material, intimately mingled with, and held together by, rubber prepared for vulcanizing, and then vulcanized, as and for the purpose described."

Upon this bill and certain affidavits, the plaintiff now moves for a preliminary injunction. The defendant reads, in opposition to the motion, his answer, in which the equity of the bill is denied, and he puts in evidence, in support of his denial of novelty, a number of patents prior in date to the invention of Jenkins, and, in support of his denial of infringement, a number of affidavits, and he insists that this evidence either defeats the Jenkins patent entirely, upon the ground of want of novelty, or compels a construction of it so limited as to exclude from its scope the article which the defendant now manufactures.

In a case like this, where it appears that the patent sued on has been twice sustained upon final hearing, in contested actions, before different courts, in one of which the defendant was the same person who is defendant here, it can hardly have been expected, that, upon a preliminary motion like the present, a construction would be given in conflict with any construction given to the patent by the distinguished judges who were called on to consider the patent in the former cases set up in the bill. Neither would it, in my opinion, be proper to deny the present application because of any doubt in regard to the validity of the patent, that the defendant may consider to have been raised by the patents prior in date to the Jenkins invention or the rubber balls which have been now, for the first time, proved. For, these patents, now newly exhibited, and the prior manufacture of the rubber balls, could have been proved by the defendant in the former action against him, but were not then relied upon. No evidence has been here produced to show that any articles were ever made in accordance with any of these patents, except by way of experiment. Nor do the affidavits show the employment of the rubber balls for the purpose of resisting the action of heat in steam valves. Moreover, some eight years have elapsed since a decree was rendered against the defendant for an infringement of this patent. During all this period he has, as he says, acquiesced in the validity of the patent. During all this period it has occurred to no person that the patent could be defeated by the production of the patents that are now exhibited for that purpose, although packing was constantly made under the patent, and sold publicly as a patented article, during all this period.

Under such circumstances, I should have little hesitation in compelling the defendant to await a final decree before putting upon the market an article adapted for precisely the same purpose as the Jenkins packing, and very similar thereto in appearance, if his right to manufacture this article depended solely upon the question of the invalidity of the Jenkins patent for want of novelty. But another, and, as I view it, more serious ground of defence is the denial of infringement. This denial raises the question whether the Jenkins patent covers the packing which the defendant now seeks to make and sell. The nature of the defendant's present manufacture is not left in doubt, upon the affidavits, although the evidence in re-

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

gard to it is not, in all respects, harmonious.

The moving papers show valve seat discs made by the defendant, similar in form and general appearance to those made under the Jenkins patent, and adapted to accomplish the same purpose, viz., to constitute an elastic packing for steam joints and valves, that will render the valve tight and successfully resist the corrosive action of the steam. The moving papers also present an analysis of the defendant's discs, according to which they are compounded of the following elements, viz., rubber, 38.97 per cent.; sulphur, 7.23; bone black, 52.89; sand, dirt, .91. This analysis shows, according to the somewhat ambiguous statement of the plaintiff's witness, "a rubber packing compound consisting of more than 40 per cent., (including the sand,) of refractory mineral matter, with 52 per cent. of carbon and about 6 per cent. of surphur in a pulverized state, intimately incorporated with, and held together by, vulcanized india rubber or caoutchouc." The defendant denies that his discs are compounded as stated by the plaintiff's witness, and says that he never made, sold or used such a compound as the plaintiff describes, but that all the discs he has made for sale or use have been made upon the following formulas: para rubber, 10 lbs.; gutta-percha, 5 lbs.; sulphur, 4½ lbs.; bone black, 22½ lbs.—or para rubber, 14 lbs.; gutta-percha, 7 lbs.; sulphur, 6 lbs.; bone black, 28 lbs. These formulas the defendant says he has always used, except that he has sometimes slightly increased the quantity of sulphur, so as to bring it up to the proportion of 5 ounces of sulphur to 1 pound of rubber and gutta-percha together.

I suppose there is no good reason to doubt the truth of the defendant's statements as to the compound of which his discs are composed, and that the subject of the present controversy may justly be considered to be valve seats for steam joints, made as the defendant says he makes them. The question then first arising is, whether the decree rendered in the action between the same parties upon the same patent precludes all enquiry in regard to the right of the defendant to make and sell valve seats such as he says he is now making. Here the burden is upon the plaintiff; and, accordingly, he has exhibited the pleadings and decree in the former action between these same parties, together with an affidavit tending to show that the valve seat discs which formed the subject of such former suit were similar in character to the discs which the defendant now claims to be making. In opposition, the defendant produces two affidavits, tending to show that the subject-matter of the former suit was a disc differing in character from the discs now being made by the defendant, in this, that it contained a portion of oxides of lead, copper and tin, which, in the process of manufacture, absorbed a portion of the sulphur used, and that the compound, when vulcanized, consisted of a skeleton of refractory matter equal or exceeding 40 per cent. of the mass, mingled with, and held together by, the other portion of the mass, which other portion consisted of soft rubber. The formulas of the defendant, as above given, contain no metallic oxides, or other element capable of absorbing the sulphur in the process of manufacture, and produces a packing that consists of a skeleton of refractory material, exceeding 40 per cent. of the mass, mingled with, and held together by, the other portion, which other portion is vulcanite, as distinguished from soft rubber.

Vulcanite and soft rubber are different things, having different properties, and are in no sense equivalents. Vulcanite is produced when rubber is mingled with 25 per cent., or over, of sulphur, and subjected to the vulcanizing process. Soft rubber is produced when the sulphur mingled with the rubber is less than 25 per cent. This difference in the proportion of sulphur absorbed by the rubber, and this only, as I understand it, causes the difference in the product. The introduction of a portion of vulcanite, and the withdrawal of soft rubber from the compound, would, therefore, effect a substantial change in the article. Not only would the elements of the compound be changed in respect to the proportion of sulphur employed, but the result would be different. The proofs show, that the capacity of the compound to resist steam is greatly increased by such a change, and the packing is thereby rendered more efficacious.

It must follow, therefore, that if, in the compound that formed the subject of the former suit, the proportion of sulphur absorbed by the rubber in the process of manufacture was less than 25 per cent., the subject-matter of the former suit was substantially different from that here involved. It is impossible to discover, from the face of the record in the former suit, so far as here produced, what was the character of the disc involved in the proceedings. Upon the affidavits read, the weight of evidence is in favor of the defendant's contention, that the discs complained of in the former suit were so compounded that 25 per cent. of sulphur was not absorbed by the rubber, and that those discs did not exhibit any vulcanite, but were refractory material held together by soft rubber instead of vulcanite. Indeed, the bill filed in this action no where avers that the former suit relates to matter similar in character to that now complained of, and the bringing of this suit seems to indicate that the packing in question must be substantially different from that adjudicated upon in the former action; for, if the defendant had simply resumed the manufacture that was forbidden by the former decree, a new action would be unnecessary.

The burden being upon the plaintiff, and it not being made to appear that the matter now in controversy formed the subject of the

former suit, the decree rendered therein can avail nothing upon the question of infringement that is raised here. In so far as concerns the infringement charged, the present is, therefore, to be treated as a new case, dependent, for its determination, upon a question that did not arise in the former suit against this defendant, viz., whether a rubber packing compound, consisting of a skeleton of refractory material, forming at least 40 per cent. of the mass, the remainder being vulcanite, mingled through the mass, holding the same together, and forming an elastic packing capable of resisting the action of steam, is within the scope of the Jenkins patent.

This question does not appear to have received the consideration of any court, nor does any allusion seem to have been made to it in either of the cases referred to, where the patent was sustained at final hearing. There is, in the opinion delivered by Judge Shepley, the expression, "hard rubber," but I do not understand the reference to be to vulcanite. The phrase is used by Judge Shepley, as it has been here, by the plaintiff's counsel, to mean, not vulcanite, but rubber that is hard to compression. And I find no expression, in his opinion, indicating that his attention had been called to the question upon which this case, as I view it, must turn.

That question—to repeat it in a slightly different form—is, whether the invention of Jenkins, as described in his patent, embraces a packing composed of 40 per cent. and over of refractory material, mingled with, and held together by, vulcanite, so as to form an elastic packing capable of resisting the corrosive effect of steam. This is a question to be determined by the language of the patent, read in the light of the evidence in respect to the state of the art. The language of the claim in the patent has been already given, and seems clearly to be broad enough. Rubber, mingled with 25 per cent. and over of sulphur, and then vulcanized, is as plainly covered by the words, "rubber prepared for vulcanizing and then vulcanized," as is rubber mingled with less than 25 per cent. of sulphur. These words, taken by themselves, are broad enough to cover both compounds, but the difficulty is, that they must be read in connection with the words, "as described," by which words reference is made to the specification for the meaning of the phrase, "rubber prepared for vulcanizing," used in the claim. Turning, then, to the specification, it is found carefully to state the limits of the proportion of sulphur to be used, and fixes that limit at "from one to three per cent." In all places where the proportion of sulphur to be used is spoken of, the proportion is less than the proportion absolutely necessary if the product is intended to be vulcanite. The language of the specification, therefore, plainly excludes from the scope of the patent a compound where the proportion of sulphur used is such that the product is vulcanite.

The difference between vulcanite and soft rubber was well known to the patentee. Equally well known was the fact, that, by using less than 25 per cent. of sulphur, in combination with rubber, soft rubber is produced, and, by using 25 per cent. and over of sulphur, in combination with rubber, vulcanite is produced. If, therefore, Jenkins had considered his invention to include a packing where the refractory material was to be mingled with, and held together by, vulcanite, it is not conceivable that his specification would have fixed the limit of the sulphur to be used at from one to three per cent.

In behalf of the plaintiff, it is said, that Jenkins' patent does not provide that the formula should be simply of soft rubber, but the patent says: "With the following ingredients the proportion would be within the following limits," and then gives the limits of sulphur at "from one to three per cent." There is added the statement: "I do not confine myself to these exact proportions, but consider the composition most accurately stated by the limitations given before." These limitations exclude a composition which would produce vulcanite. This statement shows, that the idea of so compounding his packing as that it should be refractory matter mingled with, and held together by, vulcanite, had not occurred to Jenkins. Read in the light of the specification, the claim of the patent covers simply an elastic packing composed of at least four-tenths of finely pulverized refractory, earthy or stony matter, intimately mingled with, and held together by, rubber prepared for vulcanizing, by using less than 25 per cent. of sulphur.

This understanding of the patent derives support from the circumstance, that no evidence is produced to show, that, under the Jenkins patent, a packing has ever been produced where the refractory material was held together by vulcanite; and from the further fact, so strongly stated by various witnesses, that such a packing as the defendant now makes was never known until within a year, and that it will outlast all elastic packing previously known, and is considered, by those having occasion to use packing, to involve an important discovery in regard to the efficiency of vulcanite, when used in connection with refractory material, for the purpose of packing steam valves. Such an understanding of the Jenkins patent, as I have above stated, is fatal to the present motion, for the reason, that, according to the weight of the evidence, the defendant's packing is always so compounded as to furnish, for absorption by the rubber, more than 25 per cent. of sulphur, and, when vulcanized, never contains soft rubber, and invariably contains vulcanite, whence results, according to the affidavits, an article essentially different

from the article described in the Jenkins patent, not only being compounded in a different manner, but possessing different properties, and being more efficacious to effect the object sought to be attained by both articles than it is possible for the Jenkins packing to be. The motion for a preliminary injunction must, therefore, be denied.

[NOTE. On the final hearing, the bill was dismissed because of the failure of plaintiff to prove infringement. Clarke v. Johnson, 4 Fed. 437.

[For other cases involving this patent, see note to Jenkins v. Johnson, Case No. 7,271.]

Case No. 2,856.

CLARKE et al. v. JOHNSTON et al.

[8 Blatchf. 557.][1]

Circuit Court, S. D. New York. Sept. 12, 1871.[2]

WILLS—CONSTRUCTION.

A codicil to a will contained the following provision: "The remaining two-thirds of the portions or shares of my daughters shall be held separate and distinct, and not liable to the control, debts, or engagements of either of their husbands which they now have, or may hereafter have, as well those who are married as she who may hereafter marry, giving, however, to the husbands of either or all of them, in case the wife shall die first, either with or without issue, the income of said reserved part of my estate, as long as he shall live, arising from his wife's portion, and, after his death, then to the child or children of my said daughter so dying." *Held*, that there was, in such provision, no expression or indication of any intention on the part of the testator, that there should be a limitation over in favor of the children of a daughter who should survive her husband; and that, where the husband of such daughter died, and she survived him, his death terminated the operation of the provision for his life estate, and the operation of the provision in favor of the child or children of his wife.

[See note at end of case.]

[In equity. Bill by George Augustus Clarke and Jeanet Virginia Clarke, infants under the age of twenty-one years, by Reuben Middleton, their guardian and next friend, against James B. Johnston and Adam Norrie, as executors of the last will and testament of James Boorman.]

Louis Janin and Max Goepp, for plaintiffs.
Charles O'Conor, for defendants.

BLATCHFORD, District Judge. The prayer of the bill, in this case, is, that the defendants, as executors of the last will and testament of James Boorman, may come to a just and fair account of the settlement of the estate of James R. Smith, the great-grandfather of the plaintiffs, James Boorman having been an executor, and the last surviving executor, of the last will and testament of James R. Smith, and may be ordered to deliver to the plaintiffs a certain legacy, alleged to have accrued to them under the will of James R. Smith, or, if that be impossible, to pay to them the just and present value of certain real estate, alleged to have accrued to them under such legacy.

James R. Smith, who was a merchant in the city of New York, died early in June, 1817, leaving a will executed January 23d, 1817, and a codicil executed May 30th, 1817, which were duly probated before the surrogate of the county of New York, June 11th, 1817. James R. Smith left surviving him four children: (1.) Jeanet, then the wife of the Reverend John X. Clarke, and who then had a child living, George Augustus Duncan Clarke, who was the father of the plaintiffs; (2.) Hannah, then the wife of Matthew St. Clair Clarke, and who then had children living; (3.) Elizabeth, then a minor, and unmarried, who afterwards became the wife of Joseph Duncan; (4.) James C. R., then a minor. By his will, James R. Smith appointed, as his executors, his widow, Hannah, and Andrew Foster, John Thomson, James Boorman, and Matthew St. Clair Clarke. Letters testamentary were granted to all of them but Foster. By his will, James R. Smith authorized his executors, in their discretion, to sell the whole, or any part, of his estate, real or personal, and directed that the residue of his estate, after the payment of his debts, should, unless the same, or any part thereof, should be otherwise disposed of, by codicil or codicils to his will, be distributed according to the laws of the state of New York, in the same manner as in case he had happened to die intestate. By the codicil, James R. Smith ratified and confirmed the will in all respects, except so far as any part thereof might or should be revoked or altered by such codicil. The codicil, after making various devises and bequests, in eleven clauses, proceeds as follows: "Twelfth. All the rest, residue and remainder of my estate, of every kind and nature whatsoever, and wheresoever situate, I give, devise and bequeath unto my said executors, in trust that the same shall be equally divided to and amongst my four children, share and share alike, and to their respective heirs. My will further is, that my son James and my daughter Elizabeth shall each have the sum of fifteen hundred dollars set apart by my said executors for their support and education, until they arrive at the age of twenty-one, and, if that sum shall not be found sufficient, my executors shall take such further sum, from their respective shares of my estate, as shall be necessary; and I do hereby give the tuition, care and guardianship of my said son James and my daughter Elizabeth to my said wife. My will further is, that my son James shall not come to the full possession and enjoyment of his portion of my estate until he shall arrive at the age of twenty-five years, nor shall he have the power to pawn, pledge, mortgage or dispose of it in any way, the same or any

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

[2] [Affirmed in Clarke v. Johnston, 18 Wall. (85 U. S.) 493.]

part thereof, before the expiration of that time, but shall be entitled to receive the income arising from his portion between the years of twenty-one and twenty-five. I further direct, that my daughters Jeanet, Hannah, and Elizabeth, if she should arrive at the age of twenty-one years, shall have the privilege of expending and appropriating, by and with the consent of the executors, one-third part of their portion of my estate herein devised to them, in such manner as they may think proper, and over which, when so appropriated, they shall have absolute control; and the remaining two-thirds of the portions or shares of my daughters shall be held separate and distinct, and not liable to the control, debts, or engagements of either of their husbands which they now have, or may hereafter have, as well those who are married as she who may hereafter marry, giving, however, to the husbands of either or all of them, in case the wife shall die first, either with or without issue, the income of said reserved part of my estate, as long as he shall live, arising from his wife's portion, and, after his death, then to the child or children of my said daughter so dying, and, if either of my daughters shall die without lawful issue, or having issue which shall not attain the age of twenty-one years, and without issue, then the share or portion of my said daughter, after the death of her husband, or if there be no husband living at her death, shall go and be divided among my other children, share and share alike, and to their issue, in case of the death of either of them, share and share alike, such issue to take the portion that would have belonged to his, her or their father or mother." John X. Clarke, the grandfather of the plaintiffs, died in 1824. His wife, Jeanet, the grandmother of the plaintiffs, died in September, 1847. George Augustus Duncan Clarke, the father of the plaintiffs, was born in November, 1815, and died in October, 1855.

The question involved in this case arises under the twelfth clause of the codicil. The plaintiffs contend, that, by the will and the codicil, the residue of the estate of James R. Smith, after the payment of debts and legacies, was devised to his executors, in trust, to be divided equally among his four children, share and share alike, and to their respective heirs; that each of the four children was to take one-fourth of the estate; that the son, James C. R., was to take his one-fourth in fee; that each of the three daughters was to take one-third of her one-fourth in full ownership, and a life estate only in the other two-thirds of such one-fourth, with remainder over, after such life estate, to her husband, if he should survive her; and that, after his death, the fee of such two-thirds of his deceased wife's one-fourth was to go to her child or children, if they attained the age of twenty-one years, and, if they died before that age, and without issue, then to the other children of the testator, or their surviving heirs. This suit concerns the fee of the two-thirds of the share of the plaintiffs' grandmother, Jeanet, in which two-thirds the plaintiffs claim that their grandmother had only a life estate, and which fee they claim passed to their father on the decease of their grandmother. They allege that James Boorman, by his acts as executor, in wilful default, in conjunction with Matthew St. Clair Clarke, acting as executor, in like wilful default, placed such two-thirds of the share of the plaintiffs' grandmother, Jeanet, which two-thirds consisted wholly of real estate, in such a position that the title to such real estate passed into the hands of bona fide purchasers for a valuable consideration, without notice, whereby the plaintiffs and their father were deprived thereof entirely, and that, therefore, the estate of James Boorman must respond to the plaintiffs for such breach of trust, in the present value of the property of which they have been so deprived. By 1829, James Boorman and Matthew St. Clair Clarke had come to be the sole acting executors of the will of James R. Smith, the widow and Thomson having died, and Foster never having acted as executor. On the 1st of October, 1829, James C. R. Smith having attained the age of twenty-five years, and all the debts of the testator having been paid, a partition, division, and valuation of his estate, into four parts equal in value, was agreed upon by the parties interested in it, namely, the three daughters, the husbands of Hannah and Elizabeth, and James C. R. By a deed of November 15th, 1829, all those parties, other than James C. R., conveyed and confirmed to him certain real estate described in the deed, which he thereby accepted as his one-fourth part of the estate. The two acting executors, described therein as surviving executors, joined in this deed. By a deed of the same date, executed by the two acting executors, and by Matthew St. Clair Clarke and his wife, James C. R. Smith and his wife, and Joseph Duncan and his wife, and which recited that the debts of the estate had all been paid, that the residue of the estate of James R. Smith consisted principally in real estate, that the daughters of the testator were desirous to appropriate their respective one-third parts of their respective portions of the estate, that the executors were willing that they should do so, that it was universally admitted by all the heirs and devisees, namely, the three daughters, the son, and the husbands of Hannah and Elizabeth, that a sale of the estate to convert it into money would be very injurious to all concerned, and that, by agreement among the heirs, the whole of the real estate had been parted, divided, and valued, in four distinct and equal parts, the grantors conveyed to Jeanet Clarke certain real estate, in satisfaction of the one-third part of her portion, authorized by the will to be appropriated to her, and over which, when so appropriated,

she was to have absolute control. By a deed of the same date, executed by the two acting executors, and by Jeanet Clarke, Hannah Clarke and her husband, and James C. R. Smith and his wife, and containing like recitals as the last named deed, the grantors conveyed to Elizabeth Duncan and her husband certain real estate, in satisfaction of the one-third part of the portion of Elizabeth, authorized by the will to be appropriated by her. By a deed of the same date, executed by the two acting executors, and by James C. R. Smith and his wife, Jeanet Clarke, Hannah Clarke and her husband, and Elizabeth Duncan and her husband, and which expressed a consideration of $8,948.68, and contained no recitals except that the executors, in pursuance of the power contained in the will, had sold to the grantee, for such consideration, the real estate described in such deed, the grantors conveyed to one Robert Dyson such real estate. By a deed of the same date, containing no recitals, and expressing a consideration of $8,948.68, Dyson conveyed the same real estate to Hannah Clarke and her husband, to have and to hold to them and to the heirs and assigns of Hannah forever. These two deeds, the one to Dyson and the one from him, though not so expressed, were, in fact, conveyances of the one-third part of the portion of Hannah, authorized by the will to be appropriated by her, and were so given and received. By these conveyances, and others made at the same time or previously, the entire estate of James R. Smith was disposed of, except the two-thirds of the shares of each of the three daughters.

On the 26th of December, 1829, the two acting executors, James C. R. Smith and his wife, Jeanet Clarke, Hannah Clarke and her husband, and Elizabeth Duncan and her husband, conveyed to Robert Dyson, by deed, certain real estate therein described, which was in fact all the residue of the real estate left by James R. Smith. This deed expressed a consideration of $64,710.59, paid by the grantee to Matthew St. Clair Clarke, and stated that the executors had, for such consideration, and in pursuance of the power contained in the will, sold to the grantee the described real estate. On the same day, Dyson, by a deed, expressing a consideration of $21,573.13, conveyed to Jeanet Clarke certain of the real estate so conveyed to him; and, by another deed, expressing a consideration of $21,614.56, conveyed to Hannah Clarke and her husband certain other of the real estate so conveyed to him; and, by another deed, expressing a consideration of $21,522.90, conveyed to Elizabeth Duncan and her husband the residue of the real estate so conveyed to him. These deeds were all of them deeds in fee. It is of this conveyance to Dyson that the plaintiffs complain, as having disposed of the reserved two-thirds of the share of their grandmother, so as to deprive them and their father of the fee of such two-thirds. The real estate so conveyed to Dyson passed into the hands of bona fide purchasers. Such real estate represented the two-thirds of the shares of the three daughters, as agreed upon in the partition, and each of the three deeds from Dyson represented one-third of such two-thirds. As a part of this arrangement, it was agreed among all parties, that all the heirs should enter into a bond of indemnity to Mr. Boorman, to save him harmless on account of making the deed to Dyson; that James C. R. Smith should give to Matthew St. Clair Clarke an indemnity bond to the same import; and that Jeanet Clarke, and Elizabeth Duncan and her husband, should execute mortgages of certain property to Mr. Boorman and Matthew St. Clair Clarke, as an indemnity to the latter and further assurance to Mr. Boorman, such mortgages to hold until the trust named in the will concerning the two-thirds of the portions of the three daughters should have been legally extinguished or complied with. The mortgages contemplated were not given. But Matthew St. Clair Clarke, James C. R. Smith, Jeanet Clarke and Joseph Duncan executed, on the 10th of July, 1830, an instrument of indemnity to Mr. Boorman. That instrument recites the provisions of the twelfth clause of the codicil, the conveyance of real estate to the son for his one-fourth share, the conveyance of other real estate for the one-third part of the share of each daughter, the conveyance to Dyson, December 26th, 1829, of "all and singular the remaining two-third parts of the portions or shares of the daughters of the said testator, comprehending all the rest, residue and remainder of his real estate," the fact that no portion of the consideration of the sale to Dyson had been received by Mr. Boorman, but that it had, with the consent of all parties interested, gone exclusively into the hands of Matthew St. Clair Clarke, and the fact that Mr. Boorman had accounted for all the effects of the estate which had come to his hands, and had discharged himself of all the trusts reposed in him by the will and the codicil, and then provides, that Matthew St. Clair Clarke and Duncan, for themselves and their wives, and the others for themselves, discharge Mr. Boorman from all moneys which he could have received in his trust, and from all claims concerning the estate of the testator, or any trust relating thereto, and agree to indemnify him from all demands by reason of his having executed any of the conveyances thereinbefore mentioned, or by reason of any other thing by him done, committed or suffered, concerning the estate of the testator, whether under the trusts in the will and codicil, or otherwise. On the 30th of June, 1830, a mortgage was executed by Elizabeth Duncan and her husband to Jeanet Clarke, Hannah Clarke and her husband, and James C. R. Smith. It recites the provisions of the twelfth clause of the codicil

as to the two-thirds of the shares of the daughters, and then proceeds: "And whereas, by mutual and universal agreement of all the parties interested, the whole of the said two-thirds of the real estate of the said James R. Smith, deceased, has been parted and divided, and, by divers conveyances, has been vested absolutely in the respective daughters and their heirs and assigns, and whereas, it is the wish and intention of the said parties of the first part, that this indenture shall operate and be a security on the part of them, the said parties of the first part, for the faithful fulfilment of the provisions contained in the said recited portion of said will and testament and codicil." The consideration of the mortgage is $10,000, and it covers certain real estate in the city of New York. Its condition is, that the provisions contained in the recited portion of the will and codicil shall be fully and faithfully fulfilled on the part of the mortgagors, they to retain the right to rent and lease the property for a period not exceeding twenty-one years. This mortgage was recorded October 2d, 1830, and was satisfied of record January 19th, 1835. On the 10th of July, 1830, two other mortgages were executed, one by Jeanet Clarke to Hannah Clarke and her husband, James C. R. Smith, and Elizabeth Duncan and her husband, and the other by Hannah Clarke and her husband to Jeanet Clarke, James C. R. Smith, and Elizabeth Duncan and her husband. These mortgages contain similar recitals and provisions, and a like condition, mutatis mutandis, with the mortgage from the Duncans, and cover real estate in the city of New York. They were recorded October 2d, 1830, and were satisfied of record March 26th, 1835.

At the time the two-thirds of Jeanet Clarke's share of the estate was thus conveyed to her in fee, her son was but fourteen years of age. So far, therefore, as Jeanet Clarke's share was concerned, Mr. Boorman needed indemnity against the contingency that such son might die under the age of twenty-one years and without issue, in which case the mother and sisters of Jeanet Clarke, or their issue, would come to take the two-thirds of the share of Jeanet Clarke.

The first question to be considered is the proper construction of the provision of the twelfth clause of the codicil as to the two-thirds of each daughter's share. So far as Jeanet Clarke's two-thirds of her share is concerned, the fact that the plaintiffs' father survived his mother, and died when over twenty-one years of age, leaving issue, defeated the limitation over to her brother and sisters and their issue, in any view that may be taken of the provision for such limitation over. The only practical question, therefore, is, as to what estate Jeanet Clarke took in the two-thirds of her share of the estate. The controlling provision is thus worded: "The remaining two-thirds of the portions or shares of my daughters shall be held separate and distinct, and not liable to the control, debts or engagements of either of their husbands which they now have, or may hereafter have, as well those who are married as she who may hereafter marry, giving, however, to the husbands of either or all of them, in case the wife shall die first, either with or without issue, the income of said reserved part of my estate, as long as he shall live, arising from his wife's portion, and, after his death, then to the child or children of my said daughter so dying." It is impossible to say that there is, in this provision, or in any part of the twelfth clause of the codicil, the expression or indication of any intention on the part of the testator that there should be a limitation over in favor of the children of a daughter who should survive her husband. The two-thirds of the daughter's share is to be held separate and distinct, so that it may not be liable for her husband's debts, and so that, if he survive her, he may have the income of it for his life. If he does not survive her, the fee of such two-thirds is freed from all possibilities in favor of her children, and remains subject only to the contingent provision in favor of the other children of the testator and their issue. The provision in favor of the child or children of a daughter "so dying," is one that is expressly made to take effect only after the death of the husband of a daughter who survives such daughter. Jeanet Clarke survived her husband. His death terminated the operation of the provision for his life estate, and the operation of the provision in favor of the child or children of his wife. It is admitted, on the part of the plaintiffs, that they have no cause of action unless Jeanet Clarke took only a life estate in the two-thirds of her share, and unless, at her death, such two-thirds passed to the plaintiffs' father. As the two-thirds of her share did not pass to the plaintiffs' father, it follows that the bill must be dismissed, with costs.

[NOTE. An appeal was taken to the supreme court, where the decree of the circuit court was affirmed.

[The court left the construction of the will on the question of estate in fee or life estate with vested remainder undecided, commented on the inefficiency of rules of decision and decided cases as guides, and held, as appears by the headnotes, prepared by Mr. Justice Miller, as here set forth:

[That the violation of trust growing out of a mistaken construction of a will by the executors, unaccompanied by fraudulent intent, was within the ten-years statute of limitation of the state of New York, concerning actions for relief in cases of trust not cognizable by courts of law.

[That the court was inclined to the opinion that such a case was not within the protection of the statute which allows bills for relief on the ground of fraud to be filed within six years after the discovery of the fraud.

[That the party interested, in his lifetime, having had notice of all the facts which constituted the ground of fraud alleged in the bill, and for eight years that he lived after the cause of action accrued to him, with notice of his right and of the whole transaction, having brought no suit nor set up any claim, his heirs

were not entitled to the benefit of this exemption from the bar of the statute on the ground of recent discovery of the fraud.

[That when a trustee has closed his trust relation to the property and to the cestui que trust, and parted with all control of the property, the statute of limitations runs in his favor, notwithstanding it is an express trust.

[That the general doctrines of courts of equity concerning lapse of time, laches, and stale claims will protect the executors of a trustee sued after his death for matters growing out of the trust which occurred forty years before suit brought, which were known to the ancestor under whom plaintiffs claim for over twenty years before his death, and where the suit is brought by those heirs fourteen years after his death, and two years after the death of the trustee, and where no person connected with the transactions complained of remains alive.

[Clarke v. Johnston, 18 Wall. (85 U. S.) 493.]

CLARKE (KOUNSALAER v.). See Case No. 7,927.

CLARKE (LORMAN v.). See Case No. 8,516.

CLARKE (McCOMBER v.). See Case No. 8,711.

Case No. 2,857.

CLARKE v. MATHEWSON et al.

[2 Sumn. 262.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1835.[2]

JURISDICTION—CITIZENSHIP—BILL OF REVIVOR.

1. The circuit court of the United States cannot entertain a bill of revivor, where the controversy, which it seeks to revive, is now between citizens of the same state, though the parties to the original bill, were citizens of different states. As where a bill of revivor was brought by an administrator, who was a citizen of the same state with the defendant, though his intestate was of a different state.

[Cited in U. S. v. Parrott, Case No. 15,998.]

[See note at end of case.]

2. Where the parties are citizens of different states, at the commencement of the suit, a subsequent change of domicil and citizenship will not oust the jurisdiction.

This was the case of a bill of revivor, brought by Clarke as administrator of Willard W. Wetmore, deceased, to revive a suit in equity, brought by Wetmore in his lifetime, against the defendant Henry Mathewson. The bill of revivor stated, that the present plaintiff, John H. Clarke, was a citizen of Rhode Island; that his intestate, W. W. Wetmore, was a citizen of Connecticut, and on the 22d of February, 1830, filed his original bill against Mathewson and others [Cyrus Butler, Edward Carrington, and Samuel Wetmore], all citizens of Rhode Island, in which bill, praying an account, &c. That the defendants appeared and answered the bill; that the cause was afterwards at issue; and at November term, 1831, it was referred to a master, to take an account, &c.; and, that afterwards and before any report was made, viz. in 1834, the said W. W. Wetmore died, whereby the suit became abated. That the present plaintiff had taken administration of his estate in the state of Rhode Island; and he therefore prayed, that the suit might stand revived, and be put in the same state and condition, as the same was, previous to the death of the said W. W. Wetmore.

A motion was now made, by Tillinghast and D. Webster, for the defendants to dismiss the bill of revivor, upon the ground, that the plaintiff and defendants were all citizens of the same state; and, that the plaintiff suing as administrator, made no difference in the case.

Whipple and R. W. Greene, for the plaintiff, e contra, contended, that the court had jurisdiction, because it was not the case of an original bill, but a mere bill of revivor of a suit, originally brought between citizens of different states.

STORY, Circuit Justice. If this were the case of an original bill, brought by the plaintiff, as administrator, against the defendants, it is clear, that the suit could not be maintained, although the plaintiff's intestate was a citizen of another state; for the parties before the court would be all citizens of Rhode Island. The plaintiff's suing in autre droit could not help him, although his intestate was a citizen of Connecticut; for the suit would still be his own personal suit. This is the necessary result of the doctrine, maintained in Chappedelaine v. Decheneaux, 4 Cranch [8 U. S.] 306; Childress v. Emery, 8 Wheat. [21 U. S.] 642; and Dodge v. Perkins [Case No. 3,954]. But the present bill being a bill of revivor only of an original suit, between citizens of different states, it is supposed, that the plaintiff is entitled to revive and continue the former suit, although he is a citizen of the same state as the defendants. The difficulty upon this is, that the moment the suit stands revived, it is in reality a suit between the plaintiff and the defendants personally; and the decree must treat them as the only parties to the bill. The death of the original plaintiff severed him forever from the suit.

This is not like the case of a bill, brought for an injunction to a judgment of the circuit court. There it has been held, that if the plaintiff in the judgment is a citizen of another state, than that in which the suit is brought, he may still be compelled to appear and answer the injunction bill. But the reason is, that the judiciary act of 1789, c. 20, § 11 [1 Stat. 78], requiring the suit to be brought in the district, of which the defendant is an inhabitant, or in which he is found, does not apply to any bill, but an original bill; and an injunction bill is treated not as an original, but as an incidental bill. The

[1] [Reported by Charles Sumner, Esq.]

[2] [Reversed in Clarke v. Mathewson, 12 Pet. (37 U. S.) 164.]

same rule applies to a cross bill, filed in the same circuit court, where the original bill is brought. In each of these cases, the difficulty does not arise from the constitution, but from the act of congress. The constitution would justify a suit between citizens of different states in any circuit court. The act of congress narrows it down to the circuit court of the district, where the defendant dwells, or is found.

In the cases of injunction bills and cross bills, the parties are supposed still to be citizens of different states; and therefore, the only difficulty, that arises, is, as to the service of process on them. But, in the present case, the bill of revivor seeks to carry on a suit between adverse parties, who are all citizens of the same state. When the suit is revived, it is a suit by Clarke, a citizen of Rhode Island, against Mathewson and others, citizens of Rhode Island. I confess, that I have difficulty in seeing, how this court can entertain such a suit, or make any decree therein; for the controversy is no longer between the original parties, but between the new parties on the bill of revivor. I agree to the doctrine, that, where the parties are citizens of different states at the commencement of the suit, a subsequent change of domicil and citizenship, will not oust the jurisdiction. That was so held in Morgan's Heirs v. Morgan, 2 Wheat. [15 U. S.] 290, 297, and Mollan v. Torrance, 9 Wheat. [22 U. S.] 537. But in that case, the original parties were still before the court. But in the present case a new party plaintiff is introduced, whose citizenship is, at the time of his filing his bill, in the same state with the defendants. It is true, that the judiciary act of 1789, c. 20, § 31 [1 Stat. 90], authorizes executors and administrators to appear and prosecute and defend suits, pending at the time of the death of their respective testators and intestates, unto final judgment. But I am not aware, that this provision has ever been held to apply to executors and administrators, who could not sue or defend as original parties in such suits. If there had been any known course of decisions, which had established such a right and practice, I should follow it, whatever might be my private doubts. But no such course of decisions has been appealed to.

It appears to me then, that the bill of revivor must be dismissed, as the controversy, which it seeks to revive, is now between citizens of the same state. As the district judge concurs in this opinion, the bill is accordingly to be dismissed, for want of jurisdiction.

After this opinion was delivered, the cause was continued to the next term, at the suggestion of the parties. The court, at that term, suggested, that they entertained, upon farther reflection, great doubts on the point; and recommended that the case should be taken to the supreme court for a final decision, which was accordingly done. [12 Pet. (37 U. S.) 164.]

[NOTE. The supreme court reversed the decree of the circuit court on complainant's appeal. Mr. Justice Story delivered the opinion, and stated as the reasons of reversal that, as the parties to the original bill were citizens of different states, and the jurisdiction of the court had attached to the controversy, it could not be divested by any subsequent event; and, further, that the bill of revivor was in no sense an original suit, but a mere continuation of such suit.

[The court added that if any doubt existed on general principles as to the correctness of this view, it was removed by section 31 of the judiciary act of 1789, c. 20, which provides that, if either of the parties to a suit pending in the federal court die before final judgment, the executor or administrator of such deceased party, if the cause of action survive, may prosecute or defend the same to final judgment; and which also empowers and directs the court before whom the cause is depending to hear and determine the same. Clarke v. Mathewson, 12 Pet. (37 U. S.) 164.]

Case No. 2,858.

CLARKE v. MAYFIELD.

[3 Cranch, C. C. 353.][1]

Circuit Court, District of Columbia. Dec. Term, 1828.

LIMITATION OF ACTIONS—PLEADING—AMENDMENTS.

1. Upon the plea of the statute of limitations, the plaintiff cannot avail himself of the exception in favor of merchants' accounts, without stating it in his replication. It is not admissible in evidence upon the general replication to the plea.

2. After the jury is sworn, the court will not suffer the plaintiff to amend, if the justice of the case be against him.

At law. Assumpsit for work and labor. Plea of limitations; general replication and issue.

R. P. Dunlop, for the plaintiff, offered evidence of mutual dealings and accounts between the parties, and cited Ball. Lim. 70, 71.

Mr. Redin, contra. That clause of the statute only applies to merchants, where there are mutual accounts and mutual credits.

THE COURT (THRUSTON, Circuit Judge, absent) said, that as the exception in favor of merchants' accounts is not stated by way of replication, the evidence could not be admitted. The replication is, that the cause of action accrued within three years, &c., and according to the decision of the supreme court in Bell v. Morrison, 1 Pet. [26 U. S.] 351, mutual accounts are not evidence on that issue.

Mr. Dunlop then moved for leave to withdraw a juror and amend his replication.

Mr. Redin objected, that it appears by the defendant's books of account, which he produced in court, that the plaintiff's whole claim has been paid; but the books, being in his own handwriting, are not evidence.

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

THE COURT refused leave to amend under such circumstances. The plaintiff admits there were mutual accounts, and upon that ground moves to amend, and yet refuses to admit the defendant's books in evidence, although the defendant offered to waive the plea of limitations.

Verdict for plaintiff, $30; which, being below the jurisdiction of this court, the plaintiff took a non-pros.

CLARKE (NEVITT v.). See Case No. 10,138.

Case No. 2,859.

CLARKE v. NEW JERSEY STEAM NAV. CO.

[1 Story, 531;[1] 4 Law Rep. 134.]

Circuit Court, D. Rhode Island. June Term, 1841.

ADMIRALTY JURISDICTION — PROCEEDINGS AGAINST NON-RESIDENT FOREIGNERS AND FOREIGN CORPORATIONS.

1. In all proceedings in rem, when a court of admiralty has jurisdiction over the thing itself, it is wholly unimportant, to whom it belongs.

2. By the common law, foreign corporations and non-resident foreigners cannot be served with process by any of the courts of common law, nor can their property be attached to compel their appearance. The authority, whenever it exists, results from special custom or statute provisions.

[Cited in Ashbrook v. The Golden Gate, Case No. 574.]

3. It seems, that the principles of the common law are inapplicable to process and proceedings in courts of admiralty.

[Discussed in Wilson v. Pierce, Case No. 17,826. Cited in Atkins v. Fibre Disintegrating Co., Id. 600; Winans v. McKean R. & Nav. Co., Id. 17,862; Cushing v. Laird, Id. 3,508.]

4. The district courts of the United States, as courts of admiralty, may award attachments against the property of foreign corporations, found within their local jurisdiction.

[Discussed in Wilson v. Pierce, Case No. 17,826. Cited in Boyd v. Urquhart, Id. 1,750; Atkins v. Fibre Disintegrating Co., Id. 600; Winans v. McKean R. & Nav. Co., Id. 17,862; Cushing v. Laird, Id. 3,508; Myers v. Dorr, Id. 9,988, 18 Wall. (85 U. S.) 305; Louisiana Ins. Co. v. Nickerson, Case No. 8,539. Distinguished in Atkins v. Fibre Disintegrating Co., Id. 602.

5. It is well settled, that a foreign corporation may sue in another jurisdiction.

This was a suit in admiralty, brought by an appeal from a pro forma decree of the district court [for the district of Rhode Island], dismissing the libel. The original libel was brought in February, 1841, and prayed only for personal process against the corporation, and that Moses B. Ives, one of the directors of the company, might be summoned to appear and answer the libel. At the return day Moses B. Ives appeared, and declining to appear for the company, prayed that the writ might be dismissed; and thereupon it was dismissed against him personally; but the libel was retained for further process against the property of the company. Afterwards an amended libel was filed, praying for process against the property of the company to be found within the district; and, accordingly, the district judge awarded a process of attachment against the property; and, upon that process, the marshal attached a scow, the property of the company, found within the district.

The amended libel was in substance as follows: First. That the respondents, in the month of January, in the year of our Lord one thousand eight hundred and forty, were common carriers of merchandise on the high seas, from the city of New York, in the state of New York, to Stonington, in the state of Connecticut, and were then owners of the steamboat Lexington, then lying at the port of New York, in the state of New York, and which vessel was then used by the defendants as common carriers as aforesaid, for the transportation of goods, wares, and merchandise on the high seas, from the said port of New York to the port of Stonington, in the state of Connecticut. Second. That the libellant, on the high seas and within the ebb and flow of the tide, and within the admiralty and maritime jurisdiction of the United States, and of this court, on the 13th day of January, 1840, contracted with the respondents for the transportation by water, on board of the said steamboat Lexington, from the said port of New York to the said port of Stonington, of twenty bales of cotton to the libellant belonging, of the value of fifteen hundred dollars. And the said respondents, then and there, for a reasonable hire or reward, to be paid by the libellant therefor, contracted with the libellant, that they would receive the said twenty bales of cotton on board of the said steamboat Lexington, and transport the same therein on the high seas from the said New York to the said Stonington, and safely deliver the same to the libellant. Third. That the libellant, on the high seas and within the ebb and flow of the tide and within the admiralty and maritime jurisdiction of the United States and of this court, on the 13th day of January, A. D. 1840, contracted with the respondents for the transportation by water on board of the said steamboat Lexington, from the said port of New York to the said port of Stonington, of twenty bales of cotton of the value of fifteen hundred dollars to the libellant belonging, and thence by the railroad of the New York, Providence and Boston Railroad Company, to the city of Providence, in the state of Rhode Island; and the respondents, then and there, for a reasonable hire or reward to be paid them therefor by the libellant, contracted with the libellant, that they would receive the said twenty bales of cotton on board of the said steamboat Lexington, and transport the same therein from the said port of New York, on the high seas, to the said Stonington

[1] [Reported by William W. Story, Esq.]

and there receive the said cotton upon the cars of the said railroad company, and convey the same thereon to Providence, in the state of Rhode Island, and safely deliver the same to the libellant. Fourth. That the libellant, on the said 13th day of January, A. D. 1840, at the said New York, delivered to the respondents at the said port of New York, on board of the said steamboat Lexington, then lying at the said port of New York, and within the ebb and flow of the tide, and within the admiralty and maritime jurisdiction of the United States and of this court, and the respondents then and there received on board of the said steamboat the said cotton, for the purpose of transporting the same by water on the high seas from the said New York to the said Stonington, and deliver the same to the libellant as aforesaid. Fifth. That the said steamboat Lexington sailed from the said New York on the said 13th day of January, 1840, with the said cotton on board, and bound to the said port of Stonington. Yet the said respondents, their officers, servants, and agents so carelessly and improperly stowed the said cotton, and the engine, machinery, furniture, rigging, and equipments of the said steamboat, were so imperfect and insufficient, and the said respondents, their officers, servants, and agents so carelessly, improperly, and negligently managed and conducted the said steamboat Lexington during her said voyage, that by reason of such improper storage, imperfect and insufficient engine, machinery, furniture, rigging, and equipments, and of such careless, negligent, and improper conduct, the said steamboat together with the said cotton, to the libellant belonging, was destroyed by fire on the high seas, and within the admiralty and maritime jurisdiction of the United States and of this court, and wholly lost. Sixth. That by reason of the destruction of the said steamboat Lexington, and of the said cotton, the libellant has sustained damage to the amount of two thousand dollars. Seventh. That the said New Jersey Steam Navigation Company are possessed of certain personal property within the said Rhode Island district, and within the ebb and flow of the sea, and within the maritime and admiralty jurisdiction of this court, to wit, of the steamboat called the Rhode Island, her tackle, apparel, furniture, and appurtenances and of other personal property. Eighth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this court, in verification whereof, if denied, the libellant craves leave to refer to the depositions and other proofs to be by him exhibited in the cause.

Wherefore, the libellant prays, that process in due form of law according to the course of the admiralty and of this court, in causes of admiralty and maritime jurisdiction, may issue against the respondents, and against the said steamboat Rhode Island, her tackle, apparel, furniture, and appurtenances, or any other property to the respondents belonging, within the said Rhode Island district, and that the said property, or any part thereof, may be attached and held to enforce the appearance of the respondents in this court to answer the matters particularly propounded, and to answer the damages, which may be awarded to the libellant for the causes aforesaid. And that this court would be pleased to pronounce for the damages aforesaid, and to decree such damages to the libellant as shall to law and justice appertain. To this process, the company appeared under protest against the jurisdiction; and afterwards, by their proctor and counsel, they filed the following plea: And now the New Jersey Steam Navigation Company, a corporation duly and legally incorporated by the legislature of the state of New Jersey, and established and transacting business in Jersey City, in the said state of New Jersey, appear before this honorable court by Peter Pratt, their proctor and attorney, and protesting against the process and the service of the same in manner and form, as the same has been issued and served in the case of the libel and complaint of John H. Clarke, of Providence, in the Rhode Island district, against the said corporation, say, that this honorable court here have no cognizance or jurisdiction over this corporation or the subject matters set forth in the libel of the said libellant to compel or require them to appear in this court and to plead to or answer to the said libel and complaint; because the said New Jersey Steam Navigation Company are a corporation, legally incorporated by the legislature of the state of New Jersey, established and transacting business in Jersey City, within the limits and jurisdiction of the district of New Jersey, and can alone be required and compelled to appear and plead or answer to matters within the maritime and admiralty jurisdiction of the United States, in the district court of the district of New Jersey, and this honorable court have not jurisdiction and ought not to proceed to enforce their pretended claim alleged in the libel aforesaid against their property or against the said corporation. Wherefore, the said New Jersey Steam Navigation Company pray, that this honorable court would be pleased to pronounce against the libel and the process and service thereof as aforesaid, and that the same may be dismissed with their costs.

The cause was thereupon, by the consent of the parties, brought by appeal to this court from a pro forma decree of the district court dismissing the libel.

R. W. Greene, for libellant.

Pratt & Whipple, for respondents.

STORY, Circuit Justice. No question has been made at the bar, that the case stated in the libel is a case of admiralty and maritime jurisdiction, it being founded in a maritime contract, and asserting, as a breach thereof, a maritime loss by negligence. The

Orleans v. Phoebus, 11 Pet. [36 U. S.] 175–184. Neither has it been doubted, that the process of attachment well lies in an admiralty suit against the property of private persons, whose property is found within the district, although their persons may not be found therein, as well to enforce their appearance to the suit, as to apply it in satisfaction of the decree rendered in the suit. Ever since the elaborate examination of this whole subject, in the case of Manro v. Almeida, 10 Wheat. [23 U. S.] 473, this question has been deemed entirely at rest.

The real point of controversy is, whether the respondents, being a corporation created by, and having its corporate existence and organization in the state of New Jersey, is, as a foreign corporation, liable to a suit in personam in the admiralty in this district, not directly, but indirectly through its attachable property here, so as to compel the appearance of the corporation to answer the suit, or at all events to subject the property attached to the final judgment and decree of the court. The whole argument turns upon this proposition, that there is a distinction between the case of a private person, and that of a corporation. The former is suable in the admiralty by process of attachment in a suit in personam, against his property found in the district, although he may not personally be found within the district; whereas a corporation is liable to be sued only in the state, where it has its corporate existence, and from which it derives its charter, and not elsewhere, although its property may be found in the district, where the suit is brought. If the present were a suit in rem against the property to enforce a right of property or a lien, or to subject it, as the offending thing, (as in cases of collision,) to the direct action of the court, the case could not admit of any real doubt; for in all proceedings in rem, the court having jurisdiction over the property itself, it is wholly unimportant, whether the property belongs to a private person or to a corporation, to a citizen or to a foreigner, to a resident or to a non-resident, to a domestic or to a foreign corporation. In each and in every such case the jurisdiction is complete and conclusive. If the case were one exclusively dependent upon the local law of Rhode Island, the jurisdiction of the court would be equally clear; for by the statute of Rhode Island of January, 1840 (Sess. Acts, p. 103), it is enacted, that "when any incorporated company, established without this state, shall be indebted or liable to any person or persons, the personal and real estate of such company shall be liable to be attached and held to answer any just debt and demand." And the mode of serving the process is specially pointed out by the act.

The exemption of the corporation is sought to be established upon other grounds; first, upon the ground, that the state law is not applicable to an admiralty suit, the state being incapable of conferring or taking away the jurisdiction of the courts of the United States; and next upon the ground of the non-amenability of a foreign corporation to answer in any suit in any other state, than that, from which it derives its corporate existence and charter, upon the principles of the common law, which furnish a just authority or analogy for a similar rule in courts of admiralty. It may well be doubted, whether the principles of the common law, as to process and proceedings, can be properly imported into courts of admiralty, to regulate their process, or proceedings, or jurisdiction. It is plain, that the supreme court of the United States in Manro v. Almeida, 10 Wheat. [23 U. S.] 473–490, repudiated any such doctrine, and treated it as a grave mistake to suppose, that the process of attachment in the admiralty was borrowed from the foreign attachment by the custom of London; or, indeed, that it had any other origin than in the civil law. But the argument, founded on the supposed analogies of the common law, is not as stringent, as has been supposed. The process of the common law could not reach foreign corporations, for the plain reason, that they were not inhabitants of and had not any corporate existence within the realm. But this was equally true in respect to natural persons, not inhabitants of, or found within the realm. Foreigners, who were non-residents, could not be served with process to appear in any of the courts of common law, nor could their property be attached to compel their appearance. Whenever and wherever, in any such cases, process can be served upon the property, either of foreign corporations, or of foreign natural persons, who are non-residents, the authority to do so results either from special custom, or from statute provisions. See Com. Dig. "Attachment," B, D.

The cases cited at the bar all turn upon this distinction. In McQueen v. Middletown Manuf'g Co., 16 Johns. 5, the only question was, whether a foreign attachment, under the foreign attachment act of New York, lay against the property of a foreign corporation; and it was held, that no such attachment did lie upon the true interpretation of the act; and, indeed, that it could not lie against a domestic corporation; for it could not conceal itself or abscond. The court, upon that occasion, said, that a foreign corporation could not be sued in New York; for the process against a corporation must be served upon its head or principal officer within the jurisdiction of the sovereignty, where this artificial body exists. That is clear enough upon the principles of the common law, as already stated. The case of Peckham v. North Parish of Haverhill, 16 Pick. 274, 285, 286, merely affirms the same doctrine, that foreign corporations are without the jurisdiction of the courts of the state. But it so happens, that an op-

posite doctrine has been asserted, as to the operation of the local laws of Pennsylvania, in cases of the process of foreign attachment; and it has been there held, that foreign corporations are within the reach of that process. Bushel v. Commonwealth Ins. Co., 15 Serg. & R. 176. The decision in the case of Wilson v. Graham [Case No. 17,804], and that of Ex parte Graham [Id. 5,658], turned upon other considerations. But the court there affirmed a principle, which seems directly applicable to the present case; and that is, that it is essential to give jurisdiction to the district and circuit courts of the United States in any district, that the person or the thing, against which the proceedings are directed, should be within their local jurisdiction. Now, here the thing is within the jurisdiction, and it may be added, that even in suits in personam only, if a person, who is out of the jurisdiction, chooses to appear and defend the suit without objection, there is nothing to prevent the courts of the United States from entertaining the suit, if otherwise unexceptionable; for his appearance without process is a waiver of the objection of the non-service of process within the district; and the case does not fall within the prohibitory clause of the eleventh section of the judiciary act of 1789, c. 20 [1 Stat. 73]. This is clearly established. See Harrison v. Rowan [Case No. 6,140]; Gracie v. Palmer, 8 Wheat. [21 U. S.] 699; Pollard v. Dwight, 4 Cranch [8 U. S.] 421; Knox v. Summers, 3 Cranch [7 U. S.] 496; Logan v. Patrick, 5 Cranch [9 U. S.] 280. It was applied to the very case of a foreign attachment against the property of non-resident defendants, in the case of Pollard v. Dwight, 4 Cranch [8 U. S.] 421, where it was held, that the appearance of the defendants was a waiver of all objections to the non-service of process upon them within the district, where the suit was brought. There is nothing in the nature or character of a corporation, which prevents it from falling within the scope of the same doctrine. The case of Flanders v. Aetna Ins. Co. [Case No. 4,852], is directly in point, on this very question; for, there, the corporation was a foreign corporation; and it was held, that the jurisdiction attached, and the non-service of process within the district did not present any obstacle to the proceedings, as the corporation had appeared and defended the suit; and it was but a privilege to the corporation to be sued within the district, where it was established, which it was at full liberty to waive. The supposed authorities, then, at the common law, which have been relied on, furnish no ground, on which the present objection can be sustained. They all turn upon this simple proposition, that a foreign corporation cannot be compelled to appear and defend a suit in any other state, than that, where it is created and established, unless the local law otherwise provides, and property or effects of the corporation can be found, and by the local law can be attached, to respond the exigency of the suit, or to compel an appearance thereto. If the local law provides such a remedy, then it is competent for the local tribunals to exert it against the foreign corporation. Now, it is precisely in this very view, that the jurisdiction of the courts of admiralty applies. That jurisdiction may be executed, not only against persons, found within the district, but also by attachment against their property, found within the district, although the persons are not there. This was the very point decided (as we have seen) in Manro v. Almeida, 10 Wheat. [23 U. S.] 473. So that the jurisdiction is as complete, when the property is found within the district, as it is, when the person is there.

What difference, then, can it make upon principle, whether the owner of the property be a natural person, or a corporation? In each case, where the court acts upon the property, it acts solely in rem; and it is at the option of the owner, whether he will appear and allow the proceedings to go on in personam, or not. What ground is there to say, that a foreign corporation may not appear and defend its rights of property, as well as a natural person in a foreign jurisdiction? In all proceedings directly in rem, this is the universal rule and practice. It is difficult to perceive, why it is not equally true, where the property is before the court, to be subjected to its action; for unless there is an appearance and a general defence, the decree of the court ultimately binds and acts in rem only upon the thing, which is attached.

But upon the principle, what is the foundation of the objection? It is exceedingly clear, that a foreign corporation may sue in another jurisdiction. Not to multiply authorities upon so clear a point, I will simply refer to the case of Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 519, 520, 587–591, where Mr. Chief Justice Taney, in delivering the opinion of the court, examined the subject, as well upon principle as upon authority. If a foreign corporation may sue, it may also be sued in another jurisdiction, at least to the extent of subjecting its property, found within the jurisdiction, to the process and decree of the courts thereof, upon the acknowledged principle, that all persons and all property found within the territorial limits of any sovereignty, are subject to its authority and laws. This is a well established doctrine of international law. Story, Confl. Laws, §§ 530–618. Even the property of foreign sovereigns has not been deemed exempt from this territorial jurisdiction; and courts of admiralty have not unfrequently exerted their authority over such property. U. S. v. Wilder [Case No. 16,694]. Bynkershoek and other jurists maintain, that the private property of foreign sovereigns, whatever may be the case as to public property, is subject to the local jurisdiction of the courts,

where it is found. Bynk. De Foro Legatorum, cc. 3, 4; S. P. cited [The Exchange v. McFaddon] 7 Cranch [11 U. S.] 125, 126; The Prins Frederik, 2 Dods. 458–462; Mart. Law Nations, B. 5, § 9.

Upon the whole, I find no sufficient authority upon principles of general law, or maritime law, or admiralty law, to maintain the distinction contended for between the cases of an attachment of the property of a foreign corporation, and that of a private person, so far as the process of the admiralty is concerned. The exceptive plea or allegation to the jurisdiction of the court must, therefore, be overruled, and the corporation be assigned to appear and answer over to the merits of the cause; otherwise proceedings will be had upon their default against the property, as in other like cases.

CLARKE (ORME v.). See Case No. 10,577.
CLARKE (PELTZ v.). See Case No. 10,914.

Case No. 2,860.

CLARKE v. PROTECTION INS. CO.

[Cited in Martin v. Kanouse, Case No. 9,162. Nowhere reported; opinion not now accessible.]

Case No. 2,861.

CLARKE v. RIST et al.

[3 McLean, 494;[1] 2 West. Law J. 252.]

Circuit Court, D. Ohio. Dec. Term, 1844.

BANKRUPTCY—ACT OF 1841—LIEN—ENJOINING PROCEEDINGS IN STATE COURT.

1. Where a judgment is fairly obtained against a defendant who has only equitable rights, and a creditor's bill is filed to subject those rights to the payment of the judgment, if the process issued on filing the bill be served before the defendant's petition is filed under the bankrupt law, the proceeding constitutes a lien under the bankrupt law.

[Cited in Johnson v. Rogers, Case No. 7,408; Kimberling v. Hartly, 1 Fed. 574; Platt v. Mead, 9 Fed. 96.]

2. In such a case, the court will not issue an injunction to restrain the parties from proceeding on the creditor's bill in the state court.

[Cited in Clark v. Binninger, 38 How. Pr. 341; Myer v. Crystal Lake Pickling & Preserving Works, 14 N. B. R. 16; Kimberling v. Hartly, 1 Fed. 575.]

3. If fraud were alleged against the lien set up in the state court, that would be a ground on which the circuit court might take jurisdiction.

In equity.

Mr. Clarke and Mr. Coffin, for plaintiff.

Mr. Moodey and James Mason, for defendants.

LEAVITT, District Judge. This bill is filed by the complainant, as the assignee in bankruptcy of Godfrey Beaumont. The facts before the court, so far as it is necessary to notice them, are—that in 1842, the bankrupt Beaumont was possessed of an equitable interest in certain valuable real estate, described in the bill; and in connection with his two sons, constituting the firm of J. Beaumont and Sons, was engaged in business, in the county of Columbiana, as a manufacturer of woollen goods; that in the early part of November, of that year, this firm, laboring under some embarrassments in their business, transferred by bill of sale, to one Springer, nearly all their personal property, to indemnify him for his suretyship to the Bank of New Lisbon, and Springer took possession of said property, the 1st of December, 1842; that at the November term, in said year, of the court of common pleas of said Columbiana county, sundry judgments were obtained against the firm of Beaumont & Sons; on which executions severally issued the 2d of December, and were returned partially satisfied by a levy on personal property of the defendants; that shortly after, the plaintiffs in the several judgments recovered against said firm, filed bills in chancery in said court of common pleas, to subject the equitable interest of G. Beaumont in the real estate aforesaid, to the satisfaction of such judgments; and subpoenas duly issued, and were served in said cases, between the 3d and 7th of December. It also appears, that the Beaumonts filed their several petitions for the benefit of the bankrupt law [of 1841, 5 Stat. 440], the 15th of December, 1842, and were decreed bankrupts, and the complainant appointed their assignee, the 30th of January following; that soon after his appointment as assignee, the complainant was made a party to the proceedings in chancery, instituted by the judgment creditors, as aforesaid; and, as such appeared, and filed answers, denying the jurisdiction of the court, and insisting on the dismissal of the bills on that ground; that the court of common pleas retained jurisdiction of said petitions in chancery, and upon hearing decreed the sale of Beaumont's equitable interest in the real estate aforesaid, and the distribution of the proceeds among the judgment creditors; but no sale has yet been effected. It is also charged in the bill, that the counsel for the judgment creditors had notice of the assignment to Springer, and that Springer was in possession under it, previous to the institution of said proceedings in chancery. The bill prays for an injunction, restraining the parties from further proceedings in the state court; and, that the liens of said judgment creditors may be set aside, and the property sold by the complainant, for the benefit of the general creditors of G. Beaumont.

The question arising on this state of facts, and which this court is called upon to decide is, whether the judgment creditors (the defendants in this case) by their judgments, and the institution of the proceedings in chancery, to charge the equitable interest of

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

the bankrupt as set forth in the bill, have acquired a lien on that interest, which is protected by the bankrupt law. The last proviso of the second section of the act declares, "that nothing in this act contained shall be construed to annul, destroy or impair, any lawful rights of married women, or minors, or any liens, mortgages, or other securities on property, real or personal, which may be valid by the laws of the states respectively, and which are not inconsistent with the second and fifth sections of this act."

It is insisted on the part of the complainant, that the application of Beaumont for the benefit of the bankrupt law, suspended the jurisdiction of the state court in the chancery proceedings; and, that consequently, the decrees of that court in favor of the judgment creditors, for the sale of the equitable interest of Beaumont, in the real estate in question, were inoperative, and created no valid lien, in their behalf. On the other hand, it is contended, that as these judgments against Beaumont were obtained in the usual course of proceedings in the state courts, and without fraud or collusion between the parties, the court had full jurisdiction of the chancery proceedings, in their inception; that the subsequent application in bankruptcy by Beaumont, did not deprive that court of its power to proceed; and, that from the date of the service of subpoenas in the chancery cases, a lien existed in behalf of the judgment creditors, which this court will recognise and protect. It will be seen from the provision of the bankrupt act, above quoted, that liens which are valid by the state laws, and are not opposed to, and in contravention of, the bankrupt law, are unimpaired by its operation. The law of Ohio, under which the judgment creditors filed their bills, is intended to afford the means by which certain property and interests of a judgment debtor, may be rendered available for the payment of his debts, which could not be reached by the ordinary process of execution. To charge the equitable interests of a judgment debtor in real estate, and subject those interests to the payment of a previously acquired judgment, is one of the most common cases, in which this statutory proceeding is resorted to. The creditor, on a proper case made, is entitled by the provision of the statute, to a decree for the sale of the equitable interest of the judgment debtor. The statute declares, that "the said courts shall decree sales, and enforce all necessary transfers and conveyances, to vest in any person purchasing, or taking under such decree, all the right, title, and interest of the said debtor, in the interest sold, or the subject of the decree, at the time of the service of process in such case," &c. Swan's St. 704. From the language here used, it is undeniable that the lien of the judgment creditor is coeval with the date of the service of the subpoena in chancery. This, it is understood, is in accordance with the uniform construction of the law by the courts of Ohio, and the practice of those courts under it. The statute proceeds on the principle, that by the judgment at law the creditor acquires an inchoate right to the equitable interest of the judgment debtor; which, however, can only be perfected and made available, by a decree of sale by a court of chancery. But it is within the evident design of the statute, that from the time of the service of the process in the chancery proceeding, legal validity and force are given to this previously existing, but imperfect right. Under a similar statute in New York, the same practice and the same principle of construction have obtained in the courts of that state. The case referred to in the argument of this case, decided by the district judge for the northern district of New York, reported in the fifth volume of the Law Reporter, page 362 [General Assignee, Case No. 5,305], is very analogous in its facts to that now under consideration. In that case, certain creditors of a bankrupt, previously to the entry of a decree of bankruptcy, had filed their petitions in chancery, in a state court, under the statute of New York, to charge certain equitable interests of the bankrupt with the payment of their judgments. And the court held, that in the absence of any facts impeaching the original judgments as being fraudulent under the bankrupt law, the liens of the judgment creditors were protected; and an injunction to stay the proceedings of the parties in the state courts was refused.

The inquiry then arises, whether in the rendition of the several judgments in favor of the defendants in this bill, there was fraud, in fact or in law, vitiating not only those judgments, but also the subsequent proceedings in chancery, instituted to enforce the asserted liens, which are the subjects of controversy in this case. By the second section of the bankrupt act, it is provided in substance, that all payments, securities, transfers, &c., in contemplation of bankruptcy, and for the purpose of any preference or priority to any creditor, &c., or to any person, not being a bona fide creditor, or purchaser for a valuable consideration, without notice, shall be deemed utterly void, &c. The settled and uniform construction given to this clause is, that it condemns and invalidates all transfers of property, or rights of property, made in view or contemplation of an application for relief under the law; or, when the person is in such a condition of embarrassment as amounts to a state of bankruptcy, under either of the circumstances here supposed, it is in direct contravention of the policy of the bankrupt law, that the bankrupt should make any changes or transfers of his property, whereby the rights of his general creditors may be injuriously affected. Do the transactions between the bankrupt, Beaumont, and the defendants, fall within the prohibitions of this provision? In refer-

ence to the judgments obtained against the bankrupt, there is no allegation in the bill, that there was any actual fraud or collusion, in their entry or rendition. Nor is there any fact before the court from which, as a matter of necessary legal deduction, those judgments can be pronounced invalid. They were obtained in November, 1842, for debts contracted long before; and according to the usual course of proceedings in the state courts, either upon the issue and service of process, or by virtue of warrants of attorney previously executed for that purpose. The judgment creditors are not charged with a knowledge of the bankruptcy of the Beaumonts, at the time of the entry of these judgments; though the allegation is made, that their counsel was apprised of the bill of sale to Springer, before the commencement of the proceedings in chancery. But this does not infect the judgments with the taint of actual or constructive fraud. And no doubt can be entertained that, if Beaumont had then possessed the legal estate in the lands in controversy, the lien of the judgment creditors would have been effective and wholly unimpaired by subsequent application for relief under the bankrupt law. This position is fully sustained by the opinion of Judge McLean in the case of McLean v. Rockey [Case No. 8,891]. It is there said: "that a judgment constitutes a lien on real estate, which is recognised in the second section of the bankrupt law, is undisputed." And there is no allegation in the bill, that either in the causes of action, or in the prosecution of the above suits to judgment, there was fraud. The judgments therefore, having been rendered against the bankrupt, before his petition was filed, create a valid lien on his real estate. Are the rights of these judgment creditors impaired by the fact that at the time the judgments were rendered, the bankrupt Beaumont had no legal interest in the property in question on which a lien attached, under the statute of Ohio? The interest of Beaumont, as already stated, was merely an equitable interest. The proceedings under the statute, in the state court, to charge those interests, have been noticed. And it is to be observed, that these proceedings do not partake of the character of original suits. They are to be regarded in the light of incidents, or continuations of those suits. It would seem clear, from this view, assuming the judgments to be valid, that the state court had undoubted competency to entertain jurisdiction of the chancery proceedings, both before and after the application was filed by Beaumont for relief, under the bankrupt law. The lien of the judgment creditors, though not perfect on the rendition of the judgments, became so upon the service of the process in chancery, which was prior to the filing of the application in bankruptcy. These creditors then occupy the same position, and are entitled to the same rights, as if the bankrupt had possessed the legal estate, instead of an equitable interest, in the lands mentioned in the bill. Their liens are saved under the bankrupt law; and the state court having rightfully taken jurisdiction of the proceedings, designed to perfect those liens, may retain it, till the object sought for is consummated, in accordance with the statute. It is regarded as indisputable, that there is no ground for the imputation of fraud, actual or constructive, in commencing and carrying forward the chancery proceedings in the state court. If fraud attaches to these, it must be because the conduct of the parties has given them this quality or characteristic. So far as the judgment creditors are concerned, there is clearly no room for any unfavorable inference. They stand before the court on the footing of persons, who, with no discreditable vigilance, have legitimately pursued their rights, under a statute sanctioning the procedure to which they resorted. Nor is there any better foundation for an impeachment of the conduct of the bankrupt. It was not by his procurement or agency, that the creditors commenced proceedings to enforce their equitable liens. In these transactions he was merely passive; and could not therefore have imparted to them the quality of fraud. By these judgments, and the subsequent proceedings thereon in the state court, the defendants in the bill acquired a bona fide lien, prior to the filing of the petition in bankruptcy. The equitable interest of the bankrupt, in the property in question, did not therefore pass to, and rest in, his assignee; and no ground is presented for the exercise of the power of this court, in the withdrawal of those interests from the final disposition of the state court. The lien of the judgment creditors is saved, by the express terms of the bankrupt law; and this court has neither the right or the inclination to disturb it.

In the argument of the counsel for the complainant, the decision of this court in the case of McLean v. Lafayette Bank [Case No. 8,885], was referred to; and it was insisted, that the principles laid down by Judge McLean in the opinion delivered by him, vindicate the exercise of the jurisdiction of this court, in the case in which it is now invoked. But it will be observed, that the two cases differ in many essential features. In that decided by Judge McLean, there are various liens on the property of the bankrupt, by mortgages and judgments; some pending in a state court for adjudication; and in regard to all the liens, there was an express "allegation in the bill, that they were given in fraud of the bankrupt act." The judge, after reviewing the ample jurisdiction conferred on the federal courts by that act, in the settlement of all controversies growing out of bankruptcy, very justly concludes, "that where the foundation of the liens depends upon the construction of the bankrupt act, it would seem that the jurisdiction under

which the law was passed, should carry it into effect." The case was argued on a motion to dissolve the injunction, so far as the rights of one of the defendants was concerned; and on full consideration, the motion was refused, and the case continued for final hearing; but with the express declaration by the court, that the question of jurisdiction was not to be considered as finally decided.

In controversies, involving the proper construction of the bankrupt act, the validity of liens under it, and the adjustment of conflicting rights and priorities, there is great propriety in invoking the exercise of the jurisdiction of the federal courts. Their powers in these matters are more ample than those possessed by the state courts, and they can more satisfactorily act upon and adjust the rights of all the parties concerned. But when a state tribunal has rightfully taken jurisdiction of a case, though having some connection with an estate in bankruptcy, it affords no sufficient reason for its withdrawal from that jurisdiction, that a federal court might have taken cognizance of it. And it is proper, that the courts of the nation should cautiously abstain from the unnecessary exertion of powers, which may bring them into conflict with the state courts. Nothing can tend to the more serious disturbance of the harmonious action of the state and federal authorities, than these conflicts. And as far as practicable, consistently with the operation of the just powers of each, they are to be studiously avoided. The injunction prayed for is refused.

Case No. 2,862.

CLARK v. SICKEL. FARNUM v. SAME. LEA v. LEEDS. SELLERS v. SICKEL.

[14 Int. Rev. Rec. (1871) 6; 4 Am. Law T. 141; 18 Pittsb. Leg. J. 309; 1 Leg. Op. 151.]

Circuit Court, E. D. Pennsylvania.

INTERNAL REVENUE—INCOME TAX—ACT JUNE 30, 1864.

1. The act of June 30, 1864 [13 Stat. 225], is within the power conferred by the constitution upon congress, so far as it imposes a tax upon incomes.

2. The income tax is not a capitation or other direct tax.

[At law. Actions by Clarence H. Clark against Horatio G. Sickel, Mary E. Farnum against the same, William Sellers against the same, and by Henry C. Lea against William R. Leeds.]

STRONG, Circuit Justice. The pleadings in all these cases raise the question whether the act of congress of June 30, 1864, and its supplements, so far as they impose a tax upon the annual gains, profits, or income of every person residing in the United States, or of any citizen of the United States residing abroad, are within the power conferred by the constitution upon congress. If it be true, as has been argued, that the income tax is a "capitation or other direct tax" within the meaning of the constitution, it is undoubtedly prohibited by the first and ninth sections of the first article, for it is not "apportioned among the states." But I am of opinion that it is not a "capitation or other direct tax" in the sense in which the framers of the constitution and the people of the states who adopted it understood such taxes. The reasons for my opinion it would answer no good purpose for me to state at length, inasmuch as these cases will doubtless go to the supreme court for ultimate decision. It is sufficient for me now to state that in my judgment congress has a constitutional right to impose all the taxes of which the plaintiffs complain, and that none of them are such as must necessarily be apportioned. With the policy of such an imposition I have, as a judge, nothing to do. Let judgment be entered for the defendants on the several demurrers.

CLARKE (SMITH v.). See Case No. 13,028.

Case No. 2,863.

CLARKE v. SOUTHWICK.

[1 Curt. 297.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1852.

EQUITABLE LIENS—ENFORCEMENT—PRIVIES—LIMITATION.

1. Certain mill-owners having, by articles of agreement, associated themselves for the purpose of constructing reservoirs, &c., to improve the flow of the stream, and agreed that there should be a lien on their respective estates for the share of the expenses which each was to pay: *Held*, that this agreement was an equitable lien, which each member who had paid more than his proportion might enforce, without joining the others; and that the defendant, having purchased certain of the mills, with notice of the lien, after the debts were incurred by the association, took the estates cum onere.

[Cited in The Young Mechanic, Case No. 18,180; Lawrence v. Dana, Id. 8,136.]

2. Such a lien is not barred by lapse of less time than is sufficient, by the local law, to bar a suit for the foreclosure of a legal mortgage.

[In equity. Bill by Edward Clarke against James C. Southwick.]

CURTIS, Circuit Justice. This is a bill in equity, to establish and enforce a lien on certain mills, lands, and their appurtenances, belonging to the defendant. The facts upon which the lien is asserted are, that on the fifteenth day of April, 1837, articles of agreement, under seal, were entered into by certain persons who owned mills upon a stream of water in the town of Sutton, in the coun-

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

ty of Worcester, the object of which was to associate themselves, under the name of the Sutton Water-Power Company, for the purpose of creating reservoirs of water, to render the stream, by which their mills were driven, more constant and full, for their common benefit; that the proprietors of six different mills were parties to this agreement; that they thereby agreed, among other things, that there should be a lien on their respective estates, to secure the faithful performance, by each to the other, of the covenants contained in the articles. Among these covenants was one, that the associates would pay all debts incurred in creating and managing this water power, in the proportions specified, one-sixth part thereof being chargeable to each of the six mills. The complainant was a member of this association, as one out of three owners of one of the mills; and two days after the execution of the articles, he became, by purchase from his co-tenants, sole owner thereof. The articles contained a provision, that, if either of the mills should be sold, the purchaser might become a member of the association. Three of the mills were conveyed, after the execution of the articles, to the Sutton Woollen Mills, a manufacturing corporation, which became a member of the association; and, while thus a member, and through its action as such, large expenses were incurred in the purchase of lands, the erection of a dam, and liabilities for land damages, from a flowage, which, though in part paid by the association, through regular contributions for that purpose, was mostly left unpaid; and the complainant, as one of the members of the association, has been obliged to pay the residue; and he now seeks, by this bill, to charge upon three of the mills, formerly owned by the Sutton Woollen Mills, but now owned by the respondent, three sixths of what he has thus paid, being the proportions stipulated by the original agreement to be borne by the owners of those mills.

The first question made at the bar is, whether the articles created a lien on the real estate. Of this, I have no doubt. The parties covenant, each with the other, for the payment of all debts incurred in the execution of their common object; and then go on to bind, not only themselves, but "his and their respective estates hereinafter mentioned," to the faithful performance of all the provisions of the instrument; and after describing each estate, and the contributory share to be borne by it, they use this language: "Meaning and intending hereby to create a lien upon, and to bind our said estates, so far as we may, either in law or equity, do the same," &c. Whenever the owner of real property agrees, in writing, for a valuable consideration, that a lien for a debt or duty shall exist on that property, in the view of a court of equity, it does exist. Such an agreement is not executory merely, but so far as respects the parties, and those claiming under them as volunteers, or with notice, it is executed; it creates a trust, which this court will enforce, and by means of it, work out, according to its modes of proceeding, the payment of the debt, or the performance of the duty, which the parties have manifested their intention to have thus secured. The authorities in support of this position are numerous. I will refer to some, in which the principles upon which this position rests, are most clearly stated. In Legard v. Hodges, 1 Ves. Jr. 477, Lord Loughborough said: "I take the maxim to be universal, that wherever persons agree concerning any particular subject, in a court of equity, as against the party himself, or any claiming under him voluntarily, or with notice, a trust is raised." In Collyer v. Fallon, 1 Turn. & R. 469, the principle is laid down: "Contract, with respect to a given matter, binds the property, as between the parties to the contract, and all claiming under them, with notice." And in the recent case of Malcolm v. Scott, 3 Hare, 39, 46, 52, it is taken to be clear, that when you make out an agreement to give a lien, the lien exists. Upon this principle, Burn v. Carvalho, 4 Mylne & C. 702; Hankey v. Vernon, 2 Cox, Ch. 12; Clark v. Mauran, 3 Paige, 373; Parker v. Muggridge [Case No. 10,743]; and many cases in bankruptcy, from 1 Glyn & J. 13 to 2 Mont. & A. 224,—have been decided.

My opinion is, that the articles of agreement now in question, which in express terms declared that there was to be a lien on these estates, created an equitable lien, capable of being enforced through the power of this court.

The next question is, whether this lien is capable of being enforced at the instance of the plaintiff. It is argued, that only the association or company has this lien. This depends on the intent of the parties, manifested in the instrument; and I do not so construe it. The lien accompanies the covenant, and is intended to secure its performance. The covenant, that each will pay his proportion of the debts, is a several covenant by each with each member. Its language is, "and the members of the said company, each for himself respectively, &c., does covenant, promise, and agree, each with the other, &c., for the due and faithful execution," &c. Whatever several rights the plaintiff has, are, therefore, intended to be secured, and, in a court of equity, are secured by the lien, which is coextensive with the obligation of the covenant, and binds the lands, as that obligation bound the parties to it. It has been argued, that the members were not liable inter sese until after an assessment made; but there is nothing in the instrument on which to rest this position. The covenant by each to discharge and pay his stipulated proportion of all debts, is absolute and unqualified. The

words "assessed" and "assessment" do occur in the instrument, but only as synonymous with share or proportion; and there is nowhere any provision calling for any formal act of assessment as a condition precedent to the right of each member to have every other member pay his stipulated part of the expenses of the association. It is true these debts were contracted while the Sutton Woollen Mills owned the three estates in question; and that corporation was not originally a member of the association, and did not execute the articles. But the articles contained a provision that any purchaser of either of these mills might become a member of the association, and the bill avers that this corporation did become a member. This averment of the bill is admitted to be true. Indeed, the very debts which the plaintiff has paid were contracted by that corporation as a member of the association. I am inclined to think that a purchaser of one of these mills, though he took his estate incumbered by the lien to secure the performance of this covenant, might exempt it from the charge for future debts by refusing to become a member of the association; but if he became a member, and actually participated in creating debts, I think the lien extended to his share of them. When he takes the title, it is charged with a lien, to secure the payment of the just contributory share of expenses which have been or shall be incurred, for the common benefit of that and five other estates. So far as expenses have then been incurred, they are clearly a charge on the land. Independent of any stipulation in the articles giving the purchaser a right to withdraw, and refuse to participate in future expenditures, it would be difficult to show that the estate would not be bound for them, even if he did not expressly consent to what was done. There are cases, in which, without any actual contract, equity will compel the owner of property to contribute to the cost of a work erected by another for their common benefit, as in case of a party wall. Campbell v. Mesier, 4 Johns. Ch. 334. This principle has never been extended to works designed to improve the flow of a stream, for the advantage of all the mills upon it, and there are sufficient reasons why it should not be so applied; but I know of no reason why the owners should not make a contract, not only to build, but preserve and manage reservoirs and other works for the common benefit of their respective mills, and charge the expenses thereof, permanently, on their respective estates, so that any purchaser would take his title cum onere, and be liable to pay the share belonging to his mill, even if he expressly dissented from the expenditure. As already intimated, I do not consider these articles were intended to bind the estate of any purchaser for expenses incurred after the purchase, against his will; but I see no difficulty in holding that the lien, which existed on these three mills when the original members of the association sold them, secured not only the payment of what there had been, but of what thereafter should be, expended, with the assent of the purchaser. It is true, that a purchase for a valuable consideration, and without notice, would take the estate discharged of the lien; but the bill avers notice to all the purchasers, including the defendant, and this averment is admitted to be true. My opinion is, that the Sutton Woollen Mills took these estates, charged with a lien for three sixths of the expenditures which had then been made pursuant to the articles, or which should thereafter be made with its assent; and that this lien was capable of being enforced by any member of the association.

It is urged, however, that this bill is defective, because the plaintiff has not joined the other members of the association. But they have no interest in this suit, the object of which is to charge on the defendant's estates, their contributory share. I am aware that formerly the rule was, that in a bill for contribution, all those liable to contribute must be joined, upon the hypothesis that each might assist the others in the taking of the account; but this rule has been found so inconvenient, and so little beneficial in practice, that, by an order made in 1841, it has been abrogated in England (1 Daniell, Ch. Pr. 331); and under the fifty-third rule for the practice of this court, I can have no doubt, that it is my duty to make a decree in the absence of those parties, as their joinder would defeat the jurisdiction, and a decree can be made without affecting their interests. If there was any property of this association capable of being applied, and which, equitably, ought to be applied in payment of its debts, before resorting to the lien asserted by the bill, all the members would be necessary parties, because they would then have an interest, both in the account of the debts and of the property, and in its application. But there is no such property. The works which the association has erected for the improvement of these mills, cannot be sold without defeating the very object for which the association was formed. Every member has a right to have them preserved, and to have every other member pay his contributory share, in order that they may be preserved. So far from these works constituting a fund to be resorted to in relief of the contributors, they are the very object of the contribution, and equity requires it to be made in order that the original purposes of the parties may be fulfilled. It is objected that the defendant may hereafter, by other suits, have other debts of the association charged on his estates, so that he is exposed to pay more than his just share, and thus be forced to seek for contribution himself, in another suit. If this were so, it would be a fatal objection;

but the defendant not being a member of the association, and so not being personally liable, can never be forced to pay any more than three sixths of any debt, and so can never have any claim for contribution; for this proportion is what is justly and ultimately chargeable on his estates.

These are all the objections growing out of the supposed defect of parties, which have been assigned at the bar, and, in my opinion, they are not tenable.

The defendant insists that this is a stale claim; that the plaintiff has been guilty of such laches that this court will not lend its aid to enforce the lien. He relies on the doctrines of courts of admiralty respecting maritime liens, and several decisions on that subject were cited. But there is no occasion to resort to analogies drawn from another branch of jurisprudence, because equity has its own settled rules and principles which govern the case. First of all, equity protects bona fide purchasers without notice. Against such a purchaser it does not enforce such a lien. This leaves for consideration, only the rights of the party creating the lien, and those who succeed to those rights. As against them, an equitable mortgage is like a technical legal mortgage. If there be a statute of limitations, barring the rights of a legal mortgagee after the lapse of a certain time, equity will follow the law, and hold the same time a bar to a bill to foreclose an equitable mortgage. But it will not distinguish between an equitable and a legal mortgage in this particular. Hughes v. Edwards, 9 Wheat. [22 U. S.] 494; Lingan v. Henderson, 1 Bland, 282; Moreton v. Harrison, Id. 491; Sheratz v. Nicodemus, 7 Yerg. 9. The fact, that the action at law for the debt, is barred by the statute is not material in equity, as it is not at law. Thayer v. Mann, 19 Pick. 535; Baldwin v. Norton, 2 Conn. 163. Keeping these principles in view, it is plain that the court cannot refuse relief in this case, either by reason of the statute of limitations, or upon the ground of laches. By the law of Massachusetts, twenty years adverse possession bars an action at law to foreclose a mortgage. Less than twenty years is not sufficient to afford a positive bar to a bill to foreclose an equitable mortgage, on land in that state. Neither is this a case in which laches can be imputed to the plaintiff. He paid these moneys from time to time, between 1839 and 1843, and in 1843 he brought a suit in the state court to enforce this lien. The suit failed, for want of a sufficient equity jurisdiction, in October, 1847, and in April, 1848, this bill was filed. Whatever might be said of this, if the plaintiff were seeking to call into action the discretionary authority, which this court exercises to give relief concurrently with courts of law, as in bills for the specific performance or rescission of contracts, there can be no pretence for saying, that this lapse of time has affected the right of a creditor, to obtain payment of his debt, through an equitable mortgage on land. Nothing short of such time and circumstances as raise a presumption of payment can avail the debtor, or discharge the land.

A decree is to be entered, referring the cause to a master to state an account, with directions to ascertain what debts of the association have been paid by the plaintiff, in full, and what in part only, if any, and also what debts of the association have been paid in full by the owners of the three estates held by the defendant, and what in part only, and let the report show when all such debts were contracted and paid.

Case No. 2,864.

CLARKE v. STRICKLAND et al.

[2 Curt. 439.][1]

Circuit Court, D. Maine. Sept. Term, 1855.

TAXATION—LEVY—FORFEITURE FOR NONPAYMENT—WAIVER.

1. Whether an uninhabited township of land, owned in severalty by different proprietors, was rightfully included in a tax act, which made no provision for a valuation of the land of the different owners, and an apportionment of the tax as is required by the constitution of the state of Maine (article 9, § 8), quaere.

[Cited in Hodgdon v. Burleigh, 4 Fed. 117.]

2. If the tax was legal and the land forfeited for the non-payment of the same, the forfeiture was waived by the levy of another tax, after the title of the state had become perfect under the forfeiture.

[Cited in Hodgdon v. Burleigh, 4 Fed. 127.]

3. A subsequent act of the legislature, giving further time for the payment of the tax, was also a waiver of the forfeiture, at least so far that a title under a tax sale must be made under this law.

4. If the county commissioners, in levying a tax, assess a larger sum than is granted by the legislature, it renders the whole tax void.

5. All the proceedings directed by statute for enforcing a forfeiture must be strictly followed.

6. The treasurer, in advertising the delinquency in this case, gave as the sum due the whole amount including the county tax. This was a fatal defect in the proceedings. The county tax being illegal, was not due.

7. The land agent is directed to sell the land, and he sold all the right, title, and interest of the state in and to the land. This is a different thing from the sale of the land itself

At law. This was a suit [by Joseph W. Clarke against Hastings Strickland, and others] to recover a certain tract of land, part of number 2, range 12 west from the east line of the state, in the county of Piscataquis, particularly described by metes and bounds in the writ. It was admitted for the purpose of this hearing that the demandant's title was good, unless it had been divested by a forfeiture to the state, and by a legal sale for non-payment of taxes. The forfeiture claimed was for the non-payment of

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

the tax to the state and county, for the years 1842, 1843, and 1844. By the Revised Statutes [Me. 1840–41, p. 87] c. 14, § 9, if any taxes imposed by the legislature on any township, or tract of land not taxable by the assessors of any town or organized plantation are not paid within four years from the passing of the act making the assessment, the land shall become forfeited to the state.

Mr. Rowe, for plaintiff.
Mr. Shepley, for the tenant.

WARE, District Judge. The first objection urged for the demandant against the tenant's title is, that this township is not rightfully included in these tax acts. They purport to levy a tax on "cities, towns, plantations, and other places," and one sixth of the tax is to be assessed by the assessors on polls. As this was an uninhabited township, it had no assessors, by whom the tax could be assessed, and no polls, on which it could be imposed. If, however, the difficulty, with regard to the capitation tax could be overcome, another remains not so easy to be removed. The township belonged to several owners, not owning in common, but holding in severalty, and by the constitution of the state, art. 9, § 8. "All taxes on real estate assessed by the authority of the state shall be apportioned and assessed equally, according to the just value thereof." But in this township, there were no assessors, by whom the valuation could be made, and no mode of making a valuation and apportionment is provided by the law, so that the tax must be levied on all the different proprietors pro rata, according to the quantity owned by each, without regard to the relative value of the different lots, though there might probably be a wide difference in this respect between them. On this ground it is contended that by the true construction of these tax acts, taking the constitution for our guide in interpreting them, they do not extend to and include uninhabited townships and tracts of land owned by different proprietors in severalty, as this was; but that when the acts mention cities, towns, plantations, and other places, these last descriptive words must be confined to places ejusdem generis, that is to places that have a municipal organization, so far at least as to have assessors, by whom the tax can be constitutionally apportioned.

The question thus raised, is evidently one of much practical importance, and as it appears to me of no inconsiderable delicacy, but as it involves a construction of the constitution and statutes of the state, it is more fit to be submitted in the first instance to the state tribunals than to this court, and as it is not deemed necessary to be decided in this case, it is passed.

In the second place it is contended, that if there has been a forfeiture, it has been waived by the state. If there has been a forfeiture, it was for the non-payment of the taxes assessed in the years 1842, 1843, and 1844, and in each case, it became perfect in four years from the time when the taxes were respectively levied. But the state continued to levy and assess taxes on this land, after the time when their title is supposed to have become perfect by forfeiture. It is not the practice of the state to impose a tax on its own property. Such an act would amount only to an unmeaning and expensive formality, so far as the tax was for the benefit of the state. It is argued therefore, that the imposition of a tax, after the supposed forfeiture, affords a conclusive presumption, either that there had been no forfeiture, or if any had accrued, that it was waived and remitted, otherwise it is said, that we must suppose it to have been the intention of the state, to extract from the former owners of the land, a tax levied after they had been divested of their title and it had become invested in the state itself, an imputation on the good faith of the state, equally indecent and untrue.

In reply it is said, that this very question was before the supreme court of the state, in the late case of Hodgdon v. Wright, 36 Me. 327, and that it was there decided that in such a case there was no waiver of the forfeiture. I do not understand the decision, precisely as it is understood by the tenant's counsel. The language of the court is: "The state does not appear to have insisted on forfeitures, when it could obtain payment without. Such a course of proceeding (that is, the levy of a tax after a forfeiture), might perhaps be properly considered as a pledge that the owner would be permitted to redeem." If it was such a pledge, it appears to me to be nothing less than a remission of the forfeiture, or if not an unqualified remission, at least an engagement, that it should not be enforced without further proceedings and notice. The legislature, it seems to me so to have understood it. The act of August 10th, 1848, c. 65 [Laws Me. 1848, p. 56], directs the treasurer of the state, within sixty days after the approval of this act, to publish a list of all tracts of land forfeited to the state, for the non-payment of taxes, specifying the amount of taxes due on each, and the time allowed by this act to pay the same, in certain newspapers named in the act. The second section authorizes the owner of land that had before become forfeited, to pay into the treasury the tax and other charges before the first day of the ensuing March, and provides that the treasurer's receipt shall discharge the land. The third section directs the treasurer, to furnish the land agent with a list of all tracts and townships of land, that had been advertised according to the direction of the first section, with the amount of tax, and charges thereon, who within sixty days, shall sell the same, after giving notice of the time of sale for

three weeks in the manner pointed out by the act. This act appears to me to be a complete waiver of all prior forfeitures, and includes the land now in controversy. By a compliance with its terms, the owner becomes perfectly reinstated in his former rights. The land may again become forfeited by a non-compliance with its terms. If, however, it be considered as a conditional and not an absolute waiver and remission, and so the title in this case be considered ultimately to rest on the old forfeiture, it will still remain true, that whatever title the tenant derived from the sale must have its foundation in this law, because it was under the authority of this, that the sale was made.

The counsel for the demandant contends, that the proceedings of the state authorities to enforce the forfeiture were not in conformity with the law, but were in some respects fatally defective, so that either no title passed to the purchaser, or if any, only a defective title, which was liable to be extinguished by the repayment or tender of what the purchaser paid, and it was admitted that such a tender had been made.

One objection to the proceedings of the state authorities is, to the treasurer's advertisement. He is directed to specify in his advertisement the amount of taxes due, and he gave as the sum the whole amount, including the state and county tax. But in each year the county commissioners made an overlay, and assessed an amount beyond the grant of the legislature. The tax granted in 1842 was $3,620, that assessed by the county commissioners was $3,631.32; in 1843, the tax authorized was $3,000, that assessed was $3,076.32; and in 1844 the authorized tax was $3,560, and that assessed, $3,591.34. The assessors of towns and plantations are authorized to make an overlay to an amount not exceeding five per cent., but no such power is intrusted to the county commissioners. All the authority they had for levying any tax was derived from the statutes, and these limited them to the precise amounts named in the respective acts. The additional tax imposed by them was an excess of power that rendered the whole tax void, so that the state tax was all that was legally due. Such is the settled rule of jurisprudence. Stetson v. Kempton, 13 Mass. 272; Libby v. Burnham, 15 Mass. 144; Joyner v. Egremont School Dist., 3 Cush. 569. The object of requiring the treasurer to name the sum due is, to give notice to the owners of what they have to pay to redeem their land, and the stating in the advertisement a false sum is equivocal to giving no notice. It is insisted by the counsel for the plaintiff, that this is a fatal defect in the proceedings, that renders the defendant's title void. And the court is of this opinion.

Another objection is, that the land agent, by his advertisement, and sale pursuant to it, advertised and sold, not the land itself, but all the right, title, and interest which the state had in and to the land. The language of the act of 1848 is:—"The treasurer shall furnish the land agents with a list of all the tracts and townships of land, which have been advertised as is provided in this act, &c. And the land agent shall sell the same at auction," &c.,—that is, he shall sell the tracts or townships of land, and not the right or interest which the state has in them. These are, or at least may be, very different. The interest of the state may be the land itself, or it may be a lien upon it for what is due to the state for taxes. Rev. St. c. 14, § 2.

It is a familiar principle of jurisprudence, applicable to such cases, that he who would defend a tax title must be prepared to show that all the requirements of the statute, which provide a forfeiture and sale of any land for the non-payment of taxes, have been strictly complied with. Such titles, by which proprietors are deprived of their property usually for a mere fraction of its value, and often by surprise and without their knowledge, are not favored by the law. And therefore, as was observed by Chief Justice Whitman, (Brown v. Veazie, 25 Me. 362). "Great strictness is to be required, and it must appear that the provisions of the law preparatory to and authorizing such sales have been punctiliously complied with;" and he proceeds to commend the counsel for their astuteness, in scrutinizing the proceedings of the officers in that case. But this last objection is hardly open to the criticism of being inter apices juris. It rests on a substantial foundation of justice and equity. The fourth section of the act of 1848, provides that the owner of the lands at any time within three years after the sale, on producing evidence to the treasurer of his ownership, shall be entitled to receive back the balance of the price, for which the land was sold, after deducting the taxes and other charges. He has therefore, an equitable right before his title is extinguished, to have the land sold on the most favorable conditions, being interested in the surplus. A sale of the right, title, and interest of a party, naturally suggests to bidders a clouded title; it implies a doubt of the vendor as to the extent of his interest, and cannot be expected to sell for so much as would be given for the land itself. In the present case, the price paid by the purchaser was only the exact amount of the taxes and charges.

The opinion of the court is, that the demandant is entitled to recover.

CLARKE (THOMPSON v.). See Case No. 13,951.

Case No. 2,865.

CLARKE et al. v. THRELKELD.

[2 Cranch, C. C. 408.] [1]

Circuit Court, District of Columbia. April Term, 1823.

REHEARING IN EQUITY.

A cause in equity in this court may be reheard if the petition for rehearing be filed before the end of the next term after the final decree, and if no appeal lies to the supreme court in that cause.

[Cited in Glenn v. Dimmock, 43 Fed. 551.]

This was a bill filed against Threlkeld and others, to obtain conveyance of a lot in Georgetown, to the complainants, in consequence of the deed, formerly made by Threlkeld to the ancestor of the complainants, of the same lot, having been lost before it was recorded. Threlkeld had no interest in the cause, and did not oppose the prayer of the bill. At June term, 1882, the court decreed that he should convey the lot to the complainants, and pay the costs. At the next term (October term, 1822) Taney, for the defendant, contended that the decree ought not to have been for costs. Key, contra, waived the formality of a petition for rehearing, and now, at this term (April term, 1823), consented that the court should consider the case as if the petition had been filed at October term, 1822. By the 31st rule of the equity practice of the courts of the United States, as prescribed by the supreme court, it is declared, that if no appeal lies to the supreme court, a rehearing may be granted, at the discretion of the court, at any time before the end of the next term after the final decree shall have been entered and recorded. The value of the lot decreed to be conveyed does not appear in the papers in the cause, but was supposed to be of less value than $1,000, so that it was a cause in which there could be no appeal to the supreme court.

THE COURT, under these circumstances, was of opinion (MORSELL, Circuit Judge, contra), that they had now a right to rehear the cause; and upon the rehearing, they ordered so much of the decree to be rescinded as regarded costs.

CLARKE (UNITED STATES v.). See Cases Nos. 14,809–14,813.

CLARKE (WHITE v.). See Cases Nos. 17,540–17,542.

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

Case No. 2,866.

CLARK PATENT STEAM & FIRE REGULATOR CO v. COPELAND.

[2 Fish. Pat. Cas. 221.] [1]

Circuit Court, S. D. New York. Feb., 1862.

PATENTS — "SAFETY APPARATUS FOR STEAM BOILERS"—VALIDITY—INVENTION — ANTICIPATION — CONSTRUCTION—DUTY OF COURT.

1. Clark's patent is for a mechanism, so organized and connected to the boiler of a steam engine or steam generator, that, when properly set to a given pressure in the boiler or generator, it will, automatically and promptly, by force of the pressure in the boiler or generator, open and close the damper, as the pressure in the boiler or generator rises above or falls below the figure at which the mechanism is set. In order to find this invention anticipated in a prior printed publication, the jury must find, from the evidence, that the description embodies substantially the same organized mechanism, operating substantially in the same manner as that described in Clark's patent.

[Cited in Gottfried v. Phillip Best Brewing Co., Case No. 5,633.]

2. Where a patent is offered in evidence as proof of prior invention, the construction of such patent, as of other written or printed instruments, is a duty which devolves upon the court.

[Cited in Goff v. Stafford, Case No. 5,504.]

3. It is a pertinent question, if the mechanism described in the prior patent was substantially the same as the plaintiff's, organized and capable of operating substantially in the same way, why, during the period of nearly thirty years that it was known to the world, it was not applied to the same use as the plaintiff's?

[Cited in Gottfried v. Phillip Best Brewing Co., Case No. 5,633.]

4. Old instruments, placed in a new and different organization, producing, in such new organization, different results, or the same results, by a new and different mode of operation, do not prevent such newly-organized mechanism from being patentable.

[Cited in Westinghouse v. Gardner, etc., Air-Brake Co., Case No. 17,450.]

5. With regard to the degree of mental labor and inventive skill required in the work of invention, the law has no nice or rigid standard. There must be some inventive skill exercised, but the degree of that skill is not material. It not unfrequently happens, in the progress of the mechanic arts, that the time arrives when the whole atmosphere of inventive thought is quickened with the life of an approaching discovery, that many liens of investigation and experiment, converging for a long time toward the point, almost, but not quite, reach it; when, at last, some mind, by a happy thought, supplies some new element, or instrument, or mode of organization, and instantly gives birth to the organized idea.

This was an action on the case [against Charles W. Copeland] tried by Judge SHIPMAN and a jury, to recover damages for the alleged infringement of letters patent [No. 5,254] granted to Timothy Clark August 21, 1847, and extended for seven years from August 21, 1861, for an "improved safety apparatus for steam boilers."

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

The improvement consisted in the employment of a flexible vessel, which is expanded by the pressure of the steam; the outside of the said vessel being connected with the damper or valve which regulates the draught or blast, by a lever or levers controlled by a weight or spring, set to the required pressure of steam, so that when the pressure in the boiler exceeds the required pressure, the weight or spring shall be lifted to close the damper or valve, to check the fire; and when the pressure in the boiler falls below such required pressure, the weight or spring preponderating, shall produce motion in the opposite direction to open the damper or valve, and thereby increase the intensity of the fire.

The effect is to maintain a uniform pressure in the boiler, avoid the wasteful use of fuel, and prevent explosions.

The disclaimer and claim of the patent were as follows:

"I am aware that dampers for steam boilers have been operated by the pressure of the steam, by means of pistons, in various ways; and, therefore, I do not claim the opening and closing of the dampers by the pressure of the steam by means of pistons.

"But what I do claim as my invention, and desire to secure by letters patent, is the application of an elastic vessel, substantially as is herein described, instead of the piston, whereby the friction of the piston is avoided, and the operation on the damper is rendered much more uniform, the whole constructed and operated substantially as herein described."

Charles M. Keller, for plaintiffs.

George Gifford, for defendant.

SHIPMAN, District Judge, charged the jury as follows:

The plaintiffs are the owners of what is termed, in the present controversy, the "Timothy Clark" patent.

The alleged invention secured by the patent was made, according to the testimony of the inventor, in the spring of 1847. The original patent was issued in August of the same year. Owing to some defect or obscurity in the original specification, a very common circumstance, the patent was surrendered, a new specification filed, and the patent reissued. The patent was afterward extended, by the commissioner of patents, for a further term of years.

This suit is brought on the reissued patent; and, although the plaintiffs seek to recover for an infringement, it has been wisely agreed between the parties, that if the jury find a verdict for the plaintiffs, they may find nominal damages only.

The main object of the controversy is to settle the validity of the patent, as it generally is in patent suits, damages being of minor importance. It is always wise, where it can be done, without too great a sacrifice, to relieve the controversy of the embarrassment which often arises in attempting to fix the amount of damages, where the rules to be applied are not very clear, or easy of application. The jury, in this case, then, are relieved from all perplexity on that subject, and, if they find for the plaintiffs, should assess the damages at six cents.

But the important question for the jury to determine is, is this Timothy Clark patent valid?

Congress has wisely provided by law that inventors shall exclusively enjoy, for a limited season, the fruits of their inventions. To enable them thus to reap the benefits of their inventions, letters patent are issued to them, conferring upon them an exclusive grant, authorizing them alone to manufacture, sell, or practice what they have invented.

Upon such letters patent or grant the present suit is brought.

In order to sustain the suit, the grant must be valid. In other words, the invention described in it must be new and useful, for it is to new and useful inventions alone that the law applies.

A small degree of utility is sufficient to support a patent; and, in the present case, the defendant frankly admits that the patent is useful in some degree, and, therefore, is valid, so far as that question is concerned.

This leaves but two questions for you to dispose of: 1. Was the invention new? 2. Has the defendant infringed? If you find the first question in favor of the plaintiffs, you will, I apprehend, have no difficulty in coming to a correct conclusion on the second; and I shall follow the course pursued by both counsel, and confine my remarks to what I deem the only question which will require much of your attention.

Was the invention described in the plaintiffs' patent new at the time Clark says he invented it—in the spring of 1847?

In order to start correctly on this inquiry, let us first see clearly what is the precise invention described in the plaintiffs' patent; what, in other words, is the true construction of the plaintiffs' patent.

It is the duty of the court to determine this construction.

I charge you, then, gentlemen, that the invention described in the patent is a mechanism, so organized and connected to the boiler of a steam engine or steam generator, that, when properly set to a given pressure in the boiler or generator, it will, automatically and promptly, by force of the pressure in the boiler or generator, open and close the damper, as the pressure in the boiler or generator rises above or falls below the figure at which the mechanism is set.

The practical object of this organized mechanism, in its application to a steam engine, is to regulate and control the steam by uniformly maintaining the pressure at which the steam shall work the engine, at any given power the engineer chooses to fix,

within the range of his engine, and thus to release the hand and mind of the engineer from the performance of that duty.

This is the invention which the inventor describes in his patent. His patent is prima facie evidence that this invention is new, or, in other words, that he is the first and original inventor of it. The defendant insists that, notwithstanding the patent, the invention is not new. He says that substantially the same organized mechanism existed, and was well known, before Clark's invention, and that it is to be found in the—1. Float regulator. 2. Piston regulator. 3. Brunton's operative thermometer.

As to the float regulator, it is not claimed that it is adapted to high pressure engines, and it is for the jury to say whether they find, in any description of this float regulator before them, the invention of this patentee. That the float regulator was described in books before the invention of Clark was made, of course, there is no doubt. That its description was well known to inventors and engineers for years before the invention of Clark, is equally true. But, in order to affect the validity of Clark's patent, the jury must find, from the evidence, that the description of this float regulator embodies substantially the same organized mechanism, operating substantially in the same manner as that described in Clark's patent.

As to the piston regulator—this is older than Clark's, but the same inquiry arises, and is to be disposed of by the jury: Does this piston regulator embody substantially the same organized mechanism, operating substantially in the same manner as Clark's?

In regard to both the float and piston regulators, the plaintiffs say that it may well be asked, why neither of these old contrivances were in any considerable use, at the time of Clark's invention, and why they have not been since, if they were substantially the same as his.

They claim to have proved that Clark's contrivance possesses great beauty and utility; that it performs, with ease and precision, what engineers were desirous of having performed by some mechanism that would dispense with their constant attention; and they insist, that if either the float or piston regulator was substantially like Clark's, it would have possessed substantially the same beauty and utility, and would have come into use. Of the force of this claim of the plaintiffs; when tried by the clear light of the evidence before them, the jury are to judge. If the jury do not find that either the piston or float regulator, as presented to them by the evidence, embodies the invention of Clark, as I have defined that invention, then they will inquire, if the description of Brunton's machine, contained in the printed specification of Brunton, sets forth substantially Clark's organized mechanism, as an organized mechanism, operating in substantially the same way? There has been a question raised as to the construction of one portion of Brunton's patent, and as the construction of printed or written instruments is a duty which the law devolves on the court, I will determine its construction upon that point.

The question is, whether the "Brunton's Operative Thermometer," as he terms it, is described as to be operated by liquids merely, or by fluids, when understood in the broad sense, as including both liquids and elastic vapors, such as steam and gases?

Brunton's patent speaks of his machine as having the elastic vessel expanded by fluids, and if the term fluids, as he used it, is to be understood as embracing elastic vapors, then the description includes steam as one of his agents of expansion. But, as I read his patent, he describes his machine or apparatus as to be expanded by liquids only. It does not necessarily follow from this construction that his operative thermometer could not be expanded, and operate by the expansive power of steam. Whether the organized mechanism he described was substantially like Clark's, and would, like Clark's, operate substantially in the same manner by the pressure of steam, the jury must determine from all the evidence.

And upon this point, the plaintiffs properly, in their argument, present to the jury the question—If the mechanism described by Brunton was substantially the same as Clark's, organized and capable of operating substantially in the same way, why, during the period of nearly thirty years that it was known to the world, was it not applied to the same use as Clark's?

That the elastic vessel in Brunton's machine was substantially like that of Clark's, there is no doubt.

This is conceded by the plaintiffs, and is obvious to any one. But this is not of itself sufficient to invalidate the plaintiff's patent. Old instruments, placed in a new and different organization, producing, in such new organization, different results, or the same results, by a new and different mode of operation, do not prevent such newly-organized mechanism from being patentable.

You will then look at Brunton's description, and see if you find there substantially described the invention of Clark, to wit: a mechanism, so organized and connected to a steam generator, that, when properly set by the engineer or operator, at a given pressure in the boiler or generator, it will, automatically, by force of the pressure in the boiler or generator, open and shut the damper, as the pressure in the boiler or generator rises above or falls below the figure at which the mechanism is set. If you find in Brunton's patent such a mechanism, so organized, then, of course, Clark's invention is not new. But, if you do not find such a mechanism, not only substantially the same in its particular parts, but so organized as that, when set in operation, it will pro-

duce substantially the same results in substantially the same way, then Clark's patent is valid, unless the change made by Clark is so obvious that it required no invention or labor of thought to make that change.

With regard to the degree of mental labor and inventive skill required in the work of invention, the law has no nice or rigid standard. There must be some inventive skill exercised, but the degree of that skill is not material. It not unfrequently happens, in the progress of the mechanic arts, that the time arrives when the whole atmosphere of inventive thought is quickened with the life of an approaching discovery, that many lines of investigation and experiment, converging for a long time toward the point, almost, but not quite, reach it; when, at last, some mind, by a happy thought, supplies some new element, or instrument, or mode of organization, and instantly gives birth to the organized idea.

If this inventor, Timothy Clark, has in this instance, supplied to what was old some new element, instrument, or new organization, and thus produced a better practical result than had been included by the old means, he is entitled to the merit and fruits of his labor.

It is claimed by the defendant, that the hand of the engineer is a better regulator than any automatic machine, and that it is a sufficient answer to the question, why these inventions, to wit: the float, piston, and Brunton's regulators are not in use, and have not attracted more attention from engineers.

Of the force of this you are to judge, in the light of the evidence, of the value of Clark's invention, and in view of the fact that the defendant, himself an engineer, has patented an apparatus having the same object.

If you find Clark's invention new, then the only remaining question is, has the defendant infringed? On this point, I do not apprehend that you will have any difficulty. The mere change in the form of the elastic or flexible vessel, or the material of which it is composed, does not take it out of Clark's invention, if the original mechanism is substantially the same, and operates substantially in the same way.

As I have already remarked, if you find for the plaintiffs, you will assess the damages at six cents only. The plaintiffs then can resort to a court of equity for any further protection of their rights.

The jury found a verdict for the plaintiffs.

Case No. 2,867.

CLARKSON v. MANSON.

Circuit Court, S. D. New York. Nov. 15, 1880.

[Cited as an unreported case in Falls Wire Manuf'g Co. v. Broderick, 6 Fed. 654. Reported in 4 Fed. 257.]

CLARKSVILLE (GAUSE v.). See Case No. 5,276.

CLARKSVILLE (NORTHWESTERN UNION PACKET CO. v.). See Case No. 10,342.

CLARK THREAD CO. (WILLIMANTIC LINEN CO. v.). See Case No. 17,763.

CLASEN (PHELPS v.). See Case No. 11,074.

Case No. 2,868.

CLASON et al. v. SMITH.

[3 Wash. C. C. 156.] [1]

Circuit Court, D. Pennsylvania. April Term, 1812.

INSURANCE—REPRESENTATIONS—MATERIALITY.

1. A misrepresentation, which will avoid a policy, must not only be false, but it must be material, either in relation to the rate of premium, or as offering a false inducement to the underwriter to take the risk, when otherwise he would not have done so. If it had no influence, or ought to have had none, it cannot be said to have been material.

[Cited in Coles v. Marine Ins. Co., Case No. 2,988.]

2. The mere expression of an opinion by the assured, or an expectation as to a matter which might even imply that the party had some ground, deemed by himself sufficient, on which to build his opinion, would not amount to a material misrepresentation. It was the folly of the assurer, not to have inquired into the grounds of the opinion.

[Cited in Ruggles v. General Interest Ins. Co., Case No. 12,119.]

Action [by Clason & Dunham] on two policies of insurance; one on the ship Horatio, and the other on the cargo, at and from New-York to Tonningen, at a premium of 20 per cent. She sailed with her cargo on the voyage insured, in February, 1810, and has never been since heard of. There were two questions made in the cause—1. As to the seaworthiness of the vessel. 2. A material misrepresentation.

WASHINGTON, Circuit Justice, in the charge, summed up the evidence, and then left the question of seaworthiness to the jury.

As to the second question.—The misrepresentation asserted to have been made, is contained in a letter from the plaintiffs to their agent in Philadelphia, of the 23d of January, in which they agree to give 15 per cent. premium, and add, "we have no doubt, but that we could get the insurance effected in New-York at that premium." The defendant refused to take the risk for less than 20 per cent., and after some time the insurances were completed at that premium. The evidence proves, that applications were made to the different offices, the whole of whom refused to take the risk at all. In point of fact, then, this statement in the plaintiffs'

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

letter of the 23d of January, was not true; and in this respect, the statement cannot be defended at the bar of conscience. But the question to be decided by the court and jury is, how stands the law in relation to this representation? A misrepresentation, to avoid a policy, must not only be false, but it must be material, either in relation to the rate of premium, or as offering a false inducement to the underwriter to take the risk at all; when otherwise, perhaps, he would not have done it. If, in point of fact, it had no influence, nor ought to have had any in these respects, then it is impossible to say that it was material. Now, it is clear, that in this case, the misrepresentation had no influence in affecting the rate of premium; because the underwriters proceeded upon their own judgment, and demanded 20, instead of 15 per cent., as the rate of premium; nor ought it induce them to take the risk at all, or in any respect to influence the rate of premium. The letter asserts nothing, but merely expresses an opinion, that the insurance could be effected in New-York, at 15 per cent. The very terms used, imply that the opinion was not formed on any thing certainly ascertained as to the fact; because if that had been the case, it would have ceased to be a doubt. The mere expression of an opinion, or an expectation, as to a matter which might even imply that the party had some ground, deemed by himself sufficient, on which to build his opinion, would not amount to a misrepresentation sufficiently material to avoid a policy; because it is the folly of the other party, not to inquire into the grounds of the opinion. But, when the opinion is such as cannot possibly be well founded, and bears on the face of it the full evidence that it is unauthorized, it becomes obviously harmless, so far as the insurer is concerned; and the conclusion becomes irresistible, that he was not misled, or if he was, that he has only himself to blame for it. Such is the present case. The plaintiffs say, they do not doubt that they could have the insurance effected in New-York, at 15 per cent. The insurer cannot possibly believe this to be a candid opinion, because, if it was, why should the plaintiffs come to Philadelphia, and at once offer to give the same premium here, and finally, consent to give 20 per cent.? If, indeed, the plaintiffs, by this uncandid statement, had endeavoured to get the insurance effected for less than fifteen per cent., and had succeeded, the defendant might have been deceived by the misrepresentation, inasmuch as it would have assigned at least a plausible reason for applying to the underwriters in Philadelphia. But even in that case, the statement would not have amounted to more than an opinion. If a man, in order to enhance the value of his property, asserts his belief, that he could get for it, from those who know its value, a certain sum, and offers it for the same price; or even for more; and in truth he knew that he had no just ground for the opinion he had expressed, but the contrary; we do not think that a court of law or equity would, on that account, set aside the contract of sale; for, it was the folly of the purchaser to govern himself by a mere opinion, without examining into the facts on which the opinion was founded. Nothing can be more clear, that in this case the misrepresentation was not material. Verdict for plaintiffs.

CLAUDIUS (CAMPBELL v.). See Case No. 2,356.

CLAUSON (BREWERS' FIRE INS. CO. v.). See Case No. 1,851.

Case No. 2,869.

CLAY v. McCALLY et al.

[4 Woods, 605.][1]

Circuit Court, N. D. Alabama. Oct. Term, 1877.

FRAUDULENT CONVEYANCES—CONSIDERATION.

1. M., who was insolvent, conveyed to L., the mother of his wife, substantially all his property which was subject to execution, the alleged consideration being the payment of an account due from M. to L. Within two days thereafter, L., in consideration of natural love and affection, conveyed the same property to her daughter, the wife of M. *Held*, that these circumstances were indications of bad faith, and the deed executed by M. to L. could be sustained only on the ground that it was made for a valuable consideration and to pay an honest debt.

2. The consideration for the conveyance made by M. to L., mentioned in the first head-note, was an account said to be due from M. to L. for more than $42,000. The account had been running for twenty-three years. No demand for the payment of it or any part of it had ever been made. Some of the items were such as showed conclusively that their amount had been guessed at; others were for rent of land which L. did not own, but had previously conveyed to the wife of M., and for all it was evident that L. had not considered M. her debtor. No part of the account had ever been reduced to writing, and it was stated for the first time on the day the conveyance was made. *Held*, that the account was trumped up and fraudulent, and would not sustain the conveyance.

3. A gratuity cannot subsequently be converted into a debt so as to become the consideration of a conveyance made by the grantor to the injury of his creditors.

In equity. Heard for final decree on the pleadings and evidence.

The facts were as follows: On May 15, 1866 [the defendant] Thomas S. McCally, by his deed of that date, conveyed to his mother-in-law, the defendant Ann E. Langford, certain real estate, to wit: Nineteen acres and the undivided fourth of one hundred and thirteen and one-half acres in fee simple, and his life estate in the remaining three-fourths of said one hundred and thirteen and one-half acres, and his life estate in five

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

hundred and forty-three acres, all situate in Madison county, Alabama. The personal property consisted of the following goods and chattels, to wit: Live stock, farming utensils and household furniture. The property so conveyed was worth about $10,000, and included nearly all his property subject to execution in Alabama. The consideration of this conveyance, as expressed in the deed, was a debt due from McCally to Mrs. Langford of $42,904.45. Within two days after said conveyance, Ann E. Langford conveyed the same property to the defendant Catharine M. McCally, who was her daughter and the wife of Thomas S. McCally, the consideration expressed being natural love and affection. On March 17, 1868, McCally was adjudicated a bankrupt by the district court for the northern district of Alabama, and complainant [Hugh L. Clay] was appointed the assignee of his estate. After appropriating all the assets that came to the hands of the assignee, there remained due to the creditors of the bankrupt estate more than $40,000. At the time of executing the conveyance to Mrs. Langford, McCally was insolvent.

The debt which was the consideration of the deed from McCally to Mrs. Langford was evidenced by an account which purported to have been stated on the day the deed bore date. The debt due Mrs. Langford, as shown by the account, was for her share of four crops of cotton raised by McCally jointly with her in the years 1843, 1844, 1845 and 1846, and for rent of lands and hire of negroes from 1847 to 1862 inclusive. McCally had been a merchant, carrying on business from 1840 to 1861. There was no entry of the items of this account in any book kept by him, nor in any book kept by Mrs. Langford. The land for which rent was charged was that allotted to Mrs. Langford as dower in lands of which her husband had died seized. She had relinquished all except one hundred and twelve acres at the time of its assignment on March 3, 1843, and in 1856 had conveyed this one hundred and twelve acres to Thomas S. McCally's wife. The bill charged that the conveyance from McCally to Mrs. Langford was not bona fide, but, on the contrary, was made fraudulently with intent to hinder, delay, and defraud the creditors of McCally. The prayer of the bill was that said deed be set aside, and the property conveyed thereby be declared to be assets of the bankrupt estate and turned over to the assignee to be administered as such.

David P. Lewis, S. D. Cabiniss, and F. P. Ward, for complainant.

L. P. Walker, D. D. Shelby, and Paul L. Jones, for defendants.

WOODS, Circuit Judge. The defendant Thomas S. McCally, as appears clearly from the evidence, on or about May 15, 1866, conveyed substantially all the property of which he was seized or possessed subject to execution in Alabama, to his mother-in-law, Mrs. Langford, to pay an alleged debt due to her from him of over $42,000. The property so conveyed consisted of the live stock and farming implements on his plantation, and the plantation itself, and the house in which he with his family resided and the household furniture therein. In the fall of 1865, McCally had invested $13,000 in the bonds of the Memphis & Clinton Railroad Company and distributed them among his children, several of whom were minors, and in the year 1866 he had expended on the lands conveyed by him to Mrs. Langford the sum of $13,000. Within two days after the conveyance to Mrs. Langford, she conveyed, for the consideration of natural love and affection, the same lands and property to her daughter, the wife of McCally, by a deed which left him no interest therein which could be seized to pay his debts. The circumstances which surround these conveyances are certainly suspicious. The deed to Mrs. Langford can be sustained, if at all, only on the ground that it was made for a valuable consideration, and to pay an honest debt due by the grantor to the grantee.

Was there any such indebtedness as the deed recites? The account consists of charges for Mrs. Langford's share of cotton produced by her jointly with McCally in the years from 1843 to 1846 inclusive, for stock and plantation tools bought of her by McCally, and rent of land and hire of slaves from 1847 to 1862 inclusive. The account amounts to over $42,000. A most remarkable fact about it is, that no statement of the account or any part of it was ever made until May 15, 1866. Neither McCally nor Mrs. Langford, during the entire time which the account covered, from 1843 to 1866, a period of twenty-three years, ever put a single item in writing. Until May 15, 1866, there was no memorandum, entry, account, note or other scratch of a pen to show that McCally owed Mrs. Langford any amount, or that she claimed any amount from him. The first four items of the account are for the share of Mrs. Langford in the cotton crop produced by her and McCally jointly in the years 1843, 1844, 1845 and 1846. The account states her share at twenty thousand pounds each year, and the price at six cents per pound each year. That such an account is correct is incredible. That it is fabricated is clear. If McCally ever received the proceeds of any cotton produced in the years named, the property of Mrs. Langford, which it is unnecessary to deny, it is clear that no account was ever made of it, and the amount of the cotton and the price at which it was sold was guessed at, when the account stated was made up in 1866, after the lapse of twenty years.

The items of the account for the hire of

negroes are open to similar objections. These items cover the period from 1847 to 1862 inclusive. It is not pretended that any account has been kept of these charges. No memoranda of these large items, running over a period of fifteen years, was ever made either by McCally or Mrs. Langford; nor is there a word of evidence to show that any contract of hiring was made which specified the number of slaves to be hired, or the price to be paid for their services, or any of the usual terms embodied in such contracts. The only hint that looks like a contract is the statement of McCally that in 1847 he hired the slaves referred to in the account. What this hiring really was, is made evident from the will executed by Mrs. Langford on October 7, 1864. In that will, after dividing her slaves between her two daughters, Mrs. Thomas S. McCally and Mrs. Wm. J. McCally, who were her only children, she declares: "I also direct and request, if desired by either one of my daughters, that an account current shall be made out for the hire of above negroes, including those that are dead, for the year 1847, being the year that I hired or let them have the negroes, taking into consideration the breeding and raising of young negroes, either one having to pay the other, that the balance may be against." This clause in the will makes it perfectly clear that in 1847 Mrs. Langford divided her slaves between her daughters and let them each have a portion of them, and that it was not her purpose to demand compensation for the hire, but that she intended their use to be a gratuity or something in the nature of an advancement to her daughters. It is utterly inconsistent with the pretense now set up, that from 1847 to 1862 there was a contract between Mrs. Langford and Thos. S. McCally, by which she hired to him, for a compensation to be paid her by him, the slaves referred to in the stated account.

The items for rent of land are also open to criticism. In the first place, Mrs. Langford is credited with the rent of two hunderd and thirty-five acres of land, when she only had one hundred and twelve acres to rent, and she is credited with rent of land year by year up to 1862, when she had, in 1856, conveyed the identical lands to her daughter, Mrs. McCally. It is not pretended that there was any contract between Mrs. Langford and McCally by which the amount of rent to be paid was agreed on. None of the terms of the contract were settled between them, even verbally.

It is perfectly clear from the evidence what were the dealings between Mrs. Langford and McCally. Mrs. Langford, during the period which the stated account covers, lived with her daughters, Mrs. Thos. S. McCally and Mrs. Wm. J. McCally, spending about half the time with each. No account appears to have been kept or charges made against her for subsistence. On her part, she appears to have been liberal and generous to her daughter, Mrs. Thomas S. McCally, and her daughter's husband. It is incredible that she ever expected to exact payment from McCally, or that he ever expected to make payment for the various items set out in the account stated, when we consider that no specific contract was ever made between them, even by parol; that no account of any sort was kept by either of the parties; that for a period of twenty-three years no demand was ever made by Mrs. Langford for payment of the amount now claimed to be due her, or any part thereof. From January 1, 1844, to May 15, 1866, no memorandum was made by either Mrs. Langford or McCally and no word passed between them that would indicate any indebtedness by the latter to the former; and Mrs. Langford out of regard for her daughter, who was the wife of McCally, seems to have allowed McCally to use the proceeds of her cotton, and to use her land and slaves to carry on his business and support his family without any purpose of ever demanding compensation therefor, and with no expectation on the part of McCally that pay would ever be expected. After a lapse of many years, when McCally had become embarrassed in his circumstances, evidently with the purpose of saving his visible and tangible property from execution by his creditors, the plan is conceived of stating an account between him and Mrs. Langford. The account shows on its face that it is an afterthought. No one reading the evidence would suppose for a moment that if McCally had not become embarrassed, and if there had not appeared to be a necessity to shield his property from execution, Mrs. Langford would ever have made out the account, or ever demanded payment, or that she ever expected to demand of McCally to make payment. If she had sued McCally to collect the amount claimed to be due her (as shown by the stated account), and he had pleaded the general issue, the evidence in this case would have made his defense complete and perfect. There was no debt due to Mrs. Langford from McCally; the deed to her from him was therefore without consideration.

The case is full of the evidence of bad faith. The device by which McCally put his property in the name of his wife, and beyond the reach of his creditors, is transparent. It is seldom that a clearer case of a fraudulent conveyance is brought to the attention of a court of equity.

There must be a decree in accordance with the prayer of the bill.

Case No. 2,870.

The CLAYTON.

[5 Biss. 162.][1]

District Court, N. D. Illinois. July, 1870.

LIEN FOR SEAMEN'S WAGES.

Seamen have a lien on the freight and cargo for their wages, and where the charterer of the vessel is also the owner and consignee of the freight, the lien nevertheless attaches, and the freight will be the amount which the transportation was fairly worth.

[Cited in The L. L. Lamb, 31 Fed. 34.]

In admiralty. This was a libel filed by the mates and crew of the bark Clayton against the freight and cargo of said vessel, on a voyage from Chicago to Collingwood and return, for their wages as seamen in the management of the bark.

BLODGETT, District Judge. The evidence discloses this state of facts: One Samuel D. Clark was the manager of the bark Clayton, under a charter party from her owner for the year 1867; was engaged in the lumber business in this city, and was running this bark between his mills and places where he procured his lumber and the lumber yard in this city, for the purpose of transporting lumber and timber. In the month of June, 1867, said bark started upon a voyage, with the libellants on board, from Chicago to Collingwood after a load of timber, and returned in due course of the voyage to this port with a cargo of pine timber consigned to S. D. Clark, the charterer of the bark and the owner of the cargo. Between the time this voyage was undertaken and the time of its accomplishment, Clark became embarrassed in his circumstances and made an assignment for the benefit of his creditors to C. M. Smith, and on the arrival of the bark with her cargo in this city, Smith, as the assignee of Clark, took possession of the cargo, the captain notifying Smith, at the time the cargo was unloaded, that he claimed his lien upon the cargo for the freight and seamen's wages. In point of fact, there was no technical freight earned in this case, the consignment being made by the owner to the owner. The shipment being for the benefit of the owner at this place, the assignee Smith taking possession of the cargo, he stepped directly into the shoes of the original consignee, Clark.

I think the authorities are clear that the crew of a vessel engaged upon the navigable waters of the United States have a lien for their wages upon the freight earned. As to whether that lien extends over and attaches to the cargo or not, I do not deem it necessary to decide in this case, but I have no doubt but they have a lien upon the vessel and upon the freight. In this case, the freight would be, although there were no freight bills made out as such, what it was fairly worth to bring the cargo from the place of shipment to the place of destination. There was no contract as to what the freight should be, because Clark was consignor and consignee both. He owned the cargo and had a season charter for the vessel, and was freighting the cargo here to be sold in due course of business by himself; but it does not follow that because he was thus engaged in transporting property from the place of shipment to the place of destination, to be sold, that no freight is earned in the sense of our maritime law, because he did not collect freight at the end of the voyage, but simply took the enhanced value of the cargo at this point as the advantage which he received by the shipment. I think, as between himself and the seamen employed upon his vessel, the freight earned is a fair quantum meruit for the transportation of the cargo from the place of shipment to the place of destination, and that the seamen have a lien upon that freight for the amount of their wages.

I shall therefore order a reference to the commissioner for the purpose of taking proofs as to what the freight of this vessel would fairly amount to on this cargo, and on the coming in of that report shall decree as against the freight earned the payment of the amount of the wages, not against the cargo specifically, but as against the freight earned. I am not disposed to discuss the question of the liability of the cargo, for I understand that the freight earned will be sufficient to pay the amount due to these men.

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

CLAYTON (BATTEN v.). See Case No. 1,105.

CLAYTON (GRUBB v.). See Case No. 5,849a.

CLAYTON (HAMMEKIN v.). See Case No. 5,996.

Case No. 2,871.

CLAYTON et al. v. The HARMONY.

[1 Pet. Adm. (1807) 70.][1]

District Court, D. Pennsylvania.

SALVAGE—RESCUE OF PRIZE—COMPENSATION—SEAMEN—SUSPENSION OF WAGES BY CAPTURE.

1. The Harmony, bound to Philadelphia from Great Britain, was captured by a French vessel of war, part of her crew, &c., taken out, and ordered to Rochelle. The libellants and others, seven in number, including two female passengers, rose on the French prize-master and his crew, ten in number, rescued the Harmony, and brought her into Philadelphia. One fourth of the whole value of ship and cargo allowed as salvage.

[Cited in Hart v. The Littlejohn, Case No. 6,153.]

2. The contract between owners and mariners suspended by capture, as to all claims for wages.

[Cited in Strout v. The Cuba, Case No. 13,549.]

3. No difference, in justice, whether rescue by ship's crew, or those of another vessel.

4. Captors enemies on the sea.

[1] [Reported by Richard Peters, Jr., Esq.]

5. Legal obligations on mariners continue in cases of wreck, but not to rescue captured property.

6. Rewards beyond wages given to mariners, saving from wreck. Not fixed, but vary according to circumstances.

[Cited in The Massasoit, Case No. 9,260.]

7. No salvage allowed to fraudulent claimants.

8. Policy and justice of liberal salvage.

9. Quantum of salvage, on what principles adjusted.

10. Salvage on recaptures, by act of congress.

11. Wages from last port of delivery in part of shares of salvage.

BY THE COURT.

The libel states, that the ship sailed from Portsmouth in Great Britain, on the sixth of April in the present year, under convoy, from which she parted on the twenty-second of May following, and while proceeding on her voyage to Philadelphia, to wit, on the twenty-seventh of the same month she was captured by a French corvette commanded by a Captain Gallabert. That the captain of the Harmony, the officers, seamen and passengers, were taken on board the corvette, except the libellants, who were suffered to remain in the Harmony, on board whereof were put three French officers and seven seamen, who were ordered to conduct her into Rochelle in France. That the ship being on her way to Rochelle, on the twenty-ninth of May, she having been forty-eight hours and upwards in possession of the captors, was recaptured by the libellants and the mate of the said ship Harmony. The ship and cargo are stated to belong to Messieurs Crawford and Company, of Philadelphia, and divers other citizens of Pennsylvania. The prayer is, for such part of the value of ship and cargo to be awarded to the libellants, as shall be found due, according to the laws of the United States or by the laws of nations. The answer of James Crawford and Company, owners of the ship, in behalf of themselves and the owners and consignees of the goods, accords with the allegations of facts in the libel, as to the capture, but states that Anne and Esther Collet, two female passengers, were also left on board the Harmony. It also states, that considerable quantities of goods were plundered from the cargo by the French captors, the amount whereof, at the time of filing the libel, was unknown. The respondents allege, that Brown and Revel were articled seamen, that Clayton was a passenger, and had goods on board, as was also Ardley; but the latter was not an active party in the recapture, he having remained neuter. That the mate, John Nelson, was the principal author and agent in the recapture, to whose courage and abilities it was chiefly due; and that Anne and Esther Collet assisted, to the best of their abilities, therein. The respondents deny, that by reason of the premises, the libellants are entitled to salvage by the laws of the United States, or of nations, and pray, that the libel be dismissed with costs, &c. The libellants reply, that, though Clayton had goods on board, to the value of three hundred pounds sterling, they were insured in London, and that Ardley had no goods on board, and was a party to the enterprise, and did co-operate in the recapture. They allow that Nelson exerted himself for the rescue of the ship, but he could not have effected it, without their co-operation and assistance; but they deny that the recapture was chiefly due to his courage and abilities, or that he was the author thereof. They allege, that it was, in an essential degree, due to the courage, the arms and the abilities of the libellants, that the enterprize succeeded.

The testimony, of all the witnesses, concurs in the leading circumstances of the rescue, which was accomplished when the vessel had been forty-eight hours in possession of the enemy, by the joint efforts, of all the passengers and crew of the Harmony, left on board by the captors. There is no doubt, however, that some had more active merit and agency than others. The evidence with respect to Robert A. Ardley, is the least clear and intelligible. It would take up too much time to abridge the arguments of the counsel for the libellants, to whom I am obliged for many of the observations I shall hereafter make. It is contended, on the part of the respondents, that there is no positive law of the United States (the acts of congress only operating on the cases therein enumerated, and this is not one) or any adjudged case under the laws of nations, to warrant the claim of salvage, which is an imperfect right, like that to compensation for saving a house on fire, or goods in it—rescuing a person or his property from ruffians, robbers, &c. depending on the generosity of the persons benefitted. That the mariners are the servants of the owners, and are bound to recover the ship, whether wrecked or captured, or lose their wages, and they shall not be paid for doing their duty.[2] That the passengers or some of them, had goods on board, and if they were insured, they had the profits, if saved, in contemplation; the personal liberty of all was an object worth the contest. None of these could be obtained without recapturing the ship and cargo, which remained the property of the owners, until brought infra praesidia of the captors, and condemned in a court of admiralty. It was conceded, that such condemnation would, in all probability, have taken place if the property had been brought within the power of a French tribunal. It was prevented, by the recaptors, from going into a French port, to benefit themselves, and not the owners; but, if the property was not changed by the capture, the libellants can claim no part, it being

[2] See 2 Azuni, Mar. Law (N. Y. Ed.) p. 274, and note cited from Emerig. Traité des Assur. p. 505: a similar doctrine held in argument; but the crew, rescuing the prize, were rewarded.

wholly in the owners of the ship and goods. If the capture made it enemy's property, and divested the rights of the owners, then the recapture, if lawfully made, was prize to those who took it. Therefore, in either case there can be no right of salvage, nor is there any remedy either at common law or in the admiralty; there being no legal obligation on the owners to comply with such a demand. That it is dangerous to allow the principle of salvage, in case either of wreck or rescue by the crew; the mariners would, in one case, be tempted to run ships on shore; and, in the other, to submit to a trifling force, that, by saving the ship and goods, or recapturing them, they might obtain an unmerited reward. That, if there is an allowance for salvage in this case, a discrimination must be made between the salvors, and the female passengers should share the compensation given; from which Mr. Ardley should be totally excluded, as not being active, or any wise concerned in the recapture.[3]

I think much has been said in this cause, tending to perplex, however unintentionally, a plain question, and, by no means relevant to the subject of enquiry. I did not anticipate, from counsel so truly respectable, such laboured opposition to compensation, under a plain principle of common law and common justice, evident to the most moderate understanding, and mentioned by Lord Holt, in the case of Hartford v. Jones, 2 Salk. 654: "He that serves another, ought in reason to be paid for his service." In the same case, this great and able judge, who was well acquainted with the general subject of laws, though peculiarly eminent in those of his own country, declares that, "salvors of goods cast away and saved may retain for payment, as a carrier for his hire; and salvage is allowed by all nations."—See, also, 1 Ld. Raym. 393. It is unfortunate that books reporting admiralty adjudications are rare. If the proceedings of these courts were published, the respondents' counsel would, no doubt, have had it less in their power to make the objection, that adjudged cases, to establish the libellant's claim, could not be shewn. This assertion, however, is not supported. There are not only particular instances, quoted from writers on the laws of nations, but clear and decided opinions, from the most distinguished authorities, adduced to warrant the present claim: nor are instances wanting, of cases determined in the courts of this country, both of common law and admiralty jurisdiction, as well those of the United States, as of the individual states. Though the cases, similar in circumstances are few, as they but seldom occur, the principles of the claim are supported by many authorities. See 2 Wood. El. Jur. 429–434; 1 Inst. Adm. 53–55, and authorities there cited; Lee, Capt. 95–100; 19 Vin. Abr. 275; Salk. 35; 2 Valin, Comm. 258; Wesk. Ins. 499, and many others. It is unnecessary to enquire into the motives inducing the recapture, or rescue. Speculative, or interested investigators, who, in analyzing the human mind, view the dark side of human nature, find that the best actions of men spring from selfishness. I do not envy them this discovery, or the humiliating reflections which flow from it.—It is enough for our present purpose, that the recapture has been made; and, that the owners of the ship and cargo have recovered their property to a very great amount. The benefit accruing to them, and not the motives, but the services of those, who, at the risk of their lives, and with highly meritorious exertions, restored, what would otherwise have been totally lost, are the leading objects of our present enquiry.

In opposition to the claim of the mariners, the cook and the steward, and the same objection lies to the mate, it has been stated, that they were the servants of the owners, and bound to recover the ship and cargo, or lose their wages. To these they were entitled, up to the time of arrival at the last port of delivery and for half the period of stay there, though the vessel and cargo had been lost; so that the part of their wages, put in jeopardy by the capture, was a small object. Nor is the benefit derived to the owners the less, because, in serving them, the salvors regained their persoual liberty, and, with it, some advantages to themselves. But it appears to me, that the contract between the mariners and the owners, was suspended—see note in the case of Brevoor v. The Fair American [Case No. 1,847]—or (as it respects any thing occurring thereafter) dissolved by the capture. Nor was the recovery of the ship and cargo from enemies, any part of the original contract with the seamen. 1 C. Rob. Adm. (Phila. Ed.) 234. I am confirmed in this opinion by Bynkershoek (2 J. P. l. i. c. 20), who says in a case similar in principle, though not in circumstances, "The owners and freighters of the vessel hired the mariners for the purpose of merchandizing only; and not to cruise for booty." This eminent writer puts the case of the company of a merchant ship, without commission, being attacked, and taking the ship assaulting them. He determines that the whole of the capture ought to go to the captors. In England there is a statute declaring how such capture shall be distributed, to wit, "That the officers and mariners shall receive such

[3] Authorities cited by Ingersoll and Lewis, for libellants: 2 Wood. El. Jur. 448, 432, 428–430; Moll. de J. Mar. bk. 2, c. 5, § 4; 19 Vin. Abr. 275; Lex Merc. Red. 157; Wesk. Ins. 499; Kames, Eq. 10–172; 2 Salk. 654, pl. 2; Lee, Capt. 97–100; 1 Ld. Raym. 393; Mal. Lex Merc. 119, 106, 108; acts of congress relative to captures, &c., from French; 2 Valin, Comm. 258; 1 Jour. Old Cong. 260; 2 Jour. Old Cong. 13; 2 Burrows, 695; Lee, Capt. 78, 82; 2 Burla. Nat. 295, 15–18; Inst. Adm. 503, 504; 12 Mod. 134; 2 Wils. 213; Brooke, Prop. pl. 18, 38; Lee, Capt. 232, 238; Salk. 35.

By Rawle and Tilghman for respondents: 1 Emerig. Mar. Loans, 123; 2 Valin, Comm. 713; Lee, Capt. 86, 8; 2 Wood. El. Jur. 456; Wesk. Ins. 17; Inst. Adm. 54; 4 Bac. Abr. 616; 4 Com. Dig. 271, 16; Vin. Abr. 411, pl. 43.

share of the condemned ship and goods, as is usually practised in private men of war. Wood. El. Jur. 434. Whether the retaking be from pirates or enemies, does not alter the principles of justice; nor do I see any important distinction between a crew in another ship, taking or recapturing a vessel, or the crew and passengers of a ship, taken, vanquishing the captors and restoring the property; the latter, no more than the former, being under no obligation, thus hazardously, to serve the owners. As to passengers, there is no pretence of a contract, between them and the owners. In the enterprize there is more hazard and less means, and, of course, more merit in a recapture or rescue under the present circumstances, than in a retaking by an armed vessel, whether public or private. Be this as it may, the recaptors eminently served the owners, and "ought in reason to be paid for their services." There being then, clearly a right, the law would be very inefficient and defective indeed, if it did not give a remedy, but left the salvors at the mercy, or, as it is said, generosity of the owners. There is certainly a legal remedy, and it being a transaction within the jurisdiction of the admiralty, the remedy is here properly pursued.

Under the foregoing view of the subject, it is useless to discuss the point, insisted on by the respondent's counsel, of the property remaining in the owners, until a condemnation in a court of the captors. My opinion on this point has been given long since. Besides, there is no dispute here, about the property; for on the restoration of it, the whole claim to salvage rests. It is a claim for compensation, and not a claim to property.

That the French, on the sea, are our enemies, I have, on a former occasion, given my reasons for deciding.[4] That this vessel and cargo would have been condemned in a French court, is not denied. I consider the recapturing, in the present instance, as certainly within the equity and principles of the prize acts, if I may so call them, of congress, so far at least as to authorize the recaptors to consider the captors as enemies, from whom the spoil might be lawfully wrested. The rewards given by these acts to those within their terms, shew the sense of the legislature, as to all who are within their spirit and meaning. If it be granted, as it ought to be, that there is a similarity in principle between this case and that of ships and goods saved from wreck, I have no doubt that the same reasoning and law will apply. If there be a difference in the cases, it is favourable to the libellants; the legal obligations on the mariners continuing in the case of wreck, and not existing in that of re-capture. Although seamen are bound, if possible, to save a ship and goods wrecked, or lose their wages, they are also entitled to further compensation, by way of salvage. 1 Pet. Adm. 55 [Taylor v. The Cato, Case No. 13,786]. In some countries they have daily wages, by special ordinances or practice. But in all countries they are allowed more than their wages; if the property saved warrants this extra claim. This allowance is variously determined, according to the circumstances of the cases respectively. I could refer to many authorities and marine regulations, in addition to those before cited to prove this position. Even Wesket, who probably was largely concerned in insurances, as an underwriter, allows this to be law, though as has been observed by the counsel for the libellants, he closes his chapter on the subject, querulously. As to others than mariners, saving goods or ships, their right to salvage is, unquestionably, just and legal. It is true that frauds and abuses may be committed by sailors, as well as others, let a general principle or practice be never so just. Vessels are run on shore to obtain the amount of insurances—but it is not argued from hence that no insurances ought to be made; or, that those who are bona fide entitled, should not recover. Those who do right, ought not to be deprived of their reward, because others have done, or may do wrong. No salvage would be allowed to fraudulent claimants.—It is not only dictated by the plain principles of justice, but it is highly politic to give the mariners, either saving from wreck or recovering by recapture, and restoring property, liberal salvage beyond a mere quantum meruerint. Abundantly more benefits will accrue to commerce, by encouraging recoveries of property lost, or in imminent danger, than will ever happen by any abuses arising from the establishment of a principle, so just in itself, and exemplary in its consequences. The business of this court has so much encreased, that I have found it not only useful, but absolutely necessary, to settle general principles, as well for my own convenience, as to facilitate the business of suitors. It is for this reason, that I have gone into the general subject so extensively. I add these observations, to those I made on claims to salvage, in the

[4] In a case of prize on the capture of a French armed vessel. The supreme court of the U. S. in the case of Talbot v. Seeman (1 Cranch [5 U. S.] 1), gave salvage to a ship of war of the United States, for the recapture of a Hamburg vessel, out of the hands of the French (France and Hamburg being then neutral to each other) on the ground that the Hamburger was in danger of condemnation under the French arret of 18th January, 1798. In the same case (1 Cranch [5 U. S.] 31) the court considered the situation of France and the United States, in the year 1799, as a state of partial war. Sir William Scott has, in many cases, allowed salvage on recapture and rescue of neutral vessels from the French. See the case of the American ship, The Two Friends (M'Dougal, master), 1 C. Rob. Adm. (Phila. Ed.) 271, and a note to that case (page 284); the case of a Swedish ship, The War Onskan (Biedumpel, master), 2 C. Rob. Adm. 299; also the case of the Russian ship, The Eleonora Catharina (Kreagh, master), 4 C. Rob. Adm. (Phila. Ed.) 156.

case of Warder v. La Belle Creole [Case No. 17,165], that this point in its general principles may be at rest, in this court, so far as depends on me.

From a consideration of all the circumstances, it appears to me, that, according to the evidence and the situation and capacities of the male recaptors, they should be classed in the following order.

1. John Nelson, the mate. The cook, in a manner highly meritorious, first mentioned to the mate that "he did not think it right the ship should go to France." He may have expressed the first idea of the recapture, yet it does not follow that the mate had not conceived it, or that the cook was the author of the plan. It was sufficient for the mate, who reproved this venial loquacity in the cook, to find him ripe for the attempt. Animated, no doubt, by this favourable omen, the mate immediately proceeded to discover the inclinations of his intended coadjutors. Perceiving a proper desire to co-operate in all, except R. A. Ardley, who, for some cause or other, was kept entirely ignorant of the plan, he proceeded to combine and arrange the design, and advise and direct, as well as finally to take his share in the dangerous, but successful, attack on the French officers and crew. His nautical skill was indispensable, as well, to the favourable issue of the recapture, as ultimately, to render it of any use in bringing the ship into port; which is as much a part of the ground for a claim to salvage, as the act of recapture.

2. Mathew Clayton, a passenger, whose personal courage, ready assistance, when he had determined to co-operate, and successful combat with the chief officer of the prize, were among the leading circumstances, which contributed to the fortunate issue of the contest.

3. The cook, Stephen Revel, a man of colour, whose merit is very distinguished. His reward should follow the spirited and beneficial exertions of one, whose station in life does not always produce persons of such courage and good conduct.

4. James Bowen, the steward, a black, whose deserts in cheerfully undertaking, and bravely accomplishing, his part of the enterprize, entitle him to share the reward of such hazardous services. I have a pleasure in declaring, that these are not the only instances I have had judicially before me, of virtuous, patriotic, and spirited conduct, in men of the African race.

5. Robert A. Ardley. There is a contrariety of testimony as to Mr. Ardley—he was not previously acquainted with the plan of, or engaged as a combatant in, the recapture. When he received the blunderbuss (the only fire-arm then in possession of the victors) from the mate, is not clear; it was after the officers in the cabin were subdued, and a short time before the whole of the French crew were confined. He appears to have done as much as was expected of him, after confidence was placed in him. Perhaps, towards the close of the contest, his being armed, overawed those, who, though dismayed, had not entirely submitted. Through the passage, after the recapture, he took his share in the watch, and in guarding the prisoners, which enabled others to assist in navigating the vessel. These services, in which all the recaptors partook, were necessary to the final accomplishment of the design. The bringing the ship into port was an essential part; and there was constant danger of the French crew rising and retaking possession.

The female passengers, Mrs. Anne Collet, and Miss Esther Collet, I have not yet noticed. But I should do great injustice to their merit, if I did not mention them with high approbation.—The firmness of mind evidenced by both of these ladies, in the critical situation in which they were placed, is as honorable to them, as their humanity, in attending the wounded, after the contest was over: their risk, in case the attempt to recapture had failed, was peculiarly great. Miss Collet was actively useful during the last scene of the enterprize, by taking the helm, when her services, in this essential part of the business was required in execution of the plan, with which both were made acquainted by the mate in its origin. Nor were they without their share of merit in the preparatory arrangements for digesting and executing the design. I do not estimate the circumstance of Miss Collet's obtaining from the French commander of the corvette, the return of Mr. Clayton and the steward on board the Harmony. This was, no doubt, accidental, and without any view to the object their return ensured, but it is still a circumstance of good fortune to the owners, derived from her influence and address.—She lost, by the plunder of the French crew, the greater part of the goods she had on board.

As to the quantum of salvage, I have taken into consideration all the circumstances—of value of the property—bravery in retaking—labour and risk in the recovery, and bringing into port. I have had some reference to the acts of congress, and endeavoured to discriminate, as justly as I can, between the relative merits of the salvors. I have found, in all cases of salvage, that it is impossible to satisfy all parties, and therefore endeavour to satisfy my own mind. But I do not find this to be unattended with difficulties. The appraised value of the ship is eight thousand dollars. The value of the cargo, according to the estimate made at the custom-house, is, deducting duties, ninety-two thousand eight hundred ninety-five dollars, sixty-nine cents—in all, one hundred thousand eight hundred ninety-five dollars, sixty-nine cents. By the act of congress, of July 9th, 1798 [1 Stat. 579], recaptured American vessels and cargoes pay salvage, not less than one-eighth, or more than one-

half. By the act of March 2d, 1799 [1 Stat. 651], relating to public armed ships—American or friendly property in possession of the enemy more than forty-eight, and less than ninety-six hours, is liable to pay, on recapture, one-third part of the whole value. The expense of outfit was, no doubt, a consideration with congress in fixing the salvage. I have given less, than I otherwise should, to the present recaptors, as no such expense was incurred—I respect the principles of these regulations, though I am not bound to follow them exactly in the present case, which is not included in the acts. Considering the latitude allowed in the first act, of from one-eighth to one-half, without regard to time; and the fixed proportion of one-third in the second act, I have determined under all circumstances, to allow one-fourth part of the whole value of the ship and cargo to the salvors in full recompense for salvage, being the sum of twenty-five thousand two hundred twenty-three dollars, ninety-two cents. The wages of the mate, cook and steward, from the last port of delivery, to be in part of their shares of salvage respectively; and the costs and charges to be thrown on the remaining three-fourths. Had all those concerned in the recapture joined in the libel, I should have distributed the sum allowed as salvage, in the following manner and proportions. The whole sum to be divided into seven shares of three thousand six hundred and three dollars and forty-one cents each—whereof

1. John Nelson, the mate, to have two shares, or seven thousand two hundred and six dollars and eighty-two cents.

2. Mathew Clayton to have one share and an half, amounting to five thousand four hundred and five dollars and eleven cents.

3 & 4. The cook, Stephen Revel, and the steward, James Bowen, to have, between them, two shares, being seven thousand two hundred and six dollars and eighty-two cents, whereof the cook is to have three thousand eight hundred and fifty-three dollars and forty-one cents; and the steward three thousand three hundred and fifty-three dollars and forty-one cents.

5. Robert A. Ardley, half a share, or eighteen hundred one dollars and seventy cents.

6 & 7. Mrs. and Miss Collet, one share, or three thousand six hundred and three dollars and forty-one cents to be equally divided between them.

Therefore, I do hereby adjudge, order and decree, that the several libellants in this cause, have and recover the sums following, that is to say,

1. Mathew Clayton five thousand four hundred and five dollars and eleven cents.

2. Stephen Revel three thousand eight hundred and fifty-three dollars, and forty-one cents.

3. James Bowen three thousand three hundred and fifty-three dollars and forty-one cents.

4. Robert A. Ardley, eighteen hundred and one dollars and seventy cents.——The same to be in full satisfaction for their services, for the causes, in the libel mentioned. And I further adjudge, order and decree, that the said ship Harmony, with her tackle, apparel and furniture, and also her cargo aforesaid, be condemned, and that the same be sold by the marshal of this district, for the payment of the several sums of money herein before decreed to the libellants, respectively, and of the costs and charges, legally accruing in the premises.

CLAYTON (HOUSER v.). See Case No. 6,739.

CLAYTON (LE ROY v.). See Case No. 8,268.

Case No. 2,872.

CLAYTON et al. v. STONE et al.

[2 Paine, 382;[1] 1 U. S. Law Int. 69.]

Circuit Court, S. D. New York. 1829.

WHAT MAY BE COPYRIGHTED—NEWSPAPERS.

1. A literary production to be the subject of copyright, need not be a book in the common and ordinary acceptation of the term; a volume written or printed, made up of several sheets and bound together. It may be printed on one sheet, as the words of a song, or the music accompanying it.

[Cited in Keene v. Wheatley, Case No. 7,644; Taylor v. Gilman, 24 Fed. 634; Harper v. Shoppell, 26 Fed. 519.]

2. The act of congress securing to authors and inventors the exclusive right to their respective writings and discoveries, was passed in execution of the power given by the constitution of the United States, and its object was the promotion of science and the useful arts. The act is for the encouragement of learning, and was not intended for the encouragement of mere industry, unconnected with learning and the sciences.

[Approved in Baker v. Selden, 101 U. S. 99. Cited in The Mark Twain Case, 14 Fed. 730.]

3. A newspaper or price-current is not such a publication as falls under the protection of the copyright law.

This was an action qui tam for an alleged infringement of copyright by the defendants [William L. Stone and Francis Hall], who were editors and proprietors of the "New York Commercial Advertiser," in copying into their paper the daily price-current or review of the market, compiled by plaintiffs [Edwin B. Clayton and others]. Defendants pursued a regular system of appropriating the substance of the price-current, a few hours after its appearance in each issue of their paper. At the trial, the jury, for the purpose of bringing the questions of law before the court for review, were directed to find a nominal verdict for the plaintiffs. Subsequently, Judge THOMPSON delivered the following opinion of the court upon the case which had been argued before them, ordering judgment to be entered for the defendants:

[1] [Reported by Elijah Paine, Jr., Esq.]

THOMPSON, Circuit Justice. Copyright was formerly considered to be founded on common law, but it can now only be viewed as part of our statute law. Gods. Pat. 8. A book within the statute need not be a book in the common and ordinary acceptation of the word, viz., a volume made up of several sheets bound together; it may be printed only on one sheet, as the words of a song or the music accompanying it. Id. 218.

The requisites to secure copyright under our act are: The author, before publication, must deposit a printed copy of the title of the map, chart or book in the district clerk's office, which must be recorded, a copy of the record to be printed on title page, and within two months thereafter cause such record to be published in one or more newspapers printed in the United States for the space of four weeks, and within six months after publishing the book cause to be delivered a copy. 2 Kent, Comm. 306.[2]

I am inclined to think the price-current cannot be considered a book within the sense and meaning of the act of congress. The literary property intended to be protected by the act is not to be determined by the size, form or shape in which it makes its appearance, but by the subject-matter of the work. Nor is this question to be determined by reference to lexicographers, to ascertain the origin and meaning of the word book. It will be more satisfactory to inquire into the general scope and object of the legislature, for the purpose of ascertaining the sense in which the word "book" was intended to be used in the statute.

It seems to be well settled in England, that a literary production, to be entitled to the protection of the statute on copyrights, need not be a book in the common and ordinary acceptation of the word—a volume, written or printed, made up of several sheets and bound together. It may be printed on one sheet, as the words of a song or the

[2] The power of granting and protecting copyrights is vested, by the constitution of the United States, in congress. Article 1, § 8. The act of the 31st May, 1790 [1 Stat. 124], entitled "An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the time therein mentioned." And the act of April 29th, 1802 [2 Stat. 171], "supplementary thereto, and extending the benefits thereof to the arts of designing, engraving and etching historical and other prints," compose the law of this country on this subject.

By the first of these statutes it is provided that the authors of any map, chart or book, or the proprietors of the copyright of any map, chart or book, printed in the United States, or made and composed, and not yet printed and published, and their executors, administrators or assigns, shall have the sole right of printing, publishing and vending the same for the term of fourteen years from the recording of the title in the clerk's office, as thereinafter mentioned. Such authors or proprietors must be citizens of the United States, or residents within the same. And if, at the expiration of the term, such authors are living and residents within the United States, the right shall be continued for the further term of fourteen years, provided the title of the book, &c., is again recorded in like manner. If any person, without the consent in writing of the author or proprietor, shall print, publish, or import any copies of such books, or shall publish, sell, or expose the same to sale, he shall forfeit every copy and every sheet thereof to the author or proprietor, to be destroyed by him, and shall also forfeit fifty cents for every sheet which shall be found in his possession, the one moiety to the author or proprietor who shall sue for the same, and the other to the United States, to be recovered in an action of debt, in any court of record of the United States wherein the same is cognizable; such action to be commenced within one year after the cause of action arises. A printed copy of the title of the map, chart or book, must, before publication, be deposited in the clerk's office of the district court, where the author or proprietor resides, who shall record the same in the manner and form specified in the act, and a copy of such record shall be published by the author or proprietor, within two months after the date thereof, in one or more of the newspapers printed in the United States, for four weeks. The author or proprietor of such map, chart, or book, is also required, within six months after the publishing thereof, to deliver to the secretary of state a copy thereof. But it is provided, that nothing in the act shall be construed to prohibit the importing, vending, printing or publishing, within the United States, of any map, chart or book, written, printed or published, by any person not a citizen of the United States, in foreign parts. The act further declares, that any person printing or publishing any manuscript, without the consent of the author or proprietor, in writing, (if such author or proprietor be a citizen of, or a resident of the United States,) shall be liable to such author or proprietor for all damages occasioned thereby, to be recovered by special action on the case, in any court having cognizance thereof; and provides that persons prosecuted by virtue thereof, may plead the general issue, and give the special matter in evidence.

The act of the 29th April, 1802, requires the author or proprietor of every book to insert a copy of the record, at full length, in the title-page or in the page following, and if a map or chart, to cause the following words to be impressed on the face thereof: "Entered according to act of congress," stating also the time when and the person by whom entered. This act also extends the benefits of the former act to every person being a citizen of the United States or a resident within the same, who shall invent and design, engrave, etch or work, or from his own works and inventions shall cause to be designed, engraved, etched or worked, any historical or other prints for the same term and upon the like conditions; the entry to be engraved on the plate, with the name of the proprietor, and to be printed on the print. Any person, within the time limited by the act, engraving, etching or working, copying or selling such prints, in whole or in part, or printing, reprinting or importing the same or any parts thereof, or causing the same to be done, or publishing, selling, exposing to sale or otherwise disposing of such prints, without consent in writing of the proprietors, shall forfeit the plate or plates, and the sheets wherever such prints are printed, to the proprietor of the original print, who shall destroy the same; and shall also forfeit one dollar for every print found in his custody, the one moiety to the person who shall sue for the same, and the other to the United States, to be recovered as provided in the former act. This act also provides, that if any person shall print or publish any map, chart, book or print, who has not legally acquired the copyright thereof, and shall insert therein or impress thereon that the same has been entered according to the act of congress, or words purporting the

music accompanying it. 11 East, 244, note; 2 Camp. 27, note. It is true that the English statute of 8 Anne, in the preamble, speaks of books and other writings; but the body of the act speaks only of books, the same as in the act of congress; and a

same, or purporting that the copyright has been acquired, such person shall forfeit one hundred dollars, one moiety to the person who shall sue for the same, and the other to the United States, to be recovered as aforesaid; the action to be brought within two years after the cause of action has arisen.

Statute of February 15, 1819 [3 Stat. 481], provides that the circuit courts of the United States shall have original cognizance, as well in equity as at law, of all actions, suits, controversies and cases arising under any law of the United States, granting or confirming to authors or inventors the exclusive right to their respective writings, inventions and discoveries; and upon any bill in equity, filed by any party aggrieved in any such cases, shall have authority to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of the rights of any authors or inventors, secured to them by any laws of the United States, on such terms and conditions as the said courts may deem fit and reasonable: provided, however, that from all judgments and decrees of any circuit courts, rendered in the premises, a writ of error or appeal as the case may require, shall lie to the supreme court of the United States, in the same manner and under the same circumstances as is now provided by law in other judgments and decrees of such circuit courts.

Statute of February 3, 1831 [4 Stat. 436], provides that from and after the passing of this act, any person or persons being a citizen or citizens of the United States, or residents therein, who shall be the author or authors of any book or books, map, chart or musical composition, which may be now made or composed, and not printed and published, or shall hereafter be made or composed, or who shall invent, design, etch, engrave, work, or caused to be engraved, etched or worked from his own design, any print or engraving, and the executors, administrators or legal assigns of such person or persons shall have the sole right and liberty of printing, reprinting, publishing and vending such book or books, map, chart, musical composition, print, cut or engraving, in the whole or in part for the term of twenty-eight years from the time of recording the title thereof in the manner hereinafter directed.

Sec. 2. And be it further enacted, that if, at the expiration of the aforesaid term of years, such author, inventor, designer, engraver or any of them, where the work had been originally composed and made by more than one person, be still living, and a citizen or citizens of the United States, or resident therein, or being dead, shall have left a widow, or child, or children, either or all then living, the same exclusive right shall be continued to such author, designer or engraver, or if dead, then to such widow and child, or children, for the further term of fourteen years; provided, that the title of the work so secured shall be a second time recorded, and all such other regulations as are herein required in regard to original copyrights be complied with in respect to such renewed copyright, and that within six months before the expiration of the first term.

Sec. 3. And be it further enacted, that in all cases of renewal of copyright under this act, such author or proprietor shall, within two months from the date of said renewal, cause a copy of the record thereof to be published in one or more of the newspapers printed in the United States, for the space of four weeks.

Sec. 4. And be it further enacted, that no person shall be entitled to the benefit of this act, unless he shall, before publication, deposit a printed copy of the title of such book or books, map, chart, musical composition, print, cut or engraving, in the clerk's office of the district court of the district wherein the author or proprietor shall reside, and the clerk of such court is hereby directed and required to record the same thereof forthwith, in a book to be kept for that purpose, in the words following (giving a copy of the title, under the seal of the court, to the said author or proprietor, whenever he shall require the same): "District of ——, to wit: be it remembered, that on the —— day of ——, Anno Domini, ——, A. B., of the said district, hath deposited in this office the title of a book, (map, chart or otherwise, as the case may be,) the title of which is in the words following, to wit: (here insert the title:) the right whereof he claims as author (or proprietor as the case may be); in conformity with an act of congress, entitled 'An act to amend the several acts respecting copyrights.' C. D. Clerk of the District." For which record the clerk shall be entitled to receive, from the person claiming such right as aforesaid, fifty cents; and the like sum for every copy, under seal, actually given to such person or his assigns. And the author or proprietor of any such book, map, chart, musical composition, print, cut, or engraving, shall, within three months from the publication of said book, map, chart, musical composition, print, cut or engraving, deliver or cause to be delivered a copy of the same to the clerk of said district. And it shall be the duty of the clerk of each district court, at least once in every year, to transmit a certified list of all such records of copyright, including the titles so recorded, and the dates of record, and also all the several copies of books or other works deposited in his office according to this act, to the secretary of state, to be preserved in his office.

Sec. 5. And be it further enacted, that no person shall be entitled to the benefit of this act, unless he shall give information of copyright being secured by causing to be inserted in the several copies of each and every edition published during the term secured on the title page, or the page immediately following, if it be a book, or if a map, chart, musical composition, print, cut or engraving, by causing to be impressed on the face thereof, or if a volume of maps, charts, music, or engravings, upon the title or frontispiece thereof, the following words, viz.: "Entered according to the act of congress, in the year ——, by A. B., in the clerk's office of the district court of ——," (as the case may be.)

Sec. 6. And be it further enacted, that if any other person or persons, from and after the recording the title of any book or books, according to this act, shall, within the term or terms herein limited, print, publish or import, or cause to be printed, published or imported, any copy of such book or books, without the consent of the person legally entitled to the copyright thereof, first had and obtained in writing, signed in presence of two or more credible witnesses, or shall, knowing the same to be so printed or imported, publish, sell or expose to sale, or cause to be published, sold or exposed to sale, any copy of such book without such consent in writing; then such offender shall forfeit every copy of such book to the person legally, at the time, entitled to the copyright thereof; and shall also forfeit and pay fifty cents for every such sheet which may be found in his possession, either printed or printing, published, imported, or exposed to sale, contrary to the intent of this act, the one moiety thereof to such legal owner of the copyright as aforesaid, and the other to the use of the United States, to be recovered by action of debt in any court having competent jurisdiction thereof.

Sec. 7. And be it further enacted, that if any person or persons, after the recording the title of any print, cut or engraving, map, chart or

learned commentator upon American law (2 Kent, Comm. 311) seems to think the English decisions on this subject (Cowp. 623; 11 East, 244, note) have been given upon the body of the statute of Anne, without laying any stress upon the words other writ-

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musical composition, according to the provisions of this act, shall, within the term or terms limited by this act, engrave, etch or work, sell or copy, or cause to be engraved, etched, worked or sold, or copied, either on the whole, or by varying, adding to or diminishing the main design with intent to evade the law; or shall print or import for sale, or cause to be printed or imported for sale, any such map, chart, musical composition, print, cut or engraving, or any parts thereof, without the consent of the proprietor or proprietors of the copyright thereof, first obtained in writing, signed in the presence of two credible witnesses; or, knowing the same to be so printed or imported, without such consent shall publish, sell or expose to sale, or in any manner dispose of any such map, chart, musical composition, engraving, cut or print, without such consent as aforesaid; then such offender or offenders shall forfeit the plate or plates on which such map, chart, musical composition, engraving, cut or print, shall be copied, and also all and every sheet thereof so copied or printed as aforesaid, to the proprietor or proprietors of the copyright thereof; and shall further forfeit one dollar for every sheet of such map, chart, musical composition, print, cut or engraving, which may be found in his or their possession, printed or published, or exposed to sale, contrary to the true intent and meaning of this act; the one moiety thereof to the proprietor or proprietors, and the other moiety to the use of the United States, to be recovered in any court having competent jurisdiction thereof.

Sec. 8. And be it further enacted, that nothing in this act shall be construed to extend to prohibit the importation or vending, printing or publishing of any map, chart, book, musical composition, print or engraving, written, composed or made by any person not being a citizen of the United States, nor resident within the jurisdiction thereof.

Sec. 9. And be it further enacted, that any person or persons who shall print or publish any manuscript whatever without the consent of the author or legal proprietor first obtained as aforesaid, (if such author or proprietor be a citizen of the United States, or resident therein,) shall be liable to suffer and pay to the author or proprietor, all damages occasioned by such injury, to be recovered by a special action on the case founded upon this act, in any court having cognizance thereof; and the several courts of the United States empowered to grant injunctions to prevent the violation of the rights of authors and inventors, are hereby empowered to grant injunctions in like manner, according to the principles of equity, to restrain such publication of any manuscript as aforesaid.

Sec. 10. And be it further enacted, that if any person or persons shall be sued or prosecuted, for any matter, act or thing done under or by virtue of this act, he or they may plead the general issue, and give the special matter in evidence.

Sec. 11. And be it further enacted, that if any person or persons, from and after the passing of this act, shall print or publish any book, map, chart, musical composition, print, cut or engraving, not having legally acquired the copyright thereof, and shall insert or impress that the same hath been entered according to act of congress, or words purporting the same, every person so offending shall forfeit and pay one hundred dollars; one moiety thereof to the person who shall sue for the same, and the other to the use of the United States, to be recovered by action of debt, in any court of record having cognizance thereof.

Sec. 12. And be it further enacted, that, in all recoveries under this act, either for damages, forfeitures, penalties, full costs shall be allowed thereon, anything in any former act to the contrary notwithstanding.

Sec. 13. And be it further enacted, that no action or prosecution shall be maintained, in any case of forfeiture or penalty under this act, unless the same shall have been commenced within two years after the cause of action shall have arisen.

Sec. 14. And be it further enacted, that the "Act for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of such copies during the times therein mentioned," passed May thirty-first, one thousand seven hundred and ninety, and the act supplementary thereto, passed April twenty-ninth, one thousand eight hundred and two, shall be, and the same are hereby repealed: saving, always, such rights as may have been obtained in conformity to their provisions.

Sec. 15. And be it further enacted, that all and several the provisions of this act intended for the protection and security of copyrights, and providing remedies, penalties and forfeitures, in case of violation thereof, shall be held and construed to extend to the benefit of the legal proprietor or proprietors of each and every copyright heretofore obtained, according to law, during the term thereof, in the same manner as if such copyright had been entered and secured according to the directions of this act.

Sec. 16. And be it further enacted, that, whenever a copyright has been heretofore obtained by an author or authors, inventor, designer or engraver, of any book, map, chart, print, cut or engraving, or by a proprietor of the same: if such author or authors, or either of them, such inventor, designer or engraver, be living at the passage of this act, then such author or authors, or the survivor of them, such inventor, engraver or designer, shall continue to have the same exclusive right to his book, chart, map, print, cut or engraving, with the benefit of each and all the provisions of this act, for the security thereof, for such additional period of time as will, together with the time which shall have elapsed from the first entry of such copyright, make up the term of twenty-eight years, with the same right to his widow, child or children, to renew the copyright at the expiration thereof, as is above provided in relation to copyrights originally secured under this act. And if such author or authors, inventor, designer or engraver, shall not be living at the passage of this act, then his or their heirs, executors and administrators, shall be entitled to the like exclusive enjoyment of said copyright, with the benefit of each and all the provisions of this act for the security thereof, for the period of twenty-eight years from the first entry of said copyright, with the like privilege of renewal to the widow, child or children, of author or authors, designer, inventor or engraver, as is provided in relation to copyrights originally secured under this act: provided, that this act shall not extend to any copyright heretofore secured, the term of which has already expired.

Statute of June 30, 1834 [4 Stat. 728], provides, that all deeds or instruments in writing, for the transfer or assignment of copyrights, being proved or acknowledged in such manner as deeds for the conveyance of land are required by law to be proved or acknowledged, in the same state or district, shall and may be recorded in the office where the original copyright is deposited and recorded; and every such deed or instrument that shall in any time hereafter be made and executed, and which shall not be proved or acknowledged, and recorded as aforesaid, within sixty days after its execution, shall be judged fraudulent and void against any subsequent purchaser or mortgagee, for valuable consideration without notice.

ings in the preamble. In determining the true construction to be given to the act of congress, it is proper to look at the constitution of the United States, to aid us in ascertaining the nature of the property intended to be protected. Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their writings and discoveries. Section 8, art. 1, Const. U. S. The act in question was passed in execution of the power here given, and the object, therefore, was the promotion of science; and it would certainly be a pretty extraordinary view of the sciences to consider a daily or weekly publication of the state of the market as falling within any class of them. They are of a more fixed, permanent and durable character. The term science cannot, with any propriety, be applied to a work of so fluctuating and fugitive a form as that of a newspaper or price-current, the subject-matter of which is daily changing, and is of mere temporary use. Although great praise may be due to the plaintiffs for their industry and enterprise in publishing this paper, yet the law does not contemplate their being rewarded in this way; it must seek patronage and protection from its utility to the public and not as a work of science. The title of the act of congress is for the encouragement of learning (2 Bior. & D. Laws, 104 [1 Stat. 124]), and was not intended for the encouragement of mere industry, unconnected with learning and the sciences. The preliminary steps required by law, to secure the copyright, cannot reasonably be applied to a work of so ephemeral a character as that of a newspaper. The author is required to deposit a printed copy of the title of his book in the clerk's office of the district court, and the clerk is required to record the same, a copy of which record must be published for four weeks in one or more newspapers within two months from the date thereof; and a copy of the book is to be delivered to the secretary of state within six months from the publication, to be preserved in his office; and all this would have to be done for every newspaper. The right cannot be secured for any given time, for the series of papers published from day to day or week to week; and it is so improbable that any publisher of a newspaper would go through this form for every paper, it cannot reasonably be presumed that congress intended to include newspapers under the term book. That no such pretence has ever before been set up, either in England or in this country, affords a pretty strong argument that such publications were never considered as falling under the protection of the copyright laws. We are, accordingly, of opinion that the paper in question is not a book, the copyright to which can be secured under the act of congress. Judgment must, accordingly, be entered for the defendants.

CLAYTON (UNITED STATES v.). See Case No. 14,814.

CLAYTON, The JOHN E. See Case No. 7,338.

C. L. B. REED, The (MANHATTAN FIRE INS. CO. v.). See Case No. 9,021.

Case No. 2,873.

CLEARY v. MARTZ.

[Cited in Austin v. O'Reilly, Case No. 664. Nowhere reported; opinion not now accessible.]

Case No. 2,874.

CLEAVELAND v. SMITH.

[2 Story, 278.] [1]

Circuit Court, D. Maine. May Term, 1842.

DEEDS — CONSTRUCTION — DESCRIPTION — BOUNDARIES — LATENT AMBIGUITY — CY PRES.

1. In the construction of written instruments, the intention of the parties is to be ascertained, not by parol evidence thereof, nor by mere conjecture, but by the application of certain rules of interpretation to the instrument itself.

2. Wherever there is a latent ambiguity in an instrument, as in the case of a mutual mistake in the descriptive words therein, the intention of the parties is to be collected from the instrument taken as a whole, and effect given thereto cy pres, and whatever is inconsistent therewith is to be rejected.

3. The general rule in the interpretation of the descriptive words of deeds and grants, is, that courses, distances, admeasurements, and ideal lines, must yield to known and fixed monuments upon the ground itself, whether they be natural or artificial.

4. Where, in a grant of land from the commonwealth of Massachusetts to the towns of Taunton and Raynham, the land was described as "beginning on the north line of the million acres at a yellow birch tree, six miles east from the south-east corner," &c. (the said birch tree being marked as a monument in the original survey of the land); whereas the said birch tree did not, in fact, stand upon the said north line, as supposed, but was so situated, that a gore of land was left between it and the said north line; it was *held*, that the said birch tree, and not the said north line, was to be taken as the boundary of the land granted.

This was a writ of entry, brought to recover a tract of land described in the demandant's writ, in which he declared on his own seisin, and a disseisin by the defendant [Francis O. J. Smith], within twenty years. The defendant pleaded nul disseisin, and on this plea issue was joined. The cause was tried before the district judge (Judge Ware). At the trial, the plaintiff [Stephen H. Cleaveland], to prove his title to the land in dispute, offered his deed from the agent of the commonwealth of Massachusetts, and state of Maine, of the land described in his writ, executed and bearing date Sept. 25th, 1834. The agency was admitted, and he contended, that the said tract passed to him by the said deed. The defendant, to prove his title to the said tract of land, introduced a deed from the commonwealth of Massachusetts to

[1] [Reported by William W. Story, Esq.]

the towns of Taunton and Raynham, dated on the 31st day of January, 1820, of the following described tract of land, namely, "One half of a township of land, of the contents of six miles square, lying in the county of Somerset, as the same was surveyed by Thomas McKecknie, the 30th Nov., 1813, bounded as follows, viz., beginning on the north line of the million acres, at a yellow birch tree, six miles east from the southern corner of the township number three, in the first range of townships, north of William Bingham's Kennebec purchase, thence running east six miles on said million of acres north line to a yellow birch tree, within about half a mile of Moosehead lake, thence north three miles, thence west six miles, thence south to the yellow birch tree begun at, containing eleven thousand five hundred and twenty acres." And this deed, he contended, on its southern boundary, covered all the lands to the north line of the million acres, (commonly called the Bingham purchase), and extending on that line the full length of six miles; and that the said deed towns of Taunton and Raynham being prior in date to the grant of Massachusetts and Maine, dated on said 25th September, 1834, Maine and Massachusetts had no lands, which could, on that day, be conveyed; but that the whole passed by the grant of Massachusetts to Taunton and Raynham on January 1st, 1820. The million acre tract (the Bingham purchase) was located and surveyed in 1792, and the north line thereof was marked and distinguishable. The plaintiff contended, that the tract in dispute was not conveyed by the grant of the commonwealth of Massachusetts to Taunton and Raynham, but remained in Massachusetts and Maine, on the 25th of Sept. 1834, when these two states conveyed the same to the plaintiff; and he introduced testimony, tending to prove that the two yellow birch trees on the said grant of the 1st of January, 1820, were not, as originally fixed and marked on the face of the earth in the original survey in said million acre north line; but were at a distance and to the north of the said line, and were in the line originally marked and surveyed as the south boundary of the Taunton and Raynham grant, and left, between the marked birch tree and the said million acre line, a strip or gore of land, which the said commonwealth and state conveyed to the plaintiff by their grant aforesaid, dated the 25th day of September, A. D. 1834. And he contended, that, inasmuch as the said two birch trees, marked as monuments in the original survey, did not coincide with the million acre north line, mentioned as part of the description in the said grant, the two birch trees established on the face of the earth, as monuments, must govern in fixing the boundaries of the said grant on the south line of the same; and that the strip or gore aforesaid passed to him by the said grant of September 25th, 1834; and to this effect the judge instructed the jury.

The judge was requested, by the counsel for the tenant, to instruct the jury, that if they were satisfied, that it was the intention of Massachusetts to grant, and of the towns of Taunton and Raynham to receive, according to the terms and language of the grant, viz., to the north line of the million acre tract, that they should find accordingly, notwithstanding there might be a discrepancy in the evidence, as to the actual running of the line of the said towns of Taunton and Raynham, or a variation, by mistake, in the marking of it. Which instruction the judge refused to give to the jury. And the judge left it to the jury, to determine, from the evidence, whether the south line of the Taunton and Raynham half township was identical with the north line of the million acre tract, stating to the jury, that this was to be determined by ascertaining, whether the two yellow birch trees were, in fact, in that north line. If they were, then their verdict ought to be for the tenant; otherwise it ought to be for the demandant.

The jury found, that the said birch trees, referred to as monuments, and descriptive of the said grant, were not in the million acre north line; but were so situated, as to leave the strip or gore aforesaid between the said million acre north line and the south boundary line of the Taunton and Raynham grant, as located on the face of the earth, at the time of the original survey and location thereof. The defendant produced the original plan of the survey and the laying of the said half township, granted to the towns of Taunton and Raynham, by Thomas McKecknie; and the plaintiff proved other monuments in the said survey, tending to establish the lines of the same, as contended for by him. The tenant moved for a new trial, for misdirection of the judge, at the trial, in matter of law.

The motion for the new trial was argued at this term by C. S. Daveis for the tenant, and by Deblois, (with whom was Wm. Pitt Fessenden,) for the demandant.

Deblois, (with whom was Wm. Pitt Fessenden,) against the new trial, argued, in substance, as follows:

There is a mistake in the description of the grant from the commonwealth of Massachusetts to Taunton and Raynham, dated January 1st, 1820, inasmuch as the several trees, marked as boundaries, are not found in the north line of the million acre tract; and, there being such a mistake, the actual location on the face of the earth is to govern; and, in the case at bar, the line marked by these monumental trees is to govern, instead of the north line of the million acre tract. The rule of law is, that where land is conveyed by a deed referring to a plan, between which and the original survey, there is a difference in the location of lines and monu-

ments, the lines and monuments originally marked are to govern, however they may differ from those represented on the plan. Cherry v. Slade, 3 Murph. 82; Conn v. Penn [Case No. 3,104]; Mageehan v. Lessee of Adams, 2 Bin. 109; Ripley v. Berry, 5 Greenl. 24; Brown v. Gay, 3 Greenl. 126; Esmond v. Tarbox, 7 Greenl. 61; Machias v. Whitney, 4 Shep. [16 Me.] 343; Herbert v. Wise, 3 Call, 239; Dimmitt v. Lashbrook, 2 Dana, 2; Brown v. Gay, 3 Greenl. 126; Pernam v. Wead, 6 Mass. 133; Magoun v. Lapham, 21 Pick. 135. The case of Frost v. Spaulding, 19 Pick. 445, is directly in point; and affirms the principle, by which, we say, the present case is governed. In the present case, however, the facts are stronger to support the principle than in the case last cited, inasmuch, as in the case at bar, the monuments are set forth in the grant, while, in the case cited, the monuments were not fixed until after the deed was made. See, also, Vose v. Handy, 2 Greenl. 322; Wing v. Burgis, 1 Shep. [13 Me.] 111; Wendell v. People, 8 Wend. 190. All grants and conveyances are supposed to be made with reference to an actual view of the premises by the parties thereto; and it is, therefore, a general rule, in the construction of grants, that both course and distance must give way to natural or artificial monuments or objects; and courses must be varied, and distances lengthened or shortened, so as to conform to the natural, or ascertained objects or bounds called for by the grant. Wendell v. People, 8 Wend. 190. Parol evidence is admissible to show, that a course and boundary, in a survey and patent, are incorrectly stated, and that they are otherwise upon the ground. Mageehan v. Lessee of Adams, 2 Bin. 109.

C. S. Daveis for the defendant, in support of the motion for a new trial, argued in substance as follows:

The first rule of construction requires, that the intention of parties should, if possible, be carried into effect. It is not disputed, and does not admit of question, that the half-township, granted to Taunton and Raynham, should abut upon and adjoin the million acre tract, granted to Bingham. But it is contended, that this should not prevent the introduction of proof by parol evidence, that such intention was not carried into effect, and that the yellow birch tree, referred to in the survey as standing on the line of the million acres, did not, in fact, stand there. The general rule that monuments referred to in a deed may be ascertained and established by parol evidence, is not to be questioned. Even this case affords example and occasion for its application.

Parol evidence is to be received to prove the location and previous existence of the million acre grant to Bingham, and the north million acre line. Such testimony does not vary, nor contradict, the language in the conveyance. On the contrary, it only applies it. So, there may be two or more streams, trees, (yellow birch trees,) stakes, or other monuments, each conforming to the description in the deed; and in such case, a latent ambiguity is disclosed, which may be explained by parol evidence. If, in attempting in this case to designate upon the earth the bounds named in the conveyance, it had been found that there was no such location as the million acres, and no such north line; then so much of the description, though apparently plain and clear, would have been found to be false, and that portion must have been rejected. And parol proof might then have been admitted, to prove the situation of the yellow birch tree; and that proof would not have contradicted any thing, which could be regarded as a part of the deed. When a conveyance declares a fact, as that the land, conveyed or granted, adjoins a river, or a street, or a road, parol evidence cannot be admitted to prove that it does not, unless a latent ambiguity be found, or unless the allegation be found to be false, and is, therefore, rejected. When the monuments referred to in the location of this grant, such as the million acre grant, and the north million acre line, are found to exist, as described, to allow the land granted to be separated from them by parol evidence, would be to give a preference to that which is uncertain, dependent on memory, and subject to change, to that which is clearly expressed, and declared in writing, and is of positive and certain designation. The north line of the million acres, already surveyed, was a monument named in the grant, as where the yellow birch stood; and it appears to have been adopted for the purpose of defining with certainty its position and situation. The yellow birch tree is not to be disturbed or separated from the million acre north line. The language used in the conveyance would be contradicted, and the conveyance itself so far defeated. If there should be two monuments, equally certain and permanent, and alleged to be found at the same point, and it should appear in proof, that both existed, but not at the same point, a false description would be disclosed; and it would become necessary to determine, from other parts of the conveyance, which allegation was false, and which was to be rejected. But where two monuments, one of certain, and one of uncertain location, are stated to adjoin each other, the one of certain location must be regarded as named for the purpose of making the position of the other certain. The grant in this case declaring, that the land granted to Taunton and Raynham does adjoin the million acres, the parol evidence to show, that the yellow birch tree, mentioned as being in that line, was elsewhere, is inadmissible.

The following cases were then cited: To the question of construction: Frier v. Jackson, 8 Johns. 396; Preston v. Bowman, 6

Wheat. [19 U. S.] 580; Blagge v. Miles [Case No. 1,479]; Thomas v. Hatch [Id. 13,899]; Vose v. Handy, 2 Greenl. 322; Frost v. Spaulding, 19 Pick. 445; Wing v. Burgis, 1 Shep. [13 Me.] 111. To the question of boundary: Newson v. Pryor's Lessee, 7 Wheat. [210 U. S.] 7; Preston v. Bowman, 6 Wheat. [19 U. S.] 580; Loring v. Norton, 8 Greenl. 69; McIver's Lessee v. Walker, 9 Cranch [13 U. S.] 173; 4 Wheat. [17 U. S.] 488.

STORY, Circuit Justice. The charge of the learned judge of the district court comes to this; that if the north line of the Bingham purchase was not coincident with the monuments on the land, granted by the commonwealth of Massachusetts to the towns of Taunton and Raynham, then the monuments were to govern, and not the Bingham line, and consequently, that the title of the defendant, under the towns of Taunton and Raynham, did not extend to the Bingham line, and the demandants were entitled to the gore or strip of land between that line and those monuments, under the grant to them by the commonwealth.

The argument on behalf of the defendant is, that the charge of the learned judge was erroneous, because it was the intention of the government, in the grant to Taunton and Raynham, to make the southern line thereof coincident with the Bingham line; and that it is consequently the duty of the court to give effect to that intention, although thereby the monuments actually on the land should be disregarded. But this is assuming the very point in controversy. I agree, that, in this case, as in others, arising upon the construction of written instruments, the court are to carry into effect the intention of the parties, if, by law, it may be so carried into effect. But, then, how are we to ascertain the intention of the parties? Certainly not by parol evidence, varying the language, or by mere conjecture; but by the application of just rules of interpretation to the very language of the instrument itself. Now, it may be assumed, that the intention of the government in its grant was, that the southern line thereof should begin at the Bingham line; but it was equally the intention of the government that the land granted should be bounded by the descriptive monuments stated in the grant. The government, from the survey, presumed, that the monuments were actually on the very boundary line of the Bingham purchase. This turns out to be a mistake, the monuments are at a considerable distance north of that line; and they leave a gore or strip of land between the two tracts. It is the common case of a latent ambiguity; and the real question is, what, in a case of mutual mistake in the descriptive words of the instrument, is to be done? Now, there can be but one of two courses adopted by a court of justice, under such circumstances; one of which is, to set aside the instrument, as inoperative, on account of the mistake, which would, in this case, be to defeat the object of both parties; the other is, to ascertain the real intention of the parties from the words of grant taken altogether, ex visceribus concessionis; and to give effect to that intention, notwithstanding the misdescription, if I may so say, cy pres, rejecting such of the descriptive words as are inconsistent with that intention, or are properly to be deemed subordinate, as accidents, and not as incidents thereto. This latter doctrine is the doctrine adopted by courts of law, upon the ground of the well known maxim, "ut res magis valeat, quam pereat." There is no magic in particular instruments; the doctrine is equally applicable to all instruments, where the intention is sought for, and is to be executed. Thus, in a will, if there be a general intention expressed, and a particular intention repugnant to the former, the rule of interpretation is, that the particular intention is to be rejected, and the general intention is to be carried into effect, as the predominant intention of the testator. So if there be a partial misdescription in a will of the devisee or legatee, or of the thing devised or bequeathed, and yet the party or the thing can, by reasonable interpretation, be ascertained with reference to the extrinsic evidence, creating the doubt, courts of law, as well as of equity, will reject such part of the misdescription as is manifestly unessential, and give full effect to the main intention, deducible from the words. Now, precisely the same doctrine is applied to the interpretation of deeds, and other written instruments. If the descriptive words are, with reference to the actual facts, repugnant, or inconsistent with each other, and yet the intention of the parties can be ascertained, the misdescription will not vitiate the instrument; but it will yield to the clearly ascertained intention. And it is only when the language, with reference to the actual facts, involves such fatal errors, and mistakes, as leaves the court without reasonable means of ascertaining the real intention, that the instrument will be treated as a nullity.

It is with a view to ascertain the intention of the parties to deeds and grants, that courts of law, for the purpose of founding just presumptions of the intention, have adopted certain rules of interpretation, not as artificial rules, built upon mere theory, but as the true results of human experience. When, therefore, they have held it to be a general rule, in the interpretation of the descriptive words of deeds and grants, that courses, and distances, and admeasurements, and ideal lines, should yield to known and fixed monuments, natural or artificial, upon the ground itself, they have but adopted the result of the common sense of mankind, because sources of mistake may more easily arise from the former than from the latter; and it is more likely that men may commit an

error in courses, or distances, or admeasurements, or in references to ideal liens, such as those of surveys, than in monuments, and fixed and stationary objects, visible on the very land; and that in purchases and sales and bounties, the latter, as the best ordinary means of information, as well as of exclusive possession, are uppermost in their minds, and regulate their acts and intentions. Hence, a known spring, referred to as the corner of a boundary line, has always been deemed a more certain reference, in the understanding of the parties, than the ideal line of a survey of the land of another person, supposed to terminate at the same place. If they differ in point of location, the uniform rule is, that the spring governs as to the corner boundary, and not the survey. For the like reason, the plan of a survey, if it does not coincide with the actual monuments on the land, yields to the latter in point of certainty and proof of intention. The same ground is equally true as to courses and distances from monument to monument. If they differ, the monuments govern, and not the courses or distances; or, in other words, measurements yield to monuments, because they are more open to mistake, and less carefully observed, or significantly marked. I have dwelt the more upon this point, because the main stress of the argument has been rested upon the supposed intention of the parties; and is has been pressed upon the court, that the cases, which have been already decided, do not conclude the present case; or, indeed, if they otherwise would, that they are not founded upon satisfactory reasoning. In my judgment, all the cases, cited at the bar, turn upon one and the same general principle; and that is, to give effect to the real intention of the parties, whenever it can be ascertained from the words of the instrument, and the actual state of the facts; and if there is a misdescription, to apply the common rules of interpretation to resolve the doubt, and to give effect to the predominant intention. Besides, we must treat the present case exactly in the same way, as if the grant, instead of being a bounty, had been a sale for a valuable consideration by the government. Suppose, then, that the north line of the Bingham purchase, instead of falling short of the monuments, had actually extended far beyond and within them, so as to have cut off one third of the granted land, owing to the monumental boundaries, what would have been the legal result? Would the government, if the grant had amongst other covenants contained a covenant of warranty, be entitled to set up the defense, that the Bingham line was the boundary, and not the monuments; and hence, that there was no breach of the warranty? Clearly, such an interpretation would be held inadmissible; and yet it ought to prevail in that case, if it be allowed to prevail in the present case. Indeed, in cases of this sort, the principles of interpretation must be the same, whether the grant be a public grant, or a private grant. The boundaries, in case of a misdescription, must be ascertained precisely by the same rules, and none other, since the intention must be the same, whether the grant be public or private. It is essential to the protection of titles, that the interpretation should depend upon known, fixed, uniform principles, and not upon the conjectures of judges, or the nice balancing of possible intentions, or the supposed leading but undefined motives, in a particular grant. What ground is there in the present case, any more than in any other, to suppose, that the line of the Bingham purchase was, in the view of the parties, primary in importance, and that the monuments on the ground were to yield to that line, although it might be a mere imaginary line, wholly dependent upon courses, and distances, and quantity of acres, not included within any visible boundaries on the land, or otherwise precisely defined? I profess myself unable to perceive any ground for such an interpretation. Suppose the Bingham line, truly run, had receded three miles south of the line, held by possession, would the grant to Taunton and Raynham reach those three miles, and over all the intermediate space, although instead of a half township, it might then include a whole township? Or, under the like circumstances, would the line by possession govern, although it varied equally from the monuments and from the true line? The truth is, that the moment we desert the old rules of interpretation, we are off of soundings, and deliver over the titles to lands to interminable doubts. Here, if ever, the rule should apply, "via trita, via tuta." For myself, I must say, that all the authorities, cited on the present occasion, are in my judgment harmonious upon this subject; and they differ only in applying the same general rule to the varying circumstances of each particular case, with a correspondent flexibility of force and adaptation.

The case of Newsom v. Pryor, 7 Wheat. [20 U. S.] 7, affords a strong illustration of the general doctrine. It was there said, by the court, that the general rule in all cases of this sort, is, "That the most material and most certain calls shall control those, which are less material and less certain. A call for a material object, as a river, a running stream, a spring, or even a marked tree, shall control both course and distance." The same doctrine was fully recognized and acted upon in McIvers' Lessee v. Walker, 9 Cranch [13 U. S.] 173; in Preston v. Bowmar, 6 Wheat. [19 U. S.] 380; in Barclay v. Howell's Lessee, 6 Pet. [31 U. S.] 498; in Boardman v. Reed's Lessee, 6 Pet. [31 U. S.] 328,—and, indeed, in all the subsequent cases, which have come before the supreme court of the United States. Decisions of a similar nature are to be found in the reports of many of the states of the Union; and with such a uniformity of interpretation of the doctrine, as is rarely to be found in any other class

of cases. See many cases collected in 1 Metc. & P. Dig. tit "Boundaries," pp. 473–476; Greenl. Ev. § 301, and the authorities there cited. The authorities, cited at the bar, from the Maine and Massachusetts Reports, fully sustain the same position. The same rule pervades the whole current of the English authorities; and the leading cases will be found referred to, in Doe dem. Smith v. Galloway, 5 Barn & Adol. 43. In short, the maxim, "falsa demonstratio non nocet, cum de corporo constat," is here applied with good significance and propriety; and the intention, which overrides the mistake in the description, is deduced from other demonstrations less fallible and more certain, both in character and importance. The case of Frost v. Spaulding, 19 Pick. 445, approaches very nearly in its main circumstances to the present case; and if an authority was wanting, it would certainly have a persuasive influence. But I prefer to place the present case upon the general ground already mentioned, as one sustained by solid reasoning, just interpretation, and general convenience.

The motion for a new trial must therefore be overruled, and judgment on the verdict be given for the demandant.

Judgment for the plaintiff.

CLEAVELAND (TREADWELL v.). See Case No. 14,155.

CLEAVER (FIRST NAT. BANK OF ASHLAND v.). See Case No. 4,800.

CLEINS (ATLANTIC & PAC. R. CO. v.). See Case No. 631.

Case No. 2,875.

The CLEMATIS.

[Brown, Adm. 432.] [1]

District Court, E. D. Michigan. June, 1872.

EXCEPTIONS TO LIBEL—NEGLIGENT TOWAGE—LIABILITY OF AGENT TO THIRD PERSONS FOR TORTS.

1. Where a tug, which had agreed to tow a barge from Saginaw to Cleveland, was compelled by stress of weather to turn the barge over at an intermediate port to the master of another tug, by whose negligence she was lost: *Held*, that the owner of the barge could maintain an action for negligence against the second tug.

2. Quaere, whether he could not also support an action for breach of contract.

In admiralty. Libel for "negligent towage."

The libel alleged that the barge Mohawk was bound on a voyage from Saginaw to Cleveland, with a cargo of about 200,000 feet of lumber, October 30th, 1870; that on leaving Saginaw the said barge, with five other barges, was taken in tow by the tug Zouave, to be towed through to Cleveland; that on arriving at Port Austin bay, the weather was so threatening that the master of the tug Zouave, then having the said barge so in tow, requested the master of the tug Clematis, which then lay at anchor in said Port Austin bay, to take the said barge Mohawk, together with two others of the said barges, and tow them through to St. Clair river. The libel then proceeded as follows: "4. That in compliance with said request the said tug Clematis, which was then engaged in the business of towing vessels, barges and rafts over the proposed route to St. Clair river, took the said barge Mohawk, together with the said barges Mills and Holland, in tow for the said river, and it then and there became and was the duty of the said tug Clematis to exercise ordinary care and skill and good seamanship in the management of the said barges; and the master of the said tug Clematis thereupon impliedly undertook and agreed to tow said barge Mohawk safely through to said river." The libel then charged the tug with having cast off the barge's line and abandoned her to her fate in a rough sea, nearly abreast of Pointe aux Barques, without just cause, by means of which the said barge was foundered and lost, with her entire crew. The claimants put in an answer to the libel, and accompanied the same with an exception to the said fourth article, as follows: "And your respondents hereby except to said libel and said article: for that it does not allege that respondents or the master of said tug undertook and agreed either with said libellant, or with the master of said barge, or any other person, to do said towing, so as to give said libellant any right of suit; and respondents pray the same benefit of this exception as if they had filed a separate exception."

Alfred Russell, for exceptors.

The description of the action, taking the introduction in connection with articles 4 and 5, is a cause of contract, civil and maritime. In such case the jurisdiction depends on the subject-matter, Waring v. Clarke, 5 How. [46 U. S.] 459, 462. No privity of contract between the owner or master of the tug and the owner or master of the barge is anywhere set forth in the libel. There can be no such thing as a contract without parties —at least two in number—and a consideration moving from one to another. Although the rules of pleading in admiralty are not technical, yet the parties to the contract, the contract itself, and the consideration must be distinctly set forth. Jenks v. Lewis [Case No. 7,280]. Claimants may object for want of proper parties, or for absence of detailed allegations of fault. The Commander in Chief, 1 Wall. [68 U. S.] 43–52. Who were the parties is a fact necessary to be alleged. The Havre and Scotland [Case No. 6,233]. As much certainty is required as in a declaration or plea at common law. Treadwell v. Joseph [Id. 14,157]; Pettingill v. Dinsmore [Id. 11,045]. The libel cannot be sustained without an allegation that the master of the tug contracted with the libellant himself or

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

the master of his barge. The facts show that libellant's only remedy is against the tug Zouave, whose master contracted with libellant to do the towing, and who subsequently on account of the weather requested claimants to help him.

W. A. Moore and H. B. Brown, for libellant.

There are no technical rules of pleading in admiralty, and it is only necessary to state the facts; but even in a common law declaration it is unnecessary, in an action of tort, to state the consideration for the contract, from the breach of which the tort has arisen. 1 Chit. Pl. 417; Elsee v. Gatward, 5 Term R. 143; Webster v. Hodgkins, 25 N. H. 128; Barney v. Dewey, 13 Johns. 224; Corwin v. Davison, 9 Cow. 22; Moseley v. Wilkinson, 24 Ala. 411. The great case of Coggs v. Bernard, 2 Ld. Raym. 909, upon which the entire modern law of bailments is founded, holds that a person who undertakes gratuitously to do a service for another is yet liable for negligence in the performance of it. This is still the law. Phila. R. R. Co. v. Derby, 14 How. [55 U. S.] 468; The Deer [Case No. 3,737]; The Brooklyn [Id. 1,938]. It is claimed in this case that the Clematis was merely the agent of the Zouave, that no liability was incurred except to the principal, and that the action should have been against the Zouave. It is true that an agent is not liable to third persons in an action of tort for a non-feasance, omission or neglect of duty. Story, Bailm. § 404, and cases cited; Shear. & R. Neg. 128. But where an agent has been guilty of a misfeasance, violation of duty, or of negligence in the performance of a public employment, there is no doubt of his liability to third persons. Shear. & R. Neg. 129, 130; Phelps v. Wait, 30 N. Y. 78; Wright v. Wilcox, 19 Wend. 343; Suydam v. Moore, 8 Barb. 358; Montfort v. Hughes, 3 E. D. Smith, 591; Hewett v. Swift, 3 Allen, 420; Johnson v. Barber, 5 Gilman, 425; Spraights v. Hawley, 39 N. Y. 441; The R. B. Forbes [Case No. 11,598]; The Rescue [Id. 11,708]; The John Fraser, 21 How. [62 U. S.] 184; Sturgis v. Boyer, 24 How. [65 U. S.] 110; Sawyer v. Rutland & B. R. R. Co., 27 Vt. 377.

The following authorities indicate that, in cases like the present, an action would lie as upon a contract. Certainly it would, if the case has any analogy to those of common carriers. 2 Redf. Ry. 14; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344; Sanderson v. Lamberton, 6 Bin. 129.

LONGYEAR, District Judge. The case has been argued and submitted on the exception, before proceeding to a hearing on the merits. Other objections to the libel were raised at the hearing, but as the above is the only exception found stated in the pleadings, it will be the only one noticed. The argument in support of the exception proceeds upon the assumption that there is no privity of contract between the barge and the tug Clematis. The right of action in this case does not necessarily rest upon breach of contract. It has a sufficient foundation in tort. The casting off of the barge's line and abandoning her to her fate in time of peril, as charged in the libel, was a misfeasance. It was a violation of a duty toward the barge, which had become incumbent on the tug by her taking the barge's line and towing her to the place of danger, in which she is charged in the libel with having left the barge to her fate, without just cause. No matter whether the tug so took the barge's line and did such towing with or without a contract with the barge. In other words, after she had taken the barge's line and towed her to a place of danger, it was the tug's duty to retain the line and stand by her so long and so far as possible, and for a breach of that duty an action will lie. Shear. & R. Neg. § 112. See, also, opinion of Justice Woodbury, 6 How. [47 U. S.] 418. And even upon the basis of a breach of contract, I am inclined to think that, upon the authority of the decision of the United States supreme court, in the case of New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344, 380, the action will lie. But from the view already taken, it is unnecessary to discuss this aspect of the case. Exception overruled.

[NOTE. On the trial of the action herein the libel was dismissed. See Case No. 2,876, next following.]

Case No. 2,876.

The CLEMATIS.

[Brown, Adm. 499;[1] 6 Chi. Leg. News, 405.]

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

DESERTION OF TOW BY TUG — JUDGMENT OF MASTER.

1. Where a tug abandons her tow of barges during a storm, the burden is upon the tug to show a sufficient excuse for such abandonment.

2. Much, however, must be left to the judgment of competent officers in such an emergency, and such judgment formed upon the spot and acted upon in good faith will not be impeached, except upon a clear preponderance of proof that it was erroneous.

[Cited in The James P. Donaldson, 19 Fed. 266; The Frederick E. Ives, 25 Fed. 450; The Maria Luigia, 28 Fed. 249; The Wilhelm, 47 Fed. 93.]

3. Where it was shown that the tow-line parted in the night, during a storm of great severity, and that the master of the tug was unable to pick up the line, to discover the lights of the tow, or to make any efforts to regain it without great danger to the tug: *Held*, he was justified in abandoning it.

This was an action for breach of duty, resulting in the loss of the barge Mohawk, by reason of the alleged unlawful desertion of the same during a storm in Lake Huron. On October 30th, 1870, the tug Zouave left Sag-

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

inaw with six barges in tow, bound to Cleveland. On arriving off Pointe aux Barques, the weather became rough, and the tow put into Port Austin bay for shelter. Here they found the Clematis. The tow was then divided, and, at the request of the master of the Zouave, the Clematis took three of the largest barges, of which the Mohawk was one, and put to sea, about half past seven in the evening. Although the storm continued to increase in violence, everything went well, the barges losing none of their deck loads, until about eleven o'clock, when the line connecting the tug with the forward barge parted, and set the tow adrift. The tug turned around, but failing, as her officers alleged, to see the lights of the tow, made no efforts to pick them up, and in a few minutes resumed her course down the lake. During the night, the Mohawk went to pieces, and was lost, with a part of her crew.

[For a decision overruling the exception of claimants to the fourth article of the libel, see Case No. 2,875, next preceding.]

H. B. Brown and W. A. Moore, for libellant.

Alfred Russell, for claimant.

LONGYEAR, District Judge. The libel, as amended, contains one, and only one, charge of fault, viz.: That the tug negligently deserted the tow; which charge, as set up in the amended libel, is in the following words: "That after taking the said barges in tow as aforesaid, and upon the night of the said 30th of October, the said barges Mills. Mohawk and Holland, being attached to said tug by lines astern in the order last above stated, the said tug Clematis, when off and about abreast of Pointe aux Barques, the lake being then somewhat rough, and the said barges being then solely dependent upon the said tug for their safety, and the line connecting her with the said barges having parted, without rounding to or stopping, negligently deserted said barges, with their cargoes and crews, and left them to their fate." Upon the argument, other faults were sought to be pointed out, and were urged with some earnestness, but, as the above is the only fault charged in the libel, it is the only one that can be considered.

The answer admits that the tug left the tow after the line had parted, but denies that she did so without rounding to or stopping, or negligently, as alleged; and avers that she not only rounded to, but for about an hour made exertions to find and secure the tow, and that she left only when it was found to be impossible, on account of the darkness of the night and the severity of the storm. The answer also alleges that the barge was unseaworthy in several respects, and that she failed to ride out the storm, and was lost on that account. It is undisputed that, when the line parted, a storm was in progress of greater or less severity, but at all events of such severity as to endanger the safety of the vessels composing the tow if left to their fate (being vessels of the kind called barges, and dependent solely upon towage, instead of any efficient means of propulsion of their own); also that the tug did in fact fail to regain the tow, and did leave the vessels composing it to their fate. In view of these undisputed facts, the burden was on the tug to show a sufficient excuse for such failure and abandonment; and it is to this one point that the issue in the case is really narrowed down. There is a preponderance of proof that after the line parted, the tug, after keeping on her course a short distance, rounded to, and for a short time, variously estimated by the witnesses at from fifteen minutes to an hour, stood up toward where she left the barges, and then, not finding them, and not seeing any lights by which to determine their whereabouts, and the darkness being such that except by means of lights they could not be seen from the tug until the tug should be too near them for safety in such a storm, and the tug's captain, for these reasons, deeming it useless and unsafe to attempt to find the barges, and if found, to attempt to approach them so as to regain the line, without further effort abandoned the attempt, and came in toward the land for shelter, and made no further effort to rescue the barges until the next day, in the afternoon, when the storm had abated. It certainly would have been more satisfactory if the tug had made a more persistent effort to find the barges and pick them up; yet, if the storm was in fact of such severity as to render such further effort hopeless under the circumstances, the want of it cannot be attributed as a fault.

The business of towing by steam vessels has come to constitute one of the great interests of navigation—so much so upon the great lakes and their connecting waters that it has brought into existence a class of vessels of great carrying capacity dependent almost solely upon being towed as a means of propulsion. Hence steam tugs, making the towing of vessels a business, often necessarily assume great responsibilities; and it is but fair and right that they should be held to a strict account in the manner of the discharge of their important duties. It will not do to hold that they may excuse themselves and abandon the safety of interests, and often of lives, intrusted to and dependent upon their courage and fidelity, for slight causes, or on account of even ordinary obstacles. The causes must be ample, and the obstacles in the way of performance must be at least of an extraordinary character, if not absolutely insurmountable Questions of this character are, however, often among the most difficult to determine. Of the truth of this the present case is a marked instance. Storms and their severity are so variable in degree, and the opinions of even competent and experienced seamen in regard thereto in any given case are often so conflicting, as is the case

here, that in most cases it is exceedingly difficult to decide in regard to them with any degree of nicety or satisfaction. In all such cases much must be left to the judgment of the officers in charge during the emergency. They have the circumstances then all before them far more clearly and intelligibly than they can possibly be reproduced in court; and when such officers are able, competent and experienced navigators, a judgment formed upon the spot, and acted on by them in good faith, ought not to be impeached or disregarded, except upon a clear preponderance of proof that it was erroneous. Lawrence v. Minturn, 17 How. [58 U. S.] 109, 110. The general ability, competency and experience of Capt. Rumage, of the tug, is in no manner questioned nor assailed. It is in evidence that in his judgment at the time, the severity of the storm, combined with the darkness of the night and the absence of lights by which the whereabouts of the barges could be determined, rendered it impossible for him to regain them, and extremely hazardous to make the attempt, and the good faith of that judgment is not impugned. Its correctness only is questioned. Capt. Ellery, of the Mills, the head barge, and to which the tug's line was attached, seems by his actions to have entirely coincided with Capt. Rumage in opinion, in this, that he made no preparations, and was in fact entirely unprepared to second any attempt to regain the tow should any such attempt be made by the tug, but, on the contrary, confined his exertions entirely to means of safety at his own command. I have examined and analyzed with care the voluminous and somewhat conflicting testimony upon this point, and the able and exhaustive arguments of the learned counsel on both sides, but shall not extend the opinion by going into that analysis here. It must suffice here to say that while I am in some doubt, I fail to find in the proofs that clear preponderance necessary, in my opinion, to overcome the opinion and judgment of Capt. Rumage formed upon the spot and acted on by him, and that I therefore consider it my duty to give him the benefit of the doubts I entertain. In this view of the case, it is unnecessary to notice the question of the unseaworthiness of the barge, raised by the answer. Libel dismissed.

Case No. 2,877.

In re CLEMENS.

[2 Dill. 533;[1] 9 N. B. R. 57; 21 Pittsb. Leg. J. 30.]

Circuit Court, E. D. Missouri. 1873.

BANKRUPT ACT—SECTION 39 CONSTRUED—ACCOMMODATION INDORSERS.

An accommodation indorser of negotiable paper, whose indorsement is in no way connected with the business of the indorser, cannot be forced into bankruptcy for suspending and failing to resume payment of such paper. Such paper is not "his commercial paper," within the meaning of the ninth clause of section 39 of the bankrupt act [of 1867 (14 Stat. 536)].

In bankruptcy. This is a petition by John Clemens under section 2 of the bankrupt act, to have reviewed an order of the district court by which his answer to a petition to show cause why he should not be adjudicated a bankrupt, was held insufficient. The material facts are these: Morris Langsdorf filed his petition in the district court of the United States against John Clemens, praying that he might be decreed a bankrupt. The petition alleges that one Christian Staehlin made his note for $3,000, dated St. Louis, February 14, 1873, which was indorsed by respondent and three other persons, which note, before its maturity, came to the hands of the petitioning creditor for value, and that the note was subsequently duly protested for nonpayment. A copy of the note and indorsements is set forth in haec verba in the petition. The petition also alleges that the respondent, Clemens, being a merchant, manufacturer, and trader, being insolvent and in contemplation of bankruptcy, suspended and did not resume payment of his commercial paper within a period of fourteen days.

The answer of the defendant is as follows: "And now comes the respondent, John Clemens, and shows cause why he should not be declared a bankrupt, and states: First. That he indorsed the note described in the petition, and he also indorsed several others also made by Christian Staehlin, for the accommodation of said Staehlin; but the note described in the petition, as well also as the other notes indorsed by this respondent for said Staehlin's accommodation aforesaid, were not, nor was either of them, made or indorsed in the ordinary course or in connection with the business of this respondent. This respondent admits that the note described in the petition, as well as several others indorsed by him for the accommodation of said Staehlin, as aforesaid, became due and remaind unpaid for a period of fourteen days and more before the filing of said petition. Second. This respondent avers that no note or bill made by him has become due and remains unpaid; that the only paper outstanding on which his name appears consists of the note described in the petition, and several other notes made by said Christian Staehlin and indorsed by this respondent for the accommodation of said Staehlin, and that all of said paper so indorsed was not made, indorsed, or given for, or on account of, or in settlement of, any debt or liability of this respondent, and said notes were not, nor was either of them, made or indorsed in the ordinary course of, or in connection with, the business of this respondent. This respondent avers that he is not insolvent, but is fully able to pay

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

his own debts in full, contracted in and about his own business. Wherefore respondent says he is not, by reason of his said accommodation indorsement aforesaid, subject to the provisions of the act of congress mentioned in the petition." To this answer the petitioning creditor filed his general demurrer which presented the question, whether the note set out in the petition, which was indorsed by the respondent for the accommodation of the maker, is the commercial paper of the respondent in the sense of the bankrupt law. The district court held the answer to be insufficient, and thereupon Clemens filed in the circuit court his petition for a review of that decision. [Case No. 2,878, next following.]

H. N. Hart and Krum & Patrick, for petitioner for review.

A. Binswanger, for petitioning creditor.

DILLON, Circuit Judge. The respondent below, who is here as the petitioner in review, was sought to be thrown into involuntary bankruptcy, under the clause of section 39 of the bankrupt act, which provides that any person "being a bankrupt, broker, merchant, trader, manufacturer, or miner, who has stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days, shall be deemed to have committed an act of bankruptcy."

The respondent belonged to one of the enumerated classes, and the act of bankruptcy charged is that he stopped or suspended, and, for the prescribed length of time, failed to resume payment of his commercial paper. He is an accommodation indorser on a note negotiable in form, made by one Staehlin and held for value by the petitioning creditor. It is admitted on the record that the note was indorsed by him solely for the accommodation of Staehlin, and that the note did not originate in the business of the respondent below, and was not indorsed in the course of, or in connection with, his business.

Upon this state of facts, the single point presented by the record is, whether he can be proceeded against in invitum and be adjudicated a bankrupt. And this depends solely upon the question, whether he has failed to meet "his commercial paper." Was the note of Staehlin indorsed by the respondent below the respondent's commercial paper within the meaning of the bankrupt act? This question is not settled by adjudication. There is no such act of bankruptcy in the insolvent laws of Massachusetts, from whence so many provisions of the bankrupt act have been taken, and of course no decisions in that state determining its meaning. Commenting on this clause of the bankrupt act, Mr. Edwin James (James, Bankr. Law, p. 261) says: "This act of bankruptcy is confined exclusively to bankers, merchants, and other traders. It is the first time in legislation here or in England that such an act of bankruptcy has been created. By the English bankruptcy acts, the suspension of payment by a banker, merchant, or trader, of his commercial paper and liabilities, is resolved into an act of bankruptcy by summoning him before the court of bankruptcy, and if the debt or demand be not paid or arranged to the satisfaction of the creditor within a prescribed time, the non-arrangement or non-payment within such prescribed period constitutes an act of bankruptcy."

The question now before me has never been decided by the supreme court, nor, so far as I am advised, by any circuit court of the United States. Mr. District Judge Withey (In re Nickodemus [Case No. 10,254]) and Mr. District Judge Blatchford (Innes v. Carpenter [Id. 7,049]; and see, also, In re McDermott Bolt Co. [Id. 8,750]; In re Lowenstein [Id. 8,574]) have expressed the opinion that the accommodation indorsement of the note of another did not make it, within the meaning of the clause of the act under consideration, the commercial paper of the accommodation indorser. On the other hand, Mr. District Judge Lowell (In re Chandler [Id. 2,591]) and in the case under review Mr. District Judge Treat (In re Clemens [Id. 2,878]) have reached the opposite conclusion.

The question is by no means free from difficulty; and although I distrust my judgment when it differs, upon a question of bankruptcy law, from that of the learned judge whose ruling is under review, yet I have not been able to concur in his conclusion that the present petitioner was, upon the facts admitted by the demurrer, liable to be adjudicated a bankrupt. While I need not deny that the note of Staehlin was commercial paper so far as the maker is concerned, although it does not appear that he belonged to any of the six enumerated classes, yet I do not think it became, by the accommodation indorsement of the respondent below "his (Clemens') commercial paper," so that he would be liable to be declared a bankrupt for failing to pay it for fourteen days.

Giving to the words of the act, "stopping or suspending and not resuming payment of his commercial paper," their natural meaning, it seems to me that they do not refer to the case of accommodation indorsers. If a merchant should indorse negotiable paper owned by him in the course of his own business even to borrow money, and his liability be fixed thereon, it may be admitted that it would or might be an act of bankruptcy not to meet it for the period of fourteen days, for the paper thus indorsed by him would be connected with his business. But where we say a merchant, trader, manufacturer, or other person has suspended payment of his paper, the words do not naturally convey to the mind the idea that reference is made to paper which is his only be-

cause he has indorsed it for the accommodation of another. It is an inapt expression to say that a person has stopped payment of his accommodation paper. Persons do not make a business of indorsing paper for others, and it cannot be that this exceptional class of indorsements was primarily in the contemplation of the law-maker. To make the act embrace accommodation indorsers is not necessary to give it full effect and operation. The non-payment of commercial paper by persons not within the enumerated classes is not an act of bankruptcy though made in connection with their own business. A railroad company cannot be thrown into bankruptcy for failing to pay its notes or bills—even its own notes and bills; but if it commits an act of bankruptcy by fraudulent transfers or preferences, it may be proceeded against in bankruptcy by its creditors.

So on the respondent's indorsement he is liable, and may be sued; and if, in consequence of such a suit, an illegal preference will be obtained, any creditor may, for that reason, force him into bankruptcy. But it is, in my judgment, a misconception of the bankrupt act, to regard it as having been intended to collect debts or to regard a resort to it as among the peculiar privileges which the law throws around commercial paper in the hands of a bona fide holder. The order below sustaining the demurrer to the answer is reversed. Reversed.

NOTE. As to accommodation bill transactions: Ex parte Mee, 1 Ch. App. 337; Downing v. Traders' Bank [Case No. 4,046]; Ex parte Hammond, 6 De Gex, M. & G. 699; 24 Law J. (Bankr.) 2; In re Mortimore, 7 Jur. (N. S.) 320, 9 Wkly. Rep. 423, 3 L. T. (N. S.) 828; Bassett v. Dodgin, 9 Bing. 653; 2 Moore & S. 777.

Case No. 2,878.

In re CLEMENS.

[8 N. B. R. 279;[1] 5 Chi. Leg. News, 511; 5 Leg. Op. 116; 2 Am. Law Rec. 171; 8 Am. Law Rev. 168.]

District Court, E. D. Missouri. July 25, 1873.

ACT OF BANKRUPTCY—SUSPENSION OF PAYMENT OF COMMERCIAL PAPER.

The endorser of a promissory note or bill of exchange, who, after due protest and notice, fails to provide for payment of his liability within fourteen days, thereby commits an act of bankruptcy, and may be adjudged a bankrupt upon the application of a petitioning creditor, and it matters not whether the paper be endorsed for accommodation or in the course of business.

[In bankruptcy. Petition by Morris Langsdorf that John Clemens be adjudicated a bankrupt. Clemens answered, and showed cause, and the petitioner demurred to the answer as insufficient.]

[1] [Reprinted from 8 N. B. R. 279, by permission. 8 Am. Law Rev. 168, contains only a partial report.]

TREAT, District Judge. The defendant, against whom the petition is filed, does not deny that he belongs to the class the suspension of whose commercial paper for fourteen days is an act of bankruptcy. The petitioning creditor avers that he is the holder for value of a negotiable promissory note for three thousand dollars of which Christian Staehlin is the maker and the defendant the first endorser, and that said note was presented for payment, protested for non-payment, and notice thereof duly given to the defendant. There are several endorsers of the note. The petition alleges an act of bankruptcy as follows: "And your petitioner further represents that within the six calendar months next preceding the date of this petition the said John Clemens, being insolvent and in contemplation of insolvency and bankruptcy, did commit an act of bankruptcy within the meaning of the act, to wit: In that the said John Clemens did heretofore, to wit: on the 12th day of May, 1873, being a merchant, manufacturer and trader, suspend, and did not resume payment of his commercial paper within a period of fourteen days, nor at any time thereafter." Defendant avers that he endorsed the note set out in the creditor's petition, and several others made by said Staehlin, solely for the accommodation of Staehlin; that said notes were not made or endorsed in the name of, or in connection with, defendant's own business; that said notes have remained past due more than fourteen days; that no notes made by the defendant are past due; that the only notes outstanding and past due on which his name appears are those so endorsed by him for Staehlin's accommodation, the same being in nowise connected with defendant's business; and that "he is not insolvent, but is fully able to pay his own debts in full, contracted in or about his own business."

The present purpose of the answer is to obtain the ruling of this court on the several propositions involved, concerning which there are conflicting opinions. In a few of the earlier cases decided under the bankrupt act, doctrines were announced by some of the district courts to which this court never assented. To interpret this law it is necessary to keep strictly in view the cardinal canon of construction, which requires reference to all its parts and to its scope and object. Its main purpose is, while furnishing relief to unfortunate debtors, to secure equality among creditors. Another important object is to prevent over trading by requiring those whose commercial paper is put into circulation to meet it promptly according to the law merchant, if they embark in any of the classes of business specified.

Without going into a review of decided cases, with a labored analysis of the act of congress, it must suffice for the present

case to say that, in the opinion of this court, as often heretofore held, the clause in question does not mean that the suspension of payment for fourteen days of one piece [or more][2] of commercial paper is an act of bankruptcy, irrespective of the circumstances under which the suspension occurred. In Doan v. Compton [Case No. 3,940], and in Re Brown, Webber & Co. [Id. 1,973], as well as in other cases decided by this court, it was held that the suspension contemplated was a general suspension, or a suspension from financial inability to meet one's indebtedness as it matures, and not a suspension with respect to some paper the liability to pay which is honestly questioned, it being supposed bona fide that a good defence thereto existed; nor a suspension through mere inadvertence, the ability to pay being clear, and tender made as soon as the inadvertence was known; so of a suspension at the instance of the holders of the paper pending negotiations for renewals, &c. In this respect this court has differed from some other district courts, as it does also on the following points, on which it holds that by "commercial paper" the act of congress does not mean only such paper when issued in connection with one's own mercantile, trading, banking, manufacturing or mining business—or what is sometimes denominated "business paper." Some courts have ruled that such paper, when given for money borrowed, though for the purpose of conducting the business described, is not within the meaning of the act, a construction wholly irreconcilable with the scope and object of the law. The doctrine held by most of the courts is the correct one, that the term "commercial paper" means all negotiable paper known as such by the law merchant as modified by the statute of Anne and the various American statutes.

It seems obvious that, when congress applied a special rule concerning commercial paper to specified pursuits, it did so to enforce punctuality of payment. In addition to ordinary days of grace it allowed the fourteen days, within which a merchant, if solvent, ought to be able to take up his paper or make satisfactory arrangements therefor. It is well known that many business men holding such paper rely on its prompt payment to enable them to meet their own obligations at maturity and that the failure of one to pay promptly may affect not the holder of his paper alone but the creditors of the holder. Indeed, in the present modes of business, the non-payment of such paper by one may produce serious consequences to many who are successively creditors of each other. The reasons for insisting upon such prompt payment are so urgent that some judges have erroneously held that any one who issued commercial paper is a merchant, within the meaning of that term as used in the act of congress, irrespective of his real occupation. If the origin of the paper is to determine whether it is "commercial" or not, the elemental qualities of such paper are destroyed, for it loses in the hands of a bona fide endorser for value, the element of certainty which the law merchant imposes. Being for a sum certain, payable at a specified time, such an endorsee is not affected by any equities existing between the original parties. Each endorser contracts with his immediate endorsee and all subsequent endorsees, for the payment of the sum named, and the contract of the maker is not more definite under the law merchant than is the contract of endorser. As to bona fide endorsers for value it is immaterial whether endorser put his name to the paper merely to accommodate the maker or not. The very object of such an endorsement was to give the paper currency—make it negotiable under the law merchant with all the qualities that the law imposes. Why, therefore, there should be any distinction between an accommodation or other endorser, where the plaintiff in a suit or a petitioning creditor is a bona fide endorser for value, is not apparent. It is immaterial whether the paper is "business paper" so-called, or "accommodation paper," for it is commercial paper, and the liability of the endorser is the same under the act of congress as it is under the law merchant.

The act of congress declares that those who embark in the pursuits specified shall punctually meet their obligations evidenced by commercial paper. That paper may pass through many hands, not on the faith of the maker alone, but mainly, and sometimes solely, on the faith of the endorser's name. The endorser has contracted to pay if there is non-payment at maturity, and notice to him is duly given. If that endorser is a merchant and fails to meet his endorsement when his liability is fixed, his indebtedness is to that extent increased to the detriment of his other creditors—possibly to their great loss. It is of no less moment to his creditors that he has become insolvent through [accommodation indorsement than if he became insolvent through][3] business disasters. It may be that he sells merchandise and takes negotiable paper therefor, which, after being discounted in bank with his endorsement, he has to meet, through the failure of the maker; and why any court could suppose that the bankrupt law, which looks to the rights of creditors as well as the obligations of debtors, intends, what it nowhere says, that insolvency caused by "accommodation" endorsements is not insolvency within the meaning of the law, but that insolvency otherwise caused is within the law. Why such a distinction should be drawn is not reconcilable with any well

[2] [From 5 Chi. Leg. News, 511.]

[3] [From 5 Chi. Leg. News, 511.]

considered views of the legal relationship of the parties. Congress evidently designed to have merchants, traders, bankers, &c., keep good their commercial paper, whether they were makers or endorsers. If, through misfortune, they become insolvent, whether from the one or the other cause the same result follows in law and fact. It is then for them to seek the relief the bankrupt act provides, or for their creditors to resort to its provisions in order to secure an equal distribution of the bankrupt's assets.

It is unnecessary to go into the analysis as carefully made by others or to repeat the reasons so forcibly urged by Lowell, J., in Re Chandler [Case No. 2,591]. His conclusions, on the points at issue, this court holds to be correct. The case at bar illustrates the subject. The defendant "avers that he is not insolvent, but is fully able to pay his own debts in full, contracted in and about his own business." That averment is based on the hypothesis that the cause of insolvency affects the question. The liability of the defendant on the Staehlin notes has so swollen his indebtedness, it would seem, that he cannot aver his ability to meet all his obligations. If his property is to be seized on execution to pay these endorsements, and thereby his other creditors suffer, the equality among creditors is destroyed, and the same result would follow if his other creditors absorb his assets, to the loss of those to whom he is indebted on these endorsements. If he cannot pay all his indebtedness, the law demands that all his creditors shall share pro rata.

There is one view not presented in argument, which seems to have weighed with no little force, with some persons, against the conclusions reached, and that is, that even supposing Staehlin were unable to pay the whole of his debts, it might be that the defendant's pro rata share of Staehlin's assets added to his own would leave him ultimately a surplus. This view would apply more strongly to the last of the four endorsers, for if he took up this paper and all four who precede him on the paper should go into bankruptcy, it might be that his distributive shares, out of their respective estates would nearly equal his whole liability on these notes, leaving him far from insolvent, ultimately. To this view is opposed the evident design of the bankrupt act as to prompt payments by merchants. It is not, as the United States supreme court holds, and as all the courts have held, dependent on the ultimate outcome of a merchant's affairs whether he is solvent or not, but a merchant is "insolvent" in the sense intended by the act of congress when he is unable to pay his debts as they become due in the ordinary course of business. Toof v. Martin [13 Wall. (80 U. S.) 40]. Hence, when that condition exists, creditors are not bound to wait unpaid until the ultimate winding up of a merchant's affairs determines whether he can pay in full or not. Were it so, the creditors might from that delay be themselves fatally crippled. Prompt and full compliance with the obligations imposed by the law merchant is what the act of congress exacts from all parties to commercial paper. As some of the courts say: Congress, in this respect, adopted the general mercantile view, viz: That when a merchant lies under protest he has suspended payment or failed. Whether temporarily or permanently, still it is a present suspension or failure. Recognizing that view congress deemed it wise that such suspension, unless followed by resumption within fourteen days, should entitle any creditor to cause the assets of the debtor to be subjected to the payment of all creditors' lawful demands—that is, when the suspension and non-resumption occur under the circumstances mentioned at the commencement of this opinion.

As this question can be reviewed by Judge DILLON at chambers, there need be no delay in procuring a reversal, if his views differ from what are here presented. The doctrine ought to be settled for this circuit as early as practicable. The demurrer is sustained.

[NOTE. Clemens brought the case to the circuit court by petition of review, and that court reversed the order sustaining the demurrer. See Case No. 2,877, next preceding.]

CLEMENT, In re. See Case No. 8,917.

Case No. 2,879.

The CLEMENT.

[2 Curt. 363.] [1]

Circuit Court, D. Massachusetts. May Term, 1855.[2]

PLEADING AND PROOF IN ADMIRALTY—VARIANCE—COLLISION—BURDEN OF PROOF—LESSENING EFFECT—RULES OF NAVIGATION—EXPERT TESTIMONY.

1. There is no technical rule of variance in the admiralty; and in describing the particular circumstances attending a collision, an omission to state some facts, which prove to be material, which cannot have occasioned any surprise to the opposite party, can have no effect except to raise suspicions in the mind of the judge, as to the existence of those facts.

[Cited in The Iris, Case No. 7,062; The Quickstep, 9 Wall. (76 U. S.) 670; The Coleman and Foster, Case No. 2,981; Holmes v. Oregon & C. Ry. Co., 5 Fed. 76; The Young America, 31 Fed. 753.]

2. In collision causes, the court will look at all the allegations of both parties, upon which fault depends,—consider which are true, and not allowing either party to contradict, by proof,

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

[2] [Affirming decree of the district court in Case No. 2,880.]

what he has alleged, will extract the true case from the entire record, and decree accordingly.

[Cited in Burton v. Salter, Case No. 2,218; The Cambridge, Id. 2,334; The Coleman, Id. 2,981; The Clytie, Id. 2,913; The Maryland, 19 Fed. 557.]

3. If two vessels are approaching each other on converging courses, one having the wind two points free, and the other closehauled, and a collision occurs, the burden is on the former to show that all possible care and skill were used on her part, and that the collision was the fault of the other vessel, or was inevitable. It is not enough that, at the moment of the collision, the one having the wind free, used all possible efforts to avoid or lessen the effects of a collision; previous precaution and foresight are required.

[Criticised in Whitridge v. Dill, 23 How. (64 U. S.) 455. Cited in The Maria & Elizabeth, 7 Fed. 254; The Commodore Jones, 25 Fed. 508.]

4. A very clear case for a departure from a rule of navigation must be made out, before a vessel can be pronounced in fault for adhering to it.

[Cited in Baker v. The City of New York, Case No. 765; The Sunnyside, Id. 13,620; McCoy v. The Currituck, Id. 8,730; The Golden Grove, 13 Fed. 688; The Britannia, 34 Fed. 553; Meyers Excursion & Nav. Co. v. The Emma Kate Ross, 41 Fed. 828.]

5. The rule which requires a vessel having the wind free to keep clear of one sailing close to the wind, applies between pilot boats and other vessels, and in bays and harbors as well as on the high seas.

6. Experts must give their opinion on an ascertained or supposed state of facts, not upon reading depositions. Their testimony is not admissible to prove that a rule of navigation, recognized by the general maritime law, does not exist in a particular locality.

[Appeal from the district court of the United States for the district of Massachusetts.

[In admiralty. Libel by Matthew Hunt and others, owners of the pilot boat Hornet, against the brig Clement, for damages caused by collision. There was a decree for libellants in the district court (Case No. 2,880), and the claimant Paul Mayo appeals.]

F. C. Loring, for appellant.

C. P. Curtis, Jr., contra.

CURTIS, Circuit Justice. This is an appeal from a decree of the district court pronouncing for damages in a cause of collision. The libel alleges that, about one o'clock, p. m., of the tenth day of June, 1854, the pilot boat Hornet, of the burden of fifty-three tons, and the brig Clement, were both sailing towards the "Graves," which are ledges of rocks lying outside of the harbor of Boston; that the wind was fresh from the north-west by west, the sea smooth, both vessels on the starboard tack, and the pilot boat close to the wind, and to the leeward of the brig, when the brig suddenly changed her course, and kept off and struck the pilot boat, which sunk and was totally lost. The answer avers, that at the time in question, the Hornet was to leeward of the Clement, and sailing faster and nearer to the wind, and in such a direction as must bring her across the course of the brig; that no particular attention was paid to the Hornet, by the Clement's people, until it was perceived that the Hornet was so near the Clement, as to make the danger of collision imminent, by attempting to run across the bows of the Clement; when the Hornet was hailed, and told to keep off, which might easily have been done; and though the hail was heard on board the Hornet, her course was not changed, and a collision being then apparently inevitable, the helm of the brig was put down, and the brig so far luffed into the wind that only her jib-boom caught in the rigging of the Hornet and tipped her over. The answer denies that the Clement kept off and struck the Hornet, as is averred in the libel, and says she kept her course until she luffed to lessen the force of the collision. The district judge was of opinion, that the evidence did not support the allegation in the libel, that the Clement kept off and struck the Hornet, but that it appeared from the allegations of the libel and answer, that the case was one of two vessels sailing in converging courses on the same tack, the Hornet being closehauled, and the Clement having the wind two points free; that the rule of navigation required the Hornet to keep her course, and the Clement to keep out of the way; that there were no special circumstances in this case to render this rule inapplicable, or to shift the fault, or any part of it, from the Clement to the Hornet; and consequently that the former must bear the whole loss.

The main ground upon which the appellant has sought to reverse the decree is, that it was rested upon facts not alleged in the libel. And he relies upon the rule that a decree in the admiralty must be secundum allegata as well as probata. This is a well settled and important rule. But it does not follow that a decree awarding damages to the libellant can be rested only on his allegations. On the contrary, there is an entire class of collision cases, in which the decree is in conformity with the separate allegations of neither of the parties. I refer to cases of mutual fault. In such a case the libel states fault on the part of the vessel proceeded against, and the exercise of due care and skill in the management of the libellant's vessel; the claimant denies the fault imputed to him, and alleges fault on the part of the libellant's vessel; the court finds part of the allegations in each pleading to be true, and the residue untrue; that the real case is substantially different from the one shown by the allegations of either of the parties; and upon that real case makes a decree apportioning the damages between them. And so I apprehend that in all collision cases, the court will look at the allegations of both the parties of all matters of fact, upon which fault, or its absence, depends; they will consider which of those allegations is proved, not allowing

either party to contradict by proof, what he has alleged; and having thus extracted the real case from the whole record, will pronounce for the one party or the other, as that case requires. I do not intend to say that a libellant may plead one fault on the part of the vessel proceeded against, and offer evidence of another. On the contrary, I think his proofs must, generally, be restricted to his allegation, to prevent surprise of the respondent. But when he has been thus restricted, if the facts alleged and proved by him, taken in connection with other facts admitted upon the record by the claimant, entitle the libellant to recover damages, and the claimant has not succeeded, by his allegations and proofs, in repelling that claim, in my opinion a decree should be made for the libellant. It must be remembered that the variance occurs, not in describing the substantive cause of action, which is a collision occasioned by neglect; nor in proving the contrary of any allegation; but in detailing the particular circumstances, which accompanied or constituted the neglect, the party has omitted to allege some fact which his adversary supplies by his allegation on the record. The rules of common law pleading are fully satisfied by a general allegation of negligence. The admiralty requires that each party should state all the essential particulars which go to make up the fault alleged. The Virgil, 2 W. Rob. Adm. 204. Their absence may injuriously restrict the evidence of the party, by whose fault they are omitted, or give rise to suspicions of the fairness of his statement. And yet it may happen, as Dr. Lushington declares it did in the case of The Lady Anne, 1 Eng. Law & Eq. 674, that the very point on which a case of collision hinged, had never been touched upon at all in the pleadings. In that case he remarked, "it is certainly desirable, in all these cases, that the pleadings should state the facts with precision, and should also state with accuracy the grounds upon which both parties rely. But I think we must be also well aware, that in matters of this description, it will be quite vain to expect perfect accuracy as to facts or pleadings, and for a very obvious reason." I agree with Mr. Justice Washington (Crawford v. The Wm. Penn [Case No. 3,373]) that there is no doctrine of merely technical variance in the admiralty; and that aside from the influence produced upon the mind of the judge by the fact that a party has not stated his case accurately, no effect is allowed to a variance, which cannot have surprised or injured the opposite party. And when the court takes the facts to be, as a party has distinctly averred them on the record, it is plain that party cannot be surprised or injured by a different statement by his opponent.

In the case before me, the libel alleges a collision through the fault of the brig. The facts that the vessels were sailing on the same tack, the Hornet being to leeward, and so closehauled that she could not luff any nearer the wind, are stated in the libel. It is not stated, in terms, that the brig also was not closehauled; but the answer alleges that the brig had the wind two points free, that the two vessels were sailing on converging courses, and neither changed its course until a collision was inevitable. This makes a case of fault on the part of the brig, unless it is repelled by other facts; and the burden is on the claimant to prove those facts. The Baron Holberg, 3 Hagg. Adm. 245. The claimant's counsel insists that this burden has been sustained, and that the libellant should not recover: because the steersman of the Hornet did not do all he was bound to do, to avoid a collision, after the danger had become apparent. If this were so, it might make a case of mutual fault. The Commerce, 3 W. Rob. Adm. 288. But I am not satisfied that he omitted any thing which he ought to have done. Upon the rule of navigation applicable to such cases, he was not only in the right, in acting upon the assumption that the brig would be so steered, as to keep out of his way, but he was bound to act on that assumption and keep his course, unless he saw that there would be no probable chance of a collision, if he disregarded the rule. Undoubtedly a rule is not to be followed, if it is apparent, a collision must ensue from an observance of it, and will be avoided by disregarding it. But considering the great importance of a steady observance of the rules of navigation, and the danger of allowing departures therefrom, I shall be found slow to condemn an observance of one of these rules, and shall require a clear case, demanding a departure from it, to be proved, before I declare it to have been a fault to observe the rule. The Hope, 1 W. Rob. Adm. 155. In my opinion such a case is not made out by this claimant.

The claimant insists that the rule is not applicable except upon the high seas, and never between pilot boats and other vessels. I think otherwise, on both points. The rule is as applicable in bays and roadsteads, and for obvious reasons is of more frequent application, and more practical importance there, than in the open sea. The Speed, 2 W. Rob. Adm. 225; The Eastern State [Case No. 17,494]. And I know of no safe ground, upon which I could hold, that pilot boats are neither to be subjected to, or have the benefit of these settled rules of navigation, which no class of vessels can be released from, consistently with the general safety.

It is further insisted, that at the time in question, the brig was so near the "Graves," she could not luff sufficiently to clear the Hornet, and keep clear of the "Graves," nor bear away without running the Hornet down. This may be true; but those in command of the brig should have foreseen these difficulties, before the brig was in a position,

where she could not keep out of the way of the schooner, which she was bound to do. Why the brig was in such a position, is explained by what is admitted in the answer, "that no particular attention was paid to the schooner, until it was perceived she was very near the brig;" this was a fault on the part of a vessel having the wind free, the other being closehauled. Probably the brig could have done, before the collision, what she did immediately afterwards; wear round and stand on her course for Light House channel. Whether she could or not, this was a case where the collision occurred in a summer's day, in a six to eight knot breeze, under no circumstances which a navigator ought not to have perceived or foreseen; and I cannot hesitate to pronounce that vessel in fault which, having the wind free, came into collision with the other closehauled, and exhibits no sufficient excuse for having done so.

A question was made at the hearing, concerning the admissibility of the testimony of experts, in answer to questions proposed to them, not on a given state of facts, but upon the depositions of the witnesses who were present at the collision. I am of opinion such evidence is not admissible. Fenwick v. Bell, 1 Car. & K. 312, would, perhaps, justify such a question; but Sills v. Brown, 9 Car. & P. 601, is the other way; and in The Ann and Mary, 2 W. Rob. Adm. 195, the necessary qualification was made, that a clear statement of facts must be laid before the experts. If this be not done, the court cannot know, whether the opinion pronounced by the expert, is upon the case found by the court, or upon some essentially different case. See U. S. v. McGlue [Case No. 15,679]; Rex v. Searle, 1 Moody & R. 75; Rex v. Wright, Russ. & R. 456; Com. v. Rogers, 7 Metc. [Mass.] 500.

Evidence of two experts was also offered, concerning rules of navigation, where two vessels were sailing on converging courses, the one being closehauled, and the other two points free. The rule of the maritime law upon this subject is so well settled, that I cannot regard opinions of individuals in opposition to, or qualification of it. And though it is undoubtedly true, that special circumstances may exist, upon which the opinions of nautical men may be taken, without controverting the rule, but only for the purpose of ascertaining whether the particular case is within it, yet the court has not found, in this case, any such special circumstances as render the opinions of the experts applicable.

Nor do I think their evidence is sufficient to prove a local usage, binding in point of law, that no attention is required to be paid by other vessels to pilot boats; the latter being bound to take care of themselves. Local usages, on this subject, if capable of being established at all, by any evidence, which I greatly doubt, should be admitted only with the utmost caution. To hold that sailing vessels of a particular class are to take care of themselves, under all circumstances, or under circumstances in which other sailing vessels do not do so, involves the necessity of manoeuvres on their part, which if not foreseen, must produce collisions; and while the usage is local, or forms an exception to the common rules of the sea, how can it be expected to be so known as to be generally foreseen? In my opinion, it would be extremely unsafe to declare, that pilot boats were exempt from the rules which govern other sailing vessels; and I must so declare, if I were to hold them not entitled to the protection of those rules.

The decree of the district court is affirmed, with damages at the rate of six per cent. per annum, and costs.

[NOTE. An appeal was taken to the supreme court, but the judges of that court were equally divided in opinion. See note to case No. 2,880.]

Case No. 2,880.

The CLEMENT.

[1 Spr. 257;[1] 17 Law Rep. 444; 31 Hunt, Mer. Mag. 712.]

District Court, D. Massachusetts. Oct., 1854.[2]

NAVIGATION—SAILING VESSELS—CONVERGING COURSES.

1. A vessel off the wind, must give way to one close-hauled.

[Cited in The Commodore Jones, 25 Fed. 508.]

2. Where a square-rigged vessel and schooner, both close-hauled, are sailing upon convergent courses, on the same tack, and the convergence is caused by the ability of the schooner to lie nearest to the wind, the latter must give way.

[Cited in Whitridge v. Dill, 23 How. (64 U. S.) 455; The Commodore Jones, 25 Fed. 508.]

In admiralty. This was a cause of collision, promoted by Matthew Hunt and another, owners of the pilot boat Hornet, of Boston, against the brig Clement [Paul Mayo, claimant], for running down and sinking the Hornet, in Boston harbor, in June, 1854. The libel alleged, that the two vessels were coming into the harbor, by the wind, (which was W. N. W.,) the schooner being a half a mile to leeward of the brig, and both vessels on the starboard track, bound for Broad sound; that when nearly up to the north-east ledge of the "Graves," the brig suddenly kept off three or four points towards Lighthouse channel, and ran afoul of the Hornet, and sank her. The answer of the respondent denied this statement, and alleged that the brig was sailing towards Lighthouse channel, by the Graves, two points free, and about S. S. W., while the Hornet was close-hauled; that the Hornet persisted in trying to run across the bows of the brig, although hailed

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission.]

[2] [Affirmed by circuit court in Case No. 2,879.]

and told to keep off, and thereby caused the collision. The answer further alleged, that the brig was so near to the Graves, that she had no room to luff, or tack; but that the Hornet had plenty both of room and time, to have avoided the other vessel, by keeping off.

Charles P. Curtis, Jr., for libellants.
F. C. Loring, for respondents.

SPRAGUE, District Judge. The collision between these two vessels took place in Boston harbor, about noon, on a fine summer day, when there was a good breeze, and the sea smooth. It is, therefore, a necessary inference, that it must have been caused by the fault of one or both of them. The alleged change in the course of the brig, I do not think is made out by the evidence. But the libel, taken in connection with the answer, presents a case of two vessels sailing on converging courses, both on the same tack, the one close-hauled, and the other two points free. Then the question is, which is to give way? There is some discrepancy in the testimony, as to where this collision took place, and whether it was practicable for the brig to have done otherwise than keep her course; but from the respondent's witnesses, taken in connection with those of the libellant, I infer that it must have been outside of the buoy, which is on the north-east ledge of the Graves. The captain of the brig says he was then eastward of "the buoy;" and it is shown that there is but one buoy near the Graves, and that, half a mile from the Graves proper.

The respondent says, that the Hornet was trying to run across the brig's bows. That is true; but it is equally true that the brig was trying to run across the schooner's bows; and it is to prevent collision in similar cases, that a rule of the sea has been established. The present case appears to be one to which the rule applies, viz., that when two vessels are approaching on convergent courses, one close-hauled, and the other free, and there is danger of collision, the vessel having the wind free must give way. If the brig had been close-hauled, and the Hornet close-hauled also, and the convergence of their courses had been owing to the schooner's ability to lie nearer to the wind than the other, then the brig would not have been bound to give way; for the reason that the schooner would have been in a condition, in which she would have had an advantage over the square-rigged vessel, and she might have altered her course, and still been on equal terms with the other. But, in this case, the brig was not close-hauled; she was two points free, and it was therefore incumbent on her to give way. It is in evidence, that the captain of the brig saw the Hornet half an hour before the collision; and he had it in his power either to keep off [at once in front of the schooner, or he might subsequently have gone under her stern],[3] or haul his wind [and either backed his topsail or gone about],[4] and afterwards to regain the line on which he was previously sailing. In fact, the brig luffed and wore round after the accident, and it is therefore justly inferrible, that there was room enough for her to have done so before. As she was heading toward Lighthouse channel, and was up to windward, she might have adopted either of the above measures, without any more detention than would be caused by a short deviation, while the schooner being as close to the wind as she could go, heading for a narrow passage near the Graves, any deviation by her would have been [a detention and][5] a loss of ground to leeward. It was therefore incumbent upon the brig to adopt some one of these measures, and so avoid the schooner.

Another fact tends to show negligence on the part of the brig. It appears that the captain saw the schooner half an hour before the collision, and that although he saw that the two vessels were upon converging courses, he says he paid no attention to her, from that time, till the collision was imminent. This was negligence on the part of the brig. Every vessel is bound to keep watch of all vessels in her vicinity. and to observe their motions and courses. In addition to this, the man at the wheel of the brig testified that he heard the hail from the schooner, before the collision, but took no measures to alter the course he was steering; and he gave, as his reason for not doing so, that he had no order from the captain to that effect, and would not do so till he had. This cannot be justified; having it in his power to avoid the collision when it was imminent, it was his duty to do so immediately, without waiting for orders from the captain, when life and property were hazarded by his delay. For these reasons, I think the brig was to blame.

The question then arises: Was the Hornet in fault also, because she did not keep away, when hailed from the brig? I do not think she was. If she were to be adjudged in fault, because she persevered in holding her course, then the rule requiring a vessel with the wind free to give way to one close-hauled, would be practically abrogated. The rule authorizes and requires the vessel by the wind to hold her course, under the confident belief that the other will give way. [It is not for the brig to complain that the Hornet held her course, when she herself was already off the wind, and could have kept off a little more with difficulty.][5] I think the brig was alone to blame in this collision, and therefore a decree must be entered for the libellants, with costs, and an assessor appointed, to ascertain the damages, unless the parties can agree on the amount thereof.

This case was affirmed, upon appeal to the circuit court. [Case No. 2,879.] Upon appeal to the supreme court, the judges were equally divided. [Case not reported.]

[3] [From 17 Law Rep. 444.]

[4] [From 31 Hunt, Mer. Mag. 712.]

[5] [From 17 Law Rep. 444.]

Case No. 2,881.

CLEMENT et al. v. PHOENIX INS. CO.

[6 Blatchf. 481.][1]

Circuit Court, S. D. New York. June 25, 1869.

INSURANCE—KNOWLEDGE OF LOSS—DEFENSES—EVIDENCE.

1. Where an insurer sets up, as a defence to a policy of marine insurance, that the insured was advised of the loss of the subject insured before he procured the insurance, the insurer assumes the burden of proving such defence.

2. If the attempt is made to prove such defence, by showing that such advice was conveyed by a letter, it must be shown not only that such letter was sent, but that it was received.

3. Knowledge of the loss, before insurance, possessed by a person who is not the agent of the insured for any purpose connected with procuring the insurance, is not notice to the insured.

At law. This was an action [by Francis M. Clement and Elam W. Ditterline, against the Phoenix Insurance Company, of Brooklyn, N. Y.], tried before the court without a jury.

Edwin W. Stoughton, for plaintiffs.
James C. Carter, for defendants.

BLATCHFORD, District Judge. This suit is brought on a policy of insurance, issued by the Phoenix Insurance Company, of Brooklyn, N. Y., to A. H. Cardozo & Co., "on account of whom it may concern," for the sum of $15,000, on the 8th of August, 1867, on 52 hogsheads of tobacco, lost or not lost, valued at $300 per hogshead, on transportation, by steamer and railroad, from Dycusburgh, Kentucky, to New York, being the property described in a bill of lading therefor, dated July 22d, 1867. The tobacco belonged to the plaintiffs, who resided at or near Dycusburgh. On the 22d of July, 1867, they placed it in charge of one McCoy, at Dycusburgh, who, by a written and printed agreement, then signed by him, in the shape of a receipt, or bill of lading, and in which he described himself as a contracting agent, contracted to deliver it at New York, to A. H. Cardozo & Co., by a transportation which was to be by railroad all the way from Cincinnati, and over the Baltimore and Ohio railroad. The tobacco was shipped by McCoy, at Dycusburgh, on board of a steamboat, which carried it down the Tennessee river, to Paducah, where it was shipped on board of a steamboat, called the Mary Erwin, to be carried up the Ohio river to Cincinnati. The bill of lading was forwarded from Dycusburgh, by the plaintiffs, to A. H. Cardozo & Co., at New York, and was received by them on the 2d of August. The insurance was effected at New York, on the 8th of August. The Mary Erwin struck a log or snag, in trying to back off from a reef, on which she had grounded, on the morning of the 1st of August, about forty miles west of Cincinnati, and sank. The tobacco in question was submerged, and damaged by water. It was rescued, and taken to Cincinnati, and sold there at auction, under the direction of an average adjuster, and netted the sum of $812.11.

The defendants have assumed the burden of proving, as a defence, that A. H. Cardozo & Co. were advised of the loss of the tobacco before they procured the insurance. I do not think this defence is satisfactorily made out by a preponderance of proof. The evidence relied on to show notice of the loss to A. H. Cardozo & Co. is entirely circumstantial. It is claimed that a letter was written and mailed by McCoy, at Cincinnati, on the 5th of August, addressed to A. H. Cardozo & Co., at New York, informing them of the loss of the tobacco. The receipt of that letter by A. H. Cardozo & Co. is not shown, and the two persons who composed the firm of A. H. Cardozo & Co. deny that it was received by them. The fact that a letter, written by McCoy at the same time, to the firm of R. L. Maitland & Co., of New York, informing them of the loss of some property of theirs on board of the Mary Erwin, was received by them, at New York, as early as the 8th of August, is relied on, in connection with testimony as to the regularity of the mail communication between Cincinnati and New York, and with the fact that a letter, mailed at Cincinnati, for New York, on the 5th of August, ought to have reached New York, in due course, not later than the 7th of August, to induce the conclusion that A. H. Cardozo & Co. must have received the letter, notwithstanding their denial, as witnesses, that they received it. But the fact that Maitland & Co. received the letter sent to them, and that the mail was regular, and ought to have brought to Cardozo & Co., by the 7th of August, a letter leaving Cincinnati on the 5th of August, is of no effect to show the receipt of such a letter by Cardozo & Co., unless it be clearly shown that such a letter was sent. The regularity of the mail, and the receipt of the letter by R. L. Maitland & Co., would rather serve to show that no letter was sent to Cardozo & Co., in view of the fact that the receipt of such a letter is denied by Cardozo & Co., and is not directly proved. No copy of the letter claimed to have been sent to Cardozo & Co. by McCoy is put in evidence, and, on the proofs, I am not satisfied that any such letter was sent. The burden of showing that such a letter was sent, as well as that, if sent, it was received, is on the defendants, and they have failed to make out either point. They must make out both, to establish their defence as to notice to Cardozo & Co.

It is also claimed by the defendants, that, as McCoy had notice in Cincinnati, as early

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

as the 5th of August, of the loss of the tobacco, and as he was the agent of the plaintiffs to transport the tobacco to New York, and as they had put it into his custody, to be retained therein at least until it reached Cincinnati, he was bound to communicate notice of the loss to Cardozo & Co. by a telegraphic despatch; that, whether he did, or did not, communicate with Cardozo & Co., by writing to them, he was advised, by the face of the receipt, or bill of lading, or contract, which he entered into at Dycusburgh, that the tobacco was to be forwarded to Cardozo & Co., at New York, and that he was bound, immediately on hearing of the loss, to adopt the most speedy means of communication known to the commercial world, for imparting information of the loss to the consignees, in order to guard against a possibility of their effecting an insurance after the loss had happened; and that, in this way, notice to McCoy became, in law, notice to Cardozo & Co. In support of this view, the case of Proudfoot v. Montefiore, 2 L. Q. B. 511, is cited. In that case, one Rees, the agent, at Smyrna, of the plaintiff, who was in England, purchased at Smyrna a cargo of madder, and shipped it to the plaintiff by a vessel which was stranded soon after leaving Smyrna, so that the cargo became a total loss. Rees learned, at Smyrna, of the loss, seven days before the insurance in England was effected by the plaintiff. It appeared that the fact of the loss might have been communicated to the plaintiff by Rees, by telegraph, and it also appeared, from a letter written by Rees, two days after he heard of the loss, to the plaintiff, but which was not received by the plaintiff until after the insurance was effected, that Rees abstained from telegraphing to the plaintiff, for the fraudulent purpose of enabling the plaintiff to insure. Chief Justice Cockburn, in giving the judgment of the court, says: "We think it clear, looking to the position of Rees, as agent to purchase and ship the cargo for the plaintiff, that it was his duty to communicate to his principal the disaster which had happened to the cargo; and, looking to the now general use of the electric telegraph, in matters of mercantile interest, between agents and their employers, we think it was the duty of the agent to communicate with his employer by this speedier means of communication. From the letter of the agent, it appears that, but for the fraudulent motive for his silence, he would, in the ordinary course of his duty, have conveyed the intelligence of the loss to his employer, and would have availed himself of the telegraph for that purpose." On these facts, the court held, that the plaintiff was so far affected by the knowledge by Rees of the loss of the vessel, and of the damage to the cargo, as that the fraud thus committed on the underwriter, through the intentional concealment of the agent, though innocently committed, so far as the plaintiff was concerned, afforded a defence to the underwriter, on a claim to enforce the policy. That case was, undoubtedly, on its facts, properly decided. But no such state of facts exists in the case at bar. Whatever the character of the agency of McCoy was, he was not the agent of the plaintiffs for any purpose connected with procuring insurance on the tobacco. In the case of General Interest Ins. Co. v. Ruggles, 12 Wheat. [25 U. S.] 408, the supreme court considered the question, as to how far the negligence or misconduct of an agent of an insured party, in withholding from such party knowledge of the loss of the subject insured, where the insurance was effected, lost or not lost, after the loss had happened, would affect such party, where it appeared that knowledge of the loss did not, in fact, reach such party until after the insurance was effected, and he acted in entire good faith. It held, that, if the agent guilty of the negligence or misconduct was the agent of the owner for any purpose connected with procuring the insurance, the owner would be chargeable with the loss. The court say: "It is not, therefore, true, as a universal rule, that either the fact of loss, or the knowledge of such fact by the agent or the principal, at the time the policy is procured, will vacate it. But such knowledge must be brought home to some of the parties or agents connected with the business of procuring the insurance; and then the rule properly applies, which puts the principal in place of the agent, and makes him responsible for his acts." This doctrine must be regarded as the law of this court, and of this case. Under it, a knowledge of the loss by Cardozo & Co., before they procured the insurance, would, of course, vitiate the policy. But a knowledge of it by McCoy cannot affect the plaintiffs. He appears to have been only a contracting agent, to solicit shipments of property, and, in view of his actual attitude toward the plaintiffs, and the extent and character of his agency, I am not disposed to hold that he was under any such obligation to communicate intelligence of the loss to Cardozo & Co., as would vitiate the insurance for his failure to do so. The bill of lading informed him that the tobacco was sent for account of the plaintiffs. He sent a notice of the loss, on the 5th of August, to the plaintiffs, at Dycusburgh, from Cincinnati, but they did not hear of the loss until the 15th of August, and did not receive that letter till after that time. The nearest telegraphic station to Dycusburgh was Paducah, thirty miles' distance. Even if it were shown that a telegraphic despatch, sent by McCoy to Paducah, could have reached the plaintiffs in season for them to have communicated by telegraph with Cardozo & Co., before the insurance was effected, I do not think that the agency of McCoy, or his implied legal obligation, through the plaintiffs, to the underwriters, was such as to make his failure to communicate by telegraph to

the plaintffs operate as a vitiation of the policy.

I find for the plaintiffs, for the sum of $16,543.57, as of the 9th of June, 1869.

[NOTE. Subsequently defendants submitted to the court a special finding for signature and filing, which finding the court declined to make. Case No. 2,882, next following.]

Case No. 2,882.

CLEMENT et al. v. PHOENIX INS. CO.

[7 Blatchf. 51.] [1]

Circuit Court, S. D. New York. Nov. 19, 1869.

TRIAL WITHOUT JURY—FINDINGS—PRACTICE.

1. Where an action at law is tried by this court, without a jury, under the provisions of the 4th section of the act of March 3d, 1865 (13 Stat. 501), it is discretionary with the court to make either a general or a special finding upon the facts.

[Cited in Folsom v. Mercantile Mut. Ins. Co., Case No. 4,903.]

2. The proper mode of procedure, on such a trial, in respect to propounding propositions of law, and to passing thereon, and to excepting to rulings thereon, with a view to a writ of error or an appeal, stated.

3. It is not necessary there should be a special finding on the facts, in order to secure to the defeated party the right to move for a new trial, or to have a review by the supreme court, or the full benefit of any exception taken by him at the time to any ruling of the court, on any question of law, in the progress of the trial.

[Cited in Folsom v. Mercantile Mut. Ins. Co., Case No. 4,903.]

4. A trial by the court, without a jury, is not concluded until the formal finding of the court upon the facts is made

5. The danger of prejudice to the successful party, by a special finding of facts, on a trial by the court, in case of a review by the supreme court, stated.

This was an action at law [by Francis M. Clement and Elam W. Ditterline] (see [Clement v. Phoenix Ins. Co., Case No. 2,881]) on a policy of insurance made by the defendants [the Phoenix Insurance Company of Brooklyn, New York], insuring $15,600 on 52 hogsheads of tobacco, on transportation by steamer and railroad from Dycusburgh, Kentucky, to the city of New York.

Edwin W. Stoughton, for plaintiffs.

James C. Carter, for defendants.

BLATCHFORD, District Judge. This action was tried before the court, without a jury, under the provisions of the 4th section of the act of March 3, 1865 (13 Stat. 501), a jury having been waived by a stipulation in writing signed by the attorneys of record, and filed with the clerk of the court. That section provides as follows: "Issues of facts in civil cases in any circuit court of the United States, may be tried and determined by the court without the intervention of a jury, whenever the parties, or their attorneys of record, file a stipulation in writing with the clerk of the court, waiving a jury. The finding of the court upon the facts, which finding may be either general or special, shall have the same effect as the verdict of a jury. The rulings of the court in the cause, in the progress of the trial, when excepted to at the time, may be reviewed by the supreme court of the United States, upon a writ of error or upon appeal, provided the rulings be duly presented by a bill of exceptions. When the finding is special, the review may also extend to the determination of the sufficiency of the facts found to support the judgment." The proceedings in open court at the trial having been concluded, the case was submitted for determination to the court, which subsequently announced that it found for the plaintiffs for the sum of $16,543.57, as of the 9th of June, 1869. [Case No. 2,881.] No formal finding, either general or special, has been signed, or filed, or entered in the minutes of the court. The defendants now submit to the court the draft of a special finding of the court upon the facts, which they ask the court to sign and file as the finding of the court upon the facts. It consists of eleven statements or propositions. The plaintiffs object to the making by the court of any special finding upon the facts.

It is apparent that, under the statute, it is discretionary with the court to make either a general finding or a special finding. Especially is this so, in view of the prior act of February 19, 1864 (13 Stat. 5), which provides, in its 7th section, as follows, in reference to the circuit courts for the districts of California and Oregon: "Issues of fact in civil cases may be tried and determined by the said circuit court, without the intervention of a jury, whenever the parties, or their attorneys of record, file a stipulation in writing with the clerk, waiving a jury. Upon the trial of an issue of fact by the court, its decision shall be given in writing and filed with the clerk. In giving the decision, the facts found and the conclusions of law shall be separately stated." This court, therefore, when trying an issue of fact in a civil case, when a jury is waived, is not required to state separately the facts found and the conclusions of law, nor is it required to make a special finding upon the facts. The inquiry then arises, whether it is necessary or proper that the court should make such special finding in this case.

By the statute, the finding, when made, has the same effect as the verdict of a jury. As the trial of an issue of fact before a jury is not concluded until the verdict of the jury is rendered, so the trial of an issue of fact by the court without the intervention of a jury is not concluded until the formal finding of the court upon the facts, which is to have the same effect as the verdict of a jury, is made. When, therefore, the statute speaks of the rulings of the court

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

in the cause, in the progress of the trial, it includes all rulings on questions of law which the court may make in the progress of the trial, down to the time the finding on the facts is formally made. The trial is to proceed in all respects as if before a jury, except that there is to be no charge to a jury, and, instead of a verdict by a jury, there is to be a finding by the court on the facts, which finding, if general, is to have the same effect as the general verdict of a jury, and, if special, is to have the same effect as the special verdict of a jury. The rulings of the court in admitting or rejecting evidence are to be made and excepted to as on a trial before a jury. When the evidence is concluded, the respective parties are to propound to the court the propositions of law which they respectively conceive to arise therefrom, as on a trial before a jury, except that a proposition of law, instead of running to the effect that, if the jury find thus and so, the law on such a state of fact is thus and so, will run, that if the court find thus and so, the law on such a state of fact is thus and so. The court must pass on such a proposition of law, when it tries an issue of fact, just as it must pass on a proposition of law when made at a like stage of the trial, on a trial before a jury. On a trial before a jury, the court passes on such a proposition when it is made, and before the jury retires to consider of its verdict. On a trial before the court, the court may pass on such a proposition when it is made, or it may take the proposition into consideration and pass upon it afterwards, before making its finding on the facts, and, therefore, during the trial, and, in either event, the party advancing the proposition, as well as the opposite party, will, accordingly as the court does or does not affirm the proposition, have the opportunity of excepting to the ruling of the court thereon at the time such ruling is made; and such ruling being within the 4th section of the act of 1865, a ruling of the court in the cause in the progress of the trial, and being excepted to at the time, may, under that section, when duly presented by a bill of exceptions, be reviewed by the supreme court upon a writ of error or upon appeal. In this way the rights of both parties are preserved. The propositions of law that are affirmed by the court are like the charge of the court to the jury, and its rulings can be excepted to by the party that is dissatisfied with them. When propositions of law are overruled by the court, its action can be excepted to by the party which advances the propositions. There is no absolute necessity, therefore, for a special finding by the court on the facts, any more than there is an absolute necessity, in every case tried before a jury, for the finding by it of a special verdict. If the counsel for each party discharges properly and seasonably the duty of presenting to the court such propositions of law as he conceives to arise on the evidence, no right of either party can be prejudiced. There will be the same right and the same opportunity to move, with effect, for a new trial, on a case, because the finding is against the weight of evidence, that there are, on a trial before a jury, to move for a new trial, on a case, because the verdict is against the weight of evidence. There will be the same right and the same opportunity to move, with effect, for a new trial, because of an error in law committed by the court, that there is on a trial before a jury. It is not necessary, in order to enable those remedies to be pursued, that there should be a special finding by the court upon the facts, any more than it is necessary there should, on a trial before a jury, be a special verdict, in order to enable those remedies to be pursued. By the course above indicated, as the one proper to be pursued on a trial before the court without a jury, the separation of the matters of law from the questions of fact, which is necessary in order to a review upon the matters of law in a higher tribunal, is effected as completely as it can be in the case of a general verdict rendered by a jury. The rulings of the court on the propositions of law advanced by the respective counsel, after the evidence has been put in, on a trial by the court without a jury, are equivalent to the charge of the court to the jury, and stand out separate and distinct from the questions of fact, and can be specifically excepted to. In several of the circuit courts of the United States, it is not the custom for the court to charge the jury, on the trial of an issue of fact, otherwise than by its responses to the propositions of law, advanced in writing by the respective parties after all the evidence is taken.

In the present case, it is said, on the part of the defendants, that they desire to raise the point, that, as matter of law, on the evidence, one McCoy, at Cincinnati, ought to have given notice, by telegraph from there, at a certain time, to the consignees at New York of the tobacco, of its previous loss, and that, as he did not give such notice, the plaintiffs cannot recover. This is based on the view, that McCoy knew of the loss on the 5th of August, 1867, at Cincinnati, and that the insurance was not effected by the consignees at New York, until the 8th of August, 1867. Now, the proper and effectual way to raise this point, is to have it appear, by the record, that the defendants requested the court to rule, as matter of law, that if it should find that McCoy had notice in Cincinnati, as early as the 5th of August, 1867, of the loss of the tobacco, and that McCoy was the agent of the plaintiffs to transport the tobacco to New York, and that the plaintiffs had put it into McCoy's custody, to be retained therein at least until it reached Cincinnati, then McCoy was bound to communicate notice of the loss by telegraph to the consignees at

New York as soon as he had notice of it himself, and that if it should find that McCoy did not communicate such notice by telegraph, the plaintiffs could not recover. This would be the mode adopted to raise the point on a trial before a jury, and there is no reason why it should not be adopted on a trial by the court without a jury. Of course, the substance of the request above suggested may be varied, if it is not full enough, either in its statement as to the finding of fact, or as to the proposition of law. The form suggested for the request is only intended to indicate that there can be no difficulty, on the evidence given in the case, in framing a proper and adequate form of request to secure, to the same extent, the same right of review to which the defendants would have been entitled if a trial by jury had not been waived by them. Nothing is more usual in a request to charge a jury, than to say that if the jury finds thus and so to be the fact from the evidence, then such and such is the law thereon. The hypothetical finding of fact indicated in the request must necessarily be based on something antecedent in the record, showing that evidence was given tending to establish the fact indicated. If there be such evidence, the request is a proper one to have been made, and the party making it can have the full benefit, on an exception, of a refusal by the court to charge in accordance with the request. These same views hold true in regard to a request to the court, on a trial by it without a jury, to rule thus and so as to the law, on a hypothetical finding of fact indicated in the request. The court will necessarily, by its response to the request, have indicated clearly whether or not it gave to the party making the request the benefit of the principle of law propounded therein.

The cases decided by the supreme court, cited by the defendants' counsel, do not, as I understand them, hold, as is contended, that, whenever a jury is waived, that court cannot and will not review anything unless there is in the record a special finding of facts. In Hyde v. Booraem, 16 Pet. [41 U. S.] 169, there was no bill of exceptions, and the court, on a statement of facts, held that, in point of law, the judgment below could not, on those facts, be maintained. Mr. Justice Story, in that case, says, speaking of a trial before the court without a jury: "If either party in the court below is dissatisfied with the ruling of the judge in a matter of law, that ruling should be brought before this court by an appropriate exception in the nature of a bill of exceptions." In Minor v. Tillotson, 2 How. [43 U. S.] 392, the case was tried before the court without a jury, but there was no bill of exceptions. In Prentice v. Zane's Adm'r, 8 How. [49 U. S.] 470, there was a trial before a jury, and a special verdict. In Graham v. Bayne, 18 How. [59 U. S.] 60, there was no bill of exceptions presenting questions of law. The case of Guild v. Frontin, 18 How. [59 U. S.] 135, only decides that where there is a trial before the court without the intervention of a jury, there must be either a special verdict or an agreed statement of facts, or a bill of exceptions to the decisions of the court on questions of law, in order to enable the supreme court to review the judgment of the court below.

But, even if a refusal by the supreme court to review a case when a jury was waived, unless there was, in the record, a special finding of facts, had been the established practice before the passage of the act of 1865, the 4th section of that act expressly provides that, where a trial by jury is waived, the finding of the court on the facts may be general, and shall, when general, have the same effect as the general verdict of a jury; and that, in the case of such a general finding, every ruling of the court in the cause, in the progress of the trial, when excepted to at the time, may, when duly presented by a bill of exceptions, be reviewed by the supreme court on a writ of error or on appeal. A special finding in this case, is, therefore, unnecessary, to give to the defendants the full benefit of any exception taken by them at the time to any ruling of the court or any question of law in the progress of the trial.

But there is a further provision in the 4th section of the act of 1865, namely, that, "when the finding is special, the review may also extend to the determination of the sufficiency of the facts found to support the judgment." A losing party in a cause can always have the substantial benefit of this provision, without a special finding on the facts, by requesting the court to rule, as matter of law, that unless every one of such and such facts is found by it to exist, or unless a particular fact is found to exist, his adversary cannot have a general finding in his favor. But a winning party may be seriously prejudiced by a special finding, because, on a review by the supreme court thereon, if any one fact, however slight, really necessary to support the judgment, should, merely through inadvertence or accident, have been omitted from the finding, the judgment would have to be reversed. Graham v. Bayne, 18 How. [59 U. S.] 60, 63.

The court, therefore, declines to make a special finding of facts in this case. But, under the circumstances, both parties will now be allowed to propound to the court such written requests as to matters of law, on the evidence taken in the case, as they shall desire, and the court will make written rulings thereon, and exceptions can then be taken thereto. The court will then make a general finding in form. This course can be taken, because the trial is still in progress.

CLEMENT (UNITED STATES v.). See Case No. 14,815.

Case No. 2,883.

CLEMENT'S EX'RS v. DICKEY.

[1 Paine, 377.][1]

Circuit Court, S. D. New York. April Term, 1825.

AUTHORITY OF MASTER TO DRAW BILLS OF EXCHANGE.

The owner of a vessel sent her from New-York, consigned to his correspondents at Antwerp, with directions that they should despatch her to India, furnishing the master with a letter of credit, entitling him to draw on London for 5,000 pounds. The master was instructed if he should not have funds to purchase a cargo in India, to "extend his drawing." Being in want of funds, he drew, not on the house in London on whom he had drawn the 5,000 pounds, but on the consignees at Antwerp, who had obtained the letter of credit, and to whom the vessel and cargo were to return. *Held*, that the bills were drawn without authority, and should have been drawn on the house in London.

At law. This was an action of assumpsit [by Clement's executors] to recover of the defendant [Robert Dickey] the amount of three bills of exchange, drawn by Francis Allyn, as master of the defendant's ship, Frances Henrietta, upon Parish, Agie & Co. of Antwerp, and for goods sold and delivered by the plaintiffs' testator to Allyn, as such master. The cause was tried at the September term, 1823, and now came before the court on a case made by the plaintiffs. At the trial it appeared on the part of the plaintiffs, that Allyn, in April, 1818, sailed as master of the defendant's ship, Frances Henrietta, on a voyage from New-York to Antwerp. The vessel was consigned to Parish, Agie & Co., who were to decide after she arrived at Antwerp, whether the voyage should be continued round the Cape of Good Hope. Allyn was informed by his letter of instructions, that if such an extension of the voyage should be determined on, "Parish, Agie & Co. were to put on board the ship 55,000 or 60,000 Spanish dollars, and to furnish an effective letter of credit, to enable his passing bills from the port of lading, on Holland or London, to the amount of 5,000 pounds sterling; and that after leaving Antwerp, the care and management of the voyage would be reposed in him." He was also instructed by the same letter, "to proceed to the Isle of France, to procure on fit terms, a cargo chiefly of coffee and sugar, and if he should there discover that it would be more advantageous to go to Batavia, to proceed thither. If disappointed at Batavia, to proceed on to Manilla, or return by the Isle of France, or go to Bombay, or Calcutta. That wherever he might load, it was the defendant's desire, that it should eventually be a full cargo, and that if the specie and credit he carried should fall short, he could take on freight or extend his drawing, and if needful, give security by bill of lading on so much of the shipment as his extra credit paid for. To return to Europe when loaded, proceeding to such port in the British Channel as Parish, Agie & Co. might point out to receive their orders as to what port of discharge he should take the ship to, which would be Antwerp, or a port in Holland. That he should have the papers both outward and homeward made out for the defendant's account and risk, the outward cargo to be consigned to himself, and the homeward to Parish, Agie & Co." He was further directed, "to acknowledge in writing to Parish, Agie & Co. these orders of the defendant; to inquire at Antwerp about the crops of grain, which would affect rice, and help him in his conclusion as to filling up with that article, particularly if his funds should be short." He was also informed, "that if this voyage to India should be undertaken, the defendant would, when he should hear that it was determined on, effect the necessary insurance, and would also again write, so that the letter would reach him before he left Antwerp." In June the ship arrived at Antwerp, to Parish, Agie & Co., who directed the master to proceed on the India voyage, and furnished him with 55,000 dollars in specie, and a letter of credit on Thomas Wilson & Co. for 5,000 pounds sterling. The master received no written instructions from Parish, Agie & Co., but was verbally directed by them to proceed to the Indian seas. The letter of credit contained a provision, that the proceeds of the drafts should be invested in goods and shipped on board the Frances Henrietta, to Holland, to Parish, Agie & Co. The ship not being able to enter at the Isle of France, went to Batavia, where she arrived the 2d of December, 1818. There had been lately a great rise in the markets, but the master, on the whole, concluded to purchase of Clement, the defendant's testator, 2,700 piculs of coffee at 30 dollars per picul, and 514 piculs of sugar at 9 dollars 50 cents per picul, at the specie value of a dollar, for which he paid him in the specie and proceeds of the drafts on Thomas Wilson & Co. These funds being inadequate to the payment of the amount purchased of Clement, Allyn showed him his letter of instructions, and probably also another letter he had received while at Antwerp, from the defendant, dated May 23d, 1818, advising him about prices, and informing him, that sugar at about five cents pound English would be the best return cargo, and coffee at 21 or 22 cents without our duty, the next best. Allyn and Clement then entered into an agreement in writing, that Clement should receive from Allyn in payment of the residue of his purchase, bills of exchange drawn by Allyn on Parish, Agie & Co. in favour of Clement for 5,900 pounds sterling, payable in London, and that as security for such bills, Allyn should ship 700 piculs of coffee contained in 763 bags as per invoice and bill of lading,

[1] [Reported by Elijah Paine, Jr., Esq.]

consigned to Clement, freight free, and that on the payment of the bills, the invoice and bill of lading should be endorsed and given up to Allyn's order. The bills were drawn at the rate of 5 shillings 2 pence the dollar, so as to allow Clement the difference in exchange. Allyn believed that this agreement was according to his instructions, and that he was authorized to draw as he did. Clement was the master of an American ship then on a voyage to India, and the sugar and coffee sold to Allyn, had been purchased by Clement at Batavia, for his own ship, but he had changed his mind in consequence of intelligence received, and determined to go to Canton. Allyn wished to purchase no more of Clement's cargo than he had funds for, but Clement would not break it. In pursuance of their agreement, Allyn drew the bills of exchange, and also delivered to Clement the bill of lading and invoice of the 763 bags of coffee, which were shipped for account and risk of the defendant. Allyn informed Clement, that he had ordered insurance upon that part of the cargo which exceeded his funds, but it was understood that either he or Clement might order the insurance to be effected. They both sent orders for the insurance to London, where their correspondents made an arrangement that it should be insured on Clement's order, and not on Allyn's. Nothing was said about insurance in the written agreement. The Frances Henrietta arrived at Antwerp in October, 1819, consigned to Parish, Agie & Co. The cargo was delivered to them; the 763 bags of coffee on account of Clement, and the residue on account of defendant. It also appeared that Clement received the 55,000 Spanish dollars at par, although they were worth a premium of ten per cent. Government sales, however, were always made for dollars, and just before Allyn's arrival at Batavia government sales of coffee had been made at 22 dollars per picul, but the prices had risen very rapidly, and before he made the purchase of Clement, these sales had been made at 33 dollars. Allyn could not obtain at Batavia either a full or part freight. The price of rice was 2 dollars per picul. A picul is equal to 133 pounds. Samuel Williams, who effected the insurance for Clement on the 763 bags of coffee, paid a premium amounting with charges to 171 pounds 5 shillings and 6 pence. He also paid for Clement 40 pounds for law expenses, on account of the bills of exchange. The proceeds of the 763 bags amounting to 4,842 pounds, were also remitted to him for Clement's account, and Williams's charges amounted to about 50 pounds. On the 29th September, 1819, Allyn, on his passage from Batavia to Antwerp, touched off Dover, and there received notice of the protest of the bills for non-acceptance, and while he was at Antwerp, a judgment was recovered against him at the suit of Clement on the bills. The protest for non-acceptance was dated the 13th of August, 1819, and of non-payment the 12th of November following. No other notice of the protest of the bills was ever received by either the defendant or Allyn, than the one received by the latter when he touched off Dover. A deposition of Allyn, proving most of the facts of the case, to which was annexed a release to him from Clement, executed before the taking of the deposition, was read at the trial, but objected to by the defendant's counsel, on the ground of interest in the witness. The court charged the jury, that Allyn was authorized to purchase the cargo of Clement, but not to draw bills in payment on Parish, Agie & Co. and that the plaintiffs could not therefore recover damages on the bills or re-exchange. That in making up their verdict, they should allow the defendant credit, without any premium, for the monies paid the plaintiff, and the proceeds of the 700 piculs of coffee shipped as security, and find the balance of the price of the coffee for the plaintiffs. That the plaintiffs were not entitled to recover for the insurance and law charges. The jury found a verdict for 6,818 dollars 21 cents.

H. D. Sedgwick and R. Sedgwick, for plaintiffs, contended, that the bills were drawn by the master necessarily and bona fide; and that the proper construction of the expression "extend your drawing," was, that he should draw on his consignees, who were the only persons to draw on except Thomas Wilson & Co., whose letter of credit had been exhausted, and on whom, of course, he had no right to draw.

C. Graham for defendant, contended, 1. That Allyn was not on account of his own liability as drawer of the bills, under the circumstances of the case, a competent witness on the part of the plaintiffs. 2. That the plaintiffs could not recover on the bills of exchange. They were drawn without authority. The master, it is conceded, could not have drawn the bills without the power to draw contained in his letter of instructions. Parish, Agie & Co., as he was informed by that letter, were to furnish him with a letter of credit, which would enable him to draw to the amount of 5,000 pounds on Holland or London. They were to determine whether the drawing should be on Holland or London, and did determine in favour of the latter place. The authority of Allyn to extend his drawing was, therefore, an authority to draw only on Thomas Wilson & Co. of London. 3 Term R. 757; 1 Esp. 111; 2 J. P. Smith [Eng.] 79, 80; 1 Taunt. 347; 2 Johns. 48. The release to Allyn enured to defendant's benefit, and destroyed the plaintiffs' right of action on the bills. [M'Fadden v. Parker] 4 Dall. [4 U. S.] 275; 2 Caine, 121; 12 Johns. 189. No notice was given to the defendant of the protest of the bills. Chit. Bills, 213–216. 3 That the defendant was entitled to have credit for the whole proceeds of the 700

piculs of coffee shipped as a security for the bills of exchange and the interest thereon; and that the charges for insurance, law expenses, commissions, &c. mentioned in Samuel Williams' account, ought to be rejected. 4. That the plaintiffs were not entitled to damages or re-exchange upon the bills. 5. That if the defendant was at all liable to the plaintiffs, it was upon the footing of an account stated between the plaintiffs' testator and the defendant for goods sold, crediting the defendant with the monies paid at Batavia, and the proceeds of the 700 piculs of coffee. 6. That interest ought to have been calculated at 5, and not 7 per cent.

THOMPSON, Circuit Justice. The main question in this case relates to the authority of Captain Allyn to draw the bills, which form the principal subject of litigation in this cause. It is objected, however, preliminarily, that Captain Allyn, who was admitted as a witness, was incompetent on the ground of interest; the bills appearing on their face to have been drawn by him on his own account, and not as agent of the defendant. This objection however is not tenable. For admitting Captain Allyn's personal responsibility upon the bills, he was completely discharged therefrom by the release given to him previous to his examination. This release not only embraced his liability on the bills of exchange, but extended to all matters touching this suit. And besides, if he by exceeding his instructions had thrown on the defendant a loss, he would be responsible over to him. His interest was, therefore, against the party calling him; as by exonerating Dickey he would screen himself from any responsibility over to his principal.

This objection being out of the way, I proceed to examine the point whether Captain Allyn had authority to draw the bills in question. It has not been contended that the character of master of the ship would confer upon him such authority for the purpose for which the bills were drawn. It must, therefore, arise entirely from his letter of instructions, if it existed at all. And the opinion I entertained upon the trial, that no such authority is to be found in his instructions, is strengthened and confirmed, by farther reflection and a more attentive examination of the question. He was a special agent, and bound to pursue strictly the orders of his principal, where no latitude of discretion was left to him. We must, therefore, look to these instructions only to ascertain his authority on this subject. From their general scope and object it is fairly to be inferred that the defendant intended to provide funds to purchase a full return cargo for his ship. But he chose to point out the way in which these funds were to be procured, and his agent had no authority to depart from his instructions. Captain Allyn, on the outward voyage from New York, went consigned to Parish, Agie & Co. of Antwerp, and was to receive their instructions as to its farther prosecution; and in case it should be round the Cape of Good Hope, they were to furnish him with fifty-five or sixty thousand Spanish dollars, and an effective letter of credit to enable him to pass bills from the port of lading of the return cargo on Holland and London to the amount of five thousand pounds sterling. Parish, Agie & Co. on the arrival of the ship at Antwerp, determined to send her round the Cape, and accordingly furnished Captain Allyn with fifty-five thousand Spanish dollars, and procured for him a letter of credit from Thomas Wilson & Co. of London, for five thousand pounds sterling. The defendant, however, to guard against a deficiency of funds, adds, in his instructions, the following clause: "Wherever you load, I wish it eventually to be a full cargo, and if the specie and credit you carry should fall short, you can take on freight, or extend your drawing; and, if needful, give security by bill of lading on so much of the shipment as your extra credit pays for." The captain, at Batavia, where he purchased a return cargo of coffee and sugar, finding the funds with which he had been provided insufficient to purchase a full cargo, drew the bills in question on Parish, Agie & Co. And whether he had authority so to do, depends on the clause in his instructions above cited.

When these instructions were made out, it was unknown to the defendant on whom the captain would have authority to draw for the five thousand pounds expressly provided for. That was to be left to Parish, Agie & Co. who procured the engagement of Thomas Wilson & Co. of London, to accept Captain Allyn's draft for that amount. And the contingent provision for further drafts in case of necessity, has reference to the first drawing. This is not only the literal interpretation of the language made use of, but the fair construction of what was the understanding and intention of the defendant. The word "extend" is relative in its application, and refers to something already begun, and implies a continuation of the same act. A power to extend or continue an act or piece of business, cannot authorize a totally distinct transaction. Can an authority to draw on A for a certain sum, with a contingent power to extend such drawing, by any possibility confer the right of drawing on B for such further sum? Suppose the letter of instructions had expressly directed the draft for the five thousand pounds sterling to be made on Thomas Wilson & Co. of London: Can there be a doubt, but that the authority to extend the drawing would be limited to drafts on the same house? And if so, what difference can it

make whether the house of Thomas Wilson & Co. was designated by the defendant himself, or by Parish, Agie & Co. by his authority? As soon as this designation was made known to Captain Allyn, it was precisely the same as if inserted in his original instructions; and his extended drawing was therefore restricted to the house of Thomas Wilson & Co. I can discover no more authority from the letter of instructions to draw on Parish, Agie & Co. of Antwerp, than on any other house in Holland or London. Captain Allyn no doubt acted in good faith, and supposed his drafts on Parish, Agie & Co. would be accepted, as the return cargo was to be consigned to that house. But it will be recollected that this house furnished the funds to purchase the return cargo; and the case discloses no evidence of the state of accounts between the defendant and Parish, Agie & Co. or the indemnity which the latter had for such large advances. And besides, they could not with propriety have accepted these bills, with a view of looking over to the defendant for reimbursement; for there can be no doubt that Captain Allyn's instructions were made known to them, not only because he was directed by the defendant to communicate his orders to that house, but the agency they were to have in projecting the voyage, made such a communication necessary and proper. This house then knowing the authority given to Captain Allyn to extend his drawing, and knowing that the first draft for the five thousand pounds was to be upon Thomas Wilson & Co. must have known that Captain Allyn had no authority to draw on them; and, of course, that Dickey could not be made responsible for such drafts. Nor could they have reasonably calculated upon indemnity from that part of the cargo purchased with these bills; for, although by the defendant's instructions the return cargo purchased with the funds taken out by Captain Allyn, was to come consigned to them, yet they knew from his instructions that he had authority to give security by bill of lading, on so much of the cargo as was paid for, by the extra credit. Nor could Clement have had any just grounds to suppose these bills would have been accepted. He was fully apprised of Captain Allyn's instructions, and was bound to know their legal import, and of course on whom he had authority to draw; and the precaution he observed, by taking security on the cargo, shows that he did not place implicit reliance on the bills themselves.

The right of the plaintiffs, therefore, to recover upon these drafts, as bills of exchange, cannot, I think, be sustained. And this is conformable to the real justice of the case, as it will put at rest all claim for damages, by reason of the bills having been protested, which I should consider at least a hard case, if under any circumstances I felt myself bound to allow it. But although the action cannot be sustained upon the bills of exchange, yet I think the defendant is answerable, as for goods sold and delivered, for the whole of the cargo purchased by Captain Allyn of the plaintiff's testator. Believing, as I think I am fully warranted in doing, that Captain Allyn acted in good faith, and with a view to promote the interest of his principal, his instructions ought to receive a liberal construction, where there is any latitude of discretion given. In a voyage so distant as the one in question, it is impossible to foresee and provide for every event, and some discretion must almost necessarily be left to the agent who is to have the management. In the present case we find in Captain Allyn's instructions these clauses: "After leaving Antwerp, the care and management of the voyage will be reposed in you."—"Wherever you load, I wish it eventually to be a full cargo, and if the specie and credit you carry should fall short, you can take on freight, or extend your drawing, and, if needful, give security by bill of lading on so much of the shipment as your extra credit pays for." It is evident from these parts of the instructions, it was the wish and intention of the defendant that at all events the ship should return with a full cargo. And Captain Allyn had authority to purchase it, and give the security he did by bill of lading. An account must therefore be stated between the parties, as for goods sold and delivered by the plaintiff's testator to defendant, to the full amount of the cargo; crediting the defendant with the moneys paid at Batavia, and the proceeds of seven hundred piculs of coffee, deducting therefrom the sum paid for insurance, and rejecting all the other charges in the account of Samuel Williams.

Upon the trial I thought the insurance ought not to be allowed; but, upon further reflection, I am inclined to allow it. Captain Allyn, by his instructions, was authorized to give security on the shipment paid for by his extra credit; and to make this security effectual and safe, insurance was necessary. It was actually paid on account of the plaintiff's testator. And the case fully warrants the conclusion, that no insurance was effected by the defendant that would have covered this part of the cargo. The purchase of the cargo was entire, and laying the bills out of the question, as I have done, there is no rule or principle by which a distinction can be made as to price between that part paid for at Batavia and the other part of the cargo. The sale was undoubtedly a very advantageous one for Captain Clement. Captain Allyn was averse to taking any more than he could pay for with the funds he had, but Captain Clement insisted on his taking the whole. The bills being out of the question, we must look to what Captain Allyn did, which was authorized by his instructions. He gave security on a

part of the cargo, as he had a right to do, by assigning to the order of Captain Clement seven hundred piculs of coffee, which went free of freight, and out of the proceeds of this coffee he had a right to pay himself for the balance; as this coffee was not charged with freight or insurance, there was every reason to conclude it would be amply sufficient to pay the balance due Captain Clement.

Under these circumstances, I think it would not be just to charge the defendant with interest before the arrival of the vessel at Antwerp. The account must therefore be made up as upon an entire purchase, crediting what was paid at Batavia; the balance payable out of the proceeds of the seven hundred piculs of coffee, which came consigned to Clement's order. That not being sufficient, interest must be allowed on such balance from the time it was ascertained at 5 per cent.; balance payable in London, as the whole transaction, as appears evidently to have been the understanding, was to be wound up there.

The account must be stated on the principles above laid down, and judgment entered for the balance.

CLEMENTS (MUDD v.). See Case No. 9,900.

CLEMENTS (ODORLESS EXCAVATING CO. v.). See Case No. 10,437.

CLEMENTS (UNITED STATES v.). See Cases Nos. 14,816 and 14,817.

Case No. 2,884.

CLEMENTSON v. BEATTY.

[1 Cranch, C. C. 178.][1]

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

PLEA IN ABATEMENT.

If the contract was with the defendant and another as joint partners, the defendant cannot take advantage of it but by plea in abatement.

At law. Assumpsit [against F. Beatty, Jr.] for goods sold and delivered.

Mr. Mason objected that the goods were delivered to Fisher & Beatty jointly as partners.

Mr. Swann contended that he could not take advantage of this on the general issue, and cited the case of Rice v. Shute [unreported].

CRANCH, Circuit Judge, stated that he considered the principle to be laid down generally, that where a partnership was alleged by the defendant, he must plead it in abatement, and name all the partners.

Mr. Mason abandoned the point.

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

Case No. 2,885.

CLEMENTSON v. WILLIAMS.

Circuit Court, District of Columbia. June, 1812.

[Cited in Waller v. Stewart, Case No. 17,109. Nowhere reported; opinion not now accessible. See Clementson v. Williams (possibly same case on appeal), 8 Cranch (12 U. S.) 72.]

CLEMSON (DAVIS v.). See Case No. 3,630.

Case No. 2,886.

The CLEOPATRA.

[5 Ben. 290;[1] 14 Int. Rev. Rec. 29.]

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

SMUGGLING—FORFEITURE — EVIDENCE OF INFORMERS.

Seamen engaged on board a steamship were arrested while engaged in smuggling segars, which they had brought into the port on board of her. The seamen were promised immunity, and an information having been filed against the steamship to forfeit her under the 50th section of the statute of March 2, 1799 (1 Stat. 665), the evidence of the seamen was relied on to secure the forfeiture. It appeared that neither the owners, nor the master, nor any officer of the ship, was engaged in or knew of the smuggling, but all had been solicitous to prevent smuggling. *Held*, that the evidence of the men was sufficient to sustain the action, and the decree required by the statute must follow, but that the course pursued in the matter by the government officials was open to severe criticism. The district attorney was therefore recommended to present the facts to the attorney general, before the signature of the decree.

In admiralty.

J. J. Allen, Asst. Dist. Atty., for the United States.

Sherwood & Howland, for claimants.

BENEDICT, District Judge. The charge against this steamer is, that segars, subject to duty, were imported in her, and landed from her in the night, and without a permit, in violation of the 50th section of the statute of March 2d, 1799, according to which a forfeiture of the vessel follows such acts. The proof of the charge consists of the evidence of hands employed on the steamship, who were arrested for smuggling certain segars, which were found in their possession and seized. Although the evidence is open to some suspicion, still I am bound to declare it sufficient to maintain the action. The commission of the offence is sworn to positively by the offenders. The segars said to have been landed from the steamer were actually found, and no evidence is produced to disprove the statements of these witnesses. The value of the segars landed is proved to have exceeded $400, and consequently I am bound to render the decree, which the law declares shall follow when such proof is made. In

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

performing this duty, I must say that, if I had any discretion in the premises, I should certainly abstain from any action in the proceeding. Provisions of law which render ships liable to forfeiture for smuggling, conducted by their means, though without the action or connivance of the owners or officers of the vessels, seem to be necessary. Such laws are undoubtedly severe, but they are accompanied with the power of remission which is conferred upon the secretary of the treasury, and, if judiciously administered, they tend to reduce the amount of smuggling.

The temptation to smuggle is great, and the temptation to wink at it is also great; but by laws which imperil the ships themselves, which are the vehicles ordinarily made use of to accomplish the crime, masters and owners are impelled to exert themselves in detecting the smugglers, and bringing them to justice. The object of the law is manifestly to insure the detection and punishment of actual offenders and their aids; but here it has been used to secure immunity for the offenders, and, by forfeiting the ship, to punish only the innocent. According to the evidence, neither the owners nor officers of this steamer knew anything about the criminal acts which their employees were perpetrating. The officers of the customs prove that the owners have been solicitous to prevent smuggling in the vessel. Their acts prove their solicitude to be real, and yet their steamer is forfeited, while the offenders go free. At least two of the men engaged and interested in the act of smuggling were arrested in New York City. They confessed their guilt to the persons arresting them, and were then promised immunity. The information thus acquired is not used to convict any person engaged in the adventure. The boatman who transported the segars in his boat does not appear to have been arrested, and, in fact, one of the offenders was at once taken into the employment and pay of the United States. But the steamer is seized, and sent here for prosecution, where the testimony of the smugglers is relied on to condemn her, and this without any pretence of any criminality or even neglect on the part of her owners or officers. The effect of such a prosecution is to say to seamen, stewards, firemen, and others on steamers, "If you smuggle, and are caught, you will not be prosecuted; the steamer only will be seized." I cannot believe that such a result should be permitted.

But the responsibility of instituting and suspending prosecutions does not rest upon the court. The simple duty of the judge is to pronounce the decision which the law and the evidence produced by the parties requires; and upon those who are charged with directing the legal proceedings of the government must rest the responsibility which attaches to this mode of administering the law. I recommend, however, to the district attorney, that before I am asked to sign a decree in accordance with this opinion, the facts attending the case be communicated to the attorney general for his information.

CLEOPATRA, The (UNITED STATES v.). See Case No. 2,886.

CLERK'S FEES, Case of. See Case No. 472.

CLERK'S FEES IN BANKRUPTCY CASES. See Append. Fed. Cas.

CLEVELAND, The (HUNT v.). See Case No. 6,885.

CLEVELAND (BHOLEN v.). See Case No. 1,381.

CLEVELAND (DRAKE v.). See Case No. 4,059.

Case No. 2,887.

CLEVELAND v. LA CROSSE & M. R. CO. et al.

[7 Am. Law Reg. 536; 4 Quart. Law J. 230.]
District Court, D. Wisconsin. 1859.

VALIDITY OF CONVEYANCES BY CORPORATION—RIGHTS OF CREDITORS.

1. A deed of land by the corporation to two of its directors is void as against creditors of the corporation.

2. A lease of a railroad and rolling stock, with the power in the lessee to run the road and to purchase additional rolling stock at his discretion, and to extend the road out of the proceeds of revenue, the lease being for an indefinite term of time, is void as against creditors of an insolvent company, for hindering or delaying them in the collection of their debts.

[In equity. Bill by Newcomb Cleveland against the La Crosse & Milwaukee Railroad Company, Selah Chamberlain, Moses Kneeland, and others, to subject certain real estate conveyed by the corporation to judgment and execution, and for a conveyance by the defendants Kneeland and Ludington to the purchaser on the executor's sale.]

MILLER, District Judge. The complainant recovered a judgment in this court for $112,271 against this company, on the 7th October, 1857. On the 22d of the same month he issued a writ of fi. fa. on the judgment; under which was levied the railroad of the company, and all the franchises, rights and privileges thereunto belonging and appertaining, including roads, roadways, rights of way, and real estate of every description, station houses, buildings, and the grounds and lots, cars, locomotive engines, etc. And also the Milwaukee and Watertown Division. And also several lots in the city of Milwaukee, describing them. The company, having the lots for sale, accepted a proposition of purchase from C. D. Nash, a person not connected with the company; and for the consideration of twenty-five thousand dollars, part in farm mortgage bonds and part in stock of the company, the lots were conveyed to him. This sale was brought about, and the consideration was furnished by Moses Kneeland, a member of the board of directors; who afterwards received the

title from Nash, and conveyed an undivided interest to James Ludington, another member of the board. There was a large amount of testimony respecting the value of the lots; some witnesses valuing them about the amount of the consideration of the conveyance, some less than that amount, and some very much higher. There was proof of large expenditures by Kneeland and Ludington in dredging the river, building docks, and in other permanent improvements. At the time of this sale the complainant was a creditor of the company, as a contractor for building a portion of the road. The bill prays a decree that the lots be subject to the judgment and execution, and to a sale in satisfaction of the judgment, and that Kneeland and Ludington shall convey them to the purchaser under the execution.

Directors of an incorporated company are trustees of the corporators; and have possession of the corporate property for the corporators, and the creditors of the company. All property of a corporation not sold in good faith, is liable to its creditors for the payment of its debts. 2 Story, Eq. Jur. § 1252; Curren v. State Bank of Arkansas, 15 How. [56 U. S.] 304; Mumma v. Potomac Co., 8 Pet. [33 U. S.] 281–286. It is well settled that trustees cannot purchase the trust estate. They are the vendors dealing for the interest of the corporation in making sale; the representatives of the company. Such persons cannot be permitted to purchase, where they have a duty to perform inconsistent with the character of purchasers. Deeds made between persons who are not standing in the relation of vendors and purchasers, whether directly or indirectly, are voidable, even upon a fair consideration paid. Michaud v. Girod, 4 How. [45 U. S.] 503; Hawley v. Cramer, 4 Cow. 717; Torrey v. Bank of Orleans, 9 Paige, 649; 7 Hill, 260; Grant, Corp. 159, and notes. And the use of a go-between is an evidence of fraud. Such deeds convey a title good against all persons but the cestui que trust, and as to him they are void; but he may confirm them by receipt of the purchase money, or by release, with full knowledge of the facts. The company made no objection to the sale after it became known that the purchase was made for Kneeland and Ludington; but by a resolution, the board confirmed those deeds, since this bill was filed. The question is, whether this plaintiff, as a creditor of the company, can by this bill and proceeding, obtain a decree affecting these deeds. If those deeds had not been made, it is clear that the lots would be subject to levy and sale as the property of the company, under the plaintiff's execution. And if the lots are now in equity the property of the company, they are subject to sale in satisfaction of the judgment, according to the law of the state. The company might have obtained a decree vacating those deeds, and then have turned out the lots, discharged of the apparent clouds upon the title, for sale under this execution. This the company should have done, after it became known that two of the directors were the purchasers.

A creditor of an insolvent corporation cannot sustain a suit at law against the directors thereof for negligence in the management of its affairs, whereby its property has been wasted, and its means of paying the plaintiff destroyed. Clark v. Lawrence [Case No. 2,827]. But a stockholder in a corporation has a remedy in chancery against the directors to prevent a misapplication of their capital or profits, which might lessen the value of the shares if the act intended to be done amount to a breach of trust or duty. Dodge v. Woolsy, 18 How. [59 U. S.] 331. Then why should not this judgment creditor sustain this bill against the company and directors of the company, to have applied to his debt property which was conveyed by the company to those directors by either voidable or fraudulent deeds, after the company has refused to discharge its duty as an honest debtor? It is a grave question whether these deeds should not, under the circumstances, be considered voluntary conveyances in fraud of creditors. It is said, in the opinion in the case of Curren v. State of Arkansas, 15 How. [56 U. S.] on page 307: "The plaintiff is a creditor of an insolvent banking corporation. The assets of such a corporation are a fund for the payment of its debts. If they have been distributed among stockholders, or gone into the hands of others than bona fide creditors or purchasers, leaving debts of the corporation unpaid, such holders take the property charged with the trust in favor of creditors, which a court of equity will enforce and compel the application of the property to the satisfaction of their debts." In that case the state of Arkansas, as a stockholder, by acts of the legislature, invested itself with assets of the corporation. See 2 Story, Eq. Jur. § 1252; Mumma v. Potomac Co., 8 Pet. [33 U. S.] 281; Wood v. Dummer [Case No. 17,944]; Wright v. Petrie, 1 Smedes & M. Ch. 319; Nevitt v. Bank of Port Gibson, 6 Smedes & M. 513; Hightower v. Thornton, 8 Ga. 493; Nathan v. Whitlock, 3 Edw. Ch. 215, 9 Paige, 152; Vose v. Grant, 15 Mass. 505; Spear v. Grant, 16 Mass. 9; Curson v. African Co., 1 Vern. 121. But if there should be any doubt of the right of the plaintiff to bring this bill, the law of the state entirely removes it. The statute provides, that the circuit courts of the state shall have jurisdiction over directors, managers, trustees, and other officers of corporations, to compel them to account for their official conduct in the management and disposition of the funds and property committed to their charge; to order and compel payment by them to the corporation whom they represent, and to its creditors, of all sums of money, and of the value of all property which they may have acquired to themselves; to set aside all aliena-

tions of property made by trustees or other officers of the corporation, contrary to the provisions of law, in cases where the persons receiving such alienations knew the purposes for which the same were made. And the jurisdiction thus conferred may be exercised as in ordinary cases on complaint or petition of a creditor of the corporation. The statute is sufficiently comprehensive to cover the case made by this bill. It is contended on behalf of the defendants, that that law cannot be enforced by this court; but in this I think the counsel are mistaken. The statute laws of the state do not confer jurisdiction on the federal courts, but those courts extend to their suitors the remedies provided by those laws of the states wherein they are located, according to their own rules of practice. Ex parte Biddle [Case No. 1,391].

It is contended on behalf of the defendants, that if the lots should be adjudged bound by plaintiff's judgment and execution; the consideration of the purchase, and their disbursements for taxes and improvements should be recognized as a paramount lien in equity. With the consideration paid this plaintiff has nothing to do. He is not such a cestui que trust as an heir, legatee or ward who has received a part of the consideration to be accounted for, as in the case of Michaud v. Girod, 4 How. [45 U. S.] 503. What they or the company did with the consideration is not a matter for inquiry. The consideration was of rather an unusual nature, to pass between a corporation and its directors. The company and these directors will have to settle the matter between themselves. If the consideration had been paid in cash, and proven to have been appropriated to the payment of legitimate debts of the company, it might possibly be considered a paramount lien; but I do not consider that these defendants have any such claim. It is the duty of the court to place these parties, as nearly as may be, in such position that, by doing justice to one, injustice may not be done the other. For this reason the court will order a reference to a master, to ascertain the annual rents and income of the property, with interest; and also to ascertain the amounts paid by these defendants for taxes, and for the extinguishment of liens and the actual cost of permanent improvements made by them, with interest. The master may take additional testimony to that on file, and he may examine these defendants on oath touching the matter submitted to him. Upon the confirmation of the report, a decree will be made, so that the proceeds of the sale of the lots may be equitably appropriated to these parties.

This is technically a bill in aid of an execution levied; but under the prayer for general relief, the court may decree the deeds to be void, and may appoint a receiver to make sale of the property. The lien of the judgment was sufficient for this purpose, without the service of an execution. 1 Paige, 305; 4 Johns. Ch. 677; Clarkson v. De Peyster, 3 Paige, 320; Chautauqua Co. Bank v. White, 2 Seld. [6 N. Y.] 236. The company and Chamberlain made a contract on the 20th Nov., 1856, for ballasting a portion of the road from Beaver Dam to Portage City, at forty cents per yard, the company to find the motive power. On the 20th January, 1857, they made another contract for the construction of the roadbed on the western division, extending from Portage City to La Crosse, about one hundred and ten miles of main line and side track, at $12,000 per mile; extra work specified to be paid in addition and ten per cent. to be retained from estimates; to be paid on the completion of each thirty-four miles. It was also agreed that at any time during the progress of the work, the company shall have the right to suspend the performance of the work, as it may deem expedient, and again to require it to be resumed, without being held liable for damages for such suspension; provided, that at least thirty days' notice of such suspension to be given, and a reasonable extension of time for the completion of the whole work, be allowed. And on the same day the parties made a further agreement, whereby the company extended the time for completing the work contracted for, and released Chamberlain of any claim of damages for not completing the work at the times specified. On the 30th of April, 1857, the company and Chamberlain entered into a contract for tunneling the dividing ridge, instead of a through cut, at prices largely exceeding the price specified in the original contract. On the 20th of September, 1857, the company and Chamberlain made two agreements in writing, under seal. In one, the parties agree that the contract for the construction of the western division, from Portage City to La Crosse, of January 20th, 1857, and the supplemental contract of April 30th, 1857, be so modified, that Chamberlain shall proceed to complete the construction of the road as far as the depot at New Lisbon, with reasonable dispatch, and by the first of December following. The time for completing the road from New Lisbon to La Crosse is extended indefinitely, and the road to be constructed between these last points as fast, and no faster, than the company shall be prepared and ready to pay in cash, on monthly estimates. The contract of November 20th, 1856, is also modified. And "in consideration of the extension of the time of constructing the road from New Lisbon to La Crosse; and the damages which Chamberlain will sustain by reason of such extension; and by loss on teams, materials, tools, machinery, and in other ways; and also in consideration of the mode of payment of the amount now due and the amount to become due to him for finishing the road to New Lisbon; and in consideration of the failures and delays of the company in making payment theretofore

due; and in the further consideration of the services, risks, and personal expenses of Chamberlain in the operation and management of the road, according to a contract and lease; the company agrees to pay him two hundred thousand dollars!" It is further agreed: "That before the 20th October following, a full and correct statement shall be made of the amount due to Chamberlain on the date of the agreement under the previous contract, which, together with the said sum of $200,000, shall be the balance due him on the 1st day of October, 1857, from the company. And on the first day of every month thereafter, Chamberlain shall charge the company with the amount that shall be due under or by virtue of the said contracts, or this contract, for constructing the road between Portage City and New Lisbon; and he shall credit the company with such sums as he shall receive from the net earnings of the road, by virtue of the contract of lease of this date. And on the first days of July and January in each year thereafter, a semi-annual statement of the accounts between the parties shall be made out, in which interest shall be added to the day of making such statement, at the rate of twelve per cent. per annum. Whatever sums of money shall hereafter become due Chamberlain for work in the construction of the road between New Lisbon and La Crosse, shall be paid by the company from means derived from other sources than the income of the railroad." By the other contract of the same date, the company "in consideration of the undertakings and agreements of Chamberlain, sells and conveys to him all its personal property of every name, kind and description, in the state of Wisconsin (except all such as is used on, and is appurtenant to the operation of the Watertown Division of the La Crosse and Milwaukee Railroad), of which an inventory shall be taken and attached so soon as the same can be conveniently done." "And the company, in consideration of the said undertakings and agreements of Chamberlain, leases and lets to him from and after the thirtieth day of September, 1857, for an indefinite term of time, to be determined in the manner specified, its entire railroad and railroad route from the city of Milwaukee, by way of Horicon and Portage City, to the city of La Crosse, together with its right of way, depot grounds, and all buildings, tenements and fixtures of whatever kind or description, connected therewith, or appurtenant thereto, together with all estate, rights, privileges, appurtenances and franchises connected therewith, or belonging or incident thereto, subject only to such prior or superior liens, as may or do exist thereon. Chamberlain shall operate so much of the road as is ready for operation, and from time to time such portions as shall be made ready for operation, in such manner as will produce the largest amount of net receipts. He shall keep the road and rolling stock in good thorough repair; and he shall receive and appropriate all the receipts or income derived from the operations of the road. If it shall be found for the interest of the company, he may purchase additional rolling stock, and appropriate the receipts of the road for its payment." It is then agreed that monthly accounts shall be rendered by Chamberlain, and that the officers of the company shall at any time have the right to examine his accounts. Then follows a statement of coupons of prior mortgages on the road, that are to be the first paid out of the net receipts of the road, and of the amount to be appropriated to the sinking fund; and the residue of the net receipts shall be applied by Chamberlain in payment of the amount due, or hereafter to become due to him, by virtue of the contracts, as specified in the agreement of this date, and also of this said agreement. And Chamberlain agrees that whenever he shall have received from the earnings of the road such sum as by the terms and conditions of the several contracts, (describing them,) he is, or shall be entitled to receive; or whenever the company shall pay him any balance he shall be entitled to, that he will surrender up to the company the quiet and peaceable possession of the whole premises in good repair, and all rolling stock and other personal property put on said road by him, and all personal property that shall not be worn out; and then the contract shall cease and determine. The bill prays that these contracts may be annulled as fraudulent; and that Chamberlain may be enjoined from further controlling or running the road, and for general relief.

The answer of the company alleges that the contracts or agreements were made with the sole view and design, on its part of vesting in Chamberlain the right of possession, enjoyment and use of all and singular the property, rights, privileges, franchises and emoluments therein mentioned, upon the terms therein expressed, for the purpose of securing the payment to Chamberlain of the several debts due and owing him by the company, and as a security and as a means of payment of a large sum of indebtedness then due and owing him. And it denies that the contract was made with a fraudulent intent. The answer of Chamberlain is very nearly a duplicate of that of the company, in this respect.

On the 2d day of October, 1857, and during the trial of the plaintiff's suit at law against this company, the company confessed a judgment to Chamberlain, in this court, for six hundred and twenty-nine thousand and eighty-nine dollars. It is alleged in the bill, that the company did not then owe him exceeding fifty thousand dollars; and that the judgment was confessed to hinder or delay creditors, and is fraudulent. The bill prays that the judgment be vacated.

Mr. Kilbourn, the president of the com-

pany, testified that he was present, and acted in the board when the judgment was confessed, and when the lease was given. Chamberlain was anxious for security for his debts; he thought he was incurring too large responsibilities on uncertainties. The company gave him assurances of security, as the great point with the company was the completion of the road. As September and October approached, the company was getting deeper into embarrassments. An association of bondholders was threatening the company, and he saw but one way to save the road and secure its ultimate completion, which was to make the lease to Chamberlain. The board came to the same conclusion; and the lease was made. The only remaining hope for the continuance of the work on the road, seemed to be, to give Chamberlain such a lien on it as would assure the payment of what had already become due for the work then done, as well as for that to be done under the contract. This was the great and paramount danger which threatened to overwhelm the company; but there were other and nearer dangers threatening the company more immediately, against which it was equally necessary to guard. One or two attachments had been issued against the company, for a few hundred dollars, and it seemed quite evident that by such means the company's resources would soon be so exhausted as to render it entirely powerless for further progress. The floating debt of the company then amounted to $300,000 in small sums, which, if sued under the panic, would have effectually arrested the progress of the work, and prevented the completion of the road. At the time of giving the lease, the amount of indebtedness to Chamberlain was not known. It was the intention of the company to give him a perfect lien on the road and its earnings; to secure all indebtedness accrued and accruing under his contracts, until the whole amount should be paid; and such was one of the conditions of the lease, without reference to the specific amount. The amount of indebtedness at that time, or any other time, was not a necessary element of the lease. The reason why the judgment was ordered by the board, he understood to be, in consequence of a doubt entertained by the counsel of Chamberlain, whether more legal difficulties might not be raised, as to his lease lien covering the iron not laid down on the road; and to avoid all questions in that respect, and in part to render the transaction so regarded a lien, as perfect as possible; and to accomplish the ends proposed to be secured by it, it was deemed advisable by the board, under advice of counsel, to give the force of a judgment in support of the previous lien, for the amounts then reported to be due by the chief engineer, whose statement was considered conclusive by the company. Cleveland's suit was then pending. It was rather a hurrying time with the company. Other matters were pressing. Chamberlain first suggested the judgment. It had particular reference to the iron which Vose, Livingston & Co. were endeavoring to reclaim. He wanted, first, to secure the completion of the road; second, to secure the Wisconsin stockholders. In order to secure these objects, he deemed it necessary to give the lease and judgment before Cleveland got his judgment; and he explained his views to the board. The iron was to be devoted to the use of the road, and Chamberlain was to have the use of the road to secure him. The agreement was understood to be, that the iron was to be laid on the road. So far as anything was said by Chamberlain, it was evident that his motive was to secure payment of the debts due and accruing to him from the company. The judgment was for a specific amount then due, as reported by the chief engineer. The leading object of the directors was the completion of the road. The judgment was not in derogation of the lease, but to carry out its objects. There was no understanding, when Chamberlain proposed that the judgment should be given, that it should be used in any way inconsistent with the completion of the road. Probably Chamberlain's object in proposing the judgment was not only to protect himself against Vose, Livingston & Co., but also against Cleveland's claim. In our conversation with Chamberlain the principal matter talked of was his security. It was understood that he should go on with the work. The allowance of $200,000 to Chamberlain was not included in the judgment.

A great amount of testimony was submitted on this subject, and on the amount of indebtedness of the company to Chamberlain, which is not necessary to be here stated. The company is authorized by its charter "to make such covenants, contracts and agreements, as the execution and management of the work, and the convenience and interests of the company may require." And it is "empowered to borrow money at any rate of interest, and to make all necessary writings, notes, bonds, mortgages, or other papers and securities, in amount and kind as may be deemed expedient, or in discharge of any liabilities that it may incur in the construction, repair, equipment or running of said road." The lease to Chamberlain was intended as a security, in the kind or nature deemed expedient for liabilities incurred, and to be incurred, in the construction, repair, equipment and running of the road. The company, by virtue of the general powers vested in it as a corporation, has all the powers contained in this provision of the charter. It does not materially enlarge the general power of the grant to contract and be contracted with. It was not intended to embrace a contract for a transfer, or lease of all the franchises of the company for an unlimited term. The powers and privileges

granted to the company are in many respects unusual and extraordinary; but unless so expressed, public policy and the rights of creditors should exclude any such construction of the charter as to sanction this lease.

The law of the state empowers railroad companies to borrow money and to execute trust deeds, or mortgages, or both, on railroads constructed, or in process of construction, for the sums borrowed or owing, upon such terms and in such manner as the company shall deem expedient; and the company may make such provisions in the trust deed or mortgage for pledging or transferring their railroad track, right of way, depot grounds, rights, privileges, immunities, machine house, rolling stock, furniture, tools, implements, appendages, and appurtenances belonging to or used in connection with such railroad, in any manner whatever, as security for any bonds, debts or sums of money that may be secured by such trust deed or mortgage. And in case of the sale on such mortgages or trust deeds, the purchasers shall acquire and shall exercise and enjoy all and the same rights, privileges, grants, franchises, immunities and advantages in the mortgage, or trust deed enumerated and conveyed, as fully as the corporation, shareholders, officers and agents of the company might or could have done. And the purchasers may proceed to organize anew and elect directors, distribute and dispose of stock, take the same or another name, and may conduct their business generally under and in the manner provided in the charter, with such variations in manner and form of organization as their altered circumstances and better organization may seem to require; but not greater or enlarged powers shall be exercised by the new organization. These laws establish the policy of the state in regard to the power of railroad companies to mortgage their roads; and they relieve the court of all embarrassment on that subject. By the laws of this state, railroad companies and individuals are placed on an equality in respect to their mortgages.

The two agreements of the 26th September, 1857, must be considered as one. They are so intimately connected, that they might have been embraced in one agreement.

It is contended that the defeasance gives the agreement the character of a mortgage; but without it the company would have the equitable right to regain possession by discharging its liabilities to Chamberlain. Nugent v. Riley, 1 Metc. [Mass.] 117; Erskine v. Townsend, 2 Mass. 493; Hughes v. Edwards, 9 Wheat. [22 U. S.] 489; 1 White & T. Lead. Cas. 510; Hil. Mortg. 22; Conway v. Alexander, 7 Cranch [11 U. S.] 218; Morris v. Nixon, 1 How. [42 U. S.] 118; Russell v. Southerd, 12 How. [53 U. S.] 139; Sprigg v. Bank, 14 Pet. [39 U. S.] 201; Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 386; Redf. R. R. 584, 585, and cases cited.

A court of equity will look to the substantial object of the conveyance, and will consider an absolute deed a mortgage whenever it is shown to have been intended merely as a security for the payment of a debt; and the grantee may maintain a bill to foreclose the equity of the grantor. But Chamberlain could not proceed in equity to foreclose on this agreement, if he had not been placed in possession. I apprehend his remedy would then have been at law upon the contract. It was not given nor received as a security for money borrowed; but as a security for a debt accruing and to accrue, with a transfer of possession of the premises. If possession had not been delivered to Chamberlain, I know of no means he had for enforcing a foreclosure, or acquiring possession. But being placed in possession he may be proceeded against by a bill at the suit of the company to redeem, and for an account. Technically this agreement is not a mortgage. It is an assignment to a preferred creditor, with a lease for the mutual interest of the parties. If this were a mere assignment of a part of the property of the company, it might, if bona fide, be adjudged as a mortgage of the property transferred, so that the residuary interest of the grantor may be reached by execution, or by a bill in equity, as in Leitch v. Hollister, 4 Comst. [N. Y.] 211. A debtor has a right to prefer one creditor to another in payment; and his private motives for giving the preference cannot affect the exercise of the right, if the preferred creditor has done nothing improper to procure it; but any unlawful consideration moving from the preferred creditor, to induce the preference, will avoid the deed which gives it. Marbery v. Brooks, 7 Wheat. [20 U. S.] 556. And it is no object to such an assignment that it defeats other creditors of their legal remedies. Brooks v. Marbery, 11 Wheat. [24 U. S.] 223. A debtor may lawfully apply his property to the payment of the debts of such creditors as he may choose to prefer; and he may select the time for doing it, so as to make it effectual. Such preference must necessarily operate to the prejudice of creditors not provided for, and cannot furnish any evidence of fraudulent intention. And such assignments may be made direct to the creditor. Tompkins v. Hughes, 10 Pet. [35 U. S.] 106. It is not a legal objection to this agreement as an assignment, that it was made during the trial of the plaintiff's cause against the company, and before judgment was rendered. So long as a person or corporation is the owner of property unincumbered, an assignment may be made for the payment of debts, giving preferences where there is no statute law prohibiting it, as in this state. But where fraud is alleged, the time, the occasion, and the inducement for making the assignment are proper subjects for consideration.

Under the pecuniary embarrassments of

the company, the assignment was made to Chamberlain, as a security for a debt partly accrued and partly to accrue, in building the road to New Lisbon. The whole road from Milwaukee to La Crosse is embraced in the lease, while a great portion of it was not then completed. There is no doubt, from the testimony of the witness, and from the face of the agreement, that the intent of the parties was to prevent the creditors of the company from further interfering with, or interrupting its operations. Chamberlain obtained a preference over other creditors, for a debt then existing; and he acquired possession of the whole property of the company, with which to carry on the business of the company. And while increasing the amount of his debt against the company, he enjoys the exclusive possession and control of its property for an indefinite period of time; subject to the duty of rendering an account semi-annually, showing his balance against the company, on which he draws interest at the rate of twelve per cent. per annum. In operating the road and in supplying rolling stock; at his discretion, he is substituted for the directory of the company. For an indefinite period of time he is the company for all practical purposes.

Assignments of insolvent debtors, giving unlimited discretion to the assignee, cannot be sustained against creditors. Assignments must be absolute and specific in their directions and not coupled with trusts not authorized by law. 7 Paige, 568; Boardman v. Halliday, 10 Paige, 223. Nor can such an assignment be used as a device to continue the business of the assignor uninterrupted by his creditors. Owen v. Body, 5 Adol. & E. 28; American Exch. Bank v. Inloes, 7 Md. 380. And a debtor cannot make a reservation at the expense of his creditors, of any part of his income or property, for his own benefit; nor can he stipulate for any advantage to himself. Green v. Trieber, 3 Md. 11. Assignment must be made in good faith, for the purpose of paying debts, and without any intent to lock up the property from other creditors for the use of the debtor. A conveyance of the owner in trust for himself, is in effect a conveyance to himself; and the grantor in such deed can have but one motive, and that must be to hinder or delay the claims of creditors. The law does not tolerate any hinderance in assignments for the benefit of creditors, beyond what may be necessary for the purpose of the assignment. And any stipulation in a deed, which materially hinders or delays the rights of creditors, renders it void. A deed of assignment authorizing the assignee to sell the assigned property on credit, is void as to creditors, on account of the delay. Barney v. Griffin, 2 Comst. [N. Y.] 365. A transfer of property, which creates a trust, whether secret or avowed, in favor of the grantor, renders the transaction fraudulent and void in legal contemplation, even though there may be mingled with it provisions in favor of preferred creditors. Shaffer v. Watkins, 7 Watts & S. 219. In the case under consideration the time for executing the assignment is unlimited; to be terminated only by the payment of the assignee's accrued and accruing debt by the insolvent company, or out of the avails and proceeds of the property and business of the company. The whole profits, beneficial interest, enjoyment and control of the road and property of the company passes to this preferred creditor, with powers to manage and run the road, and to purchase additional stock at his discretion. The direct tendency as well as the avowed paramount object, was to carry on the business of the company, and to pay the assignee and preferred creditor out of the profits. The cases of Arthur v. Commercial & Railroad Bank of Vicksburg, 9 Smedes & M. 394, and Bradley v. Goodrich, 7 How. [48 U. S.] 276, are irresistible authorities for determining this case against the defendant Chamberlain. The commercial and Railroad Bank of Vicksburg assigned all its property to trustees, reciting that "the embarrassed situation of the bank and the present inability of its debtors to meet the liabilities and by consequence, that the bank was unable to pay its debts promptly, rendered it necessary that a general assignment should be made for the benefit of its creditors and the completion of the railroad;" it therefore assigned all its property to trustees, with authority to sell the effects assigned, to collect all debts due to the institution and to complete the railroad, for which they were authorized to borrow a sum not exceeding $250,000; and out of the proceeds collected, to pay the principal and interest of the loan. After that dividends were to be made pro rata among the creditors; the trustees to receive eight thousand dollars each per annum for their services. The supreme court of the United States decided "that the deed was fraudulent and void as against creditors of the bank; that the deed showed on its face an intention of the bank to postpone its creditors, use the effects of the bank for the completion of the railroad, pay the trustees enormous salaries, and make no dividends among the creditors until the object was accomplished." The deed in that case made some show of regard for the rights of creditors, but the deed in this case only contemplates a benefit to the parties, the insolvent assignor, and the preferred assignee. How much salary was allowed Chamberlain in the $200,000 is not specified, but from the recklessness exhibited on the part of the directors, it may be presumed to be enormous. The whole recital of items comprising that amount strikes me as extraordinary and enormous after Chamberlain's original contract price for building the road had been extravagantly enhanced, and while he had

in his hands funds of the company amounting to nearly $150,000 which the directors did not require to be accounted for or applied. And it is questionable whether, under the circumstances, Chamberlain was entitled to any damages for the temporary suspension of the work west of New Berlin. The principles here stated apply to assignments direct to a preferred creditor, as well as to those in trust for creditors. McClurg v. Lecky, 3 Pen. & W. 83; Passmore v. Eldridge, 12 Serg. & R. 198. The assignment and lease to Chamberlain will be decreed to be void as against this complainant.

The defendant Chamberlain in his answer denies that the judgment confessed by the company in his favor was based on any fictitious consideration, or was given and accepted with any intent or design to hinder or delay or defraud the creditors of the company; but on the contrary, he says that it was given for effectual indebtedness from the company to him. And he claims the amount of work done for the company under his contracts exceeds the amount of the judgment. In the testimony of the witnesses there is very great discrepancy as to the amount of work done, and also as to the prices that should be paid. One thing, however, is beyond dispute; that the amount included in the judgment far exceeds the amount he would be entitled to on his original contract. The company might increase his compensation within reasonable bounds without incurring the imputation of fraud. In pursuance of the agreement between Chamberlain and the company in the month of December, 1857, for re-measuring the work, for the purpose of ascertaining the amount due him on the 1st of October, 1857, a survey and estimate were made, which showed an amount greater than that of the judgment. If that survey and estimate had been made on notice to the complainant, more reliance could be placed on the evidence upon that subject. Neither that survey nor the one for the complainant can be accurate, on account of the length of time the work had been done. Chamberlain may not be entitled to anything near the amount of the judgment. But liberality on the part of the company should not be considered fraudulent, unless it be so excessive as to bring the mind to that conclusion, after an examination into all the circumstances. This is not a suit of Chamberlain against the company on the contracts, requiring a legal enquiry into the amount due him; but the only question for our consideration is whether the judgment is fraudulent as against creditors. The judgment was confessed a few days after the assignment, while the company was laboring under its pecuniary embarrassments. The testimony of Mr. Kilbourn is, "that the judgment was suggested by Chamberlain and his counsel. That it had particular reference to the iron Vose, Livingston & Co. were endeavoring to reclaim. The completion of the road first, and securing Chamberlain, were the objects of the company, and they deem it necessary to give the lease and the judgment before Cleveland should get a judgment. The judgment was not in derogation of the lease, but to carry out the object of the lease. Probably Chamberlain's object in proposing the judgment was not only to protect himself against Vose, Livingston & Co., but also against Cleveland's claim."

The confession of a judgment to a bona fide creditor, even though it have the effect of giving him a preference over other creditors, is not a fraudulent disposition of an insolvent estate. While there is no statute prohibiting it, an insolvent debtor, has a right to give preference to his creditors by confessing judgments. But if such judgments are given and received for the purpose of hindering or delaying creditors, they are voidable as against those creditors if even for a bona fide debt, and if not used for that purpose. When a judgment is given and received for a fraudulent purpose, the giving judgment is such an act done in pursuance of the fraudulent purpose, as to render it voidable by any person who is in a position as a creditor, to question it. And such a judgment originally given for the purpose of defrauding creditors, cannot even be used as against such creditors to collect the amount due to the party to whom it was given. Bunn v. Ahl, 5 Casey [29 Pa. St.] 387. If Chamberlain had merely demanded and received the judgment, even to the known delay of Cleveland and the other pressing creditors of the company, it would not be legally invalid as against them. But would the judgment have been demanded and given, after the assignment and lease, but for the purpose of forestalling Vose, Livingston & Co., in reclaiming the iron, which the interests of Chamberlain and the company required should be laid on the track of the road; or to further the paramount object of the assignment and lease? The suits of Vose, Livingston & Co., respecting the iron, and the two contracts of settlement between them and Chamberlain and the company, show that they were pressing a claim for the iron, which was compromised by those contracts. So far it appears that Vose, Livingston & Co. had a claim, to effect which the judgment was demanded. But be this as it may, it appears satisfactorily that the judgment was given and received as a part of the arrangements to secure the future operations of the company and Chamberlain, in the prosecution of the work towards completion, while the creditors of the company should be hindered or delayed for an indefinite time; and it must fall under the same condemnation as the assignment and lease.

The assignment and lease to D. C. Freeman, of the Milwaukee and Watertown Division, having expired by its own limitation,

it is not necessary to make any decree against him, except that he pay his share of the costs.

The plaintiff is left now to pursue his legal remedies against the company on his execution.

Case No. 2,888.

CLEVELAND v. TOWLE.

[3 Fish. Pat. Cas. 525.][1]

Circuit Court, D. Maryland. April, 1869.

PATENTS—PRIOR USE—INFRINGEMENT.

1. A manufacture and sale, by persons other than the patentee, of articles made upon the same principle as the patented thing, for more than two years prior to the application of the patentee, avoids the patent.

2. The defendant will infringe the complainant's patent if he use the invention of complainant as one of the elements of a combination which he has himself patented.

This was an action on the case [against William P. Towle], tried by Judge Giles and a jury, to recover damages for the infringement of letters patent [No. 69,629] for "improvement in suspenders," granted to plaintiff [Charles H. Cleveland] October 8, 1867.

The claim of the patent was as follows:

"The shoulder brace meets at each end in a single attachment that buttons to the sides of the waistband.

"The suspender or shoulder brace, composed of two single straps, CC, each passing from its attaching strap at the one side over the shoulder to the attaching strap on the other side of the body, substantially as herein described."

Joseph L. Brent and Robert J. Brent, for plaintiff.

William H. Norris, for defendant.

GILES, District Judge, (charging the jury). The patent of complainant is for a suspender composed of two straps, either elastic or non-elastic, crossing each other on the back and passing over and under the shoulder, and being attached to the pantaloons at two points, one on either side, just above the hip, as described in said patent. And if the jury shall find from the evidence that in 1858, and more than two years before the complainant applied for his patent, suspenders made upon this principle were manufactured and sold by the American Suspender Company, in Connecticut, or sold by Mr. Church, their agent in the city of New York, then the said complainant was not the first and original inventor of the said suspender, and the jury will find the first issue in the negative.

2. If the jury shall find that the patent of defendant, although for a combination which contains as one of its elements the same principle or substance which is embodied in complainant's patent, the same is an infringement on complainant's patent, and the jury will find the second issue in the affirmative.

3. If the jury shall find that the defendant manufactured or vended suspenders which, in their manufacture, contained the principle which is described in the first instruction, as patented to complainant, they will find the third issue in the affirmative, if the jury shall find the first issue in the affirmative.

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

CLEVELAND & P. R. CO. (EVANS v.). See Case No. 4,557.

CLEVELAND CO-OPERATIVE STOVE CO. (HENDERSON v.). See Case No. 6,351.

CLEVELAND, C. & C. R. CO. (TOPPAN v.). See Case No. 14,099.

CLEVELAND INS. CO. (GLOBE INS. CO. v.). See Case No. 5,486.

Case No. 2,889.

CLEVELAND INS. CO. v. REED et al.

[1 Biss. 180;[1] 6 Am. Law Reg. 406.]

District Court, D. Wisconsin. Sept. Term, 1857.

ATTORNEY CANNOT ACQUIRE TITLE AS AGAINST PRINCIPAL—FORECLOSURE SUIT—HOW BARRED—SUBSEQUENT MORTGAGEE NOT MADE PARTY—COMMON LAW LIMITATIONS REGARDED IN EQUITY.

1. Where an agent, by virtue of a power of attorney, conveys the property of his principal and takes a conveyance to himself, and then mortgages it, such use of the power of attorney would not give him the title as against his principal.

2. Though the principal might have repudiated the acts of his attorney, a purchaser under decrees of foreclosure of prior mortgages, being a stranger to the transaction, cannot object to the validity of the mortgage; but he can inquire into its true consideration.

3. Usury must be specially pleaded or specifically set forth in the record, and supported by evidence, or the court will not inquire into it.

4. The statutory limitation of ten years should be applied to a bill to foreclose filed seventeen years after the mortgage debt was due, the mortgagee having notice that the land had been sold under prior mortgages, and for taxes, and that the purchaser was in possession, claiming title. This is true, although the statute was passed subsequent to the maturity of the mortgage debt.

5. Without such a statute equity would not disturb the possession or title of such a purchaser, he having been in possession fifteen years to the knowledge of the mortgagee. There must be conscience, good faith, and reasonable diligence, to call into action the powers of a court of equity.

6. Nor will the fact that the mortgagee was not made a party to the bills foreclosing the prior mortgages, under the circumstances of this case, enable the bill to be sustained.

7. Cases under the statute of limitations cited and commented upon.

8. Statutes for foreclosure and redemption are rules of property, and also laws of limitation;

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

and in the absence of laws limiting proceedings in equity, the limitations as to similar demands at common law are considered as proper rules to be observed in courts of chancery.

[In equity. Bill by the Cleveland Insurance Company against George Reed, Juliet S. Reed, James H. Rogers, and the Milwaukee & Mississippi Railroad Company.]

Butler & Buttrick, for complainant.

James S. Brown and Waldo & Ody, for defendants.

MILLER, District Judge. This is a bill filed in February, 1856, against George Reed and wife, James H. Rogers, and the Milwaukee & Mississippi Railroad Company, to foreclose a mortgage for $22,000 executed by George Reed and wife to complainant, dated February 10th, 1837, and recorded in April of the same year, covering certain lots in Finch's addition to Milwaukee, and thirty-six acres of land in the county of Milwaukee.

Reed answers, admitting the execution of the mortgage, and that the same is due and unpaid, and pleads a discharge under the bankrupt law of the United States in December, 1842.

Rogers, in his answer, says that he is the owner in fee simple of the property in Finch's addition, and of which he had been in the full and actual possession as owner for nineteen years; that he has resided in Milwaukee constantly, where he could at all times be found; that he has been in the actual occupation of the land for more than ten years since the right of action on the mortgage accrued, and before the commencement of this suit, and that the right of action is barred by the statute of limitations of this state.

He further says that the property in Finch's addition was and still is the property of Curtis Reed, and that neither George Reed nor the complainant ever had any title to or equitable lien or claim upon it; that George Reed never had any business transactions with complainant, except through Edmund Clark, the president and owner of the controlling interest of the capital stock; that George Reed on the 10th of February, 1837, as the attorney in fact of Curtis Reed, and by virtue of a power of attorney to sell and lease, dated June 23, 1836, conveyed the property by warranty deed to Clark, who at the same time re-conveyed by quit-claim to George Reed for the nominal consideration of $30,000, and he then executed these notes and mortgage to complainant; the whole being one transaction, in the absence of and without the knowledge or consent of Curtis Reed, and with intent to defraud him.

Rogers also sets forth that Curtis Reed, prior to the execution of above instruments, gave two mortgages upon these premises to one Nathaniel Finch, which were recorded prior to the mortgage to complainant, and assigned to him, Rogers, before maturity, and afterwards foreclosed in the territorial district court, and the land was sold to him, and the sale duly confirmed. He also claims title by deed from the assignee of George Reed, and under tax deeds, and insists that the cause of action is stale, and should not be enforced in equity; that it is nowhere stated in the bill that the money claimed to have been loaned was a part of the capital stock of the company, and that the charter of the company gave it no power to deal in real estate, or to loan money other than its corporate funds, for which reason the mortgage is void; that the company has long since ceased to exist; and that the transaction is usurious, and the conveyance and mortgage were a device to avoid the usury laws.

Everything connected with the transaction excludes the idea that the mortgage is upon any land in that section, but Curtis Reed's. The purchase by Rogers of George Reed's interest in the section of land, at his assignee's sale, does not affect this mortgage. George Reed's bankruptcy and the proceedings and sale under it have nothing whatever to do with this case, so far as Rogers is concerned. The return of this debt by George Reed, in the schedule annexed to his petition in bankruptcy, cannot in any way affect the interests or rights of Curtis Reed or Rogers in regard to the mortgage or the mortgaged premises.

This mortgage was a security for money loaned, and the insurance company had authority by its charter to take security for money loaned, as part of its capital.

Clark testifies that the amount paid Reed was entered on the books of the company, as paid by it; that he made the arrangements with Reed after consulting some of the directors; that eleven thousand dollars, part in cash and part in paper was the true sum advanced [and was the true consideration],[2] the other eleven thousand dollars being simply a guaranty, that the mortgaged premises would be worth the amount, when the notes should become payable; that a private note of $3,000 was given by Reed as a penalty to ensure the punctual payment of the notes. The notes were given in Ohio, and were made payable in New York [and the mortgage is on land in Wisconsin].[2] The pleadings do not authorize the court to inquire into the subject of usury; they are altogether too indefinite and uncertain. Usury must be specially pleaded, and the evidence must sustain the plea. The whole transaction appears to have been a desperate device of George Reed, to make a raise of money, and an unwarrantable scheme of Clark to embarrass a customer. [Rogers pleads in his answer, that the transaction was a violation of the usury laws

[2] [From 6 Am. Law. Reg. 406.]

of either the states of Ohio, New York or Wisconsin, and is void. Upon such pleading I shall not examine the subject; nor shall I stop to inquire whether Rogers could plead usury without tendering the amount actually loaned with interest.][2] It is certain that George Reed could not use the power of attorney so as to acquire title adverse to or exclusive of his principal, Curtis Reed. The mortgage is in equity, the mortgage of Curtis Reed, though the notes are at law George Reed's personal obligations.

A power to sell lands, usually includes a power to mortgage, but a mortgage under such a power for a greater sum than is actually loaned may be repudiated by the principal.

Curtis Reed might have required the cancellation of the conveyances and mortgage, at all events upon payment of the sum loaned. But Rogers is a stranger to the transaction, and he cannot make the objection to the validity of the mortgage. He can only cause inquiry to be made of its true consideration, if it is a lien on his land. Jackson ex dem. McCarty v. Van Dalfsen, 5 Johns. 43; Childs v. Digby, 24 Pa. St. [12 Harris] 23.

Rogers became the assignee of the two mortgages of Curtis Reed to the Finches, dated in April, 1836. In pursuance of decrees of the district court for Milwaukee county, at the suit of Rogers against Curtis Reed, Edmund Clark, and others, the mortgaged premises were sold in satisfaction of those mortgages to Rogers, and a deed was made to him of the premises, by the master, according to the order of confirmation of the sales. Those mortgages being prior liens, Rogers became the purchaser of the legal title. The mortgage in suit is dated in February, 1837, and is of Curtis Reed's equity of redemption merely. An ejectment would not lie, at the suit of this mortgagee against Rogers, the owner of the legal title. The only remedy of the complainant is by bill in equity for the sale of the mortgaged premises, which is this bill, or for redemption, and the subject matter is of the peculiar and exclusive jurisdiction of a court of equity.

At the date of this mortgage there was no statute limiting suits in equity. An act went into force in the month of January, 1839, that "bills for relief in case of the existence of a trust not cognizable in the courts of common law, and in all other cases not herein provided for, shall be filed, within ten years after the cause thereof shall accrue, and not after." This limitation was continued in the state statutes of 1849, and is now in full force. This mortgage is dated February 10, 1837. The first note is payable in twelve months, the second in eighteen months, and the third in two years. When the act of limitations went into force, the cause of action had accrued. This court will administer statutes of limitation of the state as rules of property. I shall proceed to inquire whether the statute is applicable to this case.

This case is one of the "cases not provided for" in the statute. If the word "hereafter" had been inserted in the statute (as in similar laws of some of the states) so that it would read "hereafter accrue," the question would be relieved of doubt. The statute seems to direct the attention to such causes of action as shall accrue, and not to those that have then accrued. The supreme court of this state has applied this statute to causes of action accrued at the time of its enactment. Fullerton v. Spring, 3 Wis. 667; Parker v. Kane, 4 Wis. 1. This statute was copied from the statute of the state of New York. In that state a contrary application of the statute was made in Williamson v. Field, 2 Sandf. Ch. 533, and cases cited. In those cases the general rule is announced, that no statute is to have a retrospect beyond the time of its commencement, and to affect vested rights unless expressly so declared. But in the subsequent case of Spoor v. Wells, 3 Barb. Ch. 199, it is decided that an equitable claim, upon which a bill in chancery could have been filed previous to the time when the statute first took effect, and when the complainant was under no disability, is barred by the provisions of the statute at the expiration of ten years after the statute went into operation. The statute of the state of Massachusetts, in its general provisions as to claims that shall accrue, is the same as the statutes of New York and of Wisconsin, and a similar application is there made. Smith v. Morrison, 22 Pick. 430; [Sedg. St. Lim. 691]. The legislature of the state of Mississippi passed an act, in the month of February, 1844, that judgments rendered before the passage of the act in any other state of the Union, should be barred, unless suit was brought thereon within two years after the passage of the act. In the case of Bank of Alabama v. Dalton, 9 How. [50 U. S.] 522, it is decided by the supreme court of the United States that the act could be pleaded in bar to an action on a judgment rendered in the state of Alabama one year previous to its passage, and that the constitution of the United States did not prohibit that legislation as a law impairing the obligation of contracts. The time and manner of the operation of statutes of limitations generally depend on the sound discretion of the legislature. Cases, though, may occur where the provisions of a law may be so unreasonable, as to amount to a denial of right, and call for the interposition of the court.

A statute of limitations affects the remedy, not the contract, where a reasonable time is given for bringing suit on existing demands. Jackson v. Lamphire, 3 Pet. [28

[2] [From 6 Am. Law Reg. 406.]

U. S.] 280; Sturges v. Crowninshield, 4 Wheat. [17 U. S.] 122; Bronson v. Kinzie, 1 How. [42 U. S.] 311; McCracken v. Hayward, 2 How. [43 U. S.] 608; Lewis v. Lewis, 7 How. [48 U. S.] 776; McElmoyle v. Cohen, 13 Pet. [38 U. S.] 312; Call v. Hagger, 8 Mass. 423; Holyoke v. Haskins, 5 Pick. 20; Smith v. Morrison, 22 Pick. 430; Morse v. Goold, 1 Kern. [11 N. Y.] 281. In Ross v. Duval, 13 Pet. [38 U. S.] 45, the court remarks: "It is a sound principle that where a statute of limitations prescribes the time within which suits shall be brought or an act done, and a part of the time has elapsed, effect may be given to the act, and the time yet to run being a reasonable part of the whole time, will be considered the limitation in the mind of the legislature in such cases." From a careful examination of the case of Murray v. Gibson, 15 How. [56 U. S.] 421, it will appear that the decision does not conflict with the previous decisions of the court. The act of the state of Mississippi, passed in March, 1846, as an amendment to the limitation law of the state, provided that, "no record of any judgment recovered in any court of record without the limits of the state against any person who was at the time of the commencement of the suit, on which the judgment is founded, or at the time of the rendition of such judgment, a citizen of this state, shall be received as evidence to charge such citizen, after the expiration of three years from the time of the rendition of such judgment without the limits of this state." The declaration was in debt on a judgment rendered in the state of Louisiana, in the month of November, 1844. By the literal terms of the act, the rights of a judgment creditor seem to be made dependent, not on his diligence in the institution or prosecution of his suit, but upon the trial of the action on his judgment, which is an event over which he has no control. The peculiar language of the act, if taken in its literal acceptation, might suggest a serious doubt as to the compatibility of its provision with the principles of common right, or with the federal constitution. For these reasons the courts construed the law to relate to the time of bringing the suit and not to the time of offering the record in evidence at the trial, and also confined its operation to judgments rendered in other states after its date. In addition to these reasons the law of the same state as then existing, and on which the case of Bank of Alabama v. Dalton [supra] was ruled, was applicable to the case of Murray v. Gibson [supra], and would have barred it if pleaded. The court applied the law to judgments rendered after its date, to prevent the injustice intended by the legislature, of excluding judgment records at the trial. The court remarks, "That laws should be so construed as not to allow a retroactive operation, where this is not required by express command, or by necessary or unavoidable implication. Especially should this rule of interpretation prevail, when the effect and operation are designed, apart from the intrinsic merits of the rights of parties to restrict the operation of those rights."

This bill was filed nineteen years after the date of the mortgage, seventeen years after the whole cause of action had accrued, and sixteen years and five months after the statute of limitations went into force. The complainant was under no legal disability, and might have brought suit before the ten years prescribed by the law had expired. I am of the opinion that this case should be considered as barred by the statute, but it is not essential to the proper disposition of the case, that the bill be dismissed on this ground.

In the year 1840 the sales to Rogers, in the foreclosure of the Finch mortgages, were confirmed, and deeds were executed and delivered, when he went into possession. Clark testifies that "I think I first began to look after his real estate in 1841 or '42. We got a man, who was going up there, to look into it, and he came back with rather a poor story. I first learned that James H. Rogers was in possession of the property ten years ago, perhaps more. I wrote to some gentleman in Milwaukee, and they wrote me that Rogers was in possession, claiming title. The information which John W. Allen gave us, whom we requested to look after our interests in Milwaukee, and who went there, was, that the thirty-six acres embraced in the mortgage had been foreclosed and sold on a previous mortgage, and that the twenty acres in Finch's addition embraced in the same mortgage had been sold at several tax sales, and that it was not then valued at over ten dollars per acre. This statement was made in 1841 or '42. This Mr. Allen was the first president, and a stockholder in the Cleveland Insurance Company." Rogers has continued in actual possession, and has paid the taxes mostly by suffering the property to be sold, and then taking deeds, and has made valuable improvements. The property has become very valuable, not from any labor, expenditure, or exertion of the complainant. It is the policy of this new state that titles should be quieted. The growth and improvement of the state requiring this policy, the legislature have wisely limited the time for bringing ejectments to ten years. Clark, the controlling officer of the insurance company, had notice by his agent and a stockholder of the company, that Rogers was in possession fifteen years before this bill was filed. From these facts, this bill should not be maintained at this late day. From the delay in bringing suit, after the notice that Rogers was in possession, claiming title to the land not considered worth the costs of a suit, the claim may be considered as abandoned or stale. In this respect this case somewhat resembles the case of McKnight v. Taylor, 1 How. [42 U.

S.] 161, in which it was remarked by the court—"In relation to this claim, it appears that nineteen years and three months were suffered to lapse before any application was made for the execution of the trust by which it had been secured. No reason is assigned for this delay, nor is it alleged to have been occasioned in any degree by obstacles thrown in the way by the appellant. * * * If, indeed, the suit had been postponed a few months longer, twenty years would have expired, and in that case, according to the whole current of authorities, the debts in the schedule would all have been presumed to be paid. But we do not found our judgment upon the presumption of payment, for it is not merely on the presumption of payment, or in analogy to the statute of limitations, that a court of chancery refuses to lend its aid to stale demands. There must be conscience, good faith, and reasonable diligence, to call into action the powers of the court. In matters of account, where they are not barred by the act of limitations, courts of equity refuse to interfere after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice when the original transactions have become obscure by time, and the evidence may be lost. The rule upon this subject must be considered as settled by the decision of this court in the case of Piatt v. Vattier, 9 Pet. [34 U. S.] 405; and that nothing can call a court of chancery into activity but conscience, good faith and reasonable diligence, and where these are wanting, the court is passive and does nothing, and therefore, from the beginning of equity jurisdiction, there was always a limitation of suit in that court." The demand is not to be favored, even for the amount actually loaned, on account of the circumstances attending the negotiations, and for the reason of the delay in either redeeming the land from Rogers, or instituting proceedings for such redemption. In this case, on the part of the complainant, there is a want of conscience, of good faith, and of reasonable diligence, and upon the principle and spirit of the statute of limitations, and also of the policy of the country, this claim shou... not, at this late day, be enforced in a court of equity against Rogers.

This suit was sought to be maintained, on the ground that the equity of redemption of the Cleveland Insurance Company was not barred by the foreclosure of the Finch mortgages, as it was not made a party defendant on the record of those cases. If this complainant had been nominally made a defendant in those cases, there would be no doubt of its foreclosure by those decrees of all equity of redemption as a subsequent mortgagee, even if the proceeding had been against it, by a newspaper publication of a rule to appear and plead, answer or demur, according to the statute. Why Edmund Clark was made a defendant and the Cleveland Insurance Company was omitted cannot be accounted for, unless from the nature of the several conveyances and the active agency of Clark in the negotiation, it was supposed that the mortgage was taken nominally in the name of the company for his use. In the whole business the name of the company only appears as payee of the notes and as mortgagee. The business was transacted by Clark without authority from the directors of the company, by a vote of the corporate body. There is no pretence that the directors entered on the minutes or records of the corporation any resolution or order authorizing Clark to consummate the negotiation by those deeds to and from himself, and to take the mortgage in the name of the company for double the sum actually loaned. Clark swears "that he did not know whether it was the funds of the company or his own funds that were advanced to Reed, and also, that if the company would not advance the money he would." From a subsequent examination of the books of the company and of memoranda, it may be inferred that the money advanced was the funds of the corporation. But be this as it may, Clark was the president of the company, the owner of the principal part of the stock, and the business man of the company. Under these circumstances, it was quite convenient for him to take a mortgage in the name of the corporation to secure a debt of his own, particularly in such an unconscientious transaction. He had the controlling power of the company. If he consulted the directors it was but mere matter of form. He was the company for all business purposes, and he testifies that he and the company had notice by their agent one or two years after the sale to Rogers, that he, Rogers, was in possession of the mortgaged premises claiming title.

If Rogers was claiming title, either by virtue of his purchase under the decrees of foreclosure of the Finch mortgages, or by purchase at sales for taxes, it was the duty of the Cleveland Insurance Company, by its officers or agents, upon the receipt of the notice, to have redeemed the land from those sales. They at the same time had notice that the land was not considered worth over ten dollars per acre, which would not warrant the expenses and disbursements required for redemption. Under these circumstances, it would not be equitable or just to decree, at this late day, after the land had become valuable, that Rogers' title and possession should be disturbed, for the mere omission of the Cleveland Insurance Company as a nominal defendant in the bills and proceedings to foreclose prior mortgages. If the Finch mortgages had been foreclosed by a newspaper advertisement and sale, in pursuance of authority in the mortgages, the Cleveland Insurance Company would have been entitled by law to redeem within two years. By the law then in force, the mort-

gagor had two years time to redeem from such sale, and "any person to whom a subsequent mortgage may have been executed shall be entitled to the same privilege of redemption to the mortgaged premises, that the mortgagor might have had, or of satisfying the prior mortgage, and shall by such satisfaction acquire all the benefits to which such prior mortgagee was or might be entitled." And the law directs that if the mortgaged premises so sold shall not be redeemed, the officer making such sale shall make a deed to the purchaser. And if there is an overplus of purchase money on hand, it shall be retained for subsequent incumbrances.

In the proceedings in court to foreclose the Finch mortgages, Clark, as a non-resident not served with process, was entitled by law to three years time to come in and petition the court to open the decree as to him, for the use of the insurance company. But, by the law, if such application be not made, the decree shall be adjudged to be confirmed, which confirmation shall have relation to the time of making the decree. And by law, land sold under execution was redeemable by the owner within two years after the sale, and a creditor by judgment or decree could acquire the interest of the purchaser within three months after. These several laws are rules of property, strictly observed, as to time, in all cases, and they are also laws of limitation. They fully demonstrate the policy of the state in regard to sales of land for the payment of debts. In the absence of laws limiting suits and proceedings in equity, the laws of limitation as to similar demands in courts of law are considered as rules proper to be observed in courts of chancery. From analogy to these laws, it is questionable whether a subsequent mortgagee, not named as a party in a bill to foreclose a prior mortgage, shall be allowed to redeem after two years. I am aware that the opinion prevails that such redemption cannot be denied, as the person claiming it was no party to the proceedings in court. The opinions of some courts favor this idea. But in several of the states a proceeding in court, and a decree against the prior mortgagor and terre tenant are sufficient to bar all subsequent incumbrances. The proceedings in court are open; the advertisement and sale are supposed to be known to all persons interested, who should attend the sale and bid up the property to cover their liens.

Every person is expected to look after his mortgages and liens, within a reasonable time. But whether a subsequent mortgagee should be limited in equity to redeem within two years, by analogy to the statute referred to, I need not now determine. But that he should redeem within a reasonable time, there is no doubt. The company, through its officers and agents, had notice of Rogers' possession under claim of title [within two years after his purchase at the master's sale in the foreclosure of the Finch mortgages. Inquiry should then have been made into his right to possession and claim of title],[3] and the land should have been redeemed from the sale within the two years, or a reasonable time thereafter. The complainant was under no disability to proceed on its mortgage, nor has Rogers done any act to delay or prevent a redemption or sale of the land. The complainant has done no act to enhance the value of the land, while Rogers has. The complainant cannot be allowed to profit by the delay, at Rogers' expense. For these reasons the court will not order a decree on this bill, that would disturb the possession or title of Rogers, or require him to pay the sum with interest, advanced to George Reed.

Rogers disclaims title to, or interest in the property in Finch's addition, consequently there is no decree to be ordered against him as to that. George Reed was discharged from his debt under the late bankrupt law, and he is thereby released from all personal responsibility or liability on the notes and mortgage.

The Milwaukee and Mississippi Railroad Company, I presume, was made a defendant, as claiming the right of way through section thirty. There are no parties, then, against whom a decree could be made in regard to the thirty-six acres. But if that land was sold under a decree in the case of Increase A. Lapham, as set forth in Rogers' answer, I presume the complainant has no claim of lien against it. If so, the bill will be dismissed as to both tracts. Bill dismissed.

NOTE [from original report]. That agent cannot acquire title as against principal. Ringo v. Binns, 10 Pet. [35 U. S.] 269; Church v. Marine Ins. Co. [Case No. 2,711]; Galbraith v. Elder, 8 Watts, 81; Barker v. Marine Ins. Co. [Case No. 992]; Hall v. Hallet, 1 Cox, 134; Lees v. Nuttall, 1 Russ. & M. 53; Andrews v. Mowbray, 1 Wils. Exch. 71; Whichcote v. Lawrence, 3 Ves. 740; Ex parte James, 8 Ves. 348; Chalmer v. Bradley, 1 Jac. & W. 59; Whitcomb v. Minchin, 5 Madd. 92; Norris v. Taylor, 49 Ill. 18; Collins v. Case, 23 Wis. 230; Grumley v. Webb, 44 Mo. 444. It is the settled doctrine of courts of equity that great delay of either party, unexplained, in not prosecuting his claims, constitute such laches as forbid the interference of a court of equity. Hough v. Coughlan, 41 Ill. 130. The statute of limitations binds courts of equity as well as law in cases of concurrent jurisdiction; and sometimes, by way of analogy binds equitable titles. Story, J., in Pratt v. Northam [Case No. 11,376]. As to doctrine of courts of equity, as to limitations, laches, and stale claims, see opinion of Clifford, J., in Badger v. Badger [Id. 718]; also, Ferson v. Sanger [Id. 4,751].

[NOTE. On complainant's appeal the decree of the circuit court, dismissing the bill, was affirmed.

[The grounds of affirmation were: That the deed of Reed's assignee in bankruptcy to Rogers vested in the latter such title as Reed had at the time of the decree adjudicating him a bankrupt. Consquently, Rogers held the relation of mortgagor to the complainant more than

[3] [From 6 Am. Law Reg. 406.]

10 years before the suit was brought; also, Rogers held the actual possession in 1839, when the 10-years statute of limitations was enacted, and the bar was complete in 1849. And, further, that the suit in question, being solely cognizable in equity, was within the fortieth section of that act, and was manifestly barred thereby.

[The court further held that, assuming the bill to be true, no relief could be had as to the other defendants, for, by his purchase of the bankrupt's title, Rogers took the equity of redemption, and thus cut off whatever claims to the land the other defendants had.

[The opinion was delivered by Mr. Justice Catron. Cleveland Ins. Co. v. Reed, 24 How. (65 U. S.) 284.]

CLEVELAND INS. CO. (STARKWEATHER v.). See Cases Nos. 13,308 and 13,309.

Case No. 2,890.

CLEVELAND, P. & A. R. CO. v. FRANKLIN CANAL CO. et al.

[1 Pittsb. Leg. J. No. 36.]

Circuit Court, W. D. Pennsylvania. 1853.

SPECIFIC PERFORMANCE OF TAINTED CONTRACT — FOLLOWING STATE DECISIONS — POWER OF CONGRESS—POST ROADS.

[1. A foreign railroad corporation, by agreement with a domestic corporation, secured most of its corporate stock, and the building and control of a railroad totally different from that required by the latter's charter. *Held*, that it had no standing in equity to enforce performance of such contract, or to restrain interference with the line of road so built. Following Com. v. Franklin Canal Co., 21 Pa. St. 117.]

[2. A decision of a state court declaring a railroad to be different in character, location, and object from that authorized by the charter from the state legislature under which it was constructed, though not followed by a judgment or decree, is binding upon the federal courts within the state.]

[3. The power given by the constitution to establish post roads means such roads as are regularly laid out by the authority of the states, or by counties under the laws of the states.]

[4. The act of congress making all roads post roads means only such as have charters from the several states, and not such as are built in derogation of law.]

[5. Such act does not give to the United States, to a mail contractor, or to the owner of a road the right to an injunction to restrain a threatened injury.]

[In equity. Bill by the Cleveland, Painesville and Ashtabula Railroad Company against the Franklin Canal Company and sundry persons.]

A. W. Loomis, E. M. Stanton, C. Shaler, and Th. Umhstaetter, for complainants.

S. W. Black, E. Babbitt, and J. Thompson, for respondents.

IRWIN, District Judge. This is a bill for a specific performance, and an injunction to restrain the respondents from entering upon the railroad track of the Franklin Canal Company in the city of Erie, and injuriously destroying and disturbing the said road and causeways, as it is alleged is threatened to be done by them. The complainants, under a charter from the state of Ohio, as they allege, have made a railroad extending from Cleveland, in said state, to the boundary line of the state of Pennsylvania, parallel with the shore of Lake Erie, towards the city of Erie, upon which they are engaged in transporting merchandise and passengers, and, under contract with the postmaster general, the mail of the United States. They further allege that the Franklin Canal Company is a body corporate and politic, created by the laws of Pennsylvania, and that they have constructed a line of railroad connecting and joining with the railroad of complainants, extending from the point of junction at the boundary line of the state of Pennsylvania to Peach street, in the city of Erie, which is used by the complainants under an agreement with the said Franklin Canal Company. The charter from the state of Ohio to the complainants extends only to such rights as are granted to them within that state; which, alone, does not enable them, for the causes alleged in the bill, to become complainants in this court. If they have any such right, it is derived from their agreement with the Franklin Canal Company. It becomes necessary, therefore, to inquire—1st. What are the chartered rights of the Franklin Canal Company? 2d. What is the nature of the agreement between the complainants and that company, and whether by it they can sustain this application for an injunction?

By an act of assembly of the 27th of April, 1844, the Franklin Canal Company became vested with the title to the Franklin division of the Pennsylvania Canal from the aqueduct over French creek, on the French creek feeder, to the mouth of French creek, together with all the estate, real and personal, owned by the commonwealth for the use of the said canal. And by another act passed on the 9th of April, 1849, it was inter alia provided, that the said company, instead of constructing the canal, or completing and repairing the work done thereon by the commonwealth, should have the privilege of constructing a railroad, if deemed most expedient, and using the graded line or towing path of the canal as the bed of the road; and with the further privilege, upon the increase of their stock to the amount of five hundred thousand dollars, of extending the same from the north end of said Franklin Canal to Lake Erie, and from the south end thereof to Pittsburgh, by such route as the said company might deem most expedient and advantageous, but subject to the provisions and restrictions of the act of assembly of the 19th of February, 1849, regulating railroad companies. Such, in brief, is the substance of the chartered privileges of the Franklin Canal Company.

How did the complainants become invested with these privileges, or any part of them?

In their bill they say, "that large sums of money being required for the construction of the railroad from the boundary line of the state of Pennsylvania to the city of Erie, the complainants became the owners of a large amount of stock of the Franklin Canal Company, to the amount of $448,500, the whole capital stock being $500,000, and that they also advanced large sums and guaranteed the bonds of the said company to the amount of $50,000," and to indemnify themselves for these advances for stock and pecuniary liabilities, they entered into a contract and agreement with the Franklin Canal Company, dated the 14th of May, 1851, in which, among other matters, they say "that pursuant to the terms of the statute of the states of Ohio and Pennsylvania, incorporating them, and other statutes affecting them, they are engaged in constructing a railroad from the city of Cleveland to the easterly line of the state of Ohio, in the direction of the borough of Erie, in the state of Pennsylvania, and from that state line to the borough of Erie, in connection with and forming a continuation of the railroad of the complainants. The complainants then agree to enable the Franklin Canal Company to complete their part of the road, to advance and pay for iron, and the transportation thereof, the sum of $125,000, and $125,000 in money, payable in instalments; they also agree to furnish the engines, cars, and equipments for securing the entire route from Cleveland to Erie, for all which the Franklin Canal Company agree to give their bonds with interest, at seven per cent. per annum, payable on the first of February, 1861; which bonds are to be secured by mortgage to be the first lien upon the division of the road between the Pennsylvania line and Erie. The Franklin Canal Company also agree to pay to the complainants commissions, discounts and expenses, for raising the money agreed to be paid, and for the purchase and transporting the iron. Each party agrees to keep their respective portions of the road in repair. And it is further agreed that the complainants, as soon as the roads are completed from Cleveland to Erie, shall assume and thereafter during their existence have the entire control and management of the transportation of persons and property, with power to appoint all necessary officers, superintendents and agents, to collect all the tolls and revenues, and to do whatever else is lawful and needful in the management and transportation department of the railroad, and all such tolls, revenues, incomes and receipts which shall be collected either upon or for the interest of either road, shall go into one common treasury. They further agree that no contract, lease or agreement injurious to either of the parties shall be made by either party with any other railroad company, or person or persons whatsoever, without the consent of both parties, the terms and conditions of the agreement to be in full force and binding upon both parties for and during the existence of the complainants and all contracts and arrangements heretofore made between the parties to their agreement are declared to be void.

It thus appears that the complainants, under a charter from the state of Ohio for making a railroad within that state, have become shareholders to the amount of four hundred and forty eight thousand five hundred dollars, of a capital stock of five hundred thousand dollars, in the Franklin Canal Company, chartered by the state of Pennsylvania to make a canal or railroad between certain designated points, to which the whole of that capital stock could alone be legitimately appropriated. Has this been done? By the agreement there was a common object which both companies determined to effect, and have since effected,—the making of a continuous railroad from Cleveland in Ohio, along the shore of Lake Erie, to the city of Erie, in Pennsylvania. For this purpose the whole available capital stock of the Franklin Canal Company is authorized to be used by the complainants; their advances secured by mortgage on the road, by way of lien, with power to appoint all the officers and agents of the company, to receive its profits, make disbursements, and finally to conduct all its operations during the corporate existence of the complainants. By these concessions several of the essential franchises of the Franklin Canal Company became merged in the Cleveland, Painesville and Ashtabula Railroad Company. Whether they amount to such an abuse of the corporate powers of the former company, as to disable the complainants, who were parties to them, from claiming the equitable interposition of this court, by way of injunction, or otherwise, I will not now stop to inquire. All the available pecuniary resources of the Franklin Canal Company have been appropriated, and it would seem exhausted, in making a road from the state line to and within the city of Erie. Is this the road which they are required to make by their charter? On this part of the case I am relieved from making any remarks by the opinion of the supreme court of the state, given after a full hearing in the case of Com. v. Franklin Canal Co. [21 Pa. St. 117]. In this opinion I fully concur, but from which, if I differed, I should feel myself bound to regard as the settled judicial interpretation of the several statutes of the state, under which the Franklin Canal Company derives its chartered rights. The chief justice, after an examination of several acts of assembly conferring corporate powers on the Franklin Canal Company, says: "The road made by the defendants begins at the depot of the Erie and North East Railroad, three-quarters of a mile from the lake, and one hundred and ten feet above it, and runs thence directly as the nature of the ground will permit, to that point on the Ohio state line, where

the Cleveland, Painesville and Ashtabula Railroad meets it, and there it stops. We do not say that there is any obligation to begin at one place more than another; and if this could properly be called a part of the work required, it might very well be justified. But it is no part of the road chartered; it is the whole of another road not chartered. It bears no resemblance to that described in the act of incorporation; it is different at both ends—different in character, location and object, and is used at this moment for purposes totally opposite to those which the legislature ever expressed an intention to permit."

There was no decree in this case; but it is not a judgment or decree, but the interpretations and decisions of the highest court of the state, on matters arising out of their own statutes, which this court is bound to regard. It is what in such cases they declared to be the law, which is the law for this court. A judgment or decree may be for many reasons rendered unnecessary; but the law as pronounced must be the rule of action until reversed. It must follow, from this opinion, that the railroad made from the state line where it connects with the road of the complainants along the shore of Lake Erie to the city, and within the city of Erie, is not the road, or any part of the road, for which a charter was granted to the Franklin Canal Company; and as complainants claim under this charter, and do not pretend that there was any other authority for making it, I must conclude that it was made without lawful authority, and without regard to the eminent domain of the state. The duties assigned by an act of incorporation, are conditions annexed to the grant of the franchises conferred, and it is a tacit condition of the grant that the grantees shall act up to the end or design for which they were incorporated. This the Franklin Canal Company have not done; and although the abuses of their charter cannot be enquired into collaterally, yet if they act without charter, and do what is essentially different from what they are authorized to do, as by making a canal instead of a road, or a road other than that expressly designated in their charter, they would be trespassing upon the ground they occupied, and subject to immediate proceedings for eviction, although their charter should not be judicially annulled. The supreme court of the state have said that the road which the Franklin Canal Company have made is "the whole of another road not chartered," and by the agreement which that company has made with the complainants by which they have absorbed all their available capital stock in making that unchartered road, it is not assuming too much to say that the road which the Franklin Canal Company are required to make by their charter, never will, in the present situation of that company, be made. They have disabled themselves from doing it, and also of complying with the act under which they hold their charter.

Regarding then the railroad made from the western boundary of the state of Pennsylvania along the shore of Lake Erie to and into the city of Erie, as not being made under the charter granted to the Franklin Canal Company, and as being unauthorized by any law of Pennsylvania, how will it affect the complainants in their prayer for a special injunction? It is not enough that they are entitled to sue in this court, and that there is danger of immediate and irreparable injury to their property; for if the bill discloses that they are not invested with a legal or equitable title, right or interest in that on which their claims alone are based, and which would certainly prevent a decree in their favor upon a final hearing, the prayer for a special injunction must be refused. In their bill the complainants say in substance that they are shareholders in the Franklin Canal Company, which derived its charter from the statutes of Pennsylvania, and that they entered into an agreement with that company, by which they have large pecuniary interests and other advantages secured to them, and that they have made a railroad from Cleveland along the lake shore to the Pennsylvania line and from thence to the city of Erie; the latter division being the railroad, or a part of it, which the Franklin Canal Company was, by its charter, required to make. Though purchasers of the stock of that company to a very large amount, they do not claim relief from this court merely as shareholders; but, under their agreement, by which among many concessions, they are entitled to the whole control of the road during their corporate existence. Now it has appeared that there was nothing done by the Franklin Canal Company as required by their charter. They did not make the railroad specified in their charter, or any part of it, but under the agreement referred to, another road was made, either separately or in connection with the complainants' road. On the part of the Franklin Canal Company this was, in law, a fraudulent diversion of their stock and funds, and a transfer of material parts of their corporate powers for an object wholly inconsistent with and at variance with these powers. The complainants purchased stock of the company to the amount of $448,500, and from that time were members of the corporation; and it is fairly inferable that they were then, if not before, fully informed of their chartered privileges, obligations, and disabilities. But instead of making the road required by their charter, they made another; different on its whole line and different in termini. The complainants may have been ignorant of this fraud in law, and may have done nothing more than, by their charter from the state of Ohio, they were authorized to do. But when a court of equity is invoked to enforce a specific performance of

an agreement tainted with fraud in law, on the part of one of the contracting parties, and of which fraud the other party, if not the participants, were its beneficiaries, it would, as soon as the rules permitted, be prompt in dismissing the bill, and in rejecting the prayer for an injunction. Exclusive privileges by charter are granted by a state, in trust as well for the public as the persons to whom they are granted; and although the state courts are alone competent to inquire into an alleged abuse of these privileges, there is nothing to prevent the complainants from filing a bill in this court to enforce the agreement arising out of the charter, and to which agreement they are parties. But where, as is the case before the court, a bill seeks the enforcement of an agreement, in terms not expressly forbidden by law, but which requires either party to it to do, or to omit to do anything the obvious effect of which would be to defeat or evade the obligations and trusts of that law, to the manifest injury or wrong of a third party, though not a party to the agreement or to the suit, I know of no principle of equity by which it could for a moment be sustained. The complainants rest their prayer for an injunction upon an agreement founded exclusively upon the charter of the Franklin Canal Company, and the acts of assembly connected with it. If that company has done great wrong by the act out of which this controversy has arisen; if they have disabled themselves from performing their obligations and trusts, and for which it is apparent they may be lawfully held to answer, the party benefited by that wrong cannot, surely, reasonably expect a court of equity to interfere by decree to maintain that wrong. Enough has been said to show that the preventive remedy by injunction should not be employed to protect the property which the complainants claim under the agreement referred to.

But the complainants allege that they are entitled to an injunction on another ground. They are contractors for carrying the mail of the United States over the road they have made, in railroad cars from Cleveland to Erie and from thence back to Cleveland; and by an act of congress this road has been made a post road. The power given by the constitution to establish post roads has always been construed to mean, and as I think rightly, such roads as were regularly laid out by authority of the states, or by counties under the laws of the states. The government of the United States cannot construct a post road within a state of this Union without its consent; but congress may declare, that is, establish, such a road already opened and made a public highway by the direct or indirect authority of the state. The post roads of the United States are the property of the states through which they pass; they may temporarily part with the possession of them by charter, and the grantees, while the charter continues, have the right to preserve such roads, and prevent their threatened destruction. The United States have the mere right of transit over these roads for the purpose of carrying the mail, and in case of obstructing this right their laws provide an adequate remedy. The government itself could not obtain the injunction applied for to prevent the destruction of a mail road; the right to do so follows the right of property or possession; a mail contractor and any other person may have a right of action for damages in the courts of the state, for an obstruction to a mail road, or the wrongdoer there may be punished by indictment, but no injunction can legally issue upon an application to restrain a threatened injury to the road. This power must always be exercised with great caution; to allow it in a case like this, would be an alarming extension of jurisdiction, open to great abuses and extending over many thousands of miles, and to persons who as mail contractors, have no interest in the roads they pass over. The act of congress making all railroads post roads, means only such as have charters from the several states; it is not to be inferred that they intended to do anything in derogation of the sovereignty of a state, by declaring that to be a post road which was the work of an individual or of a company for his or their profit without law, or it may be in opposition to law. The road of the complainants was made a post road either from mistake or misrepresentation, and it is to be presumed without information to the department charged with making contracts for carrying the mail, that it was not authorized by law. The bill shows no sufficient cause for the interposition of this court. The prayer, therefore, for a special injunction, is dismissed, with costs.

CLEVELAND ROLLING-MILL CO. (WOOD v.). See Case No. 17,941.

CLEW (UNITED STATES v.). See Case No. 14,819.

Case No. 2,891.

In re CLEWS.

[19 N. B. R. 109.][1]

District Court, S. D. New York. Nov. 30, 1878.

PROOF OF FRAUDULENT DEBT AGAINST BANKRUPT —SUBSEQUENT ACTION.

A creditor whose debt was created by the fraud of the bankrupt does not, by proving his claim and taking a dividend, waive his right to maintain an action for the balance of the debt.

In bankruptcy.

Abbott Bros., for motion.

W. L. Sessions, contra.

CHOATE, District Judge. This is a motion to stay proceedings in a suit brought in a

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state court against the bankrupts, and to set aside a warrant of arrest issued in that suit against the bankrupt Clews. The bankrupts have received their discharge in bankruptcy, and it is claimed on their behalf that this creditor has waived his right to maintain any action against them for the cause of action sued on, even if that cause of action was created by the fraud of the bankrupts, because they came in and proved their debt and took a dividend. The statute provides: "No creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action against him, and all proceedings already commenced, or unsatisfied judgments already obtained therein against the bankrupt shall be deemed to be discharged and surrendered thereby." Stat. 1867, c. 176, § 21 [14 Stat. 526]. And by the 33d section of the same act it was provided that "no debt created by the fraud or embezzlement of the bankrupt, etc., shall be discharged under this act, but the debt may be proved and the dividend thereon shall be a payment on account of said debt." In re Robinson [Case No. 11,939], Mr. Justice Nelson held that the effect of these provisions, considered together, was that in case of a fiduciary debt or debt created by fraud coming within the class of debts described in section 33, the creditor might prove his claim and take his dividend, and that he did not thereby waive his right to maintain an action for the balance of the debt. That case is decisive of this point in the present case. It is urged that that decision is clearly in conflict with the decisions of the federal courts, including the supreme court, under the fifth section of the bankrupt law of 1841 [5 Stat. 444], it being held under that act that a fiduciary creditor who proved his claim thereby waived his right to maintain an action for the debt. Chapman v. Forsyth, 2 How. [43 U. S.] 202; In re Tebbetts [Case No. 13,817]; In re Comstock [Id. 3,073]; and other cases. But there is no such conflict. The provisions of section 5 of the act of 1841 were substantially the same as those of section 21 of the act of 1867, cited above; but the act of 1841 contained no similar provision to that quoted above from section 33 of the act of 1867, permitting the creditor to prove his debt, and making the dividend a receipt on account, and there were other provisions of the act of 1841 indicating a different policy from that so clearly appearing in section 33 of the act of 1867. The decision in Robinson's Case [supra] proceeds upon a difference in the language of the two acts, and was in accordance with the obvious meaning of the thirty-third section of the act of 1867.

The case made by the complaint and the affidavits on which the order of arrest was issued is a clear case of a debt created by the fraud of the bankrupt within the meaning of the thirty-third section of the bankrupt law. The case as stated is that the defendants were agents of the plaintiffs to collect drafts and other evidences of debt belonging to them; that while so employed they became insolvent, and with full knowledge of such insolvency nevertheless collected the drafts and passed the proceeds to the credit of the plaintiffs. In other words, the bankrupts (as the case is stated against them) receiving a draft of the plaintiffs upon the trust in respect to them, which they knew they could not perform otherwise than by keeping them and their proceeds wholly distinct and separable from all other funds, turned them into money, and mingled the money with their own, so that they could no longer be traced. They thereby ceased indeed to hold the drafts or the proceeds in trust, and became debtors for the amount to the plaintiffs. The very creation of this debt, however, was an actual fraud and a violation of a duty which they had assumed in a fiduciary character. The point made by the bankrupts might be good, if they had, without knowledge of their insolvency, collected the drafts and passed the proceeds to the credit of the plaintiffs, as they claim in their answer was the fact. In that case the decisions that have been made in the cases of factors and others, who have been held not to be liable to arrest after discharge in bankruptcy, might be in point. But the case here made is a case of positive fraud, or fraud in fact, and not one of implied fraud, or fraud in law. Neal v. Scruggs, 95 U. S. 704. Still the question of fact on the issue of fraud being triable in the state court, that question does not come up for determination in this court. Motion denied, and stay of proceedings vacated.

Case No. 2,892.

CLEWS et al. v. LEE COUNTY.

[2 Woods, 474.][1]

Circuit Court, S. D. Alabama. April Term, 1874.

MANDAMUS TO COMPEL COLLECTION OF TAX.

1. Upon an application for the peremptory writ of mandamus to compel a court of county commissioners to assess and collect a tax to pay off a judgment recovered in a federal court against them, no matter can be set up against the application which was properly used as a defense against the recovery of the judgment.

2. Nor will it be a reason why the writ should not be granted, that the court of county commissioners has been enjoined from the assessment and collection of the tax by a state court. The effect of the case of Supervisors of Carroll Co. v. U. S., 18 Wall. [85 U. S.] 71, considered.

On May 10, 1872, [Henry Clews and Theodore S. Fowler, as] Henry Clews & Co., recovered in the federal court for the middle district of Alabama a judgment against the county of Lee, in the state of Alabama, for the sum of $13,722, being the amount due

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

upon certain unpaid coupons which had been attached to certain bonds of said county, issued by it in payment of a subscription to the capital stock of the Eufala, etc., Railroad Company. Execution was issued on this judgment and returned nulla bona. This application was made to the court for a peremptory writ of mandamus to compel the court of county commissioners of Lee county to levy and assess, as required by law, a tax not exceeding one per centum per annum upon the real and personal property of the county sufficient to pay the judgment. At a former term of the court an alternative writ had been granted, issued and served upon the persons composing the court of county commissioners for Lee county. They filed their answer to the same in which they alleged as reasons why the peremptory writ should not issue: (1) That the bonds on which the judgment was recovered were void in the hands of the first holder, namely, the railroad company to which they were issued in payment of stock, because the terms of the law which authorized their issue had not been complied with; and (2) that Clews & Co. were not bona fide holders for value.

Samuel F. Rice, for motion.
Geo. W. Stone, contra.

WOODS, Circuit Judge. In the action at law, brought by Henry Clews & Co. against the county of Lee, in which the judgment was recovered, the defendant pleaded the general issue, and two special pleas in which the invalidity of the bonds was alleged, and in which it was asserted that the plaintiffs were not bona fide holders for value of said bonds. These matters must necessarily have been passed upon by the court, adversely to the assertions of defendant, before judgment could have been recovered for plaintiffs. Having had its day in court upon these issues, can they be again raised upon this motion? The respondents are concluded by the judgment at law. They cannot go behind it to raise any question touching the causes of action upon which it was rendered. Mayor v. Lord, 9 Wall. [76 U. S.] 413.

It is further alleged as a reason why the writ should not issue, that the court of commissioners of Lee county has been restrained by an injunction issued by the chancery court of Lee county from the collection of any tax to pay the interest upon the bonds; that the bill, upon which the injunction was granted, was filed on the 26th day of November, 1870, and the injunction was made perpetual. So far as the pendency of this bill is supposed to be notice of the invalidity of the bonds to all persons, and to establish that Henry Clews & Co. are not bona fide holders, they having, as claimed, come into possession of the bonds after the filing of the bill, what has already been said has disposed of this point. That defense has already been passed upon and adjudicated by the judgment at law. Is the fact that the court of county commissioners has been enjoined by the state court of chancery from collecting the tax, which it is the purpose of the mandamus prayed for to compel them to levy and collect, a reason why the writ should not issue? The decisions of the supreme court of the United States are adverse.

In Riggs v. Johnson Co., 6 Wall. [73 U. S.] 195, which was a case, in most of its features similar to this, it was held that "state courts are exempt from all interference by the federal tribunals, but they are destitute of all power to restrain either the process or proceedings in the national courts. Circuit courts and state courts act separately and independently of each other, and in their respective spheres of action, the process issued by one is as far beyond the reach of the other as if the line of division between them was traced by landmarks and monuments visible to the eye. "Viewed in any light, therefore, it is obvious that the injunction of a state court is inoperative to control, or in any manner to affect the process or proceedings of a circuit court, not on account of any paramount jurisdiction in the latter courts, but because, in their sphere of action, circuit courts are wholly independent of state tribunals." To the same effect is the case of U. S. v. Common Council of Keokuk, 6 Wall. [73 U. S.] 516, where the supreme court says: "Principal question in the case is, whether the injunction of a state court had the effect to take away the jurisdiction from the circuit court to issue the writ of mandamus. Discussion of that question is unnecessary, as this court decided at the present term, in the case of Riggs v. Johnson Co. [supra], that a state court cannot enjoin the process of the federal court." So in Mayor v. Lord, 9 Wall. [76 U. S.] 409, where an answer was filed to the petition for the writ of mandamus, alleging, among other things, that the respondents had been enjoined by the state court from levying the tax, the supreme court says: "The injunction cannot avail the respondents. The relator was not a party to the proceeding. If he had been, it is not competent for a state tribunal thus to paralyze the process issued from a court of the United States to give effect to its judgment. This is a sound and salutary principle. It is vital to the beneficial existence of the national courts, and has heretofore been applied by this tribunal, upon the fullest consideration, in other cases presenting the same question." These decisions conclusively settle the question that the injunction issued by a state court restraining the collection of a tax to pay these bonds can have no effect upon the duty or power of this court, in a proper case, to direct the issuance of a mandamus.

The case of Supervisors of Carroll Co. v. U. S., 18 Wall. [85 U. S.] 71, recently decided by the supreme court of the United States, has been pressed upon my attention as show-

ing a disposition on the part of the court to recede from the position taken in the cases above cited. I do not so read the case. The relator in that case had recovered a judgment against the county of Carroll upon county warrants issued for the ordinary expenses of the county. At the time of their issue, it was the settled law of the state, as prescribed by statute, and settled by the supreme court of the state, that the board of supervisors could not levy a tax for the ordinary expenses of the county to exceed four mills upon the dollar. The warrants were issued with this implied understanding, that no greater tax was to be levied for their payment than that prescribed by law. The board of supervisors, in answer to the alternative writ, stated that they had levied a tax of four mills to pay the ordinary expenses of the county, and that the law did not authorize them to levy any greater tax. This was held to be a sufficient return. The court says, "It is very plain that a mandamus will not be awarded to compel county officers of a state to do any act which they are not authorized to do by the laws of the state from which they derive their powers. Such officers are the creatures of the statute law, brought into existence for public purposes, and having no authority beyond that conferred upon them by the author of their being. The office of a writ of mandamus is not to create duties, but to compel the discharge of those already existing. A relator must have a clear right to the performance of a duty resting on the defendant before the writ can be invoked. Is it, then, the duty of the supervisors to levy, in addition to a county tax of four mills, a special tax to satisfy a judgment against the county for its ordinary indebtedness? This question can be answered only by a reference to the statutes of the state."

After a critical examination of the state laws, the court reaches the conclusion that no law authorized the levy of a tax exceeding four mills for ordinary county expenses at the time these warrants were issued. "The holders of the warrants were therefore informed," says the court, "that by the laws of the state no special tax could be levied for their payment. It follows, therefore, that the return was sufficient." This case is very different from the one now under consideration. Remembering that all questions touching the validity of the bonds in this case, and the ownership thereof by Clews & Co. are closed by the judgment in their favor, let us see what is the duty imposed upon the court of county commissioners by law. The 7th section of the act, approved December 31, 1868, under which the bonds were issued (Acts 1858, p. 516), declares that "the court of county commissioners of such counties in which the electors shall have voted in favor of subscription are hereby authorized and required to levy and assess, in the same manner as is now required by law for the collection of state and county taxes, such tax as may be necessary to meet the interest falling due semi-annually on said bonds," etc.

As already intimated, the judgment in this case has settled all questions touching the validity of the bonds, including the question whether the electors had "voted in favor of said subscription." There is nothing, then, left for the court of county commissioners to do, but to levy the tax as authorized and required by the statute. This is their duty. To have this duty performed is a right of the petitioners. The section of the law authorizing and requiring this tax was a part of the contract under which they took those bonds, as much so as if it had been written upon their face. Gunn v. Barry, 15 Wall. [82 U. S.] 610. Here, then, we find the right of the relators to compel the levy of the tax, and the duty of the respondents, coupled with the power to levy the tax. Under these circumstances the duty of the court is plain, namely, upon the application of the petitioners, to compel the respondents to perform that duty which it is the right of the petitioners to have performed. Let the peremptory writ of mandamus issue as prayed for.

Case No. 2,893.

In re CLIFFORD.

[2 Sawy. 428.][1]

District Court, D. California. May 8, 1873.

GOODS IN BONDED WAREHOUSE IN POSSESSION OF U. S.—DELIVERY.

Goods in a United States bonded warehouse, and on which the duties have not been paid, are in the possession of the United States, and an order by their owner and vendor for their delivery by the warehouseman to the vendee, even though presented to and accepted by the warehouseman, will not be good as a constructive or symbolical delivery, nor constitute a receipt or acceptance of the goods sufficient to satisfy the statute of frauds.

[Cited in Northwestern Mut. Life Ins. Co. v. Elliott, 5 Fed. 228.]

[In the matter of George Clifford, a bankrupt.]

McAllister & Bergin, for Tong Wo & Co.

S. A. Jones, assignee, in pro. per.

D. T. Sullivan, for bankrupt.

HOFFMAN, District Judge. On the nineteenth of December, 1872, the bankrupt purchased of Tong Wo & Co., Chinese merchants of this city, 4,189 mats of rice for the sum of $10,472.50. The rice was at the time of sale in a bonded warehouse, and on the succeeding day the vendors gave to the bankrupt delivery orders on the warehouseman, which were duly presented, and the corresponding entries made in the warehouseman's book. The purchase money was to be

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

paid, one half on the twenty-eighth of February and one half on the thirteenth of March, 1873. The goods have remained in the warehouse (with the exception of a small portion delivered by mistake) until the present time, the duties thereon (with the exception just mentioned) being unpaid.

On the ninth of January, 1873, a petition in bankruptcy was filed by Clifford, and on the tenth of January he was duly adjudged a bankrupt. A petition was subsequently filed by the vendors of the goods, praying that their title thereto should be adjudged valid, and that all claims of the assignee should be declared invalid and void. At the time of the sale a memorandum was made, in which the goods sold, the price and the terms of payment were set forth. At the head of this paper the name of the vendor is printed, but the memorandum is not subscribed, nor is the name of the vendor anywhere written in the document. It is therefore clearly insufficient under the statute of frauds of this state, which requires the note or memorandum of the contract for the sale of goods, etc., to be subscribed by the party to be charged therewith. Davis v. Shields, 26 Wend. 350; James v. Patten, 2 Seld. [6 N. Y.] 13; Stevens v. Stewart, 3 Cal. 140.

It is contended, however, that the contract is valid under the statute, inasmuch as the buyer has "accepted and received the goods;" and the question presented is—Did the receipt by the buyer of the delivery orders, and their presentation by him to the warehouseman, constitute a receipt or acceptance of the goods sufficient to satisfy the statute? It is not questioned that in general, where goods at the time of the sale are in the possession of a third person as bailee of the vendor, the order of the latter to the bailee to deliver the goods to the vendee or to hold them subject to his order, with an assent on the part of the bailee so to hold them, will be sufficient to effect a change of possession, and to constitute a valid receipt and acceptance under the statute of frauds. The possession of the bailee, the agent of the vendor, is the possession of the latter, and where, by his direction, the bailee consents to become the bailee of the vendee, his possession is thereafter that of the vendee. But to effect a change of possession sufficient to constitute an actual receipt by the vendee, the bailee must accept the order, or recognize it, or consent to act in accordance with it; and until he has so agreed, he remains agent and bailee of the vendor. Benj. Sales, p. 128 et seq.

The evidence in this case does not clearly disclose what acts were done by the warehouseman when the delivery orders were presented. I will assume, however, that he accepted and recognized them, so far as he lawfully might, and that what was done by him would have been sufficient to effect a change of possession if his relation to the parties and the goods had been that of an ordinary bailee or agent of the vendor.

But such was not the case. The goods were in his custody as a custom-house officer in charge of a United States bonded warehouse. He did not hold the goods subject to the vendor's order, or to be delivered to him on demand, or to any person by his direction. The goods were in the possession of the government, which held them subject to the lien for duties, and they could be withdrawn only on payment of duties and by virtue of a permit obtained from the proper officers of the customs.

By the act of March 28, 1854, § 1 [10 Stat. 270], goods subject to duty may be stored in a private warehouse, to be designated on the warehouse entry at the time they are entered, "provided that such warehouse is used exclusively for the purpose of storing warehoused goods, and shall have been previously approved by the secretary of the treasury, and have been placed in charge of a proper officer of the customs, who, together with the owner or proprietor of the warehouse, shall have the joint custody of all the goods stored in such warehouse; and all the labor on the goods so stored must be performed by the owner or proprietor of the warehouse, under the supervision of the officer of the customs in charge of the same, and at the expense of the aforesaid owner and proprietor."

By the third section, the owner, occupant or lessee of the warehouse is required to give bonds to the United States, to be approved by the secretary of the treasury. By the third section of the act of August 6, 1846 [9 Stat. 54], warehouse goods fraudulently concealed or withdrawn from a public or private warehouse are declared to be forfeited, and the parties so concealing or withdrawing such goods are made liable to the penalties for smuggling; "and if any importer or proprietor of any warehoused goods, or any person in his employ, shall, by any contrivance, fraudulently open the warehouse, or shall gain access to the goods except in the presence of the proper officer of the customs acting in the execution of his duty, such importer or proprietor shall forfeit and pay for every such offense one thousand dollars."

In the revised customs regulations, framed by the treasury department in pursuance of law, the duties of the officer in charge of a warehouse are minutely prescribed. He is required to keep a correct account of receipts and deliveries of goods, with their marks, description of packages, date of delivery, date of receipt, of permit, etc., and daily returns to the collector and naval officer of the goods received and permitted for delivery, are required. Article 164. By article 165, "no goods are to be delivered unless on a permit signed by the collector and naval officer, and indorsed by the clerk in charge of the general storage books at the custom house, to show that he has entered it on his books, and the further indorsement of the cashier, as evi-

dence that the custom house charges have been paid." By article 166 it is provided that "in the collector's office accounts are to be kept with the several public stores and bonded warehouses of all goods received into and delivered therefrom, to be a check on the account of the same. The account will be debited with the goods received, as shown by the daily return of the officer in charge, and be credited with the several permits as they issue from the collector's office. These permits will be treated as deliverances in this account, and the goods permitted marked off as delivered. When this is done, the clerk will indorse the permit and state above his indorsement the charges to be collected by the cashier. When inventories are taken at the several warehouses, their correctness is to be tested by these books and not the books of the warehouse; and when certificates are required, either for claims for damage or for any other purpose, that the property is in store, the verification must come from these books, and not the warehouse books, as any property remaining in store after presentation of permits, will not for such purpose be considered in the custody of the collector."

The importer is by the custom house regulations regarded not only as the person primarily and absolutely liable for the duties, but as alone authorized to obtain a permit for the withdrawal of the goods. He may, however, by making an assignment on the original warehouse entry, substitute in his stead his assignee or vendee. A note of this assignment is taken in the warehouse books at the custom house, and the permit may thereafter be obtained by the assignee.

From the foregoing laws and regulations, it is plain that goods subject to duty, stored in a warehouse, are de jure and de facto in the possession of the government, and that possession cannot be divested by an attachment at the suit of the creditor of the importer (Harris v. Dennie, 3 Pet. [28 U. S.] 303), nor by the officer in charge, nor by the importer, except in the manner provided for by law. The officer is in LO sense the bailee of the importer, and no attornment by him to a third person by order of the importer can have any effect to change the possession of the goods.

Admitting, then, that in ordinary cases an indorsed warehouse receipt, or a delivery order on a warehouseman, accepted by the latter, will operate to transfer the possession, or be good as a constructive or symbolical delivery of the goods, the delivery order in the case at bar can have no such effect; for the importer had no right to order the delivery, and the warehouseman had no right to make it. To hold otherwise would involve the absurdity of supposing that there may be a good constructive delivery by means of certain documents where an actual delivery is legally impossible. See Zachrisson v. Poppe, 3 Bosw. 180; 3 E. D. Smith, 538, 4 E. D. Smith, 504, 505; 1 Daly, 112.

I am, therefore, of opinion that in this case there has been no receipt or acceptance of the goods sufficient to satisfy the statute of frauds, and that, therefore, no valid contract of sale has been made by the parties. It may be observed, in addition, that in holding the delivery orders in this case ineffectual, as a constructive delivery of the goods, it is by no means certain that we are defeating the intention of the vendor. He may not unreasonably be supposed to have been aware that the buyer could not obtain actual possession of the goods until a permit should be obtained for them, and this could only be procured after he (the vendor) had executed an assignment of them on the original entry as required by the custom house regulations. This, if the credit had expired, or the buyer became insolvent, he might decline to do, and it is possible that in making his contract he intended to reserve to himself the control over the goods which their situation and his relation to them gave him, and to retain in this form a lien for the purchase money.

The delivery order recites that the duties had been paid, which was untrue. The vendor must have been aware that it was wholly ineffectual and inoperative to enable the vendee to obtain possession of the goods, and it was intended, no doubt, merely to furnish the vendee with evidence of his right to take possession to be available and operative only after the vendor had paid the duties and obtained and presented a permit.

It is strenuously urged by the counsel for the assignee that in this case there was an actual delivery of part of the goods, sufficient to take the case out of the statute. It appears that the officer in charge of the warehouse did deliver on the bankrupt's order four hundred mats, erroneously supposing that the duties had been paid, as the delivery order recites, and that a permit had been obtained. On discovering his mistake, he applied to Tong Wo & Co., representing that he would be obliged to pay the duties out of his own pocket. Tong Wo & Co. thereupon consented to pay the duties.

But it is clear that this delivery under a mistake and contrary to law cannot constitute a receipt or acceptance of a part of the goods under the statute. The officer acted in clear violation of his duty, misled very probably by the recital in the order that the duties had been paid. If the order was intentionally drawn in that form, or was knowingly presented by the bankrupt, it was a fraud upon the United States, and was a criminal offense within the third section of the act of 1846. The most lenient construction of the transaction is, that it was a mistake on the part of the bankrupt, but whether an innocent mistake or an intentional fraud, neither he nor his assignee can now be heard to affirm that the obtaining of a portion of the goods under such circumstances constituted a receipt and acceptance within the meaning of the statute.

CLIFFORD (ARNOLD v.). See Case No. 555.

Case No. 2,894.

CLIFFORD v. COLEMAN et al.

[13 Blatchf. 210.][1]

Circuit Court, S. D. New York. Dec. 7, 1875.

AMENDMENT IN EQUITY.

A motion to amend a bill, by adding new parties defendant, after replication filed and the production of evidence, it appearing that the plaintiff was in a position to make the amendment before replication filed, refused.

[In equity. Bill by Neil Clifford against John Coleman and others.]

R. B. McMaster, for plaintiff.
George Gallagher, for defendants.

JOHNSON, Circuit Judge. An application to amend the bill after replication and the production of evidence ought to be accompanied by very satisfactory proof that the proposed amendment could not, with reasonable diligence, have been sooner introduced into the bill. The amendment asked for is to add as parties defendant George H. Newbold and Susanna Newbold individually and as executrix of John A. Newbold, deceased. Upon the case, as presented to me on this application, I am satisfied that the complainant was in a position to make the proposed amendment, certainly before the replication was filed, and that he ought not now to be allowed to change his case, according to the rules governing amendments, at such a stage of the cause. Motion denied.

CLIFFORD (MORRISON v.). See Case No. 9,846.

CLIFFORD (ROBINSON v.). See Case No. 11,948.

CLIFTON (JONES v.). See Case No. 7,457.

Case No. 2,895.

CLIFTON v. QUANTITY OF COTTON.
SHELDON v. The WATER WITCH.
BROWER et al. v. SAME.

[36 Hunt, Mer. Mag. (1856) 706.]

District Court, N. D. New York.

PAROL CONTRACT OF AFFREIGHTMENT — DUTY TO CARRY UNDER DECK—SUIT BY CONSIGNEES FOR DAMAGE TO CARGO.

[1. Where cotton is shipped as upon a general ship at a uniform rate of freight, it is the duty of the master, in the absence of any contract, consent, or proof of any established usage to the contrary, to carry such cargo under deck as would be required by a clean bill of lading.]

[2. Where the consignees or agents of the shippers made advances on such cotton, which was, on arrival, delivered to them, together with the freight bill, they may maintain a suit against the shipowners for damages to the cargo, although the bill of lading was not signed by the master.]

[In admiralty. Libels by John Clifton, claimant of the brig Water Witch, against a quantity of cotton, to recover freight, and by William H. Sheldon, and by John W. Brower and others, claimants of the cotton, against the brig for damages to the same. The suits were heard together.]

HALL, District Judge. In the suit first above entitled, the libelant seeks to recover the freight, claimed to be due to the Water Witch, for the transportation on board that vessel of the cotton libeled, from a port in Texas to New York City. This claim of the owner of the Water Witch is resisted on the ground that the cotton received on shipboard, by the fault of the master and owners of the vessel, a damage exceeding in amount the whole freight, which would otherwise have been due for such transportation. The other suits are prosecuted to recover such damages to the cotton, and the three suits were heard together.

I think the evidence sufficiently establishes the right of the libelants, Sheldon and Brower & Co., to maintain these suits in their own names, as the consignees and agents of the shippers, having a personal interest, by reason of advances made upon the cotton consigned to them respectively. It is true that the bills of lading prepared and presented by the shippers for the master's signature, and in which these libelants were named as consignees, were never signed by the master; but his refusal to sign these bills was based upon grounds entirely distinct from the objection that they did not name the proper consignees, and on the arrival of the vessel at New York they were by him recognized as the consignees of the cotton, by delivering it to them as such, and presenting to them his bill for the freight thereof.

The charter party proved in these cases was not made with the shippers or consignees, nor were they or either of them bound by its provisions, or even made acquainted with its contents. The cotton was shipped, as upon a general ship, at a uniform rate of freight, and there was no agreement or consent, on the part of the shippers, that part of the cargo should be carried on deck. It was, therefore, the duty of the master—as it is always the duty of a master, in the absence of any contract, consent, or established usage, allowing the cargo, or a part of it, to be carried on deck—to carry it under deck, as would be required under a clean bill of lading. Upon a parol contract of affreightment, where there are no express stipulations in regard to the extent of the shipowner's liability, the extent of that liability, as implied by law, is doubtless that which is ordinarily assumed under the customary or common bill of lading, and the goods must, as a general rule, be carried un-

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

der deck. I agree that a well-known and well-established custom to carry on deck at the shipper's risk, in a particular trade and between particular ports, in the absence of any express contract or consent, on the part of the shipper or owner of the freight, avoids, in respect to that particular trade, the force of the general rule, which had its origin in the general usages of commerce; and this, whether the contract of affreightment in the particular case is by parol, or is contained in the ordinary form of what is called a "clean bill of lading;" but such particular custom must be clearly established, and well known. The established rule upon the subject is well laid down by Judge Ware, in the case of The Paragon [Case No. 10,708], with his accustomed precision and elegance of expression, as well as with the accustomed accuracy of that learned and able admiralty judge. See, also, The Rebecca [Id. 11,619].

But in this case there is no satisfactory proof of such a custom. On the contrary, the preponderance of the proof is against the existence of such custom. Besides, the freight agreed to be paid was a uniform rate, and the ordinary rate of under-deck freight; and if, as stated by Mr. Justice Story in Vernard v. Hudson [Id. 16,921], an agreement that goods shipped under a clean bill of lading are to be carried on deck may be deduced from the fact that the goods are, by the terms of such bill, to pay deck freight only, it would seem to follow that an agreement for the payment of under-deck freight, in the absence of any proof of an express contract to the contrary, ought to be held to establish conclusively the obligation of the master to carry the goods under deck.

Upon the whole evidence, then, I shall hold that the liabilities of the Water Witch are the same as though the cotton had been shipped under a clean bill of lading, (except that there is no admission that the cotton was shipped in good order,) and had, under such a bill of lading, been consigned to the libelants in the suits for damages.

In regard to the condition of the cotton when it was shipped, and the great question in regard to the damage received on shipboard, and for which the vessel is liable, there is a most decided conflict of testimony,—equaling, in that respect, the conflict of testimony in a collision case between two vessels, each with a numerous crew, who witnessed the collision from entirely different points of view, and severally testify under the influence of the natural and strong prejudice always felt in favor of "vessel and owners." Nevertheless, I cannot doubt that the very bad condition of the cotton at the time of its delivery in New York resulted, in part at least, from sea-damage, for which the vessel is liable. It is true that it was probably received in bad condition, from what is called "country damage," and certainly the vessel is not liable for the whole damage received from the time it was first packed in bales to its arrival in New York; but I see no satisfactory mode of determining the amount of sea-damage, (as distinguished from "country damage," or damage received before shipment,) for which the Water Witch is liable, except by a reference, affording all parties full opportunity to produce all the evidence which can be adduced upon this question.

There must, therefore, be an order of reference in the three suits to ascertain: 1. The amount of freight upon the cotton delivered to Brower & Co. and Sheldon, respectively, allowing only at the "on-deck" rate for so much of the cotton as was actually carried on deck. Vernard v. Hudson [supra]. 2. The amount of sea-damage upon each lot of such cotton, for which the brig is responsible. And on the coming in and confirmation of such report a final decree should be entered, according to the rights of the parties, as determined by such report.

[NOTE. On the coming in of the report the district court made a final decree (case unreported) dismissing the libel of Clifton, but in favor of the libelants Brower and others, and Sheldon, and from this decree Clifton appealed to the circuit court, where the decree was reversed as to him, but affirmed as to the libelants in the other suits. Brower v. The Water Witch, Case No. 1,971.

[Both Clifton and Sheldon appealed to the supreme court. The appeal of Sheldon was dismissed for want of jurisdiction, and, on the hearing on Clifton's appeal, the decree of the circuit court was affirmed. See note at end of Brower v. The Water Witch, supra.]

CLIFTON v. QUANTITY OF COTTON. See Case No. 1,971.

CLINCH (MERRIAM v.). See Case No. 9,460.

CLINCH (ROPES v.). See Case No. 12,041.

Case No. 2,896.

In re CLINE.

[1 Ben. 338.] [1]

District Court, S. D. New York. Aug., 1867.

ENLISTMENT OF MINOR—HIS OATH AS TO HIS AGE CONCLUSIVE—POWER OF ARMY OFFICER TO ADMINISTER THE OATH — BURDEN OF PROOF—PRESUMPTION.

1. Under the act of congress of February 13th, 1862 [12 Stat. 339], the oath of a military recruit, in his enlistment papers, as to his age, is conclusive upon himself and upon this court, and, where he has sworn that he was not a minor, evidence to show that he was such is not admissible.

[Followed in Re Riley, Case No. 11,834. Cited in Re Davison, 4 Fed. 509.]

2. Where the oath is taken before a military officer, the presumption is that the services of a civil magistrate could not be obtained, as required by the act of June 12, 1858, § 3 [11 Stat. 336], and the burden of proof is on the recruit to show that such services could be obtained.

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

At law. This was a habeas corpus issued on the petition of John Edward Cline, a private soldier in the army of the United States, held therein by virtue of his enlistment. The petition set forth that, at the time of his enlistment, Cline was a minor, and enlisted without the consent of his parents. The return to the writ, made by Brevet Major-General Daniel Butterfield, general superintendent of the recruiting service, set forth, that Cline was regularly enlisted into the service of the United States, according to the laws thereof governing the enlistment of recruits, by his signing the proper statement or declaration required for recruits to take; that the oath of enlistment was regularly administered by an officer of the army authorized to administer oaths; and that the recruit was regularly examined by the surgeon appointed for that purpose. A certified copy of the original enlistment paper was annexed to the return, and such original was submitted to the court with the return. This paper consisted of four documents: 1. The statement or declaration required to be made by recruits. 2. The certificate of the examining surgeon. 3. The certificate of the recruiting officer, J. Christopher, Capt. 25th U. S. Infantry, and Brevet Major U. S. A. 4. An affidavit signed by Cline, and certified to have been sworn and subscribed to at Chicago, Illinois, May 20th, 1867, before Major Christopher, and reading as follows: "Oath of Recruit—I, John E. Cline, desiring to enlist in the army of the United States for the term of three years, do solemnly swear that I am twenty-two years and —— months of age; that I have neither wife nor child; that I have never been discharged from the United States service on account of disability or by sentence of a court-martial, or by order before the expiration of the term of enlistment; and I know of no impediment to my serving honestly and faithfully as a soldier for three years." It was claimed, on the part of Cline, that, being enlisted while a minor, without the consent of his parents, his enlistment was unlawful, and that he was entitled to be discharged. Testimony satisfactorily establishing the facts that he was a minor and enlisted without the consent of his parents was received, by the court provisionally, on the hearing of the writ, subject to a decision by the court as to the admissibility of such testimony.

Dudley Field and Thos. G. Shearman, for petitioner.

Lieut. A. B. Gardner, 9th Infantry, for respondent.

BLATCHFORD, District Judge. It is not contended that, if the soldier was twenty-one years of age when he was enlisted, his enlistment was in any manner illegal, but his discharge is sought solely on the ground that he was in fact under twenty-one years of age, and was enlisted without the consent of his parents.

The act of February 13, 1862 (12 Stat. 339, § 2), provides, that "the oath of enlistment taken by the recruit shall be conclusive as to his age." It is as conclusive and binding upon this court as it is upon the recruit or upon the United States. The intent of congress manifestly was, that no evidence should be received to contradict a statement as to the age of the recruit, contained in the oath taken by him on his enlistment. This view of the act of 1862 was taken by Judge Daly, in the case of George Reilly, in the court of common pleas, in the city of New York, in March, 1867, and also by my predecessor, Judge Betts, in January, 1867, in the cases of Michael J. Conley and John Jump. I am entirely satisfied that the view is a sound one. In the present case Cline swore, in his oath of enlistment, that he was then twenty-two years of age. That oath is conclusive that he was not then a minor, and no evidence is admissible to show that he was.

An objection is taken to the validity of the enlistment of Cline, on the ground that the act of June 12, 1858, section three, does not authorize an officer of the army to administer the oath of enlistment to a recruit unless the services of a civil magistrate authorized to administer the same cannot be obtained; that the act of August 3, 1831, section eleven, does not authorize an officer of the army to administer an oath of allegiance, unless it appears that he could not obtain the attendance of a civil officer authorized by law to administer oaths; and that the return should show that the attendance of such civil officer could not be obtained. It is a sufficient answer to this objection to say, that the presumption is in favor of the regularity of the proceeding, when it appears that the oath was administered by the military officer, and that, in such case, the intendment is, that the services of a civil magistrate could not be obtained, and the burden is upon the recruit to show that such services could be obtained, and not upon the United States to show that they could not be obtained. In this case, nothing appears on the subject except what is shown on the face of the enlistment papers. The enlistment of Cline was, in all respects, regular, and he must be remanded to service under his proper military officer.

Case No. 2,897.

CLINE v. HULERY

[Cited in Fitch v. Cornell, Case No. 4,834. Nowhere reported; opinion not now accessible.]

CLINTON (GROVER & BAKER SEWING MACH. CO v.). See Case No. 5,845.

Case No. 2,898.

CLINTON v. The HANNAH, ETC.

[Bee, 419.][1]

Admiralty Court of Pennsylvania. 1781.

ADMIRALTY JURISDICTION—SHIPWRIGHT'S WAGES.

A shipwright cannot sue in the admiralty for his contract wages for building a ship or vessel designed for navigation on the high seas.

[Cited in Shrewsbury v. The Two Friends, Case No. 12,819; Pritchard v. The Lady Horatia, Id. 11,438; Levering v. Bank of Columbia, Id. 8,287; Ramsay v. Allegre, 12 Wheat. (25 U. S.) 618, 619; The Stephen Allen, Case No. 13,361; Bains v. The James and Catherine, Id. 756; The Draco, Id. 4,057; U. S. v. New Bedford Bridge, Id. 15,867; Waring v. Clarke, 5 How. (46 U. S.) 480; Jackson v. The Magnolia, 20 How. (61 U. S.) 331; People's Ferry Co. v. Beers, Id. 402; Cunningham v. Hall, Case No. 3,481. Distinguished in Zane v. The President, Id. 18,201. Disapproved in The Richard Busteed, Id. 11,764.]

[This was a suit by Clinton against the brig Hannah, and the ship General Knox.]

A plea to the jurisdiction of the court was filed in this cause: and the question was, whether a shipwright might sue in the admiralty for his contract wages for building a ship or vessel designed for navigation on the high seas? After long argument, the judge gave his opinion as follows. The authorities which the libellants have urged in favour of the jurisdiction of this court, in the present case, are Croke, 296, and 1 Rolle, 533. All the other authorities adduced having reference to those, except one in 1 Strange, 707. In the first edition of Croke, 296, we find resolutions upon cases of admiralty jurisdiction subscribed by all the judges of both benches, in April, 1632; wherein, amongst other things, it is resolved that a shipwright may sue in the admiralty, provided his suit be against the ship. Rolle, as a faithful abridger, gives the law as it then stood under the authority of these resolutions. In article 19, he mentions the doctrine respecting shipwrights, and cites the case of Tasker v. Gale. And in article 21, he gives the law respecting charter-parties, adding these remarkable words: "As it was declared by the court to have been lately resolved by all the judges of England." So that those resolutions seem to be the only foundation upon which these doctrines rest. And it is very observable, that although Croke records the resolutions as they were subscribed in Hilary term, the eighth of Charles, yet he does not report the case of Tasker v. Gale, although adjudged (according to Rolle) in the ninth of Charles, which must have been but a few months after. Neither hath any other reporter of that period noticed this case. From which it seems probable, that those resolutions, and the judgment in the case of Tasker v. Gale, were not admitted as good law even in that day.

But it is further observable, that when Sir Harbottle Grimestone published Croke's Reports in the year 1657, he prefixed, even to this first edition, a declaration under the title Mantissa, that the resolutions of the judges in February, 1632, were not of authority: and for this reason (according to Comyns) those resolutions were totally omitted in the subsequent editions of that work. Since that time no instance can be found in the books, where either these resolutions, or the case of Tasker v. Gale adjudged thereupon, have been referred to either by the court, or in the pleadings in any adjudged case, except in the case of Wooward v. Bonithan, Sir T. Raymond, p. 3: and there the court declared, that those resolutions had been denied by several judges, and renounced by even some of those who had subscribed them. And of this, Danvers also takes particular notice. Page 271. Therefore the authority of these resolutions seems to have been abolished by general consent. But another case has been referred to as authority in point, viz. 1 Strange, 707. The report is very short, and in these words: "On a motion for a prohibition, it was held, that a carpenter may sue for wages in the admiralty." This report, however, is too slight and solitary to authorize a decision contrary to general established rules. The word "carpenter" doth not precisely indicate a shipwright, but may be applicable to a mariner on board a vessel; and as the cases referred to in the margin of this report, respecting the officers of a ship who sued in the admiralty as mariners, the probability is, that this also was an officer called the "ship's carpenter:" a doubt having arisen whether the subordinate officers of a ship, as well as the master, were not prohibited from suing in the admiralty for wages. If the resolutions of the judges in 1632, and the decision in the case of Tasker v. Gale, were admitted as law, and if the carpenter mentioned in 1 Strange, 707, was the shipwright or builder, how is it possible that the judges so lately as the year 1765, should declare in court, that no instance could be found where both the contract and service were to be done on land, within the body of a county, that the common law courts ever permitted the admiralty to have jurisdiction? I refer to 2 Wils. 265: and this opinion was given in the case of a pilot suing for services done, indeed within the body of a county, but in a case of a much stronger maritime complexion than the present.

There are several exceptions to the general rules of law respecting admiralty jurisdiction, as ascertained by the statutes: such as suits for mariners' wages, and on hypothecations made by the master in foreign parts, &c. &c. which have been so often contested,

[1] [Reported by Hon. Thomas Bee, District Judge.]

and so often allowed, for good and weighty reasons, that they have become confirmed law, and it would be in vain now to oppose the general rule to the general practice. But this does not appear to be the case with respect to shipwrights; neither are the same reasons applicable to them. Their contract is made with persons whom they know, or ought to know; their services are all executed within the body of the county, and mostly on dry land above high water mark; their wages have no reference to a voyage performed, or to be performed; the shipwrights have no interest or concern whatever in the vessel after she is on float, and the merchant hath paid for her; and lastly, the practice of former times doth not justify the admiralty's taking cognizance of their suits. Let the bill be dismissed, as not being within the jurisdiction of the court.

Case No. 2,899.

CLINTON et al. v. MAYO.

[12 N. B. R. 39.][1]

District Court, E. D. Virginia. 1875.

PETITION IN INVOLUNTARY BANKRUPTCY — SUFFICIENCY—HEARING ON RETURN DAY—JURY.

1. On the hearing of a petition in compulsory bankruptcy, when the debtor defendant declines to appear and defend in form, but is personally present, the court will hear a suggestion from any creditor, though it is a creditor who is charged with having received a fraudulent preference, that an insufficient number of creditors have joined in the petition.

[Cited in Re Hatje, Case No. 6,215; Re Jonas, Id. 7,442; Re Austin, Id. 662.]

2. When such a suggestion has been made, the court, if the bankrupt is relied upon to prove the insufficiency of the number of petitioning creditors, will require him to make his statement in writing, under oath, and accompany it with a list of all his creditors, and of the amounts due them.

3. If the examination into the question, whether a sufficient number of creditors have joined in the petition, has not been completed at the hearing on the day to which the order on the debtor defendant to show cause has been made returnable, and is continued until the next day, the defendant having been previously served personally with the order, and being personally present on the return day, and having failed on that day to demand a jury for the trial of the charges of acts of bankruptcy; in such a case, the defendant will not be allowed a jury if he demand one on the second day; that not being an "adjourned day" within the meaning of section 41 of the bankrupt law. [14 Stat. 537;] Rev. St. § 5026.

4. In determining whether or not a sufficient number of creditors have joined in a petition, where it is proved that a preferred creditor had "reasonable cause to believe that the debtor was insolvent, and knew that a fraud upon the bankrupt act was intended," the court will throw out of the computation the claim of the creditor so preferred, at least as to a moiety of its amount.

[Cited in Re Currier, Case No. 3,492.]

[1] [Reprinted by permission.]

The petition was filed on the 17th of March, 1875 [by G. D. W. Clinton, and others]. It charged sundry acts of bankruptcy [against D. C. Mayo]. Amongst those specified was the confession of a judgment for twenty-four thousand seven hundred and sixty-three dollars to M. E. McDowell & Co., of Philadelphia, on the 23d of January, 1875. The usual allegations were made as to fraudulent knowledge on the part of the plaintiffs in the judgment, and of insolvency on the part of Mayo, the debtor defendant. A rule was given for a hearing on the 29th of March. On that day Mayo, though personally present, declined to enter a formal appearance, or to deny, by answer, the allegations of the petition. Thereupon, an order was entered treating as confessed, as to Mayo, the acts of bankruptcy charged in the petition, and leaving open only the question whether a sufficient number of creditors had joined in it. The judgment creditors, in the judgment that had been confessed, were present by counsel, and suggested that the number of creditors required by law had not united in the petition; and asked that Mayo might be examined as to who were his creditors and the amounts due them. It was contended by counsel for the petitioning creditors, that none could make the objection now made, of the lack of the required number of creditors as petitioners, save the debtor defendant himself. The court allowed the debtor defendant to be examined, and while he was preparing his denial in writing that a sufficient number of creditors had joined, and preparing his list of creditors and the amounts due them, the examination was laid over until the next day, the 30th of March. On that day, the debtor defendant having changed his mind, asked leave to appear and file, as his answer to the petition, the statement which he had prepared in writing, denying all acts of bankruptcy; denying that a sufficient number of creditors had joined, and setting forth the names of his creditors and the amounts due them; and furthermore filed in writing a demand that the charges of acts of bankruptcy might be tried by a jury. The court refused to allow the writing to be filed as an answer, and treated its denial of acts of bankruptcy as surplusage; but accepted it as his testimony as of a witness called upon to give evidence by a creditor who had suggested that a sufficient number of creditors had not joined in the petition. The court also denied the demand for a jury. The examination was then (on the 30th of March) continued until the 5th of April, and personal notice ordered to be served by the marshal on creditors not present, all of whom were residents of Richmond, except two whose claims were for less amounts than fifty dollars. On the 5th of April the examination proceeded, and was concluded. The statement in writing submitted by Mayo, and his oral testimony, exhibited the following facts:

Aggregate claims of petitioning creditors, which each exceeded $250.00	$ 4,572 34
Claims of petitioning creditors which were less than $250.00	1,785 52
Total claims of petitioning creditors	$ 6,357 86
Aggregate claims of non-petitioning creditors, each greater than $250.00	$21,158 31
Aggregate claims of non-petitioning creditors, each less than $250.00	287 37
Total claims of non-petitioning creditors	$21,445 68
Total of all claims	$27,803 54

The claim of the preferred creditors, M. E. McDowell & Co., was eighteen thousand and sixty-two dollars and eighty-nine cents; and the act of bankruptcy charged, was a confession of judgment which had been given by Mayo to them for twenty-four thousand seven hundred and sixty-three dollars, upon which execution had been taken out. The lien of an execution has the effect, under the laws of Virginia, of divesting the title of the debtor in all personal property, to the amount of the debt, subject only to his right to certain poor debtor and homestead exemptions.

The following was the opinion and decision of the court on the several questions which arose in the examination.

L. H. Chandler and James E. Neeson, for petitioning creditors.

H. A. & J. S. Wise and J. D. Christian, for the firm of M. E. McDowell & Co., creditors who had received a confession of judgment within three months of the filing of the petition.

HUGHES, District Judge. Before the amendment of June, 1874, there was substantially but one inquiry in adjudicating upon involuntary petitions in bankruptcy. It was, whether an act, or acts, of bankruptcy had been committed. The trial of that fact might be by jury, if seasonably demanded by the debtor defendant. The law in that respect remains as before. But the amendment of June, 1874, superadds another inquiry. It gives jurisdiction in involuntary bankruptcy only in cases where a fourth in number and a third in value of the creditors unite in the petition. Accordingly, there are substantially two charges in this petition: First. That certain acts of bankruptcy have been committed; and, second. That a fourth in number and a third in interest of the creditors have united in the petition. The debtor was called upon to answer these charges on the 29th day of March. He declined, though personally present on that day, to formally appear and defend. The court, therefore, had nothing to do as to the first charge, but to take it for confessed that the acts of bankruptcy charged in the petition were committed, and treat that part of the petition as adjudicated. But the amendment of June, 1874 [18 Stat. 180], now also requires that the court shall be "satisfied" that the number of creditors which has been stated shall have united in the petition; and provides that if the bankrupt deny the allegation of the petition in this respect, his denial shall be in writing; and he shall be required at once to file a schedule of all his creditors, and of the amounts due them. Then, if it appear to the court that the number having signed the petition is short of what is requisite, ten days are to be given the petitioners in which to add the proper number. I therefore required the debtor, Mayo, when called upon to testify as a witness, to put his denial in writing, under oath, and at once to file a list of his creditors and the amounts due them.

As to the point insisted upon by counsel, that the creditors who have received a confession of judgment giving them a preference, should not be heard to make the objection of insufficiency in the number of petitioning creditors; it is true that they are not yet regularly in court, and will not be until either they shall have proved their claim, or a bill in chancery shall have been filed to set aside their judgment; still, not only they, but any one may suggest at the return day of the order on the debtor to show cause, that the number of petitioners is not sufficient; and, either upon such suggestion, or ex mero motu, in order to be "satisfied" on that point, the court will call upon the debtor for a list of his creditors, and take any other evidence it can avail itself of on that subject. I accordingly did, at the suggestion of M. E. McDowell & Co., call upon Mayo for such a statement. The demand for a jury was not made by the debtor defendant, Mayo, on the return day of the order on him to show cause. He was present on that day, though he did not enter a formal appearance. The return of the marshal on the order was that he had been served with a copy of it on the 20th of March. When such service has been made, and the debtor is present, the terms of section 5025 of the Revised Statutes do not authorize an "adjourned day" for the hearing of the petition; and, therefore, the terms of section 5026 require that the demand in writing for a jury shall be made on the return day, and do not give that right on any other day. I therefore denied the demand for a jury in writing on the 30th, which the law expressly required to be made on the 29th of March.

The single question now left in this case is, whether the debt of twenty-four thousand seven hundred and sixty-three dollars, for which the confession of judgment given on the 23d day of January, 1875, for the purpose of preferring M. E. McDowell & Co., is provable in whole, or for a moiety, and to be computed as to the whole or only as to half, in this preliminary proceeding. Before the amended bankrupt act of the 22d of June, 1874, if the claim of a creditor were doubted by the judge or disputed, especially a claim for which a creditor had accepted a prefer-

ence, it was postponed, and could not be proved until after an assignee was appointed. There was then no provision in the bankrupt law requiring that any specific number of creditors should join in a petition in involuntary bankruptcy; and no computation was necessary of the number of creditors, which could be affected by postponing the proof of the claim. Before the amendment of June 22, 1874, requiring a specific number of petitioning creditors to join in such a petition, there was no provision in the 39th section authorizing or requiring the court to pass upon the question, whether a preference had been given in fraud of the provisions of the bankrupt act, in adjudicating upon the petition in involuntary bankruptcy; because it was then unnecessary to give it that power. But when the amendment of June 22, 1874, was passed, an additional clause was added to the 39th section, immediately following the clauses requiring a specific number of creditors to join in the petition; which clause was, in fact, made necessary by that amendment. That clause empowers the court, at the time of ascertaining whether one-fourth in number and one-third in amount of creditors had joined in the petition, to decide, pro hac vice, whether the preferred creditor had had "reasonable cause to believe that the debtor was insolvent; and knew that a fraud upon the bankrupt act was intended." I say it was necessary to add this clause to the 39th section, and to give this power to the court, at least for the purposes of adjudication. I do not pretend that the decision of this court on this question, in this preliminary stage of the proceeding, is final and conclusive as against the parties to the preference; but a decision is necessary, and is final, so far as the preference affects the jurisdiction of the court to adjudicate upon the petition. If the court did not have this power, all that it would be necessary for any creditor and a colluding insolvent to do to defeat the proceeding in bankruptcy, would be to arrange a confession of judgment for a sum so large as to exceed by double the aggregate claims of bona fide creditors. The validity of the confession of judgment now under consideration being the only question left in this case, what are the facts in regard to it? The debtor defendant Mayo is made a witness and put upon the stand by M. E. McDowell & Co. He proves that M. E. McDowell, the senior partner, "was a whole week, till Friday, January 22, 1874, examining Mayo's affairs, and that it appeared upon the examination of his accounts, that his assets were less than his liabilities." He proves that this appeared at the examination in his factory, when Mayo's liability to McDowell & Co. was ascertained on that Friday, January 22, 1875, to be less than sixteen thousand dollars. He proves that on the next day, McDowell & Co. took a confession of judgment from him for twenty-four thousand seven hundred and sixty-three dollars. He proves, also, that on the day of confessing the judgment for this larger amount, he asked McDowell & Co.'s counsel, in the presence of M. E. McDowell, whether this confession of judgment would be an act of bankruptcy, and that this counsel (who did not seem to know of the previous examination of his affairs by McDowell, which had disclosed to him Mayo's insolvency), advised him to consult his own counsel; but stated that the amount for which the judgment was to be confessed was too large to allow of the remaining creditors taking steps in bankruptcy. Do these facts, proved by the witness whom McDowell & Co. themselves put upon the stand, show that that firm "had reasonable cause to believe that the debtor was insolvent, and knew that a fraud on the bankrupt act was intended?" Certainly they had reasonable cause to believe Mayo's insolvency, for they knew that he was insolvent by a long familiarity with, and a recent week's examination of his affairs. Did they also know that Mayo intended a fraud upon the bankrupt act? A fraud upon that act is an effort to defeat its objects. The leading object of that act is to secure a pro rata distribution among creditors, of the estate of the bankrupt. This confession of judgment could not but defeat that object, and could not but have been intended to defeat that object by Mayo; and M. E. McDowell could not but have known that that was Mayo's intention. If, then, it be a maxim of law that no man shall be allowed to take advantage of his own wrong; and if it be true that a fraud upon a statute cannot be allowed to defeat the purposes of the statute, am I at liberty to treat this claim of McDowell & Co. as a provable debt for the purpose of defeating the jurisdiction of this court in this proceeding?

It is not necessary for me in determining the question now before the court, to pass upon the question of "actual fraud." There is a distinction between fraud upon the bankrupt act, and "actual fraud." Taking a preference from an insolvent, knowing him to be an insolvent, is a fraud upon the act; though it may be honest in a merely moral point of view. But if a confession of judgment were taken in this case for twenty-four thousand dollars when the amount really due was only sixteen thousand dollars, then there would have been "actual fraud." I cannot at this stage of the case try the question of "actual fraud" in the meaning of the clause of the 39th section, running in these words: "And such person, if a creditor, shall not, in cases of actual fraud, be allowed to prove for more than a moiety of his debt." That question must be tried and determined at a future period, under a plenary proceeding in chancery; and I expressly disclaim passing now upon the question of "actual fraud." But, for the purpose of determining the jurisdiction of the court, I am obliged to deal with the confession of judgment at once, so far as to decide whether or not it was a fraud upon the bankrupt act. Upon the evi-

dence of Mr. Mayo I feel bound to decide that it was. If so, it cannot be computed in estimating the aggregate provable claims against the debtor, at least as to half of its amount. The amendment of June, 1874, and section 23 of the original act, must be taken together. Section 23 does not use the word "fraud." It simply declares that a preference taken from a debtor, when reasonable cause existed for believing that he was insolvent, shall not be proved, etc., until the preferred creditor has surrendered the property received under the act of preference. The same section provides that where the validity of any claim is doubted by the judge, the proof of it shall be postponed until the appointment of the assignee; which is as much as to say that the debt is not provable at the date of adjudication, in whole or in part. The clause last quoted from the 39th section provides that a creditor guilty of "actual fraud" shall not be allowed to prove for more than half of his debt; but if the 23d section is to stand, this proof for the moiety of the debt is not admissible until after the assignee is appointed. I think, therefore, that this debt cannot be received or counted as proved or as provable until after the assignee shall have been appointed. A doubtful claim cannot be considered as provable until after it has been proved. For the purpose of determining the jurisdiction of the court, I must refuse to treat the claim of McDowell & Co. as provable until it is proved, in pursuance of the provisions of the 23d section. Whether it will then be provable in whole, or only for a moiety, is not material to the question now to be decided, inasmuch as the number of petitioning creditors is sufficient to give jurisdiction to the court to adjudicate upon this petition, in either event. I decide, therefore, that a sufficient number of creditors have joined in the petition, and that an order of adjudication must be made.

CLINTON (QUIRK v.). See Case No. 11,518.

CLINTON & S. R. CO. (SCOTT v.). See Case No. 12,527.

Case No. 2,900.

In re CLINTON BRIDGE.

[1 Woolw. 150;[1] 7 Am. Law Reg. (N. S.) 149.]

Circuit Court, D. Iowa. Oct. Term, 1867.[2]

EFFECT OF A STATUTE ON PENDING LITIGATIONS — SUCH A LAW IS NOT UNCONSTITUTIONAL — THE COMMERCIAL CLAUSE—INTERFERENCE WITH JURISDICTION OF COURT.

1. An act declaring a bridge a lawful structure, pending a suit to have it declared a nuisance, has the effect to remove the ground of complaint made against it. By its own terms it seems to do so; for it describes it as a bridge already erected, and congress must have known of the complaints made against it. It makes lawful the bridge which was before unlawful; and the court must be governed by the law as it is when it is called upon to act.

2. A law declaring lawful a bridge over the Mississippi, which obstructs the navigation of the river, is not unconstitutional because of the treaty with France, by which its free navigation is secured. Such questions are international and political in their character, and belong to the executive and legislative departments of the government.

[Cited in Buckner v. Street, Case No. 2,098; U. S. v. Tobacco Factory, Id. 16,528; U. S. v. Bridleman, 7 Fed. 902; Bartram v. Robertson, 15 Fed. 214; The Head-Money Cases, 18 Fed. 141; Edye v. Robertson, 112 U. S. 580, 5 Sup. Ct. 253.]

3. A law authorizing such a bridge to be built, and prescribing general rules for its construction and maintenance, is a regulation of commerce, and is within the powers conferred on congress by the commercial clause of the constitution. It was so held in the Wheeling Bridge Case, 18 How. [59 U. S.] 421.

4. Any means by which passengers and merchandise are transported is an element of commerce. This has been repeatedly held in respect of navigation, and congress has legislated on the subject accordingly. The railroad, as much as the steamboat, is a means of interchanging persons and property, which interchange is commerce itself. When railroads become portions of the great highways of our Union, acting an important part in a commerce which embraces many states, to regulate them is to regulate commerce. This is true of a bridge over a great river for the passage of such railroad.

[Approved in Union Pac. R. Co. v. Peniston, 18 Wall. (85 U. S.) 47. Cited in Louisville & N. R. Co. v. Railroad Commission of Tennessee, 19 Fed. 712.]

5. The act is decisive of the case, becase it furnishes a rule by which the action of the court is determined, not because it deprives the court of jurisdiction.

[See note at end of case.]

This was a bill in equity, filed by [Richard C.] Gray on the 2d day of March, 1861 [against the Chicago, Iowa and Nebraska Railroad Company and others], complaining of a bridge across the Mississippi river, on the ground that it presents a serious obstruction to the navigation of that river, and asking its abatement as a nuisance. The authority to build the bridge was derived from the state of Illinois, by an act incorporating the Albany Bridge Company, and from the state of Iowa, under its general law on the subject. On the Iowa side of the river, it was located at Clinton. To that point, from Chicago, a railroad was built and operated by the Chicago and Northwestern Railroad Company. Thence west to Cedar Rapids in Iowa, ran the Clinton and Cedar Rapids Railroad, which was already constructed and being operated; and from Cedar Rapids to Omaha, in Nebraska, the Cedar Rapids and Missouri River Railroad was in process of construction. At Omaha, the last mentioned road would, when completed, connect with the Union Pacific Railroad. So that from Chicago, through Illinois, Iowa, and Nebraska, a large and important commerce was be-

[1] [Reported by James M. Woolworth, Esq., and here reprinted by permission.]

[2] [Affirmed in The Clinton Bridge, 10 Wall. (77 U. S.) 454.]

ing opened and carried on, all of which crossed the Mississippi upon this bridge. The defendant's answer to the bill came in on the 7th of November, 1864, and very voluminous proofs touching the business done at this point, the manner of the construction of the bridge, its effect upon the river and the navigation thereof, were taken. The testimony having been closed, the cause was set down to be heard upon pleadings, proofs, and exhibits. The cause being in this attitude, on the 27th day of February, 1867, congress passed an act [14 Stat. 412] declaring the bridge a post route, and lawful structure as follows:

"Be it enacted by the senate and house of representatives of the United States of America, in congress assembled, that the bridge across the Mississippi river erected by the Albany Bridge Company, and the Chicago, Iowa, and Nebraska Railroad Company, under the authority of the states of Iowa and Illinois, between the towns of Clinton, Iowa, and Albany, Illinois, shall be a lawful structure, and shall be recognized and known as a post route, upon which also no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States, than the rate per mile paid for their transportation over the railroads or public highways leading to the said bridge.

"Sec. 2. And be it further enacted, that the draw of said bridge shall be opened promptly, upon reasonable signal, for the passage of boats whose construction shall not be such as to admit of their passage under the permanent spans of said bridge, except when trains are passing over the same; but in no case shall unnecessary delay occur in opening the said draw during or after the passage of trains.

"Sec. 3. And be it further enacted, that in case of any litigation hereafter arising from any alleged obstruction to the free navigation of said river, the cause may be tried before the circuit court of the United States of any state in which any portion of said obstruction or bridge touches.

"Sec. 4. And be it further enacted, that the right to alter or amend this act, so as to prevent or remove all material obstructions to the navigation of said river, by the construction of said bridge, is hereby expressly reserved." 14 Stat. 412.

The defendants now moved the court to dismiss the bill, on the ground that this act took away its jurisdiction to determine the questions involved in it.

Mr. Howe, for motion.

Mr. Grant and Mr. T. D. Lincoln, contra.

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

MILLER, Circuit Justice. This is a bill in chancery to procure the abatement of the bridge as a nuisance, on the ground that it presents a serious obstruction to the navigation of the Mississippi river. The pleadings are at issue, the depositions all taken, and the case set down for hearing.

The defendants now present a motion to dismiss the bill for want of jurisdiction. This motion is founded on the act of congress of February 27, 1867 (14 Stat. 412), which, it is claimed, takes away the jurisdiction of the court to proceed further in this case. The complainant, on the other hand, maintains, that the act, rightly construed, does not dispose of the present suit; and that, if its true construction has such effect, it is unconstitutional. It is said, that because the third section provides for litigation about the bridge after the passage of the act, and vests jurisdiction thereof in the circuit courts, congress could not have intended to conclude the question raised by this bill, which was then pending. But the second section of the act makes certain regulations concering the use of the draw in the bridge, and contemplates that suits may grow out of their neglect or violation. It is to this litigation that the third section seems most naturally to refer. At all events, it is a species of litigation to arise after the passage of the act, to which alone that section, by its own terms, can apply.

The first section of the act, after describing a bridge already erected across the Mississippi river at Clinton, declares, that "it shall be a lawful structure, and shall be recognized and known as a post route." It cannot be doubted that congress was aware of the existence of the bridge, and that it had been complained of as an unauthorized and illegal obstruction to navigation. Undoubtedly, by this act congress intended, so far as it had the power, to remove therefrom the objection of illegality and want of authorization. The declaration that it shall be a lawful structure admits of no other interpretation. The language is almost identical with that used by the same body in reference to the Wheeling bridge, where the supreme court has held that such was its intent. [Pennsylvania v. Wheeling & B. Bridge Co.] 18 How. [59 U. S.] 421.

But it is not necessary to determine whether congress intentionally referred to this suit at the time of passing the act, or whether it was aware that such a suit was pending. If it had the power to make this bridge lawful, which before was unlawful, it has done so in this case; and the court must be governed by the law as it exists at the time when it is called upon to act.

The objections taken to the constitutionality of the act are these: 1. That it violates the obligations of certain treaties between the United States and foreign nations, which in effect declare that the navigation of the Mississippi river shall remain free and unobstructed forever. 2. That no power exists in congress to authorize or regulate bridges over the navigable streams of the

United States. 3. That such special legislation, while a suit is pending in the courts involving the same matter, is an invasion of the rights of the judicial department of the government, as secured by the constitution.

1. In reference to the first of these objections, we need not inquire whether the treaties referred to were designed to affect such cases as the one before us or not; for we are of opinion that whatever obligation they may have imposed upon our government, the courts possess no power to declare a statute passed by congress and approved by the president, void, because it may violate such obligations. See The Amiable Isabella, 6 Wheat. [19 U. S.] 1.

Questions of this class are international questions, and are to be settled between the foreign nations interested in the treaties and the political department of our government. When those departments declare a treaty abrogated, annulled, or modified, it is not for the judicial branch of the government to set it up, and assert its continued obligation. If the court could do this, it could annul declarations of war, suspend the levy of armies, and become a great international arbiter, instead of a court of justice for the administration of the laws of the United States. See Georgia v. Stanton, 6 Wall. [73 U. S.] 50.

2. The second of these objections involves the consideration of the commercial clause, as it is appropriately called, of the constitution. If the determination of the circumstances under which a bridge may be built over a navigable stream, or the prescribing of general rules for its construction and maintenance, be a regulation of commerce, either with foreign nations or among the states, then the enactment under consideration falls within the powers conferred on congress by that clause.

It would be sufficient, in this court, to say that we are concluded on this question by the decision of the supreme court in the Wheeling Bridge Case, already referred to, in that part which expressly holds that the power to declare such a bridge a lawful structure is included within this clause of the constitution. That case was decided when it was first before the supreme court in 1852, and is reported in 13 How. [54 U. S.] 518. Its circumstances at that time were briefly these: A bridge over the Ohio at Wheeling being in process of construction, the state of Pennsylvania, alleging certain circumstances in which the bridge would operate to its special injury, commenced an original suit in the supreme court to have the structure declared a nuisance, and as such its erection enjoined, and it abated. Thereupon the state of Virginia passed an act declaring it lawful, and the validity of this enactment, among other things, was drawn in question. The court found that the state legislation conflicted with that of congress regulating commerce upon the river between the different states, adjudged the bridge a nuisance, and that it should be abated. Afterwards congress passed an act declaring the bridge a lawful structure, and a post road for the passage of the mails of the United States. A bill being filed to carry the former decree into execution, an injunction was allowed by Mr. Justice Grier against the renewal of work on the bridge, which being disregarded, motions were made in the court at its December term, 1858, for attachment for contempt, and for sequestration; and a counter motion to dissolve the injunction. This brought up the question of the validity and effect of the act of congress. The opinion delivered by Mr. Justice Nelson is found in [Pennsylvania v. Wheeling & B. Bridge Co.] 18 How. [59 U. S.] 421. On the subject of the competency of congress under the commercial clause of the constitution to pass the act, he says: "Since, however, the rendition of this decree, the acts of congress already referred to have been passed, by which the bridge is made a post road for the passage of the mails of the United States, and the defendants are authorized to have and maintain it at its present site and elevation, and requiring all persons navigating the river to regulate such navigation so as not to interfere with it.

"So far, therefore, as this bridge created an obstruction to the free navigation of the river, in view of the previous acts of congress, they are to be regarded as modified by this subsequent legislation; and although it still may be an obstruction in fact, is not so in the contemplation of law. We have already said, and the principle is undoubted, that the act of the legislature of Virginia conferred full authority to erect and maintain the bridge, subject to the exercise of the power of congress to regulate the navigation of the river. That body having, in the exercise of this power, regulated the navigation consistent with its preservation and continuation, the authority to maintain it would seem to be complete. That authority combines the concurrent powers of both governments, state and federal, which, if not sufficient, certainly none can be found in our system of government.

"We do not enter upon the question whether or not congress possess the power, under the authority in the constitution, 'to establish post-offices and post-roads,' to legalize this bridge; for, conceding that no such powers can be derived from this clause, it must be admitted that it is at least necessarily included in the power conferred to regulate commerce among the several states. The regulation of commerce includes intercourse and navigation, and, of course, the power to determine what shall or shall not be deemed, in judgment of law, an obstruction to navigation; and that power, as we have seen, has been exercised consistent with the continuance of the bridge."

There was great disagreement between the judges in their views of the case, in conse-

quence of which the authority of the decision has been much questioned. But this court is bound by the law as the majority of the judges there held it. In the supreme court this would not be the case, the judges sitting there being left to review the ground.

But I will not rest on the authority of that case alone. I think that the proposition declared in it is well founded in principle. The power to regulate commerce is one of the most useful confided to the federal government; and its exercise has done as much as that of any other to create and foster that strongest bond of nationality—a community of interests among the states. The want of it was one of the most pressing necessities which led to the formation of the constitution. The clause has always received, at the hands of the courts and of congress, a construction tending liberally to promote its beneficent object.

The power to regulate commerce, is the power to regulate the instruments of commerce. In the case of Cooley v. Board of Wardens [12 How. (53 U S.) 299], the court says, that "the power to regulate navigation is the power to prescribe rules in conformity with which navigation must be carried on. It extends to the persons who conduct it, as well as to the instruments used." Navigation is here spoken of as one of the subjects of legislation included in the power to regulate commerce. In this view of the subject, congress has passed statutes regulating steamboats, their construction, equipment, officers, and crews, prescribing qualifications of pilots and engineers, limiting the number of passengers they may carry, and prescribing the signals they shall use in passing each other; in short, it has established a minute code for building and navigating those vessels. The right to do this depends wholly on the power vested in congress to regulate commerce, and has never been disputed.

Navigation, however, is only one of the elements of commerce. It is an element of commerce, because it affords the means of transporting passengers and merchandise, the interchange of which is commerce itself. Any other mode of effecting this would be as much an element of commerce as navigation. When this transportation or interchange of commodities is carried on by land, it is commerce, as well as when it is carried on by water; and the power of congress to regulate it is as ample in the one case as in the other. The "commerce among the states," spoken of in the constitution, must, at the time that instrument was adopted, have been mainly of this character; for the steamboat, which has created our great internal commerce on the rivers, was then unknown.

Another means of transportation, equal in importance to the steamboat, has also come into existence since the constitution was adopted. By it, merchandise is transported across states and kingdoms in the same vehicle in which it started. The railroad now shares with the steamboat the monopoly of the carrying trade. The one has, with great benefit, been subjected to the control of salutary congressional legislation [because it is an instrument of commerce].[3] Is there any reason why the other should not be? However this question may be answered in regard to that commerce which is conducted wholly within the limits of a state, and which is therefore neither foreign commerce, nor commerce among the states, it seems to me that when these roads become parts of the great highways of our Union, acting an important part in a commerce which embraces many states, and destined, as some of these roads are, to become the channels through which the nations of Europe and Asia shall interchange their commodities, there can be no reason to doubt that to regulate them is to regulate commerce both with foreign nations and among the states, and that to refuse to do this is a refusal to discharge one of the most important duties of the federal government. As already intimated, the shackles with which the different states fettered commerce in their selfish efforts to benefit themselves at the expense of their confederates, was one of the main causes which led to the formation of our present constitution. The wonderful growth of that commerce since it has been placed exclusively under the control of the federal government, has justified the wisdom of our fathers. But are we to remit the most valuable part of it to the control of the states through whose territories it must be conducted, and to all the vexations and burdens which they may impose? And must all this be permitted, because the carrying is done by a method not thought of when the constitution was framed?

For myself, I must say that I have no doubt of the right of congress to prescribe all needful and proper regulations for the conduct of this immense traffic, over any railroad which has voluntarily become part of any of those lines of inter-state communication, or to authorize the creation of such roads, when the purposes of inter-state transportation of persons and property justify or require it.

The bridge which we are now considering constitutes a part of an unbroken iron track from the Atlantic seaboard to the Missouri river, over which many thousand persons and millions of dollars' worth of merchandise are carried every year. Within two or three years, it is confidently believed, this track will be without break from the Atlantic to the Pacific ocean, and will carry the commerce of continents. Can it be seriously doubted that, in reference to this commerce, the magnitude of which we can hardly conceive, congress can prescribe the place where the bridge shall be built, over which it crosses the Mississippi, and can make such

[3] [From 7 Am. Law Reg. (N. S.) 149.]

regulations concerning its character and its use as shall be best for the commerce of the river, as well as of the road? The commerce of the river, and the commerce across the river, are both commerce among the states, and may be regulated by congress, and when any regulation is necessary, should be so regulated.

And in these views I am confirmed by the language held by the federal courts on this provision of the constitution. In nearly every case the question was as to the force and effect of state legislation, when it conflicted, or was supposed to conflict, with congressional legislation. But the judges, in their opinions, often speak of the power of congress under the commercial clause.

The great case of Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1, arose upon an act of the legislature of New York, granting to Fulton, the inventor, and Livingston, his associate, the exclusive right to navigate the waters of that state with boats propelled by steam; and the question was whether this act conflicted with the laws of the United States regulating the coasting trade. Chief Justice Marshall delivered the opinion of the court, and supported its decision by reasoning so cogent that it has never been questioned. He defines commerce in terms so comprehensive as to include within its meaning railroads, as well as steamboats, of which he is speaking. He says: "Commerce undoubtedly is traffic; but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches; and is regulated by prescribing rules for carrying on that intercourse." Id. 189. And again, "These words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend." Id. 193, 194. "In regulating commerce with foreign nations, the power of congress does not stop at the jurisdictional lines of the several states. It would be a very useless power if it could not pass those lines. If congress has the power to regulate it, that power must be exercised wherever the subject exists. If it exists within the states, if a foreign voyage may commence or terminate at a port within a state, then the power of congress may be exercised within a state." Id. 195. "The power of congress, then, comprehends navigation within the limits of every state in the Union, so far as that navigation may be connected with commerce with foreign nations or among the several states." Id. 197. And again, "It is the power to regulate, that is, to prescribe, the rule by which commerce is governed." Id. 196. "Vessels," said the chief justice, "have always been employed to a greater or less extent in the transportation of passengers, and have never been supposed to be on that account withdrawn from the control or protection of congress. Packets which ply along the coast, as well as those which make voyages between Europe and America, consider the transportation of passengers as an important part of their business. Yet it has never been suspected that the general laws of navigation did not apply to them." And again, "A coasting vessel employed in the transportation of passengers, is as much a portion of the American marine as one employed in the transportation of a cargo." Id. 215, 216.

U. S. v. Coombs, 12 Pet. [37 U. S.] 72, was an indictment under the act punishing thefts of goods belonging to vessels in distress, although committed above high-water mark. Upon the question of the competency of congress to pass such act, Mr. Justice Story, delivering the opinion of the court, said, "But we are of opinion that under the clause of the constitution giving power to congress 'to regulate commerce with foreign nations, and among the several states,' congress possessed the power to punish offences of the sort which are enumerated in the ninth section of the act of 1825 [4 Stat. 116], now under consideration. The power to regulate commerce includes the power to regulate navigation, as connected with the commerce of foreign nations, and among the states. It was so held and decided by this court, after the most deliberate consideration, in the case of Gibbons v. Ogden, 9 Wheat. [22 U. S.] 189–198. It does not stop at the mere boundary line of a state, nor is it confined to acts done on the water, or in the necessary course of the navigation thereof. It extends to such acts done on land, which interfere with, obstruct, or prevent the due exercise of the power to regulate commerce and navigation with foreign nations, and among the states. Any offence which thus interferes with, obstructs, or prevents such commerce and navigation, though done on land, may be punished by congress, under its general authority to make all laws necessary and proper to execute its delegated constitutional powers."

In Corfield v. Coryell [Case No. 3,230], Mr. Justice Washington, in the course of his opinion, said, "The first question is, whether this act, or either section of it, is repugnant to the power granted to congress to regulate commerce. Commerce with foreign nations, and among the several states, can mean nothing more than intercourse with those nations, and among those states, for purposes of trade, be the object of the trade what it may; and this intercourse must include all the means by which it can be carried on, whether by the free navigation of the waters of the several states, or by a passage over land through the states, where such passage becomes necessary to the commercial intercourse between the states. It is this intercourse which congress is invested with the power of regulating, and with which no state has a right to interfere."

In Cooley v. Board of Wardens of Port of

Philadelphia, 12 How. [53 U. S.] 299, the supreme court, Mr. Justice Curtis delivering its opinion, held that a regulation of pilots and pilotage is a regulation of commerce within the grant to congress of the commercial power; and he says, "The power to regulate navigation is the power to prescribe rules in conformity with which navigation must be carried on. It extends to the persons who conduct it, as well as to the instruments used."

In Gilman v. Philadelphia, 3 Wall. [70 U. S.] 713, it was held, that "the power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those on which they lie; and includes, necessarily, the power to keep them open and free from any obstruction to their navigation, interposed by the states or otherwise. And it is for congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided."

And while conceding to the states the power to authorize the construction of bridges, turnpikes, streets, and railroads, in answer to the objection that such a concession to the states would arm them with a power potent for evil and liable to abuse, it was expressly said, that "congress may interpose, whenever it shall be deemed necessary, by general or special laws. It may regulate all bridges over navigable waters, remove offending bridges, and punish those who shall thereafter erect them. Within the sphere of their authority, both the legislative and judicial power of the nation are supreme. A different doctrine finds no warrant in the constitution, and is abnormal and revolutionary."

In these cases, the judges have been speaking of navigation. But the terms of the constitution are not confined to that mode of conducting commerce. Any other means of commerce are obviously within its terms, and the language of the extracts above given either distinctly state or clearly import such fact. I have shown that railways are now means of inter-state commerce as well as steamboats. Their iron tracks, extending from ocean to ocean, are no more limited by political boundaries than are the rivers which rise in one state and flow through others to the sea. Over the former, propelled by one application of the motive power of steam, roll many cars, laden with the products and fabrics of one section of the country for the supply of the wants of a distant section. Through the latter, propelled by another application of the same power, ply the steamers, laden in like manner, and discharging a like beneficent office. Where lies the difference between them? Why should not the power which regulates one extend to the control of the other?

Whatever might be my individual opinion, as a member of the supreme court, upon the proposition that the statute under consideration is an invasion of the judicial powers of this court, I am, while sitting here, bound by the decision in the Wheeling Bridge Case, already referred to, where this question was raised and decided.

The statement of this case above shows that the interference by congress there was even after the decree of the court. Mr. Justice Nelson, considering the objection urged, that the act of congress had the effect and operation to annul the judgment of the court, shows that the bridge was unlawful because its erection was a violation of the federal legislation, and that when this legislation was modified, it was unlawful no longer. He says, "If, in the meantime, since the decree, this right has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court cannot be enforced. There is no longer any interference with the enjoyment of the public right inconsistent with law, no more than there would be where the plaintiff himself had consented to it after the rendition of the decree."

The act of February 27, 1867 [14 Stat. 412], then, in our opinion, must finally dispose of this case. But it does so by furnishing a rule of law on which it must be decided, and not by depriving the court of jurisdiction. When reached for hearing, therefore, the bill must be dismissed, not for want of jurisdiction, but on the merits. For this and other reasons the present motion cannot prevail. Motion overruled.

The motion having been thus disposed of, the cause came on to be heard, finally, upon the record. The complainant, by his counsel, presented the depositions and other evidence which he had taken to support his bill, claiming that it showed that he had a special interest in the navigation of the Mississippi river at the point where the bridge was, and that the bridge was an obstruction to the navigation of the river by steamboats, and was specially injurious to him, as a navigator thereof by such boats. To the introduction of this testimony the defendants objected, because, they said, it was immaterial, since, by the act of February 27, 1867 [14 Stat. 412], congress had declared the bridge a lawful structure. It was admitted that the bridge formed a link in a chain of railroads extending from Chicago to the Missouri river. The court sustained the objection, and refused to hear the proofs offered. Thereupon a decree was made dismissing the bill. Bill dismissed.

[NOTE. Congress has power to interfere and legalize the bridge, under its authority to regulate commerce; it was evidently its intention to so legalize it by the act of Feb. 27, 1867 (14 Stat. 412), and the effect of the passage of the act pending the suit furnished a rule of decision for the court. Per Mr. Justice Nelson on the appeal of complainant from the decree

herein to the supreme court; following the Wheeling Bridge Case, 18 How. (59 U. S.) 421. The Clinton Bridge, 10 Wall. (77 U. S.) 454.]

CLINTON LINE EXTENSION R. CO. (GRIFFIN v.). See Case No. 5,816.

CLINTON LINE R. CO. (LUDLOW v.). See Case No. 8,600.

CLINTON, The MARY. See Case No. 9,203.

CLIPPER MOWER, ETC., CO. (WHEELER v.). See Case No. 17,493.

Case No. 2,901.

CLIPPINGER v. MISSOURI VAL. LIFE INS. CO.

[1 Flip. 456;[1] 5 Ins. Law J. 310; 22 Int. Rev. Rec. 47; 2 Cin. Law Bul. 218; 8 Chi. Leg. News, 155; 4 Amer. Law Rec. 585; 1 Law & Eq. Rep. 138.]

Circuit Court, N. D. Ohio. Jan. Term, 1876.

REMOVAL OF CAUSES FROM STATE TO FEDERAL COURTS—CONSTRUCTION OF STATUTES—THE PARTY SEEKING TO REMOVE SHOULD DO WHAT IS NECESSARY—THE PROPER TIME.

1. No action of the state court can confer or take away the right of removal. No order of state court for the removal of the cause is necessary. The right is not dependent on the state court.

2. The party seeking a removal is to do all that is necessary to secure a removal. Whether the state court makes an order for removal or not, he can perfect the removal by entering in this court, at the proper time, copies of the proper papers, and his appearance and special bail, if necessary.

3. The proper time for entering in the circuit court "copies of the proper papers," etc., is on the first day of the next session after the filing of the petition for removal, affidavits, etc. But if the term of the circuit court, to which the same is removable, should commence within twenty days after the filing of the petition and bond in the circuit court, still the removing party is to have twenty days to file copy of record.

[Cited in Woolridge v. McKenna, 8 Fed. 667.]

[At law. Action by Elizabeth Clippinger, administratrix of the estate of John Crestead, against the Missouri Valley Life Insurance Company, to recover on a policy of insurance.] Motion by plaintiff to dismiss and remand to state court.

I. Pillars and C. M. Hughes, for plaintiff.

Marvin, Ballard & Richard and Hart & Squire, for defendant.

WELKER, District Judge. The plaintiff filed a petition against the defendant on a policy of insurance in the court of common pleas in Allen county, on the 28th day of December, A. D. 1872. On the 18th day of January, 1873, and before appearance, the defendant being a non-resident company, filed a petition for removal of the case to the circuit court of the United States, and at the February term, 1873, of said court filed the necessary affidavit, and offered surety as required by the statute; at which term the common pleas court refused to make an order of removal, and dismissed the petition, the defendant excepting to the ruling.

On the 19th of April, 1873, the defendant filed its answer in the common pleas to the original petition, on which issue at the October term, 1873, a trial was had, and verdict and judgment entered for the plaintiff. At the same term a second trial was demanded and allowed, and bond given therefor, as authorized by the statute of the state. Afterwards, on the 19th of February, 1874, an amended answer was filed by the defendant to the original petition in said court. On the 23d of February, 1874, in term time, a second petition for removal to this court was filed by the defendant, alleging non-residence in the state, with proper affidavit alleging local prejudice, and surety was offered, and bond given, as required by the statute, for removal. At the May term, 1874, answer to petition for removal was filed by the plaintiff, and on hearing the court dismissed the petition for removal. At the October term, 1874, a second trial on the issue made in the original case was had in said court; and a verdict and judgment rendered for the plaintiff.

On the 13th of March, 1875, the defendant filed a petition in error in the district court of Allen county to reverse the judgment so lastly rendered in the common pleas, alleging for error, among other things, the dismissal of the petition for removal as aforesaid; and at the April term, 1875, of said district court, that court reversed the common pleas for the assigned error of dismissing said petition for removal. At the May term, 1875, of the common pleas, in pursuance of the said judgment of the district court, that court made an order accepting the sureties, and ordered that no further proceedings be had in said court in the case.

Certified copies of the pleadings, etc., were filed in this court on the 26th day of August, A. D. 1875. The plaintiff files a motion to dismiss the case from this court, and remand the same to the state court. 1st—Because the petition, affidavit, and bond for the removal of the cause to this court were not filed in the court of common pleas until after the trial of the cause. 2d—Because the certified transcripts of the process, pleadings, etc., were not filed in this court within the time prescribed in the statute after the filing of the petition, affidavit and bond for removal. 3d—Because the removal of the cause to this court is contrary to law, and this court has no jurisdiction to try and determine the same.

In determining this motion it will only be necessary to examine the second ground of the motion in connection with the third. As to the time of the filing of the petition for removal to this court, it is conceded that the

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

first petition was in time under the act of 1789 [1 Stat. 79], and the second under the act of 1875 [18 Stat. 472], which combines the preceding statutes on that subject in the revised statutes then passed. It would seem from the fact that the defendant, after having filed the first petition for removal, failed to file copies of the process, etc., in this court, and filed an answer in the state court, and there went to trial on the issue made, as well as the filing of the subsequent petition, affidavit, etc., for removal, in 1874, that it had waived any right to file the papers under that petition. Indeed, it is not claimed that it had such right.

The question then is, had the defendant the right to file copies, etc., in this court under the second petition? No question is made as to whether the case itself was a proper one to be removed, or that the defendant had not brought itself within the statute by the filing of a petition and affidavit and offer of surety in the state court, but it is claimed that it did not file the papers for removal in this court within the time prescribed by the statute.

Each of the statutes upon the subject of removal, in force at the time the last petition was filed, provide "that on filing such petition and affidavit, and offering good and sufficient surety for entering in such circuit court on the first day of its session next to be held, copies of the process, etc., it shall be the duty of the state court to accept surety and proceed no further in the case; and that when said copies are entered as aforesaid in the circuit court, the cause shall then proceed in the same manner as if it had been brought there by original process." Thus this court obtains its jurisdiction in such cases; and thus the jurisdiction of a state court is terminated; that is to say, by a compliance on the part of the party seeking to remove a cause with the provisions of the act of congress respecting such removals; and as the jurisdiction of this court in such cases is of a purely statutory character, the provision of the act of congress should be strictly followed or no jurisdiction is obtained.

But it may be urged that in the case at bar, although the petition for removal was duly filed, supported by the proper affidavits to bring the application within the provisions of the act of congress, and good and sufficient surety was offered, yet the court of common pleas defeated or obstructed defendant's right of removal by dismissing its petition and refusing to accept the surety, and that this operates to excuse the defendant for its failure to enter copies, etc., in this court on the first day of its then next session, and enlarge the time within which this may be done.

The answer is, the court of common pleas had no power to do this. Its "duty" is clearly defined by the act of congress, viz.: "To accept the surety and proceed no further in the cause." A failure or refusal to perform this plain duty cannot defeat the right of the defendant to remove the cause. On this point the language of an eminent jurist of New York is so clear and comprehensive that it is adopted here. Says Judge Blatchford: "No action of the state court could either confer the right or take it away. The discretion to be exercised by the state court in passing on the question as to whether the proper steps for a removal have been taken, and as to whether the evidence thereof is sufficient, and as to whether the surety is good and sufficient, is a legal discretion," i. e., a discretion to be exercised in a legal manner and in accordance with its "duty." "No order of the state court for the removal of the cause is necessary." "The right of the defendant to a removal is not dependent on the question whether the state court does or does not make an order for the removal. If it were so dependent, the refusal of the state court, in a proper case, to make such an order, would make it impossible for the defendant to secure the removal except by carrying the suit through the state tribunals," * * * and thence "to the supreme court of the United States." See 6 Blatch. 117, 118 [Hatch v. Chicago, R. I. and P. R. Co., Case No. 6,204]. This interpretation of the acts of congress stands uncontradicted so far as my researches have extended, and is believed to be the true one; and in the conclusions of the learned judge from the premises there laid down, I am forced to concur. He says: "If he (the party seeking a removal) does all that is necessary to secure a removal, then, whether the state court makes an order of removal or not, he can perfect the removal by entering in this court, at the proper time, copies of the proper papers, and his appearance and special bail, if necessary." As will have been seen, the proper time for entering in the circuit court "copies of the proper papers," etc., was on the first day of the next session after the filing of the petition for removal, affidavit, etc. In this case the last petition for removal was filed in the court of common pleas on the 23d of February, 1874. The first day of the then next session of this court was the 7th of April, 1874, and "copies of the proper papers" were not filed in this court until the 26th of August, 1875, a point of time too late to enable this court to obtain jurisdiction of the cause in the manner provided by the statute. Nor can the action of the court of common pleas of Allen county be held to excuse the delay, nor to enlarge the time within which the defendant might and should have completed the steps necessary to the removal of his cause to this court.

In the act of 1875 [supra], which takes the place of all preceding statutes on this subject, we have a legislative construction, that the time of entering copies, etc., in this court is material to the jurisdiction of this court. That act provides that, "If the term of the

circuit court to which the same is removable then next to be holden, shall commence within twenty days after the filing of the petition and bond in the state court for its removal, then the removing party shall have twenty days from such application to file copy of record, etc."

The motion is sustained, and cause stricken from the docket, for want of jurisdiction.

CLOSE (LONGWORTH v.). See Case No. 8,489.

CLOSE (RICH v.). See Case No. 11,757.

Case No. 2,902.

The CLOTH CASES.

[Crabbe, 335.] [1]

District Court, E. D. Pennsylvania. Feb. Term, 1840.

FORFEITURE FOR FRAUDULENT IMPORTATION.

While these cases excited much attention at the time of their trial, both from the extensive character of the frauds perpetrated, and from the general acquaintance with the parties concerned, yet, on account of the paucity of legal principles developed, and the great similiarity of all the cases, it has not been thought advisable to report each in detail. The great struggle took place in regard to the cloths claimed by Taylor and the Blackburnes. This case, therefore, has been inserted at length; and a general history of the whole transaction, drawn from official sources, has been thought a sufficient notice of the other suits.

The goods in controversy in these cases, were all from the district of Saddleworth, in Yorkshire, in England, and had been entered at the custom-house by persons from that district, whose business in this country was the importation and sale of woollen goods. By far the greater portion of the cloths and cassimers of low and medium prices, imported into the United States for many years past, had been manufactured in this district of Saddleworth. It is inhabited principally, or to a great extent, by persons engaged in the manufacture of such articles. The goods made there, which are intended for the British market, are generally sold in the bauk or unfinished state, at the cloth hall in Huddersfield. The goods which are finished in Saddleworth, were generally sent to this country, the local sales being so limited that the district is rarely resorted to by purchasers from other places. With occasional exceptions, this appears to have been the state of things in Saddleworth in 1838 and 1839, when the goods in controversy were exported, and for many years previous. The high rate of duties in this country on imported woollens afforded a strong temptation to persons in Saddleworth, and their associates in this country, to resort to measures for the evasion or reduction of their amount. The character and extent of the measures to which they resorted for this purpose, will hereafter be stated. Their effect was to drive other importers out of the market, and secure a sort of monopoly to these parties—some of whom privately declared that they could import goods at such rates as to render competition with them impossible, even on the part of skilful and experienced importers, who had partners or agents residing in England, qualified in every manner to take advantage of the most favorable opportunities of purchasing. It was testified that a member of the house of William Blackburne & Co., a partnership of whom mention will be made presently, at a time when the duties on cloths and cassimeres were not less than 41 per cent. on their value, declared that he could buy them in England, and have them delivered at his warehouse in Philadelphia, in such a manner that only 25 per cent. duty should be paid on them, and no questions asked.

Early in the summer of 1839, the attention of then collector of New York was called, by the secretary of the treasury, to reported frauds in the importation of British woollens. In the same summer the case of U. S. v. Wood [Case No. 16,751], tried at New York, and that of U. S. v. Bottomley, at Boston [Cases Nos. 1,688 and 1,689], made it a matter of public notoriety that there had existed, for years, a combination, between certain parties residing in Saddleworth, and persons from the same district who were temporary residents in this country, to pass goods through the custom-house at New York, by means of fictitious invoices, most of them representing sales of the goods to have been made by the parties abroad to those in this country, at prices greatly below the market value of the goods in England. In the case at Boston it appeared that a corrupt understanding had existed between the importer and an officer of the revenue at New York; and there was some ground to believe that the success of the fraud had been facilitated by a lax practice in England of permitting the export duty to be paid upon a fictitious representation of the value of the goods exported, which corresponded neither with their actual value on the one hand, nor on the other hand with the value or price alleged in the invoice by which it was intended that they should be entered in this country. In the case of Wood at New York, however, the developments were of an astonishing character. The father of the importer had failed in England, and his assignees, under a commission of bankruptcy, had placed the counsel for the prosecution in possession of the letters from the son relating the course of his transactions, and referring incidentally to similar transactions on the part of other importers of the same class. Of the persons whom he thus incidentally named as parties to sim-

[1] [Reported by William H. Crabbe, Esq.]

ilar frauds, suspicion had for some time been entertained, on evidence which had occasionally transpired in the course of investigations previously instituted. But the disclosures on this trial rendered this a matter of certainty, and pointed out distinctly the manner in which the frauds were perpetrated. The invoices on which the importations of Wood had been entered, represented as sales what were in reality mere consignments from the father to the son as an agent or partner. The correspondence not only negatived the reality of the sales, as such, but showed clearly that the pretended prices in the custom-house invoices differed from the valuations in other invoices referred to by the parties, and were, indeed, regulated by no other criterion than that which had been ascertained as the minimum standard of successful deception of the examiners in the appraiser's department, by whom goods were ordinarily passed through the custom-house.

Shortly after the decision of the two prosecutions at New York and Boston above-mentioned, the attention of persons in Philadelphia was turned toward certain commission and auction houses, of whom it was known, that their principal or entire business was the sale of goods imported into New York from Saddleworth. Private information was obtained that on a Sunday, in the early part of August, 1839, B. Broadbent, of Saddleworth, formerly an importer at New York, afterward in the employment of Mr. P. Brady, one of the agents referred to, and at that time a partner in the firm of Davis, Broadbent & Co., who were also concerned in similar agencies, had visited Jeremiah Adshead, formerly of Saddleworth, and stating his apprehensions lest the store of Davis, Broadbent & Co., should be visited and searched by custom-house officers, had requested the assistance of Mr. Adshead, who was a rapid writer, in altering the marks upon certain goods in their store. Mr. Adshead accompanied him, and assisted in making tickets with numbers different from those on the original tickets. On that day, these new tickets were, to a considerable extent, substituted for the original ones. It seems that Mr. Broadbent exercised a discrimination in altering the marks of goods received from certain importers, and leaving unchanged the marks of those received from others. It did not appear whether he used this discrimination in consequence of communications with any of the parties, or from a knowledge that some of them had already altered the marks in New York, as was the fact, or from what other reason. In the same and in the succeeding week, other goods were received by Davis, Broadbent & Co., from New York, of some of which the marks were altered in like manner. Adshead, the person who on the Sunday referred to had assisted in this operation, was one of the proprietors of an establishment to which the agents of the Saddleworth importers had been in the practice of sending cloths to be refinished, or cut and headed. With the privity of the same Mr. Broadbent, this person caused goods which had been sent to his manufactory to be secreted elsewhere. Some of these goods were placed in the upper story of a small grocery store; another portion in one of the bed-rooms of a tavern, in the cellar of which another portion was placed in an old oil cask, and covered with vegetables. Similar measures of concealment were likewise pursued by other agents of these importers. Batturs, Okie & Co., an auction house, sent some goods, of the importation of John Platt and William Bottomley, to a hardware store, with a request that they should be kept out of view. In all the places mentioned, when the officers of the customs afterward came to search for the goods, the persons in possession of them denied that they had any cloths or cassimeres in their possession. Persons privy to some of these measures of concealment, disclosed a portion of what had occurred, to parties through whom information was communicated to the district attorney, that certain goods, which had been fraudulently passed through the custom-house at New York on false invoices, were believed to be in Philadelphia in the hands of agents of the importers. He immediately made a requisition upon the collector of New York, to send to Philadelphia an officer by whom the suspected goods of New York importation might be identified. The collector of New York despatched upon this duty an officer, who arrived in Philadelphia on the 19th of August, 1839, and, under the direction of the district attorney, applied for instructions to Mr. Wolf, then collector of the port of Philadelphia. On the same day, under the direction of Governor Wolf, one thousand pieces of cloths and cassimeres, of New York importation, and thirty-one pieces, which afterward appeared to have been brought from Canada, and entered at Rouse's Point, were seized at the store of Davis, Broadbent & Co. Two days afterwards, on the 21st of August, a visit was made, by officers of the revenue collection service, to the store of William Blackburne & Co., in the same neighborhood. William Blackburne & Co. were the principal receivers and sellers in this city of goods which John Taylor, Jr., imported to a large extent through New York. John Taylor, Jr., was of Saddleworth, and received his importations thence through Abel & Thomas Shaw, a son of whom was a member of the firm of William Blackburne & Co., and to whom all the other members of this firm were related or connected by marriage. Mr. Taylor also received some goods from other parties in England. His annual importations were of very large amount. It appeared that Mr. Blackburne rented a store in Church alley, No. 24, in Philadelphia; that the adjoining store, No. 26, was rented by Mr. Worrell, and

that the lower, or ground story, was occupied by him. The second story or floor of this store, which extended over the whole building, was in the occupancy of Mr. Blackburne, and the access to it was by a large opening or doorway from Mr. Blackburne's second story into it. This door was usually kept open, and was so in July and August, 1839, and up to the 20th of August, on the day when the seizure was made. On the morning of that day, the porter of Mr. Blackburne saw in a newspaper, or was informed by somebody, that a seizure had been made of Mr. Broadbent's goods. Whether Messrs. Blackburne had the same information or not, did not appear. On the same morning, the hour was not precisely fixed, at about eight or nine o'clock, this door or passage was completely blocked up, and concealed by boxes, &c., so that persons going into Mr. Blackburne's second story, saw nothing by which they could discover or suppose there was any communication between the two rooms. The officers on their first visit did not discover it; they went away; but on getting further information, they returned, and by introducing a stick between the boxes, they found where the passage was, removed the obstructions which concealed it, and went into the adjoining room. It was entirely dark, although Mr. Blackburne's porter says he had opened one of the windows that morning. In this room the goods in question were found, some in their cases, some lying on them. When the officers first came to Mr. Blackburne's store he was there. They told him their business; he said they might search. He said he had no goods in his possession but what were imported through the port of Philadelphia. The officers examined the cloths and cassimeres in the lower story, and then went up stairs of store No. 24. After looking at some cloths and cassimeres there, one of them asked Mr. Blackburne if they were all the cloths in his possession. He answered, "Yes, you have seen all." He was asked if he had no other store in the neighborhood. He answered, "No, you have seen all that we have." The officer did not on this visit discover the passage into the next store. They returned in the afternoon. One of them said to Mr. C. Blackburne that they wished to see the second story over Mr. Worrell's store. He replied, "You have seen all the rooms that we have." The officers went up stairs and searched for the entrance into the next room. He denied that there was any access to that room. They proceeded in their search to discover one, and at last he said, "The entrance is behind those boxes." The officers were thrusting a stick between the boxes. In the next room the goods were found, and Mr. Blackburne said he was the owner of them. The goods of New York importation, thus found concealed at W. Blackburne & Co.'s, seven hundred and thirty-nine pieces, were, of course, seized. On the next day an additional seizure was made at P. Brady's, of five hundred and fifty-eight pieces of New York importation, which had been received on consignment from parties, most of whom had consigned other portions of the same importations to Batturs, Okie & Co., or Davis, Broadbent & Co. Besides the seizure at Davis, Broadbent & Co.'s, Blackburne's, and Brady's, one hundred and sixty-nine pieces were found, in small lots, in the hands of other agents of the importers, and one hundred and seventy-six pieces in the hands of parties who afterwards alleged that they were purchasers of the goods for a valuable consideration. The whole quantity of cloths and cassimeres seized in August, 1839, was twenty-six hundred and seventy-three pieces, all from Saddleworth, of which it is believed that twenty-five hundred and eighty-four pieces had been imported into New York, fifty-eight pieces into Philadelphia, and thirty-one pieces, imported through Rouse's Point, had been originally brought into Canada.

Informations were filed in due course, alleging as causes of forfeiture, under several different counts, what may be resolved into the substantial charge of the goods having been falsely invoiced with intent to defraud the revenue. To the goods thus libelled forty-four several claims were interposed, under which as many distinct issues were joined. The parties making these forty-four claims were twenty-four persons, some of whom claimed goods at each of two or more different places. The result of the trials as to the twenty-five hundred and eighty-four pieces of New York importation was, that as to twenty-three hundred and forty-two pieces there were verdicts for the United States. Of the remaining two hundred and forty-two pieces, there were entries of nolle prosequi as to one hundred and twelve pieces in one case, and two pieces in another case. In regard to these one hundred and fourteen pieces, the claimants offered to admit on the record that there was probable cause for the prosecution; and the district attorney did not think that the evidence on the part of the United States, would have justified the asking for more than a certificate to this effect. It certainly was not so strong as to warrant the urging the condemnation of the goods. As to one hundred and eighteen pieces, embraced in nine cases, in each of which they formed a portion only of the goods in controversy, there were verdicts for the defendants, with a certificate of the court that there was probable cause for the prosecution. Of the fifty-eight pieces believed to have been imported at Philadelphia, forty-two pieces were condemned, and sixteen pieces acquitted, the court certifying, as to the latter, that there was probable cause for the prosecution. The thirty-one pieces imported through Rouse's Point, were the subject of a correspondence between the deputy collector at that place, and the late collector at New York. The person who had entered them

was the same party claimant of one hundred and twelve pieces imported at New York, as to which a nolle prosequi had been entered as above; and upon an examination of the correspondence and other papers exhibited on his behalf, it was considered a proper case for a similar discrimination in his favor. Probable cause for the prosecution being admitted in like manner on the record, a nolle prosequi was, therefore, entered as to these thirty-one pieces, with the sanction of the court. The goods consigned to Philadelphia, were usually selections of parts of several importations; and, in most cases, portions of them had been sold, leaving on hand the goods in controversy. These goods had, in many instances, been so long in this country, that if really bought for exportation, according to the tenor of the invoices, the prices of them must have been remitted to England. Correspondence and accounts must, therefore, have been interchanged with persons in England, as well as with persons in Philadelphia. Before the trials, the counsel of the United States, adverting to these circumstances, gave timely notice to the several parties to produce all invoices, correspondence, accounts, and books of account, with the parties in England, from whom the goods in question purported to have been received. Under these notices, various calls were made, during each of the contested trials, for particular accounts and documents; of some of which, the existence and possession by the defendants were distinctly proved. These calls were not, in a single instance, responded to by the production of a letter, voucher, or other paper, or of a book containing an original or other account of their pecuniary transactions with the parties in England, and no excuse was given for withholding them.

The first case tried was that of a claim interposed by John Taylor, Jr., and William Blackburne & Co., to the goods concealed as above at William Blackburne & Co.'s, Mr. Taylor alleging himself to be the owner and importer, and William Blackburne & Co., as his factors, alleging that they had advanced to him fifty-nine thousand dollars upon the goods. Upon the trial, the United States proved the concealment of the goods, and attendant facts detailed above, and proved a variety of circumstances tending to show that Taylor was not really a purchaser of the goods in the fair and proper sense of the term, but had received them under some secret understanding or arrangement, the result of a combination between him and the parties in England, under which the goods of his importation were invoiced at prices lower than those of the English market. It was also proved by importers of cloths and cassimeres, as to the goods in question, that the prices mentioned in the invoices were generally much lower than those ordinarily paid by purchasers in England at the same period. There was other evidence tending to prove that there were fictitious deductions inserted in the invoices. A point was raised and insisted upon, as will be seen in the following report of the case, that the goods having been passed through the custom-house at New York, and duties assessed and paid on the footing of the invoices being correct, it was afterwards too late to allege the contrary as a cause of forfeiture. As regarded the law of the question, it was a sufficient answer, that if the invoice on which the importer had obtained a permit for his goods was a false one, and had been the means of practising a deception upon the officers who had passed the goods, the fraudulent party should not be allowed to take advantage of his own wrong, and rely upon the fraud itself as a shield and protection against the penalties imposed upon the very act on which he relied for his immunity. Of this opinion was the judge. He left the facts to the jury, who, after a protracted trial of several weeks' duration, returned a verdict for the United States. Shortly before this trial, some of the claimants had obtained at New York, from Chancellor Kent, an opinion, which was circulated extensively through the newspapers, that "when the duties have been paid and the goods fairly passed through the government offices into the general mass of the circulating commerce of the country," the collector had no right to seize goods for any of the causes of forfeiture set forth in the revenue collection acts. The context of that part of his opinion which contains this important word "fairly" was, by many persons, supposed to indicate the opinion of this eminent jurist, that a permit, though obtained by fraud, would operate as an irrevocable exemption of the goods from prosecution for any forfeiture previously incurred. This can scarcely have been his meaning; because, thus understood, his opinion would be opposed to the whole course of judicial decisions on the subject. Nevertheless, this view of the law had been pressed with such earnestness, that, after the trial, the judge acceded to a request on behalf of the claimants that the trials of the remaining cases should be postponed until after a decision of this point by the supreme court. After this, no case involving this precise point under the same enactments on which the informations were framed, came before the supreme court, until it was decided in Wood v. U. S., 16 Pet. [41 U. S.] 342.

The opinion of the supreme court, delivered on the 7th March, 1842, resolved the doubt, if there ever was one, upon this subject. The court said: "The second instruction of the court is, in effect, that if the invoices of the goods now in question, were fraudulently made, by a false valuation to evade or defraud the revenue, the fact that they had been entered, and the duties paid or secured at the custom-house at New York upon those invoices, was no bar to the present information. This instruction was certainly correct,

if the sixty-sixth section of the revenue collection act of 1799, c. 128 [1 Stat. 677], now remains in full force and unrepealed: for it can never be permitted that a party who perpetrates a fraud upon the custom-house, and thereby enters his goods upon false invoices and false valuations, and gets a regular delivery thereof upon the mere payment of such duties as such false invoices and false valuations require, can avail himself of that very fraud to defeat the purposes of justice. It is but an aggravation of his guilt, that he has practised imposition upon the public officers, as well as perpetrated such a deliberate fraud. The language of the sixty-sixth section completely covers such a case. It supposes an entry at the custom-house upon false invoices, with intent to evade the payment of the proper duties, and the forfeiture attaches immediately upon such an entry, upon such invoices, with such intent. The success of the fraud in evading the vigilance of the public officers, so that it is not discovered until after the goods have passed from their custody, does not purge away the forfeiture; although it may render the detection of the offence more difficult and more uncertain. The whole argument turns upon this, that if the custom-house officers have not pursued the steps authorized by law to be pursued by them, by directing an appraisement of the goods in cases where they have a suspicion of illegality, or fraud, or no invoices are produced, but their suspicions are lulled to rest, the goods are untainted by the forfeiture, the moment they pass from the custom-house. We cannot admit that such an interpretation of the objects or language of the sixty-sixth section, is either sound or satisfactory." Nearly two years had elapsed since the trial of the case against John Taylor, Jr., when this decision of the supreme court removed every obstacle to the trial of the remaining cases upon their fair merits. The report of most of them, however, would consist in stating that, on the examination and appraisement of the goods by persons conversant with the British markets, they had been found greatly to exceed in value the prices stated in the respective invoices; that the proceeds of goods of the same importations, sold before the seizure, had been such as more than verified the accuracy of the appraisements of the goods in controversy; that a similar confirmation was found in the limits affixed to the goods in controversy on their transmission to Philadelphia for sale, after making full allowance for the largest difference between limits and actual sales, apparent on a recurrence to the accounts of previous transactions through the agents in Philadelphia. In some cases it appeared that the prices of importation of goods received after the seizure had been considerably higher than those of previous importations, received by the same importer from the same parties in England, and there were cases where it also appeared that goods on their way from England to this country at the time of the seizure of the goods in question, were not entered upon the original invoices, but were allowed to remain several months in the public stores until new invoices were obtained from England, and were then entered at prices considerably higher than those of previous importations. In most of the cases the parties or their agents had resorted to concealment or other artifices, of the character of some of which a description has been already given. In all the cases it was fully in proof that the particular importations in question were not isolated or distinct transactions, independent of or unconnected with others, but were parts of a connected series of importations made under some general contract or arrangement.

The case of Joseph Wrigley at first appeared to involve peculiar considerations. A widowed mother, two daughters, and three sons, in Saddleworth, were said to have derived their support for about 20 years from doing journeywork in different branches of the woollen manufacture. The mother died in 1836 or 1837, and the sons, in partnership, continued the business in which they had been engaged in her lifetime—which was making cassimeres,—by doing a part of the work themselves, and getting the other parts of the manufacture performed by artisans in the neighborhood, as they could afford to pay for it—some of the members of the family working in the mean time, at intervals, for neighboring manufacturers. In January, 1839, the importer of the goods in question came to the United States, when it was arranged that the former establishment of the family should be broken up. Of the daughters, one married, and the other left the family residence. The other two brothers were to remain in partnership at the homestead, with a portion of the mother's furniture and effects, for which they were to be charged, and the rest were to be sold at auction. The brother who came to America left behind him his share of these effects, and a sum of money, in the hands of the two other brothers, the whole amount of which, except a small invoice of shawls, which he took out with him, was to be worked up into cassimeres, which he was to receive at the cost of manufacture, in payment of what should be found due to him upon the settlement of the concern, which was to take place after his departure. Accordingly, in April, 1839, an invoice was made out of 17 pieces of black cassimere, as sold by one of the brothers in England to the brother in this country, by whom they were entered, and passed through the New York custom-house, on the 28th May following, as purchased goods. Of these 17 pieces, 14, seized in August, 1839, at Davis, Broadbent & Co's., where he had placed them for sale, formed the subject of controversy. In October, 1839, the two brothers who had remained in Saddleworth, dissolved their partnership. One of them

came to this country, and was sworn for the importer as a witness, to prove the entire fairness of the transaction, and the impossibility that there could have been any fraudulent motive in respect to the revenue. He proved the transactions, of which the above is an outline, and positively swore, that, except the shawls, there had been no goods previously sent by them to America. There were, however, many circumstances which attracted suspicion, and rendered necessary an extended and careful cross-examination of this witness. In the first place the goods were invoiced, certainly sixty per cent., and probably seventy-five per cent., below their market value, and doubtless, greatly below even their cost of production, to the brothers in England, who were the alleged manufacturers. The circumstance of these two brothers having continued their business on that side of the water, until the time when the news of the seizure of these goods would regularly have reached them, and having then abruptly closed it, compared with the fact that the package in which these goods were imported, was numbered W 100, and that the number 2,300, on the first piece of the goods contained in it, answered to an ordinary average of 23 pieces to a package; and that the shawls which he had brought with him, were in a package marked W 99, furnished strong ground for the belief that these importations were part of a connected series, of which 98 more or less had preceded the one in question; and more would have followed had not the course of business been arrested by the seizure. In cross-examination, the witness professed the most entire ignorance of everything relating to the goods, and to the business in which he had been a partner, alleging that he and the importer had always left everything like writings, accounts, and calculations, to their brother, who was still at home; and that he himself was so ignorant, as not to know the cost of a single process of the manufacture, although he had himself received wages in one of the processes at which he had worked in the neighborhood. As the cross-examination proceeded, however, it appeared that he had known the name of the ship-broker at Liverpool, and other matters not entirely reconcilable with such entire ignorance. He was closely questioned as to the handwriting of his two brothers. That of the importer, ascertained by his entry and signature of the oath annexed to it, was pointed out to him as on papers which he had said were written by the other brother now in England. Upon this he said that he was not sure which of them had written what was shown to him, but that the latter had usually made out the invoices.

On following rapidly with the questions, which naturally arose upon this observation, it appeared that for many years, in the lifetime of the mother, and subsequently, the family had been in the habit of occasionally sending goods to this country, some or all of which had been sold here for them, as he said, by an importer of Saddleworth, residing in New York, who had accounted to them for the proceeds. The whole theory of the supposed accidental character of the importation in question was thus destroyed, and the attempted explanation of the manner in which such low prices had been inserted in it, and of the reason for giving the transaction the form of a purchase, entirely failed. The court left to the jury the question whether they believed the invoice to have been made out at low prices with intent to evade the payment of a part of the duties to which the goods were justly liable, saying that if it was really a sale as between the parties, the small amount of the price was otherwise no cause of forfeiture. Under this instruction the verdict was for the United States. This case is since divested of all doubt, and therefore of all sympathy, by the ascertainment of what might have been anticipated from the evidence on the trial, viz.: that the same party in New York who was testified by the witness to have previously received consignments for account of this family, had in 1838 entered as sold by them to him at least two previous invoices of packages marked W 96 and 97, and it is highly probable that other importations of the series with this mark could be traced on a further examination in the custom-house at New York.

Another case, in which evidence of the actual purchase and price of the goods was offered, was that in which James Mallalieu was the claimant. The goods imported by him were invoiced as sold to him by different persons, four of whom were examined under a commission. Two were his brothers, the other two his brothers-in-law. Each of them testified that the respective goods were actually sold to him at the prices mentioned in the respective invoices, nine in number, which bore date at different periods in the winter and spring of 1838, '39, and that the witness had no interest, direct or indirect, in the goods or their proceeds, and had received the prices mentioned in the respective invoices, but had not received, and was not to receive anything more. In the interrogatories in chief, each witness was asked to "state under what contract or order from the said claimant, if any, or under what arrangement, if any, the said bale or bales of goods were sold or purchased," and to "state the manner of the sale or purchase as aforesaid of such goods, and whether for cash or on credit," &c.; and as to any verbal contract, order or arrangement, to which he might testify, was in a cross-interrogatory requested to state whether he was in person present when it was made, &c. In answer to these interrogatories, each witness testified that the goods mentioned in the respective invoices were sold upon credit, under a verbal contract made by the claimant with each of

them personally some time before the dates of the invoices. It was clear that at these dates the parties were three thousand miles apart, and that the alleged antecedent verbal contract, made when they were together, was a general one, not applicable specifically to the particular goods in question alone. Yet neither witness testified what were its terms or conditions, or even stated on what credit the alleged sale under it was made. Two importers of New York, each of whom had passed a great portion of the last five years in England as a purchaser of Yorkshire cloths and cassimeres, two importers of Philadelphia, who had been in Yorkshire, and bought such goods there in 1839, another who for twenty years had had a partner residing in England, engaged in the same business, from whom he had been constantly receiving importations, and two others, who, without having been in England, had been importing with great facilities, and opportunities for doing so to advantage, in all, six experienced and skillful persons, together with the official appraisers of this port, had concurred in appraising these goods at rates from which it appeared that they were invoiced forty-five per cent. below their market value in Yorkshire, at the time of exportation; and upon evidence of the actual cost of the materials and wages required to produce them in England, it appeared that they exceeded the prices of the invoices, exclusive of any allowance for rent, taxes, wear and tear of machinery, superintendence, manufacturer's profit, forwarding, warehouse rent, interest, &c. It appeared that other goods included in the same invoices, had been sold in Philadelphia by the piece, with the factor's guarantee of sale, at an advance of one hundred and fifty-six per cent. on the prices mentioned in the invoices on which they had been imported, at a time when the ordinary advance on the invoice was eighty to eighty-five per cent., or about ten per cent. beyond cost and charges. The importer, Mallalieu, had come to this country in November, 1838, to succeed, as a resident at New York, a person, who, having returned to England in December, 1838, was one of the exporters by whom a portion of the goods in question were afterwards invoiced to him from England. It appeared that Mallalieu, while in England, had been in the practice of forwarding goods to this person in New York, in the same manner as sold by him, and that they had been entered accordingly, as purchased goods. These goods were in part traced to the hands of the factor, by whom they had been disposed of in Philadelphia, in the previous year, 1838. In that year goods of this description, fairly imported, had not commanded more than a barely saving price, say 75 to 80 per cent. advance on the invoice. Yet these goods sent out by Mr. Mallalieu, had commanded an advance of 126 per cent. on the prices at which he purported to have sold them, according to the tenor of invoices in his own handwriting, on which they had been entered by his brother-in-law, the alleged purchaser. A variety of other circumstances combined to induce a belief that the persons invoicing and receiving these goods, were concerned in a combination to defraud the revenue, of which these invoices of pretended sales were the machinery. This belief became equal to a conviction, on a careful examination, and comparison of the numerous invoices of all his importations. The numbers upon the goods were scattered in each invoice, in such confusion, as to indicate the reverse of any regular or progressive series. But, on arranging them in numerical succession, it appeared that the numbers on these goods, thus purporting to be bought at different times and places, from different persons, each of whom testified that he had no knowledge of any of the sales, other than those made by himself, formed parts of consecutive ranges of numbers, in which the goods of each party were connected in every possible form with those of each of the others. This coincidence was strengthened by the circumstance, that the numbers were not in a single progressive range, but formed a succession of ranges, with gaps or intervals, sometimes of several hundreds or thousands, each man's invoices taking a new start in each new succession or range of numbers. As each witness had sworn that he was himself the manufacturer, and had, himself, packed the goods for exportation, it was impossible to allege that a subsequent agent of the importer had placed the marks upon them; and an almost equally decisive negative was found in the circumstance, that in very many instances, the numbers which formed the subject of consideration, were not upon the tickets attached to the goods alone, but even the list number, or original weaver's mark, in many instances, corresponded with the ticket number. In this, as in the other cases, notice had been given to produce the party's books and papers, which were as usual pertinaciously withheld. The defendant's witnesses having stated that a bill of exchange had been remitted for the amount of each invoice, a call was made for the thirds of exchange of each of the party's remittances to the alleged sellers, but none were produced. However painful the result, the conscientious convictions of the jury compelled them to disbelieve the testimony of the witnesses under the commission. It is also to be observed, that the testimony produced under the commissions to Saddleworth, was apparently entitled to but little credit, because of the evident collusion and connexion between the witnesses. The words used, the forms of the answers, and even the method of evasion, being in many cases identical. In some of the cases, there was this difference, that while the invoice prices of certain of the goods were greatly below the appraisements, those of others were not at all below, or so little

below them, as scarcely to justify the counsel of the United States in insisting upon the prosecution. A proposal was made on behalf of these parties to withdraw all opposition to the condemnation of those goods of which the appraisements materially exceeded the invoice prices, if it could be understood that the prosecution would not be pressed as to the others. The counsel of the United States replied, that if the books and accounts of the parties could be exhibited, and appeared to be fair, a nolle prosequi would be entered in each case as to the whole. The counsel of the claimants, not being authorised to exhibit the books and accounts, the counsel of the United States determined to insist upon the prosecution, as to all goods which were appraised more than ten per cent. above the invoice prices. On announcing this determination to the counsel of the claimants, they declined opposing any defence as to such goods, and submitting as to these to a verdict for the United States, contented themselves with asking a verdict of acquittal as to the others. In this manner a few pieces were acquitted, the court, in every such instance, certifying that there was probable cause for the prosecution.

In all the cases, except two, it was an undisputed fact, that the goods in controversy were still in the hands of the original importers, or their immediate agents. But two parties, namely, James Lynd, Jr. & Co., and Daniel Deal & Co., pleaded in bar of the informations, that they were purchasers of the goods claimed by them, respectively, for a valuable consideration, without any notice of the frauds of the importers. This plea was in neither case tenable in point of fact, as will appear presently. But, if true in fact, it could not avail the defendants in point of law. The plea in each case was, therefore, demurred to, and the demurrers were sustained by the court, on the authority of Wood v. U. S., 16 Pet. [41 U. S.] 342, and previous decisions of the supreme court. Wood v. U. S. arose upon an information similar to the informations in question. On page 362, the court say that the 66th section of the act of 1799 [supra] "supposes an entry at the custom-house upon false invoices, with intent to evade the payment of the proper duties, and the forfeiture attaches immediately upon such an entry upon such invoices with such intent." And again, on page 365, that, under this section, "the forfeiture immediately attaches to every entry of goods falsely and fraudulently invoiced." In Gelston v. Hoyt, 3 Wheat. [16 U. S.] 311, upon a question under the act of 1794 [1 Stat. 383], imposing a forfeiture of a vessel fitted out and armed, to be employed in the service of a foreign state hostilely against another foreign state, it was held to be the doctrine of the English courts, which had been previously recognised and enforced by the supreme court of the United States, that the forfeiture attached at the moment of the commission of the offence, and that the title of the party incurring it was completely divested from that moment. The previous decision referred to was U. S. v. Certain Bags of Coffee, 8 Cranch [12 U. S.] 398, where it was decided that the forfeiture of goods for the violation of the non-intercourse act of 1809 [2 Stat. 529] took place upon the commission of the offence, and avoided a subsequent sale to an innocent purchaser, although the duties had been paid, and the goods delivered under a formal permit. Thus the language of the court in 16 Pet. is traced back to a case in which the forfeiture was held to defeat the title of a purchaser. In delivering judgment on the demurrer, the court relied on these authorities, and cited English decisions to the same effect. But neither of the two cases in which this point arose, were instances of purchases, in the proper sense of the term. To constitute a party a purchaser, entitled as such to protection against what would be otherwise a better title, it is indispensable at law, and in equity, that the price or consideration should have been paid away and absolutely parted with before notice of the adverse claim. In one of the cases, James Lynd, Jr. & Co., the alleged purchasers, had bought the goods from William Blackburne & Co., on terms of credit which, as to about two-thirds in value of the sales, had not expired when the seizure was made, and, shortly before the seizure, had failed in business, indebted to William Blackburne & Co., the alleged sellers, in an amount greatly exceeding the price of the whole of the goods. The real parties interested were, therefore, William Blackburne & Co. and John Taylor, Jr., the importers, whose fraudulent practices in reference to the revenue, were not denied or deniable. The other case was that in which Daniel Deal & Co., the claimants, alleged themselves to have been purchasers of the same John Taylor, Jr., and William Blackburne & Co. Here, however, no part of the price had been paid for any of the goods.

Case No. 2,903.

The CLOTILDA.

[1 Hask. 412.] [1]

District Court, D. Maine. June, 1872.

VALIDITY OF BOTTOMRY BOND—REQUISITES—SALVAGE AGREEMENT—PRESUMPTION OF FAIRNESS—BURDEN OF PROOF—CONTRIBUTION—COMPENSATION.

1. An obligation is not strictly a bottomry bond and cannot be enforced as such, which the master of a vessel cast upon the shore gave for a loan to relieve his vessel and her cargo from distress, wherein he binds himself absolutely as well as his vessel and her cargo to repay the loan in a specified time, no voyage being set out upon which if the vessel and cargo should be lost by the perils of the sea, &c., the obligation is to become void.

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

2. The master, in case of necessity, is justified in procuring such loan to relieve his vessel and cargo from the liens of salvors and prevent delay and expense in their enforcement, and for this purpose he can bind the vessel and cargo.

3. A salvage agreement between the master and salvors is presumed to be fair and equitable, and the burden rests upon the claimants to prove it contrary to equity and justice, or that it was procured by fraud and compulsion.

4. Such agreement to pay a specific price, proved to have been entered into under a mistake by both parties as to the value of the property to be saved, and manifestly inequitable, should be disregarded by the admiralty court in awarding salvage.

5. A vessel cast upon the shore and in imminent peril should bear an equitable proportion of the salvage awarded for landing the cargo, when the vessel is thereby lightened and enabled to pass to a place of greater safety.

6. Salvage for landing the cargo under such circumstances should be assessed ratably upon the value of the cargo and the value of the vessel after deducting the salvage chargeable to it.

7. A salvage of six thousand dollars is allowed for landing a cargo from a steamer cast upon Wells beach in December, and is assessed upon the property saved valued at $20,000.

In admiralty. Libels for salvage and to enforce a lien upon the vessel and cargo for money loaned the master to relieve his vessel and her cargo from distress. The owners appeared, claimed the vessel and cargo, and answered that the salvage claimed was exorbitant, and that the loan was unnecessary and illegal, and that no lien existed upon the vessel or cargo to secure its payment.

Henry B. Cleaves, Nathan Cleaves, and Joseph Howard, for libellant.

William L. Putnam, for claimants.

FOX, District Judge. Two libels are promoted against this ship and her cargo by Nathaniel L. Thompson, a merchant of Kennebunk in this district, one founded on an alleged bottomry bond, or hypothecatory obligation of the ship and cargo, executed to him by Young, the master of the ship, on the 19th day of January, 1871, as security for the payment of an advance of $10,000 in ninety days, made to the master by Thompson, and the other on salvage services rendered to the ship and cargo by Thompson and his assignor Cleaves, under a written contract for salvage made between Young and Cleaves December 15, 1870, and subsequently assigned to Thompson by Cleaves, after a partial performance of the salvage services.

The material facts are, that this vessel, an iron propeller of about 1,000 tons American registry, sailed from Newcastle upon Tyne in the fall of 1870, bound into the St. Lawrence. Her cargo consisted of about 100 tons of chemicals and glassware, together with the frame, plates and all other portions complete of an iron ferry boat, constructed for the Grand Trunk Railway by the Palmer Iron Shipbuilding Co., of Newcastle, who were also the owners of the "Clotilda." In the course of her voyage the ship fell into distress and went into Belfast, Ireland; she there took on board, according to the statement of her master, 100 tons of coal, which was thrown down among the iron to prevent any further shifting of the cargo, and the season being late, her destination was changed to Portland. H. & A. Allan were understood to be the consignees of the ship and cargo, but bills of lading were never received by them, as it is said, and they made no claim to the control or direction at any time afterwards.

On the morning of the 13th of December, the ship was stranded on Wells beach, about forty miles westerly from this port. The weather at the time was stormy, dark and foggy, and blowing a double reef top-sail breeze with a heavy sea. The beach is of sand, quite flat, affording very poor holding-ground, and is at the head of Wells bay, exposed to the full force of the winds and waves. The vessel went on at a low run of tides, near high water, and the sea broke heavily over her stern, she being fast in the breakers. The weather thus continued throughout nearly all of the 13th. The officers went ashore and took lodgings at the house of Mr. Davis, a respectable man living in that vicinity. At low tide the water left the forward part of the ship, so that on one side persons could pass freely to and from the ship. Her stern, rising and falling with the tide and sea, settled her in the sand making a bed for her. At low tide there were six or eight feet of water under the stern post. The master engaged Davis to procure men from the shore to go on board to clear up decks, get up cranes and other things necessary for discharging the cargo, and also to assist in pumping the ship; and eleven men were thus employed on board on the 14th.

A large crowd of people from the neighborhood collected on the beach near the ship on the 13th, including a number of experienced ship-masters, merchants and mechanics, and among them Robert Cleaves of Kennebunk, a place about ten miles from the ship. Cleaves has followed the sea for many years, has been in command of sailing vessels and steamships, and appears to have been a man of energy and readiness for emergencies, with funds at his command. He was introduced to the master of the "Clotilda," and offered his services if he could render any assistance. The master informed him that he had sent to Portland for Lloyds' agent, and to the Allans, and that he should probably act on their advice. Cleaves gave him references as to his ability and character and then left.

He returned the next morning to the beach; it was then clear, the weather had moderated and continued to moderate throughout

the 14th, but the ship was still in the breakers with the sea breaking over her. Cleaves inquired of the master "if he wanted any one to contract to save the cargo and ship," to which the master replied by asking what he would undertake to take the cargo out for. There is some discrepancy as to Cleaves' reply, as given by him in different portions of his testimony, whether his offer was one-third of the value, or one-third of the invoice cost, freight added; but on the whole, I find that Cleaves' offer was to discharge the cargo for one-third of its value. This offer the master declined as too high, and he took counsel of Capt. Aird, a master of one of the Allan Line of steamers, who advised him it was too large. Capt. Cleaves persisted in his original demand, setting forth, as best he could, the possible difficulties he might have to encounter, such as building rafts with the risk of their destruction by the wind and tides; and, also, that he might be obliged to rig purchases from the mast-head to the shore, and that he had other business of importance requiring his attention, so that he was not inclined to undertake the enterprise unless he should be fully paid for his services. After considerable discussion of the matter, Capt. Young, as Cleaves states, proposed "to pay for the discharge of the cargo on the beach above the spring tides, one-quarter part of the invoice price of the cargo, freight added, assigning as a reason for fixing the compensation in this manner, that the duties were very high on manufactured iron, and that they would be included in the value when landed, and would thereby very much increase the amount to be paid for its salvage if it should be computed on its value after being landed. On the 14th a survey was called, of which Capt. Aird was a member, and by their report made the same day, the surveyors recommended "that the ship be immediately discharged with a view of getting her afloat." Cleaves accepted the master's proposal, and the same evening a written contract was drawn up by Cleaves and signed by the parties at the Falmouth Hotel in this city, by which Cleaves agreed "to discharge from said ship all the cargo, stores, &c., that it was practicable and convenient to discharge, in as good order as the circumstances will permit, and to place as many men to work as he can work to advantage, and to use all the dispatch in his power to get the cargo out, and to place it above high water, ordinary spring tides on Wells beach, and that when the ship is afloat he will, if requested, put in sufficient sand for ballast;" for all which Young agreed "to give Cleaves the free use of blocks, tackle, engines, cranes, coal, &c., and to pay him twenty-five per cent. in gold on the invoice cost of said cargo in England, with freight added, on all that portion of said cargo that Cleaves takes out of said ship, and twenty-five per cent. on all the stores, tackle, apparel, &c., of the ship so deposited by Cleaves; salvage to be paid in Portland or Kennebunk as soon as the cargo is out, or as much of it as is practicable and convenient for him to take out. The value of said cargo is represented by said Young to be about $35,000 gold, and said Cleaves agrees to pay the eleven men who have worked on board for their day's work."

Under this agreement Cleaves immediately went to work discharging the cargo. With the exception of procuring a steam pump, he was at no other expense than the hiring of the men and teams he employed, working principally at low tide in discharging on to the sand alongside, occasionally at full tide, employing a few hands in breaking out the cargo and getting it within reach of the ship's tackles. He used the ship's engines, winches, cranes, &c., constantly, but states that he kept no account of his expenditures, and is not able to testify how long he was employed in this business, or the number of his men and teams, or the amount paid by him; his impression is that he expended $3,000 in the operation.

From the testimony of Mr. Goodwin, we learn that he commenced work on the second day, and worked steadily all the time there was any thing done, and he was paid $2.00 per tide, receiving in the whole $32.00, the pay for one night's services as a watchman being included in that amount. The first week in January, the vessel being then filled with water, Cleaves concluded he had discharged all the cargo which was practicable without means of freeing her. At that time all the chemicals and glass, a portion of the sails, &c., and about three-fourths of the ferry boat had been landed. Young pressed upon Cleaves the importance of landing the balance, as it would add to the value of that already landed, and finally Cleaves agreed to procure a steam pump, if one could be had for a reasonable amount, to free the ship from water so that they could reach the balance of the cargo. Cleaves procured a pump at Portland for $325, which required some repairs, and before they were completed, and the balance of the cargo discharged, Cleaves assigned this contract to Thompson, who afterwards removed some of the sails, chains and anchors from the ship, and then surrendered her with the balance of the cargo on board to Hilton, who had been sent to Wells from New York by Barclay & Livingston, agents for the owners, and who claimed to act in their behalf. Barclay & Livingston had contracted with the Coast Wrecking Company to get the ship off for sixty per cent. salvage, and by the exertions of this company, after nearly four months' labor, the ship was finally taken off the beach, with the balance of her cargo in her, and brought to Portland in June last. $15,000 salvage was paid to the company in accordance with the contract, she being appraised with the cargo then in her at $25,000.

At the time Thompson gave up the ship and cargo to Hilton, it was on condition that he should receive the salvage on the cargo on board, that which he would have been entitled to under the contract with Cleaves if he had landed it, as he was prepared with the steam-pump, at a small additional expense to have discharged it. The ship on examination in the dock was found badly damaged, her stern-post cracked, and her plating and rivets started and broken. Nothing was done by the master or Cleaves to hold the ship in position on the beach. As she was lightened by the discharge of the cargo, she consequently moved further up the beach, in all probably 500 to 600 feet, and also swung round, so that she was nearly broadside to the sea. She was thus carried beyond the force of the sea and breakers, and was in a much safer position than if she had remained where she struck; but if she could have been held there in safety, she would probably have come off in a few days, as the tides were on the increase, and the vessel was daily becoming more buoyant by the discharge of the cargo. The bottom was however all loose sand, and it is exceedingly doubtful whether with only her own ground tackle she could have been kept in position if the attempt had been made; and if the boisterous weather had continued and she remained in the breakers where she struck, she must soon have become a complete wreck.

Whilst Cleaves was at work discharging cargo, he called upon Young for money, and Young procured from the Allans $2,000 which he paid to Cleaves. In January, Cleaves demanded of Young payment of the balance due him under the salvage contract, and it not being paid, he left his demand for collection with his proctors. Young called upon various parties in order to raise the amount, and among others upon Thompson, the libellant, stating to him, "that the Allans had called upon him to repay them their advances, and that he was in want of $12,000 to pay Cleaves and Allans, and to forward the cargo to Portland and save the ship, and that he wanted the amount on a credit of four months." Thompson declined making the loan, and advised him to go to Portland and see the Allans to get his money. He returned, stating "that he had been offered the money in Portland at thirty per cent. and that the Allans advised him to get the money of Thompson in Kennebunk if he could; that Allans' folks had promised to let him have $4,000 or $5,000, but that they had received a dispatch not to let him have another dollar."

The owners had in the meantime been advised of the condition of the vessel, and ship and cargo were abandoned to the underwriters, and from that time neither owners, underwriters nor the Allans, in any way, so far as it appears, rendered any assistance to the master, gave him any advice or instructions, or took any steps to provide him with the necessary funds or credit. But all parties interested appear to have abandoned the master to his fate to do what he should think proper, or might by circumstances be compelled to do, manifestly not intending by anything they might do to be committed by the actions of the master in any ulterior proceedings, unless they should prove to be for their advantage. There was not that frankness and fair dealing which a master had a right to expect from his owners when advised that he was in distress in a foreign country; they seemed to fear that if they should give any advice or assistance to the master, they would thereby compromise their own rights among themselves, and they therefore preserved a complete silence, and abstained from all communication with him after the abandonment to the underwriters, and so cautious have they been, that it has not been thought advisable to inform the judgment of the court in relation to the transaction, by the testimony of the master or owners of either ship or cargo, or of the consignees or underwriters. The defence is apparently presented by the original owners in their answer, charging most fraudulent practices on the part of Young and Cleaves, whilst it appears in evidence that Capt. Young has by the same owners been since advanced to the command of another and more valuable ship belonging to them, thus most pointedly discrediting the good faith of their answer in charging him with such fraudulent practices. Whilst the defence is nominally made by the owners, the court cannot but believe that in fact it is conducted in behalf of the underwriters, the answer being subscribed and sworn to by New York merchants, one of whom is the general agent for Lloyds, and who has most diligently and carefully watched over and protected the interests of his principals, in no way compromising them by any voluntary explanations when examined as a witness, but the rather withholding all information which might in any way disclose any agency for the underwriters in making this defence.

This bottomry bond, as it is termed, was given under peculiar circumstances, and although drawn by able counsel, and intended to have the effect of an ordinary bond of bottomry, it is conceded that such cannot be its legal effect, as no maritime risk for any particular voyage is assumed by it. It recites, "that the ship is now ashore on Wells beach, and the master binds himself, the ship, tackle, apparel and cargo, a part of which lies on said beach, and the remainder on board the ship, in the sum of $10,400, to be paid to said Thompson, his heirs, &c.;" and the consideration is "that whereas said Christopher H. Young has been obliged to take up and has received from said Thompson, for the use of said ship and for the purpose of paying salvors for saving cargo and lightening said ship and other expenses accrued by the stranding of the ship, the sum of $10,-

000, the sum loaned, and the said sum of $400 additional for interest on sum loaned for ninety days as a premium, which sum loaned to be and remain as a lien and bottomry on said ship, her tackle, apparel, furniture and cargo, at the rate of sixteen per cent. per annum, for the purposes aforesaid, in consideration whereof, all the risks of the seas, rivers, enemies, fires, pirates, are to be on account of said Thompson; and for the better security of the sum and premium, the said master doth by these presents hypothecate and assign over to said Thompson, his heirs, &c., the said ship, her tackle, apparel and furniture and cargo aforesaid; * * * if the just and full sum of $10,000, being the sum borrowed, and also the premium of $400, shall be well and truly paid by said Young, at or before the expiration of ninety days, then this obligation and said hypothecation to be void and of no effect, otherwise to remain in full force and virtue. This instrument is made subject to all salvage that Capt. Robt. Cleaves of Kennebunk may have for balance of salvage due on said cargo and stores, and the said master reserves to himself the right of sale of said property, subject to the conditions of forfeiture of this bond and the claims of said Cleaves as aforesaid."

By this obligation the master was absolutely bound for the payment of the amount at the expiration of the ninety days, and although it recites that all the risks of the seas, rivers, &c., are to be on account of said Thompson, yet no particular voyage is set forth for which they are assumed, nor does it stipulate that the obligation is subject to any such condition, and that it shall become null and void in case of loss of the property by such casualties. This is not strictly a bottomry bond, and the second article in the libel founded upon it as such an instrument cannot be maintained. The libel contains a further article claiming to enforce a maritime lien on the ship and cargo for $10,000, the same being a loan for supplies and advances necessary for their care and preservation, and for which a lien existed, and which was by the master thus expended for their benefit. Such a lien, if it exists, may be enforced in this court, and is within the decisions in the cases of The Hunter [Case No. 6,904]; The William and Emmeline [Id. 17,687]; and The A. R. Dunlap [Id. 513]. It appears that Thompson well knew of the salvage contract made by Cleaves with Young, and of all that had been done in performance of it. He is therefore chargeable with full notice and affected with all the equities and obligations in relation to it, to the same extent that Cleaves would be if he were now prosecuting a libel founded on said contract.

It is therefore incumbent on the libellant to establish a necessity for the advances, and that the same were for the common benefit of ship and cargo, if he would sustain his libel against them. The justification for the advances by Thompson depends first, upon the validity and extent of Cleaves' lien upon the ship and cargo for the salvage services rendered by him, and secondly, upon the authority of the master to hypothecate by a loan the ship and cargo to discharge such lien. Upon the latter point it is sufficient to observe that the master at this time was wholly abandoned by the owners and all other parties to whom he had a right to look for assistance and advice. It was very evident that they were not willing to assume any obligation, or to make any advances to him in his distress, or even to advise him as to the course he should adopt; but they left him to be governed entirely by his own judgment under the circumstances in which he was placed.

His alleged consignees repudiated the consignment, and had, as he stated, called upon him to repay the amount they had advanced to him, and which he had paid to Cleaves on account of the salvage. The claim for the balance due to Cleaves under his contract had been left with the counsel for collection, and the only means of relief at the command of the master was from the property, either by permitting it to be libelled and disposed of by a court of admiralty, or from a loan by its hypothecation. The master then contemplated a completion of the voyage, that his ship would be relieved and the cargo forwarded to its place of destination, if he could obtain funds to pay the claims upon them and other expenses on a credit of three months, and in the opinion of the court, any prudent owner would have adopted the course taken by the master as he was then situated; and the master was not only justified, but it was his duty to have obtained the loan at a moderate rate of interest, and for a reasonable time to relieve the property from the liens then existing against it, and not have subjected it to the expense and delay attending proceedings in admiralty, devesting him of all control or possession of the property, and greatly hindering, if not utterly preventing, his getting the ship off the beach or forwarding the cargo.

Of the $10,000 which was paid by Thompson to Young, $6,000 was paid to Cleaves, $3,183 to H. & A. Allan, and the residue was applied by the master in payment of officers, wages and other expenses. So far as these sums were paid in discharge of Cleaves' claims, which were a lien upon the ship and cargo, including the repayment to the Allans of the $2,000 which was paid to Cleaves, to that extent the court is of opinion that the libel may be sustained, and the libellant be subrogated to his rights. What then was the extent of Cleaves' lien? Was this contract valid and obligatory, and were ship and cargo chargeable therewith?

The written contract stipulates for the discharge of the cargo, stores and apparel, as

far forth as practicable, at a compensation of twenty-five per cent. of the invoice value of the cargo, freight added, and a like proportion of the stores, tackle, &c. Nothing is said about the ship, or getting her off the beach; but it is quite evident that at that time the master expected the ship would be saved; and the discharge of the cargo was not only for the benefit of the cargo, but equally for the ship's advantage, as appears from the report of the surveyors, and the salvage services in unlading the cargo were for the common benefit of ship and cargo. If the ship had remained twenty-four hours longer in the breakers where she was when Cleaves commenced discharging, there can be but little question that her decks would have been stove by the sea, and she would have gone to pieces. By removing the cargo, she was enabled to pass beyond the reach of the breakers, and for the time being was removed to a place of safety. To effect this object, among others, the contract was made by Cleaves with the master. It proved successful, and all the property thereby benefited, both ship and cargo, was bound for the expenses thus incurred.

In defence, it is contended that this salvage agreement is invalid, being unconscionable in its amount, the sum claimed under it being greater than the actual value of the entire cargo. The rule in relation to such contracts as laid down in 2 Pars. Shipp. & Adm. 306, is that "if at the time of service, the salvors make a bargain with the owners of the property in peril or their servants as to the amount of salvage, this is enforced by the court only so far as it seems equitable and conformable to the merits of the case; and it is wholly disregarded if it be deemed unconscionable and oppressive to the owners of the property saved, or entered into under circumstances which amount to compulsion."

In Houseman v. The North Carolina, 15 Pet. [40 U. S.] 40, Taney, C. J., says, "In all such cases (of salvage contracts) unless the acts of the captain are ratified by the owners, his conduct will be carefully watched and scrutinized by the court, and his contracts will not be regarded as binding upon the parties concerned, unless they appear to have been bona fide and such as a discreet owner, placed in like circumstances, would have made. If he settles the amount by agreement, those who claim under it must show that the salvage awarded was reasonable and just." In The Emulous [Case No. 4,480], Judge Story says, "It is true that contracts made for salvage services are not ordinarily held obligatory by the court of admiralty upon the persons whose property is saved, unless the court can clearly see that no advantage is taken of the parties' situation and that the amount is just and reasonable."

This rule has repeatedly received the sanction of the high court of admiralty in England, and been recognized by this and other admiralty courts in this country. See The W. D. B. [Id. 17,306]. If the agreement is proved, it should be presumed to be fair and equitable, and the burden is clearly upon the claimant to satisfy the court that to carry it into effect would be contrary to equity and justice, or that it was procured by fraud or compulsion.

The evidence does not establish that any fraud was practiced by Cleaves, or that the contract was obtained by compulsion, or any advantage taken of the position of the property of the master. On the contrary, the agreement was made with deliberation, between parties fully competent to contract, after time for reflection, and as the court has no doubt, after the master had consulted with Lloyds' agent as well as Capt. Aird and other parties in relation to it. At the same time the court is equally well assured that the agreement was entered into under a mutual mistake of the real condition of affairs and of the consequences which must result from its enforcement, and that to sustain it will produce gross injustice.

The invoice value of the cargo, freight added, is admitted to have been in currency, $47,178.20, twenty-five per cent. of which sum, $11,794.55, is the amount of salvage claimed for discharging the cargo; and to this is added a further sum of $660, being one-fourth of the alleged value of sails, stores, &c., belonging to the ship and landed from her under the salvage contract. An appraisal in bond of the entire cargo has been taken by order of the court, by persons well qualified for that duty, who have under oath estimated its entire value on the wharf in Portland at $14,086.49. Deducting from this amount the expense of removal from Wells beach to Portland, $3,226.22 would leave the net value on the beach $10,860.27, whilst the amount claimed as salvage for its discharge is $11,794.55, being more than $900 beyond the value of the entire cargo. This appraisal, so far as it relates to the ferry-boat, is said to be erroneous and should not conclude the court, as the appraisers have considered it as of no greater value than scrap iron, and have not allowed its real value as the parts of a boat in readiness to be put together and completed. This was a matter entirely for the consideration of the appraisers, and courts of admiralty are never inclined to question the correctness of a valuation made by those it has selected for that duty. On the contrary, in England, such appraisal is always held conclusive as to value. I am not aware of any authority to that effect in this country, and without intending to decide whether the court is or not concluded by its valuation, I have no doubt that the appraisers in the present case have arrived at a just and correct result.

It must be recollected, that this portion of the cargo, the frame and plates of an iron ferry boat, is a kind of property designed

for a particular, special purpose, constructed at a great expense, and valuable for the purpose for which it was designed, but not susceptible of being used for any other purpose. Few customers can be found for such property; it is very seldom that such a boat is needed; it was constructed for a ferry boat in connection with railroad trains, quite long and flat, and unless accepted by the party for whom it was manufactured, in all probability a purchaser could not be obtained for it. Such, in the present instance, is shown to have been the case. By reason of the great delay attending its transportation, the Grand Trunk Railway considered itself exonerated from its obligation to accept it, and took no steps to obtain possession of it, even at the valuation objected to by the libellant; and the reasonable inference from the conduct of this company is, that it has from some other source obtained a boat, so that it has no occasion for this. This property has been extensively advertised in New York, Boston, and western papers, and the only offer received has been one of $40.00 per ton, from which, if the duties and expense of transhipment are deducted, it would afford a valuation not very different from that given by the appraisers. This portion of the cargo has been examined by a skilled mechanic, who states that many of the frames and ribs, constituting about one-third of the entire quantity of the whole cargo, were broken or badly twisted, and that some of the iron plates were also broken so that they were only fit for scrap iron, which of course very much reduces its value.

The libellant states that he was offered $45,000 for the cargo, and so informed Hilton, the agent for the underwriters, and that when a week or two afterwards Hilton wanted him to take it he refused as the chance had gone. At that time the property was in the custody of the court, and on petition the court would at once have directed the acceptance of the offer; it is not referred to in any of the correspondence, and the court cannot but think that there is some mistake in relation to it, and that for the cargo, as it then was, no such amount would have been paid for it by any one after a careful examination of its condition.

Taking therefore the valuation as correct, and sustaining and enforcing this salvage agreement, the entire cargo would not pay for its landing, and it would require the further sum of $900 to be realized from the ship and freight, if the cargo was first applied to the payment. It is claimed that the ship should bear her proportion of this expense, as she was benefited by the discharge of the cargo and removed thereby from immediate peril to temporary safety. As I have before stated, I think this expenditure was for the common benefit and to the advantage of the ship, and she should bear her proportion of it according to the benefit rendered to her from the expenditure. She was rescued from the then impending peril of destruction from the breakers, but she was not then brought into safety and a condition to perform her voyage.

To accomplish this, a long delay and heavy expenditures were incurred, which, in my view, should be deducted from the value of the ship before she can be called upon to contribute to the expense of her discharge. She was valued at $20,000 in the dock at Portland, but this did not include her sails, spars, chains, &c., amounting to about $2,000 additional. Her whole value, therefore, when taken off the beach was about $22,000, on which sixty per cent. was paid the Coast Wrecking Company as subsequent salvors. Deducting the amount of this second salvage would leave a value of $9,000 in the ship to contribute to the expense of her discharge, which added to the net value of the cargo on the beach, $10,860.27, gives an aggregate of property of nearly $20,000 to contribute to the salvage claim of $11,794.55 for cargo, and $660 on sails, chains, &c., amounting to $12,454.55 to be borne by the $20,000.

Cleaves was engaged but about a fortnight in this enterprise; the labor was not very severe or perilous, as after the second day he found no difficulty in obtaining all the men he required at $2.00 per tide, and ox-teams including drivers at $4.00 per tide; the weather was cold but not stormy, with the exception of one day, and his expenses beyond his payments for men and teams and the steam pump did not exceed $100. His contract gave him the privilege of the ship's coal, engines, tackles and cranes, and by means of them he was enabled to discharge successfully a large portion of the cargo at an expense, so far as the court can discover from his own statements, not exceeding $2,000 or $2,500.

The principal part of the cargo was heavy, crooked and difficult to handle, but the hindrances were not very different from what they would have been at many of the wharves in this town. It was allowed to be dropped upon the beach, and in some instances by so doing was broken or bent, and its value greatly diminished; but it was necessary to use all expedition possible in this work, and the court is not inclined to make any great deduction on this account, although with more care and time it would undoubtedly have been landed in better condition. The salvage claim is four-fold the expenditure, without any risk of property, or any personal exposure to danger, or requiring of the salvors extraordinary skill and exposure in the business, and is more than fifty per cent. of the entire value of all the property benefited by the service, which is the usual amount allowed in cases of derelict at sea, attended with much risk and exposure

of persons and property. I have stated that this agreement was entered into under mutual mistake, and it is very manifest that such was the case, as the parties would never have entered into an agreement to pay $900 more than the entire value of the cargo for merely discharging it on the beach above spring tides.

If both parties had then known that its value when landed would not have exceeded $11,000, it cannot be supposed they would have contracted that Cleaves should receive $11,794 for its discharge. Both believed that when landed it would be worth and would command nearly, if not quite, its full invoice value with freight. They do not appear to have contemplated any diminution of its value by reason of the damage it had sustained on the voyage, or which it might receive in process of landing, or from its not being a kind of property which at all times would command a purchaser at nearly its original cost. There was evidently such a mistake as would require a court of admiralty in the present instance not to hold this agreement obligatory upon the claimants.

In the opinion of the court a salvage contract similar to the one now under consideration ordinarily should not receive the sanction of the court, it being in conflict with the policy of courts of admiralty in matters of salvage. The value of the property as saved should always be a very important element in determining the amount, and an agreement to pay a fixed proportion of the invoice value and freight, entirely excludes any consideration of the present value of the property. Salvage services are only required when the ship or cargo is in distress; and when a vessel is stranded, it is almost certain to be the case that the cargo is more or less injured, and in most cases so as to materially affect its value and reduce it below its original invoice cost. Compensation for salvage services is allowed by reason of the benefit conferred, and ought to bear some proportion to such benefit. This can only be ascertained by an examination of the cargo, and if found damaged, the benefit being so much the less, the award for salvage should be affected thereby; but by the rule adopted in this agreement, the salvor is assured of his reward without any regard to the benefit he may render the owner. The cargo may from various causes, as in the present instance, not be of sufficient value to pay the price agreed, and yet if the agreement is to control the rights of the parties, the salvors will realize more than the whole value of the property.

It is for the interest of commerce and navigation that compensation for salvage services should usually be somewhat of a contingent nature, dependent on the value of the property rescued from peril by the services. The diligence and skill of salvors are thereby incited and promoted, and they will be much more likely to render valuable aid and assistance, and to rescue from peril a much larger amount of property, if they understand that their reward is dependent upon the value of the property saved, than they otherwise would, if they were sure of a certain amount, provided the property saved proves insufficient to realize such amount. Salvage services are generally required in storms and rough weather, are attended with more or less danger and exposure, and salvors would not be inclined to expose themselves to continued peril and danger in rescuing the balance of the property at risk, after they had saved enough to insure their own demand upon it, under a contract like the present. It is frequently the case, that the portion of the cargo which is in the lower hold of a ship in distress cannot be discharged without much more cost and peril than attends the discharge of that found between decks; and it is certainly not salutary or judicious for the court to approve of any practices by which salvors will be induced to abstain from saving that portion of a ship's cargo which is most difficult to rescue, and content themselves with taking care of that only which can be preserved without much trouble or exposure.

The agreement not being sustained by the court, it only remains to determine what is a reasonable award for the salvage services rendered, the property benefited thereby being of the estimated value of $20,000. The cargo is stated in the contract to have been of the invoice value of $35,000 in gold, so that the amount which Cleaves expected to receive was in excess of $10,000.

"Compensation as salvage is not viewed by the admiralty courts merely as pay on the principle of quantum meruit, or as a remuneration pro opere et labore, but as a reward given for perilous services voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property. Public policy encourages the hardy and adventurous mariner to engage in these laborious and sometimes dangerous enterprises, and with a view to withdraw from him every temptation to embezzlement and dishonesty, the law allows him in case he is successful a liberal compensation." The Blackwell, 10 Wall. [77 U. S.] 14.

In my view, the sum of $6,000 under all the circumstances of this case is a reasonable and just award for the salvage services. It is probably a somewhat larger sum than the court would have awarded if there had been no agreement in relation to the amount; but an inducement of a much larger compensation was thus held out by the master to Cleaves if he would undertake the service, and it is possible he might not have assumed it if he had not expected to be thus liberally rewarded. If these claimants, therefore, are required to pay more than they otherwise

might have been, they must ascribe it to the conduct of their master, for whose proceedings they are to some degree thus held responsible. Decree for $6,000 and costs on the first libel. Second libel dismissed without costs.

Case No. 2,904.

CLOUD v. HEWITT.

[3 Cranch, C. C. 199.][1]

Circuit Court, District of Columbia. Nov., 1827.

INSPECTION OF FLOUR—QUI TAM ACTION—PARTIES—PLEADING.

1. In an action for a penalty, under the Virginia act of 21st December, 1792, "regulating, the inspection of flour and bread," it is not necessary that the United States should be nominally a plaintiff, but the penalty may be recovered in an action qui tam.

[Cited in Winne v. Snow, 19 Fed. 508.]

2. In an action for the penalty for altering the inspector's marks on barrels of flour, it is necessary to set out the marks, and how altered.

3. The word "condemned" must be branded on the cask, or it is not within the fifteenth nor the tenth section of the act.

This was an action of debt qui tam, under the tenth and fifteenth sections of the Virginia act of 21st December, 1792, "regulating the inspection of flour and bread." Pages 229, 231. The declaration had two counts: 1st. Upon the tenth section, for lading on board a ship for exportation twenty barrels of flour, marked "condemned" by an inspector. 2d. Upon the fifteenth section, for altering the inspection marks on twenty-four barrels of flour. The defendant demurred to the declaration.

Mr. Hewitt, for defendant, contended that, under the act of congress of the 3d of March, 1801 (2 Stat. 115), supplementary to the act concerning the District of Columbia, section 2, it was necessary that the action should be in the name of the United States and of the informer, and that a qui tam action by the informer, who sues for himself and the United States, is not sufficient.

But THE COURT (nem. con.) overruled the objection.

THE COURT, however, was of opinion that the second count was bad, in not setting out what the marks were, which were altered, and how they were altered.

Mr. Swann, for plaintiff, had leave to amend his declaration, and the defendant pleaded nil debet.

Mr. Taylor, for defendant, upon the trial of the issue upon nil debet, contended that the evidence did not bring the case within the fifteenth section of the act. That the mark "condemned" contemplated in the statute, means a mark branded; whereas, the evidence is, the mark was only made with red chalk. In the tenth section the word is "marked;" in the fifteenth, the expression is "stamped" or "branded, condemned." It is a highly penal law, seven dollars a barrel, and should be construed strictly. The policy of the law requires that the word "condemned" should be as permanently marked as any other word which the inspector is required to put upon the barrel.

Mr. Swann, contra. The inspector, if the flour is unmerchantable, is, by the tenth section, to "cause the same to be marked, on the bilge, with the word 'condemned,' or secure it for a further examination, if required; which examination the owner shall procure to be made within twenty days." This shows that the mark was to be temporary, not permanent, and if upon such re-examination, the flour shall be found merchantable, "the inspector shall erase out the word 'condemned,' and put such brand on the flour as" the examiner shall direct. The degree of fineness only is to be branded.

THE COURT (THRUSTON, Circuit Judge, contra) was of opinion that the word "condemned" must be branded on the bilge, or it is not within the fifteenth or the tenth section of the act.

The verdict being for the defendant, upon both counts, Mr. Swann, for the plaintiff, moved for a new trial, on the ground of misdirection of the jury by the court upon the matter of law; and the case was again argued by Mr. Swann, for plaintiff, and Mr. Hewitt for defendant.

CRANCH, Chief Judge, delivered the opinion of the court (THRUSTON, Circuit Judge, contra), as follows:

This was an action of debt, under the tenth and fifteenth sections of the act of Virginia, of the 21st of December, 1792, "for regulating the inspection of flour and bread." Rev. Code, 229. The first count was upon the tenth section, for lading on board a ship, for exportation from the town of Alexandria, in the District of Columbia, twenty barrels of flour marked "condemned," by an inspector in that town. The second count was upon the fifteenth section, and was for altering the mark "condemned," which had been put upon the barrels of flour by an inspector.

THE COURT, upon the trial of the issue upon the plea of nil debet had (THRUSTON, Circuit Judge, contra) instructed the jury that the word "condemned" must be branded; or it was not such a mark as was contemplated by the statute. Upon this instruction the jury found a verdict for the defendant, the marks having been made with red chalk only; which was said to have been the invariable practice under the statute; and it was said that the inspectors had never used a brand for that word; but had always used brands for the four words indicating the four degrees of fineness of the

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

flour, namely, "superfine," "fine," "middling," and "shipstuff."

Mr. Swann, for plaintiff, moved for a new trial, on the ground of misdirection of the jury, by the court, on the point of law. This motion has been argued, and the question now to be decided, is, whether the mark "condemned" must be branded on the cask.

The main object of the law was to prevent the exportation of bad flour, whereby the credit of the Virginia flour would be injured in foreign markets. The fourth section provides that all flour brought to a port "for exportation," shall be made of due fineness, &c. The fifth section regulates the size and quality of the barrel. The sixth requires every miller of flour "for exportation," to provide and keep "a distinguishable brand-mark," with which he shall brand every cask of flour and mark thereon the tare and net weight; and inflicts a penalty on any person, who shall remove any cask of flour from the place of manufacture, "not branded and marked as aforesaid." The carrier, who should have paid the penalty, might recover it from the miller, provided he informed him that he intended to carry it, and requested the miller "to secure and brand the said barrels." The seventh and eighth sections regulate the weight of flour which should be packed in the casks. The ninth relates to bread only. The tenth provides that any cask of flour brought to a port, to be from thence laden or shipped for exportation, shall be inspected by an inspector, and if he shall judge it to be well packed and merchantable, he shall "brand the cask in the quarter with the name of the place at which he is inspector, with a public brand-mark, to be provided for that purpose; and shall also brand and mark the degree of fineness which he shall, on inspection, determine the said flour to be of; which degree shall be distinguished as follows, namely, superfine, fine, middling, and shipstuff." "No inspector shall pass any flour which shall prove, on examination, to be unmerchantable, according to the true intent and meaning of this act, but shall cause the same to be marked on the bilge with the word 'condemned,' or secure it for a further examination if required; which examination, the owner shall procure to be made within twenty days." It then provides the mode of appeal to three persons, to be appointed by a justice of the peace; "and if they or any two of them, shall pass and declare the same to be merchantable; in such case, the inspector shall erase out the word 'condemned,' and put such brand on the said flour, as they or any two of them shall direct." "It shall not be lawful, for any person to export, or lade on board of any ship or vessel, for exportation out of this state, any cask of flour marked 'condemned' by an inspector; or to export or lade on board any ship or vessel, for exportation, from any port or place within this state, any casks or barrels of flour, not inspected or branded as aforesaid, on pain of forfeiting ten dollars for every cask or barrel exported, or laden on board any ship or vessel, for exportation." The eleventh section declares, that complaints have been made that evil-disposed persons have packed flour "in old casks which have been branded agreeable to this act," and provides a penalty for so doing. The twelfth provides for the inspection at certain mills. The thirteenth contains the form of the inspector's oath, by which, among other things, he swears, "that no flour shall be passed or branded by him, without inspecting the same; that he will not brand, nor cause to be branded as passed, any cask or casks of flour that do not appear to him" to be merchantable; "that he will mark on all casks of flour, the degree thereof, according to the directions of this act; that he will carefully examine the casks," "and that he will not pass or brand any such casks, unless they be of such size, goodness, and thickness, as by this act are required." The fourteenth section forbids inspectors to purchase flour, unless for their own use. The fifteenth section provides that, "if any person shall alter the mark stamped on any cask of flour, by an inspector, or shall mark or brand any cask of flour, which has not been inspected, with any mark or brand, similar to, or in imitation of any inspector's mark or brand, or after an inspector shall have passed any cask of flour as merchantable, shall pack, into such cask, any other flour; or after any cask of flour shall be branded 'condemned,' shall unpack, and re-pack the same in other casks, for exportation, such person shall forfeit and pay the sum of seven dollars for every cask."

These are all the parts of the act, which are believed to have any bearing upon the question in what manner the word "condemned," shall be marked upon the cask, within the meaning of the statute. It may be observed, that by the tenth section it is equally penal to export casks of flour not branded, as to export casks of flour "marked condemned," and therefore, it was not necessary that the word "condemned" should be branded on the cask; for whether branded or not, it could not affect the credit of the Virginia flour in a foreign market, because it was never to be exported. The tenth section does not say how the word "condemned" shall be marked on the cask; but it expressly provides that the degree of fineness of merchantable flour, shall be branded and marked; and if, upon appeal, flour, which the inspector shall have marked "condemned," should be determined to be merchantable, the inspector is to "erase out the word 'condemned,' and put such 'brand'" on the flour as the reviewers shall direct. The expression is not, such other brand, (which would have been used, if the legislature

had intended, that the word "condemned" should be branded on the cask,) but the expression used is "such brand as," implying that it had not been before branded and marked. The degree of fineness is to be branded and marked; the word "condemned" is to be marked. The same section makes it penal to export casks of flour, not inspected or branded as aforesaid. If the casks of flour should have been inspected and branded "condemned," they would not literally have been within this penalty, if the act had required the word "condemned" to be branded upon such casks. Hence it may be strongly inferred that the legislature did not intend that the word "condemned" should be marked by branding. The eleventh section, surely, is not intended to guard against the mischief of packing flour in old casks marked "condemned;" yet it complains that evil disposed persons have packed flour "in old casks which have been branded agreeable to this act." If the word "condemned" was to be branded on the cask, it would be included in the expression "branded agreeable to this act," and therefore within the letter of the mischief complained of, although clearly not within its spirit. The legislature, therefore, in this section, seems to have considered the term "branded" as applicable only to the branding of merchantable flour.

This is believed to be the whole substance of the argument, on the part of the prosecution, upon this point; and if the question rested entirely upon the tenth and eleventh sections of the act, the court would be clearly of opinion that the penalty for lading on board of a ship, for exportation out of the district, a cask of flour marked "condemned" by an inspector, might be incurred, although it were so marked with red chalk, and not branded. But the question does not rest on those two sections only. The whole act must be construed together, so as to be consistent in all its parts, if possible. The tenth is the only section which requires that the word "condemned," should be marked upon casks of unmerchantable flour. When the fifteenth section says, that "if any person" "after any cask of flour shall be branded 'condemned' shall unpack and re-pack the same in other casks for exportation, such person shall forfeit and pay the sum of seven dollars for every cask," it evidently refers to the marking of the word "condemned," required by the tenth, and renders that certain, which the tenth section left uncertain, to wit, the manner of marking the word "condemned."

It is evident that the legislature took it for granted that, under the tenth section, the word "condemned" was to be branded on the cask; and, upon the principles of construction applicable to penal laws, no person would be liable to the penalty of seven dollars a barrel, under the fifteenth section, for unpacking and repacking condemned flour in other casks, for exportation, unless the word "condemned" had been branded on the cask. That the mode of marking was, by the tenth section, left to the discretion of the inspector, is only matter of inference; and we think that the inference, arising from the fifteenth section, is stronger than that arising from the tenth and eleventh sections. We think that the tenth and fifteenth sections must have the same construction, as to the mode of marking; and, if they conflict with each other, one must yield. But we do not think that there is any repugnance between them. One designates the mode; the other does not. The uncertain must be construed by the certain. This construction is corroborated by other sections of the act. The sixth requires every miller of flour, for exportation, to provide and keep a distinguishable brand-mark, with which he shall brand every cask of flour, and mark thereon the tare and net weight; and inflicts a penalty for removing the casks not branded and marked, as aforesaid; but the person removing the cask, and who may have paid the penalty, may recover it from the miller, if he shall have informed him of his intention to carry them, and requested him to brand the casks. He is not obliged to request the miller to brand and mark the casks, but only to brand; implying that the tare and net weight is to be marked by branding. The thirteenth section contains the form of the inspector's oath, by which he swears not to pass or brand any flour without inspecting it. Here the word "brand" may be applied, as well to unmerchantable as to merchantable flour. He is not to pass, nor to brand as condemned, any flour without inspecting it. He further swears that he will not brand, as passed, any flour not merchantable; implying that the flour may be branded, and not passed. He also swears that he will mark, on all casks of flour, the degree thereof. Here the word "mark" is used for brand; for, by the tenth section, he is to brand and mark the degree of fineness. Some stress was laid on the word "erase," in the tenth section, where it is said that, if flour which has been marked "condemned," should, upon appeal, be adjudged merchantable, the inspector shall "erase out" the word "condemned." It was said that the word "erase" was not the proper word to designate the obliteration of a brand-mark. But, in truth, it is the most proper word that could be used to express the idea. It is derived from the Latin word rado, which signifies to shave, to scrape, to make smooth. It is defined by Johnson, "to blot out by razure;" and razure is defined to be "the act of scraping, or shaving." Whatever argument, therefore, may be derived from the meaning of the word "erase," is against the construction which would permit the word

"condemned" to be written with chalk; to the obliteration of which neither scraping nor shaving is necessary, as it is for that of a brand-mark.

Upon a comprehensive view of the whole act, we are still of the opinion which we expressed at the trial, that, unless the word "condemned" be branded on the cask, no person can be liable to the penalty, under the tenth section, for lading on board of a vessel, for exportation, flour marked "condemned;" nor to the penalty under the fifteenth section, for altering the inspector's mark.

Judgment for the defendant; but THE COURT ordered it to be certified that there was probable cause for the prosecution.

Case No. 2,905.

In re CLOUGH.

[2 N. B. R. 151 (Quarto, 59); 2 Ben. 508; 16 [Pittsb. Leg. J. 25.] [1]

District Court, S. D. New York. Oct. 3, 1868.

PROOF OF DEBT IN BANKRUPTCY — UNLIQUIDATED DAMAGES.

A creditor not on the bankrupt's schedules files a deposition setting forth a claim for unliquidated damages on a breach of contract by the bankrupt, but makes no application for assessment of alleged damages. *Held* such debt was not duly proved.

[In the matter of Oscar H. Clough, a bankrupt.

[On certificate of James F. Dwight, register in bankruptcy.]

I certify that in the course of the proceedings before me, the following question arose pertinent to the proceedings, and is referred to the judge under section 6 of the law, for his opinion.

On the return day of an order to show cause why the bankrupt should not be discharged, Patrick Murray appeared and filed the following proof of debt, viz:

"At New York, in the county of New York and state of New York, on the 11th day of September, A. D. 1868, before me, James F. Dwight, register, came Patrick Murray of Bergen, in the county of Hudson, and state of New Jersey, and made oath, and who, after being duly sworn and examined at the time and place aforesaid, upon his oath says that the said Oscar H. Clough, the person for whom a petition for adjudication in bankruptcy has been filed, at and before the filing of the said petition, and still is, justly and truly indebted to this deponent in the sum of fifty thousand dollars, being the amount of damage suffered by deponent by the violation, by the said bankrupt and others, of a certain agreement entered into by deponent, the said bankrupt, and Richard & Cyrus Butler, bearing date October 1, 1860, and also gains and profits made by the sale of plumbago thereunder, due and payable from the said Butler and Clough to deponent, the said claim of deponent being now in litigation and pending in an action in the supreme court of the state of New York, wherein he is plaintiff, and the said Butler and Clough defendants, for which said sum of fifty thousand dollars, or any part thereof, this deponent says that he has not, nor has any person by his order, or to this deponent's knowledge or belief, for his use, had or received any manner of satisfaction or security whatever.

"And this deponent further says that the said claim was not procured for the purpose of influencing the proceedings under the act of congress entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved March 2, 1867 [14 Stat. 517]; that no bargain or agreement, express or implied, has been made or entered into by or on behalf of this deponent to sell, transfer, or dispose of said claim, or any part thereof, against said bankrupt, or to take or receive, directly or indirectly, any money, property, or consideration whatever, whereby the vote of this deponent for assignee, or any action on the part of this deponent, or any other person in the proceedings under said act, has been, is, or shall be in any way affected, influenced, or controlled. P. Murray.

"Subscribed and sworn to this 11th day of September, 1868.

"James F. Dwight, Register."

The said Murray does not appear as a creditor on the bankrupt's schedules, and had not appeared before, although the case has been pending since the 21st day of September, 1867, and the bankrupt, through his attorneys, comes and denies the debt set forth by the creditor, and objects to the proof of debt being received, and claims that the same should be rejected as not "duly proved." And the objections filed by the bankrupt are hereto attached. There has been no application by the creditor to have his damages assessed.

By JAMES F. DWIGHT, Register:

I believe the objection of the bankrupt to be well taken, and do not think the proof of debt can stand as filed on this deposition. The creditor was notified by me, when the proof was filed, that, being for unliquidated damages, the amount should be fixed by assessment, he pronounced himself satisfied to let it remain thus. I do not understand that the court is called upon by the laws to order an assessment of damages, unless the creditor applies for the same.

Objection of bankrupt:

"Oscar H. Clough, the above-named bankrupt, hereby denies the existence of any debt against him, either individually or jointly with others, in favor of Patrick Murray, who has made what purports to be a proof of debt against him in these proceedings,

[1] [Reprinted from 2 N. B. R. 151 (Quarto, 59), by permission. 2 Ben. 508, only gives a condensed report of this case.]

amounting to the sum of $50,000, and he hereby objects to the said proof of debt, and to the same being received by the court, the register, and the assignee, and alleges that said debt is not duly proved, and that the courts should 'reject' the same as not being 'duly proved' pursuant to section 22 of the bankrupt act. 1st. Because the alleged debt is for unliquidated damages as appears on the face of said proof of debt, and in such cases there must, under section 19 of the act, be an assessment of the damages by the court, before any debt arising therefrom can be proved, and no such assessment or application therefor has been had. 2d. If provable ex parte under section 22, as has been attempted, the proof of debt does not sufficiently set forth as required by said section 22, either the 'demand' or the 'consideration thereof.' Wherefore the said bankrupt objects to said debt and the proof thereof, and he denies such debt, and asks the register to certify the same to the court, that the court may, according to said section 22 (last clause), reject said claim as not duly proved, or grant said bankrupt such further relief as may be just. Cotterill Bros., Attorneys for Bankrupt."

BLATCHFORD, District Judge. I concur in the views of the register. The clerk will certify this decision to the register, James F. Dwight, Esq.

Case No. 2,906.

CLOUGH v. GILBERT & B. MANUF'G CO. et al.

[3 Ban. & A. 523;[1] 15 O. G. 1009; Merw. Pat. Inv. 225.]

Circuit Court, S. D. New York. Oct. 14, 1878.

PATENTS — "GAS BURNERS" — CONSTRUCTION — EQUIVALENTS—COMBINATION—INFRINGEMENT.

1. The first claim in the patent to Clough, June 14th, 1870, for improvement in gas burners, includes the combination of the perforated burner with surrounding tube, irrespective of any method of regulating the escape of gas from the perforations, and is found in the patent to J. F. Barker, July 26th, 1870, who is the prior inventor of the same.

2. The employment of a slit extending down to the base of the burner, instead of small perforations at the base: *Held*, to be an equivalent, the structure and mode of operation of the combination being the same.

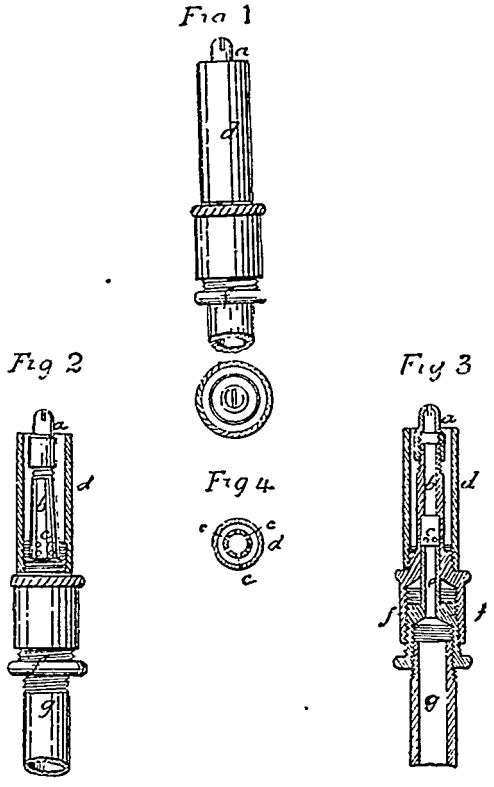
3. A combination, such as was embraced in the second claim of Clough's patent, being found to be old in the art, the claim was limited in construction so as to include the particular devices shown, and when so limited, the defendant's device did not infringe.

[See note at end of case.]

[In equity. Bill by Theodore Clough against the Gilbert & Barker Manufacturing Company and others for alleged infringement of letters patent.

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

[The following is a drawing of the Clough burner:]



George H. Yeaman, for complainant.
William Stanley, for defendants.

BLATCHFORD, Circuit Judge. This suit is founded on letters patent No. 104,271, granted to the plaintiff, June 14th, 1870, for an improvement in gas-burners. The specification says:

"My invention relates more particularly to burners for burning illuminating gas made by saturating gas with vapors of gasoline, commonly called air-gas. It has been found that common bat-wing or fish-tail burners are not adapted to burning this gas as ordinarily made, owing to the variable density of the gas coming from the generating apparatus.

"The object of my improvement is to adapt the slitted or bat-wing burner to the burning of air-gas.

"Said improvements consist, first, in perforating the base of the burner-tube with small holes or passages for gas to escape at the base of the burner, and surrounding the burner with a tube open at the top, but closed at the bottom, and united to the burner below the perforations in the burner-tube. It is more convenient to screw the tube to the burner, but it may be attached in any suitable manner. Second, in regulating the escape of the gas from the perforations at the base of the burner by a sliding tubular valve

or cut-off, introduced into the burner-tube at the base and extending upward within it, the position of the tubular valve being regulated by a screw. These improvements, by furnishing a regulated supply of gas outside of the burner, but directed to the tip of the burner by the surrounding tube, give steadiness and increased illuminating power to the flame of the bat-wing burner, and make it a desirable burner for burning air-gas.

"The drawings represent a bat-wing burner as improved by me.

"Figure 1 represents an elevation of my improved burner attached to a short piece of gas-pipe; Fig. 2, a view showing the surrounding tube in section and the burner therein; Fig. 3, a vertical section through the burner and tube; Fig. 4, a transverse section through the base of the burner-tube.

"Letter a represents the burner-tip; b, the burner-tube; c, perforations at the base of burner-tube; d, the surrounding tube screwed to base of burner-tube; e, the tubular valve extending up in the burner-tube, and operated by an annular screw, f, attached to the lower end. Said annular screw, besides having a screw to work in the base of the burner, has an internal screw, by which it and the burner are attached to the gas-pipe, as clearly shown in Fig. 3 and the other drawings, the gasway being through the annular screw and tubular valve to the burner. As the burner is connected to the gas-pipe, g, by means of the annular screw, the adjustment of the gas escaping through the perforations of the burner-tube, is easily made by turning the burner upon the annular screw.

"I claim, as my invention and improvement in air-gas burners, the bat-wing burner perforated at the base, in combination with the surrounding tube, substantially as described. Also, in combination with the bat-wing burner perforated at the base and surrounding tube, the tubular valve for regulating the supply of external gas to the burner, substantially as described."

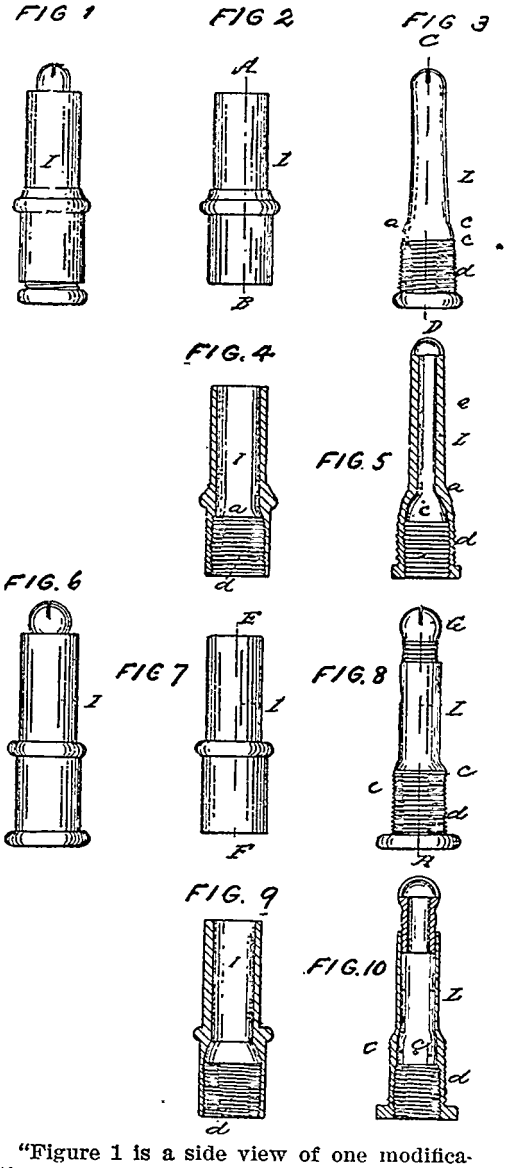
The defendants, in their answer, set up that they have not infringed the patent, and that it is void for want of novelty. At the request of both parties the court ordered a trial, at law, in this court, of two questions:

First. Whether or not the complainant is the first and original inventor of the improvement in gas-burners for which the first above-named patent has been granted to him.

Second. Whether or not the gas-burners manufactured by the defendants are substantially identical with those described in the complainant's patent and schedule thereto annexed, in their construction and mode of operation.

The issues were tried before Judge Shipman and a jury, and the jury answered both of the questions in the affirmative. Afterward, on a case made, the defendants moved before Judge Shipman for a new trial on the ground that the verdict was against the weight of the evidence. He denied the motion in a written opinion, in which he stated that the weight of the evidence on the question of infringement was not such as to justify him in granting a new trial, and that he was satisfied with the conclusion of the jury on the question of priority. He afterward signed and filed a certificate, that, in his opinion, the verdict, on both questions, was sustained by the evidence given.

The burners made by the defendants were made in accordance with the description of the first form of burner described in the specification of letters patent [No. 105,768] granted to John F. Barker, one of the defendants, July 26th, 1870, for an improvement in gas-burners. The drawings of that patent consist of ten figures, which are thus referred to in the specification:



"Figure 1 is a side view of one modification of my invention. Fig. 2 is a side view

of the shell. Fig. 3 is a side view of the burner. Fig. 4 is a vertical longitudinal section of the shell through line A B of Fig. 2. Fig. 5 is a vertical longitudinal section of the burner through line C D of Fig. 3. Fig. 6 is a side view of another modification of my invention. Fig. 7 is a side view of the shell. Fig. 8 is a side view of the burner. Fig. 9 is a vertical longitudinal section of the shell through line E F of Fig. 7; and Fig. 10 is a vertical section through line G H of Fig. 8."

The specification goes on to say: "My invention relates to a device for regulating the flow of carburetted air or gas from the burner to its point of combustion; and it consists of a burner having a screw-thread made upon its lower part upon which is fitted, to turn freely thereon, a shell or tube, also having a screw-thread upon its interior lower part; and the bore of said tube or shell is somewhat larger in diameter than the diameter of the upper part of the burner upon which it turns. A series of perforations is made in the lower part of the burner, so that, when the burner is made or set for the combustion of carburetted air or gas of any certain quality, the flame may be increased or diminished by turning the shell either up or down, as the case may be; the shell, in its movements up or down, either closing or opening the holes or perforations, and letting out or stopping the flow of the gas through the said holes, as it is moved up or down. In the use of carburetted air for illuminating purposes it is almost always the case that, when the gasoline is first placed within the generator, it gives off a much greater amount of vapor, and the air, in passing through the generator, absorbs a greater amount of the carbon, and consequently becomes more thoroughly charged with, and is much richer in, the illuminating qualities of the gasoline than when the generator has been charged for a greater length of time; and, as a result, the carburetted air is sometimes too rich to make a desirable light, with the same amount passing out of the burner, and, at other times, as when the generator has been charged a longer time, the carburetted air flowing through the burner is deficient in illuminating power, and the light or flame produced is not uniform in its power or steadiness, and is sometimes liable to produce a smell of smoke, when too rich in carbon. My invention is designed to obviate all difficulty in this respect, as the burner is set, or made to let out at the tip the minimum quantity of gas that will produce a good flame, and, as the gasoline remains longer in the generator and becomes weaker in its illuminating qualities, the outer tube or shell may be turned so as to let out more gas and increase the flame, without liability to smoke.

"That others skilled in the art may be enabled to make and use my invention, I will now proceed to describe its construction and mode of operation.

"In the drawing, L represents the main part of the burner, which is made similar to the common burner, except that the lower part has a screw-thread made upon the outside and inside. Figs. 1, 2, 3, 4, and 5 represent one modification, in which L is the burner, having the usual screw-thread made upon the lower interior part, by which to secure it to the pipe. At a' is a conical shoulder or seat upon the exterior (shown in Figs. 3 and 5), and a screw-thread, d', made upon the exterior of the lower end, and the small holes c are made either at the seat a' or just below it. I is a shell or tube, the inside diameter of its upper part being somewhat greater than the outside diameter of the part L, and upon the interior of the tube at a is a conical-shaped seat, made to fit upon the exterior seat a' upon the burner L. A screw-thread, d, is made upon the interior of the lower part of the tube I, which fits the thread d' upon the exterior of the burner L.

"The operation of this modification is as follows: When the tube I is turned entirely on to the burner L, the inner seat, a, fits down upon the shoulder a' of the burner L, and the only place of egress for the gas is through the slot at the tip. When the gasoline is fresh or new this slot will be quite sufficient to supply the flame; but, as the gasoline becomes more exhausted of carbon, the tube or shell I may be turned up a little, so that the seat a shall be raised slightly from the shoulder a', and more or less of the gas will pass out through the holes c, and pass up between the tube I and the burner L as the tube I is turned up or down, and when the gas, which escapes through the holes c and passes up between the tube and burner, reaches the top, it unites with that passing out of the slot at the tip, increasing the volume and flame. In this device the gas, after passing out through the holes c, is prevented from passing down between the tube and burner by the screw-threads d and d' upon the inside of the tube and outside of the burner.

"In the modification shown in Figs. 6, 7, 8, 9, and 10 both the burner and the regulating-tube are similar to that already described, except that the thread d' upon the outside of the burner L is carried up higher and the holes c are made below the top of the outer thread but above the top of the inside thread. The thread upon the inside of the tube I is not so long as the outside thread upon the burner L, but is considerably less, so that when the tube I is turned entirely down on the burner the holes will be above the thread on the inside of the tube, and there is no inside seat in the tube I to operate upon a beveled or conical exterior shoulder upon the burner L, as in the other modification.

"The operation of this modification is as follows: If the flame be too weak, the tube I is turned down upon the burner L until the top of the inside thread of the tube begins to pass below the holes c, when the gas

will escape and pass up between the tube and burner, and increase the flame as before. If it should be desirable to stop the escape of gas through the holes c, it is only necessary to turn up the tube upon the burner, and, when the thread inside the tube covers the holes c, then there will be no escape of gas.

"It will be seen that the principles of the operation of both modifications are very much alike, and are intended to accomplish the same object, although the tube turns up in the first case to let out more gas, while it turns down in the second case, both being equivalent, however, in their operation, and accomplishing the same result.

"I am aware that gas-burners have been heretofore made to give an additional supply of gas to the flame, but in those that I have seen they consisted of more pieces, and were considerably more expensive to manufacture, and in their operation the burner revolved with the tube, thus causing the flame to revolve also. This is very objectionable, as it is often desirable to have the flame stand in one particular direction. In this device the flame does not turn in the least, while the whole burner may consist of only two pieces, and is cheaply made, and its operation and effect are perfect."

The claim of that patent is: "An improved gas-burner, consisting of the burner or pillar L, having holes c c therein, and provided with the movable or adjustable shell or tube I, all constructed and operating substantially as and for the purposes herein described and specified."

After such certificate was signed and filed by Judge Shipman, the Gilbert & Barker Manufacturing Company, defendants in this suit, brought a suit in equity in this court, as owners of the said patent granted to John F. Barker, for the infringement of the same against Clough, the plaintiff in this suit, alleging as the infringement the making and selling of burners constructed exactly like the two forms described in the patent to Barker. The only testimony taken directly in the present suit brought by Clough is that taken on the trial before the jury, and embodied in a case made, on which the motion for a new trial was made. It is stated in the brief in this case, on the part of the defendants, that this case is brought to a hearing on the proofs and the verdict on such jury-trial, and on the proofs taken in the suit against Clough, and that such latter proofs are, by stipulation, used on this hearing. I am not furnished with any such stipulation, but I assume that both parties understand that there is one, verbal or written.

In the record in the suit brought against Clough I find the following entry:

"It is agreed by the counsel that upon the trial of this cause either party may read such parts of the testimony, as he wishes, given in the suit of Theodore Clough against the Gilbert & Barker Manufacturing Company, and contained in the printed case and exceptions in that suit, as evidence herein, subject to the same objections taken on the trial at law in that suit, and that, if the court will consent, the two causes may be tried together, when the case of Clough against the said company, or any motion for final decree therein, is reached and heard. This stipulation is without prejudice to the right of either party to take further testimony in this cause."

The stipulation contained in such entry is not a stipulation for the use, on this hearing, of any proofs taken in the suit brought against Clough, but I shall assume that all such proofs are to be regarded as used and read on this hearing, and, from the brief of the counsel for Clough in the two suits, I infer such to be his view.

The first claim of the Clough patent relates to the first of the two improvements set forth in the specification, and the second claim relates to the second of such improvements. The combination of the perforated burner with the surrounding tube, irrespective of any method of regulating the escape of the gas from the perforations, is the subject of the first improvement and of the first claim. The office of that combination is, as the specification states, to enable the surrounding tube to direct to the tip of the burner the gas which comes through the perforations, such tube being open at the top and closed at the bottom, and united to the burner below the perforations. The combination of the regulating-valve with the perforated burner and the surrounding tube is the subject of the second improvement and of the second claim. Moreover, if the means of regulation are to be regarded as entering as an element into the first claim, there is no difference between the two claims.

The two forms of burner, A and B, alleged to be infringements in this case, are both of them substantially like the first form of burner described in the patent to Barker. In both of them the outside tube turns up to let out more gas. It is very clear that each of these burners contains the combination claimed in the first claim of the Clough patent. It is a more serious question whether either of these two burners contains the combinations claimed in the second claim of the Clough patent. They have no sliding tubular valve or cut-off introduced into the burner-tube at the base, and extending upward within it. In them the tubular valve forms part of the surrounding tube. Such valve goes to or leave its seat by screwing up or down the surrounding tube. The surrounding tube cannot be permanently attached to the burner, but must be capable of movement, as it carries the valve. In the arrangement shown in the Clough patent the surrounding tube may be permanently attached to the burner, because the tubular valve is not carried by the surrounding tube, but is a third and separate instrument car-

ried by an adjustable cylinder inserted within the burner from below. Moreover, in the arrangement shown in the Clough patent the burner and surrounding tube revolve together in adjusting their position in reference to that of the tubular valve, so as to let on or turn off the supply of gas through the perforations in the base of the burner, and by the revolution of the burner the flame also revolves. In the burners A and B the revolution of the surrounding tube regulates the supply of gas through such perforations, and the burner never revolves, nor does the flame.

The combination covered by the first claim of the plaintiff's patent is, I think, found in the Horace R. Barker burners, the existence of which prior to the plaintiff's invention is satisfactorily proved. In those burners the burner was a bat-wing burner perforated at the base. The perforations did not consist of small holes, but the stem of the burner was slitted all the way down to the base, allowing the gas to escape through the whole length of the slit. There was a surrounding tube united to the burner below the lower end of the slit. The burner-stem had a cone near its top, and when the surrounding tube was screwed so as to be in a certain position with reference to such cone, the effect was to direct to the tip of the burner the supply of gas coming through the slit below, the surrounding tube being open at the top and closed at the bottom, and the flame was thickened and a ring of flame was formed. The structure and mode of operation of the combination were the same as those of the combination covered by the first claim of the plaintiff's patent. The fact that the perforations in the Horace R. Barker burner existed not only at the base, but were continued in the form of a slit all the way up, makes no difference. Nor does it make any difference that the Horace R. Barker burner had a cone near its top. The first claim of the plaintiff's patent is broad enough to cover the Horace R. Barker burner, and that claim must be held to be invalid for want of novelty.

In respect to the second claim of the plaintiff's patent, it is shown that in the Horace R. Barker burner, by the screwing down of the surrounding tube-socket it impinged against the cone near the top of the burner; cut off the supply of gas which came through the slit below; and that the raising of the tube, so that it did not bear against the cone, allowed a supply of gas to come from below. Thus there was regulation, and by a valve arrangement. In view of the existence of that burner, which contained the combination of a bat-wing burner, perforated at its base, with a surrounding tube in substance like that of the plaintiff's patent, and a tubular valve for regulating the supply of external gas to the burner, the construction of the second claim of the plaintiff's patent must be such as to limit that claim to the form of tubular valve which he describes, namely, one in the interior of the burner-tube, and not forming part of the surrounding tube. Under this construction, the second claim of the plaintiff's patent is not infringed by the burners A and B, nor by any burner constructed in accordance with any description of a burner in the John F. Barker patent.

I have come to the foregoing conclusions after a careful examination of all the evidence given in this suit, and in the suit brought against Clough, and of the exhibits introduced, and with reluctance, because of the issue of the jury-trial, and of the expressed views of the judge who presided at it. But, being satisfied that the law and the evidence require a decree contrary to the verdict on the jury-trial, I am authorized and bound to pronounce such decree.

The bill is dismissed, with costs.

[NOTE. For another case involving this patent, see Clough v. Gilbert & B. Manuf'g Co., 106 U. S. 166, 1 Sup. Ct. 188.

[The complainant appealed to the supreme court, which reversed the decree dismissing the bill, and remanded the cause with directions to enter a decree for appellant for an account and injunction as prayed in the bill.

[The opinion was delivered by Mr. Justice Blatchford, and, after establishing the validity of the Clough patent, holds that the second claim of the same patent was infringed by defendants. Clough v. Gilbert & B. Manuf'g Co., 106 U. S. 166, 1 Sup. Ct. 188.]

CLOUTMAN (SWEENEY v.). See Case No. 13,685.

Case No. 2,907.

CLOUTMAN v. TUNISON.

[1 Sumn. 373.][1]

Circuit Court, D. Massachusetts. May Term, 1833.

SEAMEN'S WAGES — FORFEITURE FOR DESERTION — CONDONATION — ENTRY IN LOG-BOOK — END OF VOYAGE — UNLIVERY OF SHIP — DUTY OF OFFICERS AND CREW.

1. Desertion during the voyage is by the maritime law a forfeiture of all wages antecedently due. But a desertion, to work this effect, must be, not merely an absence without leave, or in disobedience of orders, but animo non revertendi, an intention to abandon the ship and the service.

[Approved in The Union v. Jansen, Case No. 14,348. Cited in The Rovena, Id. 12,090; The Crusader, Id. 3,456; The Swallow, Id. 13,664; The Philadelphia, Id. 11,084; The Moslem, Id. 9,875; The Osceola, Id. 10,602; Joy v. Allen, Id. 7,552; Burton v. Salter, Id. 2,218; The Merrimac, Id. 9,474; The Almatia, Id. 254; The John Martin, Id. 7,357. Distinguished in Graham v. The Exporter, Id. 5,667.]

2. If after desertion a seaman offer to return to duty in a reasonable time, and offer amends, and repent of the offence, the master is bound to receive him back, as a case fit for condona-

[1] [Reported by Charles Sumner, Esq.]

tion, unless his previous misconduct would justify a discharge.

[Cited in Scully v. The Great Republic, Case No. 12,571.]

3. By the act of 1790, c. 56 [1 Story's Laws, 102; 1 Stat. 133, c. 29], a statute desertion and forfeiture of wages are created by forty-eight hours' absence without leave, if a proper entry be made, on the day of the absence, in the log-book.

[Cited in The Rovena, Case No. 12,090; The Quintero, Id. 11,517; Welcome v. The Yosemite, 18 Fed. 384. Criticised in The Union, Case No. 14,347. Approved in Coffin v. Jenkins, Id. 2,948.]

4. The effect of this provision is, that the absence for such a period is deemed conclusive evidence of desertion; whereas in the maritime law it would only afford a presumption of desertion.

[Cited in The John Martin, Case No. 7,357; Welcome v. The Yosemite, 18 Fed. 384.]

5. The due entry in the log-book is indispensable to inflict the statute forfeiture. If not made on the very day of the absence, there can be no forfeiture inflicted.

[Cited in The Quintero, Case No. 11,517; The Lilian M. Vigus, Id. 8,346.]

6. Desertion, to bring after it the forfeiture of wages, either by the maritime law or by the statute, must be during the voyage, and befor it is ended.

[Cited in Francis v. Bassett, Case No. 5,037.]

7. The voyage is ended, when the ship has arrived at her proper port of destination, and is moored in safety in the accustomed place, although her cargo is not unlivered.

[Cited in The Mary, Case No. 9,191; Francis v. Bassett, Id. 5,037.]

8. Officers and seamen are bound to remain by the ship, and unliver the cargo. If they do not, they are liable for damages and a compensation to the owner.

[Cited in The Hudson, 6 Fed. 830.]

9. A forfeiture of two months' pay, deducted for absence of a second mate without leave, during unlivery of the ship, under the circumstances.

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

Libel for wages [by Thomas Cloutman] as second mate of the ship America, in personam, against [George R. Tunison] the master of the ship. The district court decreed in favor of the libellant.

Mr. Peabody, for appellant.

David A. Simmons, for libellant.

STORY, Circuit Justice. This is a suit by libel against the appellant in personam, for wages asserted to be due to the libellant, as second mate of the ship America, belonging to the port of Boston. The voyage, as described in the shipping articles, is "from the port of Boston for Cuba; from thence to one or more ports in Europe; and back to her port of discharge in the United States." The voyage was duly performed, and the ship safely arrived on her return at Boston, and there duly discharged her cargo; and there is no question, that the libellant performed his duty on board, until after the arrival of the ship. The defence set up by the answer to the libel is, that the ship arrived at Boston, on Friday, the 4th of January, 1833; that after her arrival, to wit, on Monday, the 7th of January, the libellant, not having been discharged, "left the ship without any license or permission from the respondent, and without any license or permission from any other person to his knowledge; and that he (the respondent) is informed, and believes, that the libellant did not return, or offer to return on board, till Saturday, the 12th of January; and by so deserting the ship and his duty, this respondent suggests, that the libellant has forfeited his claim for wages." The answer farther alleges, that the respondent, with the consent of the owner, on Friday, the 4th of January, left the ship, and went to Salem, on a visit to his family, whence he returned on Monday following; and on going on board, he saw the libellant there; that the respondent immediately went into the cabin, where he had occasion to visit his trunk, which he found broken open; and that certain articles (naming them), of the value of $34, had been taken therefrom; and on his return on deck, the libellant had left the ship without his consent; and he has never since seen him on board of the ship. As to this latter allegation of embezzlement from the trunk of the respondent, during his absence from the ship, I do not perceive, in the actual form in which it is propounded, that it has the slightest bearing upon the merits of the case. It does not set up, that the embezzlement was either by the libellant, or by his connivance; or that it was occasioned by his gross negligence or failure in duty. And certainly without one of these ingredients, it is utterly impossible to maintain it, as an articulation of any matter of defence, or of set-off against the claim of wages. If it had been intended to present it to the court in either aspect, the answer should have been framed with suitable certainty and directness for this purpose; for in admiralty proceedings the cause must be heard upon the proofs, as applied to the allegations, secundum allegata et probata. No proofs are admissible of any facts not propounded in the allegations; and the decree must stand upon both. Whatever is not alleged is coram non judice. I dismiss, therefore, all consideration of this charge, as incapable of having any bearing upon the controversy before the court.

The other part of the defence requires a more full and exact consideration. By the general maritime law, desertion from the ship in the course of the voyage is held to be a forfeiture of the antecedent wages earned by the party; and this rule is equally as applicable to the officers, as it is to the seamen of the ship. It is believed, that this rule constitutes a part of the maritime code of every commercial nation, and is founded upon a universal principle of public policy. But, still, a very important question remains, upon which much loose and unsatisfactory opinion seems to pervade the community. It

is, what in the sense of the maritime law constitutes desertion? It is commonly enough supposed, that an absence from the ship without leave of the proper officer, or in disobedience of his orders, constitutes desertion. But this is certainly a mistake. Desertion, in the sense of the maritime law, is a quitting of the ship and her service, not only without leave, and against the duty of the party, but with an intent not again to return to the ship's duty. There must be the act of quitting the ship, animo derelinquendi, or animo non revertendi. If a seaman quits the ship without leave, or in disobedience of orders, but with an intent to return to duty, however blamable his conduct may be,—and it is certainly punishable by the maritime law, not only by personal chastisement, but by damages by way of diminished compensation (see 1 Valin, Comm. lib. 2, p. 534, tit. 7, art. 3; The Mentor [Case No. 9,427]; 3 Kent. Comm. (2d Ed.) pp. 198, 199, lect. 46),—it is not the offence of desertion, to which the maritime law attaches the extraordinary penalty of forfeiture of all antecedent wages. And even in a case of clear desertion, if the party repents of his offence, and seeks to return to duty, and is ready to make suitable apologies, and to repair the injury sustained by his misconduct, he is entitled to be received on board again, if he tenders his services in a reasonable time, and before another person has been engaged in his stead, and his prior conduct has not been so flagrantly wrong, that it would justify his discharge. Upon this subject it is well known, that the maritime law encourages a reasonable indulgence to human infirmity, and especially to the known thoughtlessness and rashness of seamen. It favors repentance and condonation; and will not permit a master to insist upon the utmost stretch of authority, or forfeiture, unless there is a clear propriety in exerting it. My learned friend, Mr. Chancellor Kent, has, in his Commentaries (volume 3, 2d Ed., p. 198, lect. 46), put this doctrine on its right footing, and persuasively shown its justice and sound policy. But there must not only be a desertion, but the desertion must be in the course of the voyage, and before its termination in the home port, to justify an infliction of the forfeiture by the maritime law. It is not sufficient, that there has been a desertion after the voyage has ended; although it be within the period, for which the party is bound to do duty on board the ship. It must be during the voyage. Now, when is the voyage ended, in the sense of the maritime law? I answer, when the ship has arrived at her last port of destination, and is moored in good safety in the proper and accustomed place. I do not say, that the officers or seamen are then discharged from any farther duty, and are not bound to attend to the unlivery of the cargo. On the contrary, I maintain, that the seamen, and a fortiori the officers are bound to remain by the ship, and watch over her concerns, and assist in the unlivery of the cargo, if made in a seasonable time; unless there be some express or implied agreement, or established usage, to dispense with their farther services. There is a clause in the common ship articles, pointed to this very duty. "And whereas" (says the clause) "it is customary for the officers and seamen, on the vessel's return home, in the harbour, and whilst her cargo is delivering, to go on shore each night to sleep, greatly to the prejudice of such vessel and freighters, be it further agreed by the said parties, that neither officer nor seaman shall, on any pretence whatever, be entitled to such indulgence; but shall do their duty by day in discharging the cargo, and keep such watch by night as the master shall think proper to order for the preservation of the same." And this very stipulation is in the present articles, and constitues a part of the contract. But it is one thing to be responsible for a violation of the terms of the contract; and quite another thing to incur the visitation of the maritime penalty of forfeiture of the whole wages of the voyage. In the present case, it is, in my judgment, quite clear that the voyage was ended, so far as the maritime law is concerned, at the time when the asserted act of desertion took place. The vessel was not only safely moored, but had come to the wharf, and had been duly entered, and part of her cargo had been discharged. However reprehensible the act, then, was, it was not a desertion during the voyage; and therefore, so far as the forfeiture turns upon the principles of the maritime law, it was not incurred. Nor is there any thing novel in this doctrine. It is manifestly implied in the reasoning of that truly great judge, "princeps inter pares," Lord Stowell, in the case of The Pearl, 5 C. Rob. Adm. 224, which has been cited at the bar. But it is still more directly announced in the more recent case of The Baltic Merchant, Edw. Adm. 86. In this latter case, which turned upon the very point, whether the voyage was ended by a mere arrival in port, Lord Stowell on that occasion said: "By interpretation of law, the voyage is not completed by the mere act of arrival. The act of mooring is an act to be done by the crew; and their duty extends to the time of the unlivery of the cargo. There is no period at which the cargo is more exposed to hazard, than when it is in the act of being transferred from the ship to the shore; and therefore the law, not only the old law, but particularly the statute, by which the West India trade has been in later times regulated," (and the case before him was of a West India ship,) "has enjoined in the strictest manner, that the mariners shall stay by the vessel, until the cargo is actually delivered. I take this to have been always a part of the duty of the mariners; their contract is legally understood to go this length; and there never can have been a

time, when the owner was not entitled to some consideration against the mariners, on account of the non-completion of the contract. This is a consideration not in modum poenae, but it is a civil compensation for injury received, existing in all reason and justice antecedently to any statute upon the subject." His lordship here points out the very distinction between cases of compensation for an imperfect performance of the contract, and cases of forfeiture for desertion, which are strictly in poenam. And he afterwards proceeded to decide, that the voyage in that case could not, upon the true construction of the statutes on the subject of the West India trade, be deemed to be ended, (not, until the cargo was unlivered, but) until the vessel was safely moored in the West India docks; and when so moored, he held the voyage complete and ended, so that the forfeiture for desertion would not afterwards attach. But, the desertion being before such mooring, he pronounced for a forfeiture in the case. It seems to me, that this decision is as fully in point as could be desired; and it affirms, what has always appeared to me to be the true import of the maritime law. See Abb. Shipp. pp. 463–472, pt. 4, c. 3, § 3, and Story's Notes (Ed. 1829); Frontine v. Frost, 3 Bos. & P. 302. I am therefore of opinion, that, upon the mere footing of the maritime law, no forfeiture of wages has been incurred; because, in the first place, I am not satisfied, that there was any quitting the ship animo non revertendi, with an intention to desert the service; and, in the next place, because, at the time of the asserted absence, the voyage was ended.

The next question is, whether there has been any statute forfeiture of the wages for the asserted desertion. The fifth section of the act regulating seamen in the merchants' service—Act 1790, c. 56 [1 Stat. 133, c. 29]—provides, "that if any seaman, &c., shall absent himself from the ship or vessel in which he shall have shipped, without leave of the master or officer commanding on board, and the mate, or other officer having charge of the log-book, shall make an entry therein of the name of such seaman, &c., on the day he shall so absent himself; and if such seaman, &c., shall return to his duty within forty-eight hours, such seaman, &c., shall forfeit three days' pay for every day for which he shall so absent himself, to be deducted out of his wages. But if any seaman, &c. shall absent himself for more than forty-eight hours, at any one time, he shall forfeit all the wages due to him, and all his goods and chattels, which were on board the ship, &c. &c., at the time of his desertion, to the use of the owners of such ship or vessel; and moreover shall be liable to pay to him or them all damages, which he or they may sustain by being obliged to hire other seamen or mariners in his or their place," &c. &c. This section has always been construed to apply to cases of unlawful absence during the voyage, after the vessel has left the home port, at which it commenced; as the second section of the same act has been also held exclusively to apply to such absence at the home port. See Cotel v. Hilliard, 4 Mass. 664. It supposes, therefore, that the voyage is still in transit; and can by no reasonable interpretation extend to any absence after the voyage is ended. Independent of this general ground, which at once, from what has been already stated, disposes of this part of the defence, there is another quite as decisive. The statute manifestly contemplates a distinction between absence without leave and desertion; and it supposes, that the former, if there should be a return to duty within forty-eight hours, would not incur the forfeiture of all antecedent wages by the maritime law; for it would be almost absurd, if such were the legal result, to declare the minor penalty of a forfeiture of three days' pay. It treats absence, therefore, without leave, to be an equivocal act, and not necessarily desertion, animo non revertendi. But, inasmuch as such prolonged absence might endanger the safety of the ship, or the due progress of the voyage, it deems forty-eight hours' absence without leave, to be ipso facto a desertion, and inflicts upon it a total forfeiture of wages. It thus creates a statute desertion, and makes that conclusive evidence of the fact, which would, upon the common principles of the maritime law, be merely presumptive evidence of it. It does not supersede the general doctrine of the maritime law; or repeal it; but merely in a given case applies a particular rule in poenam, leaving the maritime law in all other cases in full efficiency. But, to bring the case within the statute, there must be a strict compliance with all the statute requisites; for, in a case so highly penal, nothing is to be taken by intendment. Now, to work the statute forfeiture, it is made an indispensable condition, that the mate, or other officer having charge of the log-book, should make an entry therein of the name of such seaman, on the day on which he shall so absent himself; and the entry must not merely state his absence, but that he is absent without leave. Abb. Shipp. p. 468, pt. 4, c. 3, § 3, Story's Note (Ed. 1829). The entry on the very day is, therefore, a sine qua non. It is a just and reasonable precaution, to prevent all subsequent fraudulent entries, and all parol evidence of unlawful absences in the progress of the voyage, which may result from after thoughts and contrivances, from personal pique, or from the unavoidable deficiency of positive proof of leave. Whoever is much acquainted with maritime life, has had occasion to know, how many cases of this sort would arise from the common controversies between seamen and officers, if such solemn charges could be set up at any distance of time, without any other proof, than the quickening power of resentment, or the stimulated industry of memory, might

supply by parol. Now, the proof is incontestable, and indeed it is admitted, that the entry of absence without leave in the log-book, was not made until the evening of the fourth day after the asserted absence without leave; and it was then made at the special application of the owner himself. Under such circumstances it is manifest, that it is not a compliance with the statute; and therefore the defence on this point cannot be sustained. Indeed, if the statute were out of the question, I should have thought, that the entry in the log-book, being after the case was put in controversy, post litem motam, would have been inadmissible upon general principles to found a penalty.

Whether the omission to record the entry of desertion in the log-book would have been equally fatal to an enforcement of the forfeiture of the maritime law for desertion, it is not necessary to decide. The present inclination of my opinion is, that it would not be. But, be this as it may, the omission would afford a strong presumption, that there was an express or implied leave of absence, unless the other circumstances of the case positively repudiated it. But, although I cannot pronounce for a forfeiture of wages in this case founded upon any desertion, statutable or maritime; yet I am entirely satisfied, that the absence in this case was without leave, either of the master or owners, and indeed was against the known will, if not the orders, of both. It is, therefore, a case of a criminal disobedience and departure from duty; and the more reprehensible, because it was done by an officer of the ship, who ought to know better, and owes a better example both to the seamen and to his employers. I cannot but feel also, that the evidence establishes, that the absence was the less excusable, because it was under some feelings of resentment for censures passed upon his inattention by the owner; and because it is, in an emphatic manner, the duty of the second mate to attend punctiliously to the discharge of the cargo, to prevent plunderage and damage, and to secure promptitude and care on the part of the persons employed in the unlivery. The excuses set up by him are in a legal point of view wholly unsatisfactory, and are matters of personal feeling, with which the court cannot intermeddle. I follow out the doctrine on this subject in the case of The Baltic Merchant, Edw. Adm. 86, and deem the owner entitled, not merely to a compensation for the loss of the services of the second mate during this period, but for something more, as a just admonition to officers having such high and responsible duties devolved upon them, and designedly departing from them. Of moral turpitude or blame I acquit the libellant, but not of studied omission of duty. The district judge came upon this subject to the same conclusion, which I have arrived at. He inflicted the penalty of a forfeiture of one month's pay for the neglect. If this were the case of a common seaman, I should do the same. But in the case of an officer, I think the good of the merchants' service requires a somewhat higher forfeiture. If the effect of this would be to deprive the libellant of his costs in this court, I would not upon so slight a difference of opinion change the decree. But, as under no circumstances I should allow the libellant's costs in this court, thinking, as I do, that the appeal was rightly and properly taken, I shall decree a forfeiture of two months' pay, instead of one month's pay, of the mate to be deducted (namely $36), and affirm the decree as to the residue. Each party is to bear his own costs in this court; and the libellant is to be entitled to his costs in the district court. Decree accordingly.

Case No. 2,908.

The CLOVER.

[1 Lowell, 342.][1]

District Court, D. Massachusetts. July, 1869.

COLLISION — VIOLATION OF STATE STATUTE REGULATING NAVIGATION—DIVISION OF DAMAGES.

1. The statute of Massachusetts of 1847, c. 234, § 2, requiring vessels in Boston harbor to rig in their jib-booms in certain cases, is valid, and binds all persons navigating that harbor.

2. A vessel whose jib-boom is standing contrary to the law must be *held* liable for a collision which happens in part or in whole by reason of the neglect.

3. Where a tug in such a case knowing the position of the first vessel, collided with her, when by the exercise of ordinary skill and care she might have avoided her, the tug must bear one-half of the damage.

[Cited in The Belknap, Case No. 1,244.]

The tug-boat Clover was engaged to tow the bark Sarnia from Clark's wharf in East Boston to another part of the same harbor. The bark was not fully rigged nor manned, and the whole movement was conducted by the master of the tug-boat, and no question was made that if either the tug or the bark was liable for the consequences of the collision which ensued, it was the former. The Sarnia was lying on the south side of the wharf with her bows up the dock, which was about one hundred and sixty feet wide. Across the end of the next wharf lay the bark Lord Palmerston, discharging into lighters, and with the extreme end of her jib-boom extending about seventy feet into the dock between the two wharves, thus leaving about ninety feet width of dock free for moving the Sarnia. The tug made fast to the port quarter of the Sarnia, and her master ordered the bow line of the Sarnia to be cast off; he then towed her stern a few feet beyond the edge of the wharf and cast off her stern line, and then went on at full speed. Finding that the Sarnia was sagging down

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

with the tide and wind more than he had expected, and fearing that a collision with the Lord Palmerston was inevitable, he let go his tow-line to ease the shock, and the Sarnia drifted into the other bark and carried away a part of her jib-boom. He testified that the collision would not have happened if he had kept on. A statute of Massachusetts enacts that the master, &c., of every vessel shall, as soon as practicable, after having hauled to the end of any wharf that extends to the channel in said harbor, cause her lower yards to be cockbilled and her jib-boom to be rigged in, so that said jib-boom may not annoy any other vessel going in or out of the adjoining docks, &c., under a penalty not exceeding ten dollars. St. 1847, c. 234, § 2.

R. H. Dana, Jr., and L. S. Dabney, for libellants.

1. The statute does not apply to us. The claimants have not shown that this wharf extends to the channel, nor that our jib-boom did "annoy" vessels going in or out of the dock.

2. Even if we violated the statute we can recover. The cases of Arundel v. McCulloch, 10 Mass. 70, and Garey v. Ellis, 1 Cush. 306, were decided at common law, and besides turned on the fact that the wharf and bridge were obstacles to navigation. Here there was ample room to pass, and the law of admiralty is that a vessel which is out of her proper place must not be run down, but must be avoided if possible. The Bay State [Case No. 1,149]; The Batavier, 4 Notes Cas. 356; The Duna, 5 Ir. Jur. 384; Philadelphia, &c., R. Co. v. Philadelphia, &c., Towboat Co., 23 How. [64 U. S.] 218; The Marcia Tribou [Case No. 9,062]; Butterfield v. Boyd [Id. 2,250]; The Telegraph, 8 Moore, P. C. 167. And even at common law the modern doctrine is that an individual cannot abate a public nuisance unless such action is necessary for his reasonable use of the public way. Dimes v. Petley, 15 Q. B. 276.

G. O. Shattuck, for claimants.

1. This wharf extends to the channel line of Boston harbor, as shown by the statutes establishing that line. No other evidence is necessary.

2. State statutes which establish harbor regulations are constitutional and binding on all vessels resorting to the harbor. The New York v. Rae, 18 How. [59 U. S.] 225, per Nelson, J.

3. The violation of the statute is a fault for which the libellants are responsible, and it was one which contributed to the collision. Waring v. Clark, 5 How. [46 U. S.] 465, per Wayne, J.; The John Fraser, 21 How. [62 U. S.] 184; Chamberlain v. Ward, 21 How. [62 U. S.] 565; The Scioto [Case No. 12,508]; Amoskeag Manuf'g Co. v. The John Adams [Id. 338].

4. We say the jib-boom was a nuisance, and if, in the exercise of ordinary care and skill, we accidentally and not willfully ran against and injured it, the owner has no remedy. Brown v. Perkins, 12 Gray, 89; Arundel v. McCulloch, 10 Mass. 70; Mayor of Colchester v. Brooke, 7 Q. B. 339.

LOWELL, District Judge. Although the damage is small which is sought to be recovered in this proceeding, the parties have thought the points of law sufficiently important to warrant a careful and learned discussion. They are not altogether new to me, and I have given them renewed attention in the light of the arguments. The cases cited appear to establish the proposition that the states may lawfully make regulations concerning the harbors within their limits, and not repugnant to any act of congress, which will be binding on all persons resorting to them for trade. The libellants having failed to comply with such a regulation are in the wrong, if their delinquency caused or aided in causing the collision. The words "so that the said jib-boom shall not annoy" other vessels, do not qualify the express command to rig in the jib-boom, but only explain its purpose, or at most limit the law to those cases in which the jib-boom might possibly or probably interfere with navigation. The collision in this case, which was solely with the jib-boom, sufficiently shows that annoyance was to be apprehended, and that the fault of the libellants contributed to the result.

But the fault of the libellants does not excuse any want of due care and skill on the part of the tug. The doctrine of nuisance has little application here, because, in this case, the true mode of abating the nuisance, if it were one, would be to move the ship, which the evidence clearly proves could have been done in a few minutes and with great ease, by simply letting her drop down with the tide. The master of the tug testified that on former occasions a request for such a removal had sometimes been refused, but it is not fit that the rights of the libellants should be forfeited by the former misconduct of strangers. The tug, therefore, must share the loss, if the want of care or skill of her master contributed to the disaster. It was daylight, the state of the wind and tide, and the width of the dock were all patent, and no reason is given for the collision but the miscalculation of the master. Though he is a man of undoubted skill and prudence, yet it is plain that he did not, in this particular case, take all necessary and proper measures for safety. The theory of the defence is that the only mistake was in not keeping on at full speed; but this mistake would have been avoided by having a competent lookout on board the Sarnia to report whether she was dangerously near the Lord Palmerston. Instead of this the master trusted to his own more distant observation, and ran into unnecessary danger. Two cases

in Judge Sprague's Reports closely resemble this. See O'Neal v. Sears [Case No. 10,530], and The Marcia Tribou [supra]. The ground for holding the libellants to bear a part of the loss is that by their illegal conduct they diminished the width of the dock; and the claimants are liable because, taking the dock as it was, they might by competent skill have taken the vessel out without damage to the Lord Palmerston, though not as easily as if the law had been complied with by the latter vessel. Decree accordingly.

Case No. 2,908a.

CLOWSER v. JOPLIN MIN. CO.

[4 Dill. 469, note.] [1]

Circuit Court, W. D. Missouri. April Term, 1877.

TENANCY IN COMMON OF MINERAL LAND—ACCOUNTING.

[Where a tenant in common of mineral lands exercises his undoubted right to take the common property, and has no other means of obtaining his just share than by taking at the same time the share of his cotenant, the value of the ore in place furnishes the just basis of account.]

[At law. Action of ejectment by Clowser against the Joplin Mining Company.]

DILLON, Circuit Judge (KREKEL, District Judge, concurring), charged the jury as follows in respect to the measure of liability for ores taken out of the land and sold by the defendant:

On this subject, no uniform rule applicable to all circumstances and all cases exists. Here is a case where (if the plaintiff is entitled to recover at all) the parties were in fact tenants in common, and where each party claimed the whole, and each denied any right in the other; where the defendants were rightfully in possession (for one tenant in common has as much right to the possession as another); where the plaintiff was absent, and for years had paid no attention to the land; where the defendants developed, if they did not discover, the lead mines and worked the same and took ore therefrom; the defendant company was organized and went into possession in 1874, the plaintiff appeared and set up a claim to the land in 1875, each party then claiming the whole. Under such circumstances, the court approves the rule laid down by the supreme court of Pennsylvania: Where "a tenant in common exercises his undoubted right to take the common property, and has no other means of obtaining his own just share than by taking at the same time the share of his companion, the value of the ore in place is the only just basis of account." Coleman's Appeal, 62 Pa. St. 278; Barton Coal Co. v. Cox, 39 Md. 1, and cases cited.

Under the statute of Missouri this rule may properly be applied in measuring the right to a recovery in respect to ores taken when one tenant in common recovers in ejectment against another. Wag. St. 560, § 13.

[NOTE. This case is reported in 4 Dill. 469, as a note to Bly v. U. S., Case No. 1,581.]

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

Case No. 2,909.

CLUM v. BREWER et al.

[2 Curt. 506.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1855.

PATENTS—"ELECTRIC TELEGRAPH"—TEMPORARY INJUNCTION—PRACTICE—ENJOINING EQUITABLE OWNER—COMMISSIONER'S DECISION ON EXTENSION—CONCLUSIVENESS—SALE OF INVENTION—LICENSE BY CO-OWNER.

1. Since the decision of Poor v. Carleton [Case No. 11,272], the practice of this court has been settled, that the denial of the plaintiff's title in an answer does not prevent the court from awarding a special temporary injunction.

2. If a patentee has established his title under original letters-patent, he is entitled to a temporary injunction under an extension of those letters-patent, without a further trial of his right.

3. The act of the commissioner in extending letters-patent is conclusive evidence of all the facts, which he is required to find in order to grant such extension, in the absence of fraud and any excess of jurisdiction.

[Cited in Crompton v. Belknap Mills, Case No. 3,406; Jordan v. Dobson, Id. 7,519.]

4. Where the right to a temporary injunction does not depend upon any controverted and doubtful facts, but upon the interpretation to be put upon a written instrument, it is the duty of the court to interpret it and grant or refuse the injunction accordingly.

[Cited in Earth Closet Co. v. Fenner, Case No. 4,249; Hodge v. Hudson River R. Co., Id. 6,560.]

5. The inchoate right of an inventor to the exclusive privileges under an extension of letters patent is the subject of a sale.

[Cited in Newell v. West, Case No. 10,150; Emmons v. Sladdin, Id. 4,470; Hendrie v. Sayles, 98 U. S. 552.]

6. Semble, a sale of "an invention" does not necessarily carry this inchoate right; but such a sale may be so explained in the instrument, as to have that effect.

[Distinguished in Hodge v. Hudson River R. Co., Case No. 6,559. Cited in Jenkins v. Nicolson Pavement Co., Id. 7,273; Mowry v. Grand St. & N. R. Co., Id. 9,893; Gear v. Grosvenor, Id. 5,291; Waterman v. Wallace, Id. 17,261; Emmons v. Sladdin, Id. 4,470; Hendrie v. Sayles, 98 U. S. 552. Applied in Johnson v. Wilcox & Gibbs S. M. Co., 27 Fed. 690.]

7. One tenant in common of letters-patent has the same rights as another, to make, use, and sell the thing patented; and a license under one tenant in common cannot be enjoined on a bill by another tenant in common.

[Approved in Dunham v. Indianapolis & St. L. R. Co., Case No. 4,151.]

8. A court of equity will not enjoin the equitable owner of a patent, on the application of the legal owner.

[Cited in Whiting v. Graves, Case No. 17,577; Wright v. Randel, 8 Fed. 599.]

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

9. Construction of the contracts and conveyances between S. F. B. Morse and F. O. J. Smith, respecting the electric telegraph invented by the former.

This bill was filed by the complainant [William B. Clum], who claimed to be the grantee under Professor Morse, of a certain sectional interest in the state of Massachusetts, under the extended letters-patent, originally granted to Morse, on the twentieth day of June, 1840, and renewed and extended by the commissioner of patents for seven years from the twentieth day of June, 1854 [against Charles H. Brewer and others]. The defendant Smith, by his answer claimed under certain instruments executed by Morse, set out therein; and the other defendants justified under licenses from Smith. As the decision of this motion for a temporary injunction, turned mainly on the construction of these contracts, they are here inserted.

"Deed.

"Whereas I, Samuel F. B. Morse, of the city and state of New York, am the sole and original inventor of a system of electro-magnetic telegraphs for the conveyance of intelligence by words and signs, or by either, and to secure my legal rights and property to said invention, I have filed a caveat and evidence of my said invention in the office of the commissioner of patents, in the city of Washington, to the end of obtaining letters-patent for said invention hereafter according to law. And be it therefore known to all to whom these patents shall come, that I, the said Morse, for a valuable consideration to me paid by Francis O. J. Smith, of Portland, Maine, the receipt whereof I do hereby acknowledge, have bargained, sold, and do hereby bargain, sell, and convey unto the said Smith, his heirs and assigns, one undivided fourth part of my said invention, and of all my rights and property therein secured by my said caveat or otherwise, that I have or may have from any letters-patent for the same, granted by the government of the United States, and within the limits thereof. Also five undivided sixteenth parts of all the right, title, and property which I have or may secure or otherwise derive from and in said invention, without the limits of the United States by letters-patent or otherwise, except in the republic of Texas, hereby making and constituting said Smith part and joint owner with myself, of said invention, and all property consisting therein, both within and without the limits of the United States, in the proportions already specified. And I further agree, that as soon as may be, after letters-patent for said invention shall be obtained from the government of the United States, or any other governments, I will execute and deliver good and sufficient deeds of transfer of said parts, and of all rights and property incident thereto, and to account from the date hereof to the said Smith in the proportions before named, for all the proceeds of sales of rights to use said invention in any place or country, that may accrue to me at any time, including also a right to share in like proportions in all improvements that may be made thereon by me.

"In testimony whereof, I have hereunto set my hand and seal, on this —— day of March, A. D. eighteen hundred and thirty-eight. Samuel F. B. Morse, (L. S.)

"Witness, Leonard D. Gale."

"Articles of Agreement.

"These articles of agreement made and concluded on this —— day of March, A. D. eighteen hundred and thirty-eight, by and between Samuel F. B. Morse, of the city and state of New York, of the first part, and Francis O. J. Smith, of Portland, in the state of Maine, of the second part, and Alfred Vail, of Speedwell, in the township and county of Morris, and state of New Jersey, of the third part, and Leonard D. Gale, of the city of New York, of the fourth part, witnesseth as follows, that is to say:—

"That in consideration of said parties being the joint owners, in unequal parts, of a certain invention of an electro-magnetic telegraph, for the conveyance of intelligence by sounds and signs, or by either, to wit: The said Morse as original inventor of said telegraph, and the other several parties named, as assignees of the said Morse, they have agreed each for himself, his heirs, and assigns, except so far as either heirs or assignees are incapable of rendering the personal services by these presents contemplated, and each separately and not for the other, as follows, and each with the other, namely:—

"1st. The said Smith hath agreed, and hereby agrees, to proceed as soon as may be, at and upon his individual expense and advance, to take all legal and necessary measures for procuring and securing by letters-patent, the ownership and control of said invention to the said Morse, and his associate proprietors therein, including the said Smith, from the governments of Great Britain and France, and their respective dependencies, and from such other foreign governments and potentates, excepting the republic of Texas, as shall be practicable for him to do by ordinary vigilance, and, in his opinion, of profit and advantage to said proprietors. And to this end, the said Smith shall, in the month of April next, as early in said month as convenient, sail for Europe, taking with him sufficient and necessary means to defray the expenses of travelling, and of government fees, and of other incidental services and charges, for the accomplishment of the purposes aforesaid—including the personal expenses of said Morse, in the manner hereinafter described.

"2d. That the said Smith shall use his best and utmost endeavors to negotiate and sell the right to use said invention, to any of said governments, or potentates, or to any person or associations of persons, for the benefit and

common account of the proprietors thereof. And all proceeds of such sales, first deducting the aforesaid expenditures which the said Smith shall incur in the premises, or by way of advances, shall be divided and apportioned among the proprietors of said invention, in the ratio of their respective interests.

"3d. That in negotiating any sales as aforesaid, the said Smith, while out of the United States, shall be at liberty and authorized to exercise his best judgment and discretion, as to the price, terms, and manner of payment from purchasers, and in all things effect, and do what he shall judge to be for the best interests and advantage of the proprietors, but in no case to incur any expense or debt chargeable to them, without their previous authority, and assent, or otherwise than is in this instrument specifically provided.

"4th. That said Smith shall account to the proprietors severally for their respective shares of the proceeds of all sales that shall be effected by him, by virtue of these presents at any, and at all times on demand, to the extent that the same shall have been realized in money, or other property by him.

"5th. That unless the said Smith shall succeed in effecting sales of said invention, in the manner before described, from the proceeds of which to refund his expenditures in the premises; the other co-proprietors are not to be holden or liable to refund or contribute to the payment thereof, be the same more or less; but the whole shall in that event be borne by and remain the loss of the said Smith, to the extent that such proceeds shall be deficient.

"6th. That the said Smith shall and will at all times hereafter, during the continuance of said invention as a patent right, without other charge or compensation than the interest therein conveyed to him as aforesaid by said Morse, render his individual services as a counsellor and attorney at law, to the said Morse, and the persons associated with him in the ownership of said invention at the date hereof, as well in the managing, conducting, and transferring their individual interest in said invention, as in sustaining the validity, and repelling infringements of their titles thereto, and in the United States after his return from Europe, as elsewhere, while absent from the United States as before provided; but in all cases, wherein by rendering such services, the said Smith shall incur travelling, or other incidental expenses, he shall be repaid the same by the party or persons for whose benefit or at whose demand such services may or shall be rendered as aforesaid—and when such services shall be for the common benefit of the proprietors of said invention, then such incidental expenses shall be paid by them in the ratio of their respective interests.

"7th. The said Morse hath agreed, and hereby agrees, to accompany said Smith to Europe, and such governments without the limits of the United States, besides England and France, as he and the said Smith shall hereafter determine to visit together,—sailing with said Smith for that purpose in April next, as herein before provided, to aid and assist in exhibiting said invention, and sustaining the validity thereof as may be in his power, and devoting himself to the business of said proprietors in such foreign countries as he may visit with said Smith, for a term not exceeding three months after their arrival in Europe. But all of said Morse's personal expenses of travelling, and incidental expenses during said term, and so long as he shall be engaged with said Smith in such foreign countries in the business of said proprietors, and in returning to the United States, shall be advanced, and borne and paid by the said Smith, exclusively, at his individual risk and loss, until the same shall be refunded to and realized by him, deducting the same from the proceeds of sales that shall be made by said Smith, in the manner provided in the preceding articles of this instrument.

"8th. The said Morse is to furnish the said Smith the material and mechanism, of one complete set of telegraphs for use and exhibition in foreign countries, and provide another set for use and exhibition in the United States; and no charge or expense of the same shall be borne or paid by the said Smith; and the said Smith shall, also, be furnished with all necessary models and drawings that may be required abroad or without the limits of the United States, at the common charge and expense of said proprietors in the ratio of their respective interests abroad, to be refunded as before provided.

"9th. The said Vail hath agreed, and hereby agrees, to devote his personal services and skill in constructing and bringing to perfection, as also in improving the mechanical parts of said invention, until the same shall be made the property of the government of the United States, or otherwise be disposed of by said proprietors; and without charge for such personal services to the other proprietors, and for their common benefit; said services to be in accordance with the general direction and supervision of the said Morse.

"10th. The said Gale hath agreed, and hereby agrees, at all times hereafter, while said proprietors shall have an interest in said invention, to devote his professional services and skill, without charge or expense to said proprietors, in effecting improvements in the philosophical and physical qualities or properties of said invention, and in extending and perfecting the same, by such chemical and other scientific experiments as may be suggested as serviceable and proper to be made, by either of said proprietors, with a view to enhance the value of said invention, and of each proprietor's interest therein.

"11th. All expenses and charges incident

to the perfection of said Morse's application for letters-patent from the government of the United States, and of obtaining said letters-patent, shall be borne and paid by the said Morse and Vail, exclusively—as are also all expenses incident to and growing out of the improvement and perfecting of the mechanism of said invention, until said letters-patent shall have been obtained.

"12th. And each of said parties agrees with the other, that all improvements, new discoveries, or other additions which he shall make, or in any other manner acquire, in the use, structure, philosophical properties, or other parts of said invention, or for telegraphic purposes of any description, or in any way affecting said invention, he shall communicate as soon as may be practicable to each of the said parties; and the same shall be held, esteemed, and owned as the property of each in the ratio of his property in the original invention; and all letters-patent that shall be obtained therefor of any government, shall be in that ratio, the property of each, and of his heirs and assignees, respectively. And the expenses of obtaining letters-patent for such improvements or additional discovery, shall be borne by said parties severally, in the ratio of their respective rights and interests therein, in all cases of the kind that shall hereafter arise.

"13th. It is also agreed by all parties herein before named, that all expenses that shall be incurred by either of said parties with the approbation of the proprietors of a majority of the property in said invention, and other than the expenses and services particularly specified in this instrument, and other than personal services, shall be borne by and assessed upon said proprietors in the ratio of their respective interests—so far as the same shall be incurred for the common benefit, and in managing and conducting the common interests of such proprietors, but the same shall be recoverable from, and payable only in proceeds of said proprietors' sales of rights to use said invention, and not otherwise; and until such proceeds shall equal such expenses of any proprietor, such expenses shall remain at the risk of him who shall incur them, unless a written assent thereto shall be given previously by each proprietor.

"14th. It is further mutually agreed by said parties, that all relations existing expressly or impliedly, between said Morse and the government of the United States, relative to the use and sale of said invention, to said government, shall be recognized and carried out in good faith by said parties conjunctively, in the full extent that said Morse is bound thereby, and for the common and joint benefit and interest of said proprietors in the ratio of their rights and property in said invention within the United States.

"15th. It is also agreed, that excepting the negotiations which may be conducted without the limits of the United States, by the said Smith as herein before provided, and during his first mission abroad; no negotiation or sale of rights to use said invention, to or by any government or individual, and no contract in any way affecting the manufacture or use of the mechanism of said invention, shall be made or entered into by any of the said proprietors, without the assent and concurrence of all the proprietors herein before named, or of their legal representatives.

"In testimony whereof, the said parties have hereunto interchangeably set their hands and seals, on the day and year aforesaid, at said city of New York. (Signed.) Samuel F. B. Morse, (L. S.) Francis O. J. Smith, (L. S.) Alfred Vail, (L. S.) Leonard D. Gale. (L. S.)

"These presents witnesseth, that Samuel F. B. Morse and Alfred Vail, by their attorney, Amos Kendall, of the first part, and Francis O. J. Smith, of the second, being sole owners of Morse's letters-patent of the electromagnetic telegraph in the United States, have agreed and hereby doth agree to and with each other for the better and more effective management of their joint interests remaining unsold, or not under contract for sale, as follows:—

"That said Smith shall have full and exclusive power to bargain, sell, and convey any and all routes for the construction and use of said Morse's above-named patents, and of all his improvements thereto, not hitherto sold or placed under contract, within the following territory, namely, in all of the territory of the United States bounded on the south by the route extending from Pittsburg to St. Louis, via Wheeling, Columbus, Cincinnati, and Louisville, thence to St. Louis by any route said Smith shall elect, and on the west and north by the western and northern boundaries of Illinois, Wisconsin, Michigan, and Ohio, and on the east by the eastern boundary of Ohio, to the intersection of the telegraph route from Wheeling to Columbus, opposite Wheeling; also all within the boundaries of New York and the New England states. And that said Kendall, in like manner, shall have full and exclusive power for and in behalf of the first party, to bargain, sell, and convey any and all other routes for the construction and use of said Morse's patent, not hitherto sold, or placed under contract within all the remaining territory of the several states of the Union now existing.

"And the sales of each party within his said territory, made pursuant to the provision of these presents, shall be ratified and concurred in, by the other party, from time to time, as may be required, and by due and legal process of conveyance.

"The manner of disposing of such lines and realizing cash therefor, shall be such as the respective parties shall in their discretion think best for the common interest; and each shall account to the other for money realized by him, whether from absolute sales or participation in the profits of construc-

tion, or in any other mode out of the common property: provided, that neither shall be bound to account to the other for more than fifty dollars per mile, on any route, as the aggregate belonging to the owners of the patents.

"The terms of payment for sales made, shall be twenty-five per cent. of the amount that shall be raised and paid as the first instalment, for construction purposes on the route sold, and a like proportion of every succeeding instalment until the aggregate shall have been paid. And no contract or sale shall be made to extend the omission of the first payment longer than nine months from the date of the contract, or to delay any succeeding instalment beyond the period of sixty days from the prior one. And no conveyance of the letters-patent for any route, shall be made, until the entire price of purchase has been paid.

"Neither of said parties shall charge for his personal services, or expenses of himself, or of any agent he may employ, nor incur any liability in behalf of the other party, in effecting such sales beyond the requisite terms of a conveyance.

"A report shall be made by each party to the other at the end of every September, December, March, and June, of all sales made by him during the quarter so ending. And of all payments received on sales, and such other particulars as either party may require. And payments shall then be made by each to the other, of all collections on the joint interests of said parties up to such periods, as follows:—

"Said Smith shall pay said first party three fourths of all such collections on sales as he shall have made, and of sums of money any way realized as aforesaid, deducting therefrom ten per cent. for commissions. And said Kendall shall pay said second party one fourth of all such collections on sales as he shall have made, and of all sums so as aforesaid realized, deducting therefrom ten per cent. for commissions.

"And it is agreed that the arrangement therein stipulated for the management of said interests within the territorial divisions herein described, shall continue in full force between said parties and their legal representatives, for the period of six years from the date hereof, unless sooner revoked by mutual consent.

"In testimony whereof, said parties have hereunto set their hands and affixed their respective seals, at the city of New York, in duplicate parts, on this twenty-second day of June, one thousand eight hundred and forty-seven. Samuel F. B. Morse, Alfred Vail, (L. S.) by their attorney. Amos Kendall, (L. S.) Francis O. J. Smith, (L. S.)

"In the presence of J. J. Speed, Jr., E. Cornell."

Mr. Parke, for complainant.

Mr. Choate and F. O. J. Smith, contra.

CURTIS, Circuit Justice. Upon the preliminary questions raised in this case, I feel no difficulty. The principal of these is, that, since the letters-patent were extended, there has been no trial of the right, and no such length of possession as lays the foundation for a presumption of its validity. It appears that during the original term of fourteen years, it was decided by the supreme court after full examination of the law and facts, that Morse was the original and first inventor of all that was claimed in his reissued letters-patent, save the subject-matter of the eighth claim, which is of no importance here, and that those letters-patent were valid. The act of congress of July 4, 1836, § 18 (5 Stat. 124), after providing for the extension of letters-patent and the making and recording of the necessary certificates thereof, declares: "And thereupon the said patent shall have the same effect in law, as though it had been originally granted for the term of twenty-one years." It is manifest therefore that the exclusive right now claimed is the identical, exclusive right adjudicated on, and held valid by the supreme court, and that the court is commanded in express terms, to consider it as if it had been originally granted for a period not yet expired, provided it was duly extended, according to the requirements of the act of congress. There is a suggestion of fraud in one of the answers filed in the case. But no evidence, in support of the suggestion has been produced, nor has it been relied on in argument. I cannot presume that any fraud existed. Of all matters necessary to a valid extension, there is not only a strong presumption, arising from the act of extension, but, in respect to the entire merits of the patentee, and the existence of the legal grounds for an extension, the law makes the commissioner the judge, and in the absence of fraud his adjudication is conclusive. I entertain no doubt therefore, that there is such a prima facie title to the exclusive right made out, as calls on the court to protect it by injunction, provided the defendants have not shown, that they have acquired some title to the use they make of Morse's invention.

It was urged by the defendants' counsel, that as this is an application for a preliminary injunction, it ought not to be granted, because the defendants have answered and denied the complainant's title, and asserted title in themselves. But the practice of this circuit has been settled since the case of Poor v. Carleton [Case No. 11,272]. A mere denial by an answer, of the equity of the bill, does not prevent the court from looking into the law and the facts of the case, when a special injunction is moved for, and granting or refusing it according to its discretion. And where the title to an injunction does not depend upon any controverted or doubtful facts, but upon the interpretation to be put by the court upon a written instrument, I

consider it my duty to interpret it on such a motion and grant or refuse the injunction according to the result of that interpretation. There may be cases in which there is so much doubt what the parties to an instrument intended to effect by it, that the court may think it proper to suspend its judgment until the surrounding circumstances can be more fully and safely examined on a final hearing. It is possible also, that where there are grave doubts concerning the legal effect of an instrument, the court might decline to interfere by special injunction, even though, if compelled to decide, their decision must be in favor of the complainant. Probably the circumstances of the case, and the degree of mischief which would be suffered by refusing the injunction, compared with the inconvenience and loss occasioned by granting it, would control the action of the court in the case supposed. But in general, I apprehend that if the title to a temporary injunction depends on the construction of a deed, the court will construe it and act accordingly, whatever view of that question the answer may have presented. I have therefore looked into the documents on which the title of the respondents depends, and will now state my opinion thereon.

The defendants claim under Francis O. J. Smith. His title was originally granted to him by Morse, by a deed dated on the —— day of March, 1838. The subject-matter of this grant is thus described in the deed. (Here the judge read the clause beginning, "fourth part of my said invention," &c., to the end of paragraph.) At the date of the deed no letters-patent had been obtained. The deed could not convey, and does not purport to convey an interest in any particular letters-patent, or in any exclusive right secured by any particular letters-patent. It purports to convey "one undivided fourth part of the invention." As is said by the supreme court in Gayler v. Wilder, 10 How. [51 U. S.] 493, "the discoverer of a new and useful improvement is vested by law with an inchoate right to its exclusive use, which he may perfect and make absolute by proceeding in the manner which the law requires." It was one quarter part of this inchoate right, which the deed undertook to convey. But the inventor has not only an inchoate right to obtain letters-patent securing to him the exclusive right to his invention for the term of fourteen years, but also a further inchoate right to have the term extended, provided he shall fail, without fault, to obtain a reasonable remuneration for the time, ingenuity, and expense bestowed upon the same, and the introduction thereof into public use. Though it has not been expressly determined that this last right is the subject of a contract of sale, I conceive there can be no reasonable doubt that it is so. The reasoning of the court in Wilson v. Rousseau, 4 How. [45 U. S.] 646, assumes and indeed asserts that it is so. And there is nothing in the nature or incidents of such a right, to distinguish it as a subject of sale, from the inchoate right to obtain the original patent. Each appertains to the inventor by reason of his invention. Each is incomplete, and its completion depends upon the compliance by the inventor with conditions, and the performance by public officers of certain acts, prescribed by law. It is true, the title of an inventor to an extension is still further qualified by a further condition, of his failure to obtain remuneration from the enjoyment of the exclusive right, for the first term of fourteen years. But though this is an additional condition, which may render parties less willing to contract, its existence does not change the nature of the right, and it no more prevents it from being the subject of a contract of sale, than any other condition which is attached to it.

Considering, then, that the title of an inventor to obtain an extension may be the subject of a contract of sale, the inquiry in this case is, whether part of it was intended to be sold. I am inclined to the opinion that a sale of "the invention," before letters-patent are obtained, does not necessarily carry with it the exclusive right for the extended term. Because this right is not a mere incident of the invention. Its existence is made to depend, not only on matter which is subsequent to the invention, but exclusively personal to the inventor himself; and only he or his personal representatives can obtain it. This may distinguish the case from Carnan v. Bowles, 2 Brown, Ch. 80. See, also, Pierpont v. Fowle [Case No. 11,152]. But at the same time, it must be admitted, that where an inventor has in terms, sold to another person, a part of his invention, he has done that which is quite consistent with an intent to have that other person participate in all the rights which he, as inventor, can acquire by law; and that where the invention is the subject sold, it would be natural to expect to find in the instrument of sale, something showing an intention, that the purchaser should be interested not merely in the original letters-patent, but in any extension thereof securing the exclusive right to the same invention which was the subject of the sale. Taking the whole of this deed together, I think it quite clear such was the intention of its parties. It superadds to the words "my invention," the words, "rights and property that I may have from any letters-patent for the same." These terms are broad enough to include the extended letters-patent now in question. Passing over some intermediate clauses which are not decisive, though they tend to show that a community of the entire interest was contemplated, we come to the covenant of the grantor, "to account, from the date hereof, to the said Smith, in the proportions before named, for all the proceeds of sales of rights to use said invention in any place or country, that may accrue to me at

any time." It can hardly be doubted that the accountability raised by this covenant was intended to be no more than co-extensive with the grant. It was manifestly inserted by reason of, and more perfectly to secure the benefit of the title conveyed; and so far as there is room for doubt upon the language of the granting part of the deed, this covenant may be resorted to, for the removal of that doubt. Looking at the deed from this point of view, I find the intention of the parties was, to have the grantee interested in the rights springing from this invention, not merely during the limited period of fourteen years from the date of letters-patent, but "at any time." This view of the rights of the parties is confirmed by the indenture, which bears the same date, and which had for its object, to settle the relative duties and powers of those who had become what it terms, "joint owners of the invention."

Without examining the different clauses of this deed in detail, it may be said that throughout its provisions, no expectation is shown, that they will cease to be in force or applicable at the expiration of any particular letters-patent; or that any thing less than what is denominated in the sixth article, "the continuance of said invention as a patent right," was considered to be the subject-matter upon which they were contracting. That it was the invention, and all rights to use it, which might at any time be acquired, which the parties had in view, seems to me clear, upon the whole instrument. Nor do I understand that Professor Morse has, at any time, or does now, take a different view of this matter. His letter of the 15th July, 1854, written soon after the extension, though it denies Mr. Smith's legal title, and is worded with a caution, quite consistent with the utmost fairness of intention on his part, certainly does not controvert the equitable title of Mr. Smith to participate in the proceeds of sales of rights under the extended patent. But I am of opinion that this cannot be conceded, without admitting at the same time that Mr. Smith became the owner of one undivided fourth part of the inchoate exclusive right, during the extended term. There was but one sale made by the deed of March, 1838. And if one undivided fourth part of the inchoate right to be secured under any and all letters-patent, was the subject of that sale, as I think it was, Mr. Smith owns the same interest under the patent after it was extended as he owned before it was extended. I do not think what he thus acquired, was merely a right to an account of the poceeds of sales. It is not necessary in this case to determine, whether the interest of Mr. Smith became a legal title to one undivided fourth part of the original letters-patent as soon as they were issued; nor whether he was one of the assignees or grantees provided for in the 18th section of the patent act of 1836. Gayler v. Wilder, 10 How. [51 U. S.] 493. That he was an equitable owner, and entitled to call for a conveyance of the legal title to whatever was intended to be secured to him, seems very clear. For the inventor not only bargains, sells, and conveys one undivided fourth part of all rights which he may acquire from any letters-patent, but he expressly covenants, to execute deeds of conveyance of such undivided part, as soon as may be after letters-patent shall have issued. If this, by operation of law, did not give Mr. Smith a legal title, a jus in re, it clearly conferred on him a jus ad rem, an equitable right to the thing itself, and was not a mere executory contract to account for proceeds. Under the original letters-patent, the indentures of March, 1838, and June 22, 1847, show that all parties considered and treated him as a joint owner of these letters-patent, and entitled to make sales of rights secured thereby. Whatever rights he acquired by force of the deed of March, 1838, under the original, I am of opinion he had by force of the same deed, under the extended letters.

As has already been said, it is not material in this case whether his title was legal or equitable, for a court of equity, upon a bill by the legal owner of a patent right, cannot enjoin the equitable owner from using the thing patented. It considers the equitable title the true title. This case, therefore, must stand as if Smith had that legal title which Morse is under covenant to convey to him. And in that case it could not be doubted that the suit must fail. One tenant in common has as good right to use, and to license third persons to use the thing patented, as the other tenant in common has. Neither can come into a court of equity and assert a superior equity, unless it has been created by some contract modifying the rights which belong to them, as tenants in common. No such modification appears here, and the motion for an injunction must be denied.

[NOTE. On the final hearing the bill was dismissed. Case No. 2,910.

[For other cases involving this patent, see note to Smith v. Ely, Case No. 13,043.]

Case No. 2,910.

CLUM et al. v. BREWER et al.

[Brunner, Col. Cas. 635;[1] 21 Law Rep. 390.]

Circuit Court, D. Massachusetts. 1856.

COVENANT—INJUNCTION FOR BREACH OF.

A mutual and reciprocal covenant having been broken by one party, he cannot obtain the aid of a court of equity to restrain the other covenantor from its violation. Otherwise, where the covenants are independently or only collaterally connected, though contained in the same instrument; or where the breach is of such a nature that it may be fully repaired, and such reparation made a condition precedent to granting the relief sought.

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

[In equity. Bill by William B. Clum and others against Charles H. Brewer and others.]

George T. Curtis, for complainants.
Choate, contra.

CURTIS, Circuit Justice. When this case was before the court upon a motion for a preliminary injunction, a construction was put upon the deeds between the parties. See 2 Curt. 506 [Case No. 2,909]. Subsequently leave was given to amend the bill. Under this certain amendments were filed; but these amendments were not drawn into the original bill, nor are any places where they were designed to be inserted in any way indicated. They are filed in court by the complainant Morse alone, and not by him and Clum, in whose name alone the bill was originally filed; and they state a case which, if well founded, shows that Clum had no title. Under these circumstances I feel great difficulty in proceeding upon the amended bill. The case falls within the rule laid down in Shields v. Barrow, 17 How. [58 U. S.] 130; for the amendments not only state a totally new case, but one which is inconsistent with that set up in the original bill. But as no objection was taken to these amendments until the hearing, and they have been answered, and the case set down for hearing, without objection, on the bill and answers, I shall not refuse to adjudicate, though in point of practice the proceeding is open to very serious objection.

The questions of construction have been again argued. They are not free from difficulty; but I see no sufficient cause to change the opinion heretofore formed and expressed.

Another question has been raised upon the fifteenth article of the agreement, which is as follows:—"15th. It is also agreed, that excepting the negotiations which may be conducted without the limits of the United States, by the said Smith as hereinbefore provided, and during his first mission abroad, no negotiation or sale of rights to use said invention, to or by any government or individual, and no contract in any way affecting the manufacture or use of the mechanism of said invention, shall be made or entered into by any of the said proprietors, without the assent and concurrence of all the proprietors hereinbefore named, or of their legal representatives." It is insisted that though the complainant has himself broken this covenant by the license granted to his co-complainant Clum, he did so under a misapprehension of his rights, arising out of a construction of the deeds which differed from that placed upon them by the court, and that he can now have relief in the nature of a specific performance of that article, by a decree restraining Smith from its violation, and Brewer from acting under the title which Smith made to him, contrary to the covenant in that article contained.

It is a maxim that he who seeks equity must do equity. This mutual and reciprocal covenant having been broken by Professor Morse, he cannot obtain the aid of a court of equity to restrain the other covenantor from its violation. It is true that the court, on a bill for specific performance, does not inquire into breaches of other contracts between the same parties, even though they may be contained in the same instrument, provided they are only collaterally connected together. The law on this subject is very fully expressed by Sir James Wigram in Hanson v. Keating, 4 Hare, 1; and was applied in Gibson v. Goldsmid, 27 Eng. Law & Eq. 588. But here the covenants are mutual and reciprocal, and not independent. It is true, also, as may be seen in Sir James Wigram's opinion, that a court of equity will sometimes grant relief to a plaintiff who has not kept his part of the contract in question, when the breach is of such a nature that it may be fully repaired, and one of the conditions precedent for obtaining the relief may be such full reparation, as payment of the purchase money before receiving a conveyance. But upon this bill the court cannot enjoin Professor Morse from further breaches of this covenant, nor Clum from acting under the title which Morse has made to him in violation of the covenant. Yet Smith's title to such an injunction is precisely the same as Morse's under this covenant. If upon this bill I were to enjoin the defendants upon the footing of what is contained in the covenant, I should not only fail to see justice done to Smith, but I should, practically, be protecting Clum in the enjoyment of a title gained by a breach of the mutual covenant under which I should act. This I cannot do. The bill must be dismissed with costs.

Case No. 2,911.

CLUTE et al. v. GOODELL.

[2 McLean, 193.][1]

Circuit Court, D. Michigan. Oct. Term, 1840.

SHERIFF—RESPONSIBILITY FOR ACTS OF DEPUTY.

A sheriff is responsible for the acts of his deputy.

[Cited in The Laurens, Case No. 8,122.]

[At law. Action by Clute and Mead against Goodell.]

Frazer & Walker, for plaintiffs.
Witherell & Buell, for defendant.

OPINION OF THE COURT. This action is brought against the defendant, who acts as sheriff, for the misconduct of one of his deputies. It was proved that an execution was issued, on a judgment, for $3,898.09, and costs, the 25th November, 1837, which was, on the same day, placed in the hands of the deputy to levy and collect the amount im-

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

mediately. A levy was made on a store of goods, amounting to thirteen or fourteen thousand dollars, which belonged to the defendant, named in the execution. But an arrangement was made with him by the deputy, under which the goods were sold, and only a small part of the proceeds of the sale was applied in satisfaction of the execution.

THE COURT instructed the jury, that the sheriff was responsible to the plaintiffs for the acts of his deputy, and that, if the levy was made on a sufficient amount of goods to satisfy the execution, which the deputy failed to dispose of, as by law he was bound to do, they would find against the defendant, the amount due on the judgment, including interest. The jury rendered a verdict for the plaintiffs for $3,418.48. Judgment.

CLYBURN (STRACHEN v.). See Case No. 13,520.

CLYDE, The REBECCA. See Cases Nos. 11,621 and 11,622.

Case No. 2,912.

CLYMER v. CENTRAL R. CO.

[5 Blatchf. 317.][1]

Circuit Court, S. D. New York. May 26, 1866.

NEGLIGENT OPERATION OF RAILROAD TRAIN UPON TRACK OF ANOTHER COMPANY.

Where a railroad train, while moving on a track belonging to one railroad company, is in the exclusive charge of the servants of another railroad company, the former company is not responsible for the negligence of the servants of the latter company in conducting such movement of the train.

At law. This was an action to recover damages for an injury received by the plaintiff [William S. Clymer] in December, 1864, through the alleged negligence of the servants of the defendants [the Central Railroad Company of New Jersey], while in a car attached to a through stock train upon the track of the defendants' railroad. The train was made up at Harrisburg, Pennsylvania, and was on its way to the city of New York. The route was over several distinct railroads, the last one of the line being the road of the defendants. That road commenced at the eastern end of the bridge which spans the Delaware river, between Easton, Pennsylvania, and Phillipsburg, New Jersey. That bridge belonged exclusively to the Lehigh Valley Railroad Company. The train upon which the plaintiff was a passenger, with his stock, passed over the Lehigh Valley road, in charge of the agents and servants of that road, and crossed the bridge at Easton, and passed on to the track of the defendants' road. It followed on that track for about 200 rods, when a switch was turned by a switchman in the employ of the defendants, forming a communication to a side track upon which the train was to be backed, where it was to be left by the agents of the Lehigh Valley road, and from which it was subsequently taken by the defendants. There were one or two coal cars standing on the rear end of this side track, and of this fact the switchman gave notice to those in charge of the backing train. The presence of cars on this side track was a common occurrence. The conductor from the Lehigh Valley road backed his train, as usual, upon the side track, preparatory to unhitching his engine, and returning to Easton with all those servants of the Lehigh Valley road who had been engaged on the train. But, in backing down the train on the side track, he moved it too far, or too fast, or both, and came in contact with the coal cars referred to. The shock of the collision was not severe, but the effect on the plaintiff, who was lying down, with his head bent forward toward his breast, was such that it inflicted a serious injury on him, probably injuring his spinal marrow, to such an extent that he suffered severely in his general health, and had not yet recovered.

SHIPMAN, District Judge (charging jury). The circumstances proved are such as would warrant the jury in finding a verdict for the plaintiff, were the proper defendants before the court. But, in the view I take of the case, no recovery can be had, on these facts, against these defendants. The train in question was still in the exclusive charge of the agents and servants of the Lehigh Valley Railroad. They had brought the train over that road, and were on the road of the defendants with it, for the purpose of delivering it over to the servants of the defendants. The servants of the Lehigh Valley road still had charge of it, and controlled all its movements, and they, or that road, alone must be held responsible for injuries resulting from any negligence in conducting its movements. The bare fact that they were moving the train over a portion of the track belonging to the defendants cannot make the latter responsible for the negligence of the servants of the other road. It is for this negligence alone that the suit is brought, and not for any obstructions on, or defect in, the track of the defendants' road. Your verdict must, therefore, be for the defendants.

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

Case No. 2,913.

The CLYTIE.

[10 Ben. 588; 25 Int. Rev. Rec. 335; 14 Am. Law Rev. 85.] [1]

District Court, E. D. New York. Oct., 1879.

COLLISION IN NARROW CHANNEL — OVERTAKING VESSEL — RULES OF NAVIGATION — CHOICE BETWEEN DOUBTFUL MEASURES — TESTIMONY OF EXPERTS.

1. Where the C. and the V., two yachts of a squadron, beating out of New Bedford harbor, wind S. S. E., weather clear and all vessels in plain sight, being at one time on parallel courses about a hundred and forty feet apart and approaching a long tow crossing their then courses, went about so near together that the jib-boom of the one astern as she forged ahead caught the outer leach of the main-sail of the other then crossing her bows and just filling away on the other tack, and some slight damage was done, for which suit is brought: *Held*, that the C. was the overtaking vessel under rule 22 (Rev. St. art. 17, § 4233), but nevertheless it was the duty of the V., under the circumstances, to terminate her port tack in time to enable the C. to tack between the tow and herself, whether or not she was hailed so to do.

2. That the C. was justified in holding her reach, relying upon the V.'s shortening her tack if necessary, provided that she herself went as near the tow before tacking as was prudent for her to go.

3. That upon the evidence the C. might have gone much nearer the tow in safety, and as only six feet nearer was required to have enabled the yachts to pass each other clear, she must be held responsible for the collision and damage, and the V., having left her room enough, must be held not in fault.

4. That when of two doubtful measures to be decided on to avoid a collision, the one taken carries the vessel so nearly clear as six feet, it cannot be imputed to her as a fault that she did not take the other course. What a yacht is willing to do for the sake of winning a wager, she is, in a case of necessity, bound to do to avoid a collision.

5. Semble, that even where a case is governed by statutory sailing rules, the question being whether the circumstances are special and render a departure from the rule necessary, the testimony of practical seamen as experts may be taken.

Nath. Niles, for libelant.

H. S. Ledyard, for claimant.

BENEDICT, District Judge. This is an action involving an insignificant sum of money, which has been brought, as I must suppose, for the purpose of obtaining a judicial determination of certain nautical questions, both of law and of fact, that have come to be matters of dispute between the parties thereto. The earnestness displayed by the respective advocates, and the amount of time they have felt justified in consuming in the presentation of the case, indicate that, by the parties at least, these questions are deemed of importance.

The incident that gave rise to the controversy was the tearing of the mainsal of the yacht Volante by the yacht Clytie, while the two, together with the rest of the New York yacht squadron, consisting of some twenty vessels, were beating out of the harbor of New Bedford, on the 15th day of August, 1877. The parties to the controversy are, on the one side, Francis B. Hitchcock and Thomas Hitchcock, who, as owners of the yacht Volante, have filed their libel against the yacht Clytie, to recover the damages by them sustained by reason of the tearing of their sail; on the other side, William L. Brooks, who, as claimant of the yacht Clytie, appears in her defence. The facts attending the collision have been narrated to the court by some thirteen witnesses who saw the occurrence, and in addition expert testimony from several witnesses has been presented.

The vessels involved are described as follows: The Volante is a sloop, English cutter rigged, forty-five feet long with twenty feet of bowsprit out-board, making sixty-five feet in all. The Clytie is a schooner, eighty-five feet long, one hundred and thirty-five feet from the end of the main-boom to the end of the flying jib.

The account of the accident given by the parties in their pleadings, first deserves attention. According to the statement in the libel, the Volante was standing out of New Bedford harbor, close hauled upon the starboard tack, and near the middle of the channel, standing to the eastward at the speed of about three knots an hour, the wind being from the southward and eastward. While the Volante was in the situation aforesaid, the Clytie, on her way out of said harbor, was standing to the southward or southward and westward, and had been, for not less than half an hour, visible from the Volante's deck. The Clytie was to leeward of the Volante and bearing to the northward and westward, and was close hauled on the port tack, sailing as fast or faster than the Volante, and was heading so that she would strike the Volante on the Volante's quarter, or else would pass astern of the Volante. Thereupon, when so to leeward of the Volante and close aboard, the Clytie went in stays, and while in stays ran into the Volante on her port side near the quarter, while the Volante was in the position above described; and the libel charges that the Clytie should either have kept off so that she would go well astern of the Volante, or else have gone in stays sooner so as to allow for headreaching while in stays.

It will be observed that the case stated in the libel is that of two vessels under sail, close hauled, having the wind on different sides, and crossing so as to involve risk of collision. That is to say, the libel states a case where it was the duty of the Clytie, having the wind on her port side, to keep out of the way of the Volante. A violation of sailing rule 17 (article 12), is therefore the fault charged upon the Clytie in the libel.

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission. 14 Am. Law Rev. 85, contains only a partial report.]

The Clytie in her answer denies the correctness of the account given in the libel, and gives an account of the accident in substance as follows: The Volante and Clytie were beating out of the harbor of New Bedford, the wind being about southeast and a fair working breeze. The channel at the place of collision was only about an eighth of a mile wide, and this distance, so far as the working room of the two yachts was concerned, was diminished by half, owing to a tug which was standing out of the harbor in the middle of said channel having two large yachts in tow, one astern of the other with a long hawser between them, and heading about south. The Volante was on the port tack, close hauled, and heading so that she would strike the tow unless her course was changed. The Clytie was on the same tack, close hauled, and a little to leeward and astern of the Volante, and heading so that she also would have to change her course before reaching the middle of the channel in order to avoid striking the said tow. Several other yachts were to leeward of the Clytie on the same tack, one of them being so close under her lee that the Clytie could not keep off without coming in contact with her. The Clytie was going faster than the Volante and was so close aboard of her that she could not luff up or go about without running into the Volante. The Volante kept her course unchanged until very near to the said tow, when she went about and filled away on the starboard tack. At the moment the Volante so went about the Clytie was still to leeward of her and had nearly caught up with her, and it was absolutely necessary for the Clytie then to go about to avoid running into the tow which was close aboard of her, and accordingly she went in stays; but being a much larger vessel than the Volante, it took her much longer to get around, so that while she was still in stays the Volante had got around on the starboard tack and was heading directly across her bow. Those on board the Clytie, seeing that there was no room for her to get around on the starboard tack without certainly running into the Volante, kept her in stays, so that the Volante, by luffing up a little, might allow the Clytie to pass astern of her; but the Volante, instead of luffing up, kept her course with sails full, and came straight across the Clytie's bow, so close that just as she was going past, the head boom of the Clytie caught in the Volante's mainsail, forward of the leach rope, and brought her up all standing. The answer expressly admits that at the time of the collision the Clytie was going fast enough to steer well and charges the accident to have been caused by the fault of the Volante in not going about on the starboard tack sooner than she did, and in not luffing up after she had got about on the starboard tack, so as to allow the Clytie to pass astern of her.

The case stated in the answer is obviously one to which sailing rule 17 (article 12) has no application, but is that of one vessel, close hauled, overtaking another vessel close hauled upon the same tack and to windward, under circumstances rendering it impossible for the overtaking vessel to avoid colliding with the leading vessel while tacking, because of a failure on the part of the leading vessel to give the following vessel room to make her tack. According to the answer, therefore, the case is one to which sailing rule 24 (article 13) applies, where, by reason of special circumstances, the general rule applicable to overtaking vessels is not to be applied, and the leading vessel is to be charged with fault for failing to make proper effort to prevent a collision otherwise unavoidable. The special circumstances are the narrow distance in which the yachts were compelled to work; the presence of the tow directly in the course of both yachts; the relative speed of the yachts and their position with reference to each other. It is thus seen that the pleadings of the respective parties state cases wholly dissimilar.

If this case were one in which to enforce the rule of the admiralty whereby the decree is required to be according to the averment in the pleadings as well as according to the proofs, and the enquiry was therefore limited to whether the collision occurred as stated in the libel, a short disposition could be made of it; for, although Mr. Hitchcock's statement upon the stand, in harmony with his account in the libel, is that the Clytie was upon the port tack at the time of the collision, the evidence of the other persons present does not permit it to be contended that the Clytie was upon the port tack at any time after the Volante had gathered way upon the starboard tack. But I have not been asked to dismiss this libel upon a question of pleading, and as the answer sets forth an affirmative case, in regard to which evidence has been given and argument made on both sides, I can properly consider the points thus submitted for decision. The Clement [Case No. 2,879]. It will aid to an understanding of these points to state here such facts as I find to be either admitted or proved beyond dispute. The collision occurred in broad daylight. The wind at the time was blowing a fresh breeze from the south-southeast. The weather was clear and the vessels were in plain sight of each other for a considerable period before they came in collision. As stated in the libel, the collision occurred near the middle of the channel, which was at that place obstructed by the tow described in the answer, then passing to the southward, somewhat to westward of the middle of the channel, and, so far as these two yachts were concerned, having the effect to narrow the channel by nearly one-half. The tide was flood. The Volante and the Clytie got under weigh with the rest of the squadron at the signal given. Their first tack was to the eastern shore, heading about

for red buoy No. 16, on the eastern side of the channel, opposite Palmer's island. On this tack the Volante came abeam of the Clytie while the latter was getting away from her anchorage, and was to the windward as the yachts approached buoy 16. The Clytie was the larger and faster vessel of the two, and as they neared the buoy, hailed the Volante to go about. The hail was heard on board the Volante but disregarded, and the Clytie, to avoid the Volante, passed inshore of the buoy. While there coming about she caught her centre-board on the reef, stopped short for a moment and fell off some four points.

Before coming to her course by the wind on the port tack, she passed some distance to the eastward from the buoy. When she did come by the wind the Volante was to windward of her and ahead, the courses of the vessels upon the port tack being about parallel and some one hundred and forty feet apart, as stated by Mr. Brooks. The tow was in front of both yachts upon that tack, and it was apparent to both that a tack must be made by both vessels to eastward of the tow. As they drew near the tow the Volante first put her helm down and tacked quickly without losing her headway in any substantial degree. The helm of the Clytie was put hard down immediately after the Volante was seen to be tacking. As the Clytie came head to wind she forged ahead, and while head to wind, and as the answer expressly admits—therein contradicting the evidence of her sailing master—while "going fast enough to steer well," her jib boom caught in the outer leach of the mainsail of the Volante, then crossing her bows upon the starboard tack with sails all full. Had the Clytie been six feet further to the westward there would have been no collision. Twenty-five feet was a safe distance from the tow for the Clytie to be when head to wind. How far from the tow the Clytie was, in fact, when she came head to wind is a question over which the contest has been severe. The distance astern of the Volante at which the Clytie was when she came by the wind upon the port tack, is equally a matter in dispute.

Upon these indisputable facts it has been contended in behalf of the Clytie that inasmuch as the Volante started from her anchorage further up in the harbor and astern of the Clytie, the Volante was the overtaking vessel at the time of the collision and charged with the duty of avoiding the Clytie. But I cannot agree to this view. On the contrary, I am of the opinion that from the time when the Clytie was stopped near buoy 16, at which time the Volante was standing over to westward towards the tow, on her port tack, the Clytie was the overtaking vessel.

I next notice the contention of the Volante that the Clytie is responsible, because, being the overtaking vessel, she came in collision with the Volante in violation of sailing rule 22 (article 17), which provides that "every vessel overtaking any other vessel, shall keep out of the way of the last mentioned vessel." The responsibility of the Clytie does not necessarily follow from the mere fact that she was overtaking the Volante on the port tack. For sailing rule 22 (article 17), like all the other statutory sailing rules, is subject to sailing rule 24 (article 19), which provides that "in construing and obeying these rules due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case, rendering a departure from them necessary in order to avoid immediate danger." Accordingly it is contended on the part of the Clytie that in this instance the relative speed of the two yachts and their position with reference to each other and to the tow ahead, were circumstances that required the Volante to shorten her course upon the port tack sufficiently to enable the Clytie, on reaching the tow, to come to the wind between the Volante and the tow, and so pass to windward; and it is claimed in behalf of the Clytie that the sole cause of the collision was the fault of the Volante in continuing her port tack so near to the tow as to render it impossible for the Clytie to avoid collision at the tow.

Upon the evidence there is no room to doubt that, however the fact may have been at the time when the Clytie came on the wind on the port tack, there was a time after both vessels were on the wind when the Clytie had gained upon the Volante to such a degree that it was impossible for her either to luff clear of the Volante or to go upon the starboard tack under the Volante's stern, or to clear the tow by bearing away, or to slacken her speed, or to anchor; and that after that point had been reached by the Clytie it was still possible for the Volante, by shortening her port tack, to enable the Clytie to tack at the tow without hitting either the tow or the Volante, and so avoid collision. From that time forward the right of the Volante to keep her course without reference to the Clytie was at an end, and it became her duty to terminate her port tack in time to enable the Clytie to come to the wind in safety between the tow and the Volante. This obligation rests upon principle, for under the circumstances stated, if the Volante should fail to shorten her tack, it would not be possible for the Clytie to avoid striking the Volante except by running into the tow, while it would be entirely possible for the Volante to shorten her tack without any substantial loss of distance or increase of risk, and thereby to prevent a collision. The decisions are uniform that no vessel can properly insist upon adhering to a right given by any sailing rule when a collision will be caused by such adherence. This understanding of the duty of the Volante under the circumstances stated, derives support from the evidence given by experts as to the practice of seamen under similar circumstances. It has been said here that expert

testimony is incompetent in a case governed by statutory sailing rules. But where the question is whether the circumstances are special, and render a departure from the general rule necessary to avoid immediate danger, it appears to me to be both reasonable and proper to consider the effect given to similar circumstances by practical seamen in actual navigation. It is the testimony of all the experts that under circumstances similar to those stated it is the practice among seamen for the windward vessel to shorten her tack with reference to the necessities of the vessel to leeward; but some intelligent seamen, differing from others equally intelligent, say that in practice, the windward vessel never goes about for the vessel astern, unless she is hailed to go about by that vessel. Manifestly, on this occasion, it was not supposed by those on board the Volante that a hail from the Clytie was necessary to render it obligatory on them to shorten their tack, for Mr. Center, a yachtsman of large experience, who was on board the Volante and part of the time at her helm, and who is called as a witness by the libellants, and who says that he heard no hail from the Clytie (as say all the others on board), when particularly interrogated in regard to the Volante's movements, gives the following testimony: "Q. What was your object in going about as you did? A. To give the other boat plenty of time; I saw the Clytie coming behind us, and in order to give him time. Q. You thought you had to do that? A. Always have to do it."

But whether a hail from the Clytie was or was not necessary in order to cast upon the Volante the duty to shorten her tack, is a question of no importance in this instance, because there is convincing evidence that the Volante while on the port tack was loudly hailed and beckoned to go about. It is true that no one of those on board the Volante who have been called as witnesses, heard the hail or saw the signal from the Clytie, but this negative evidence is by no means sufficient to overthrow the positive and particular testimony of the seaman on the Clytie who gave the hail and made the signal, the sailing master who ordered the hail to be given, and the witnesses on the Clytie who heard the order obeyed. The evidence for the Volante, in regard to not hearing the hail, can do no more than convict those on board of a want of proper attention. The Clytie was known to be coming behind them to leeward and on the same tack, that she was the faster vessel and that both were approaching an obstacle that would compel both to tack. If it be the practice under similar circumstances for the leeward vessel to hail, there was every reason for those on board the Volante to anticipate a hail from the Clytie which would require the Volante to go about, and it was the duty of those on board the Volante to be watching for the signal. Had they been watchful, there is no room upon the evidence to doubt that they would have heard the hail that was given or seen the signal that was made. The legal obligation of the Volante to shorten her tack is therefore the same as it would have been had she heard the hail.

The next question is, did the Volante so tack as to permit the Clytie to come to the wind between the tow and the Volante without hitting either? That it was the duty of the Clytie under the circumstances to hold on to her port tack as long as was possible without running into the tow is conceded by her; failure on her part to perform this duty must render her liable. On the other hand, if there was no such failure on the part of the Clytie, the fact that the vessels collided in the manner they did, convicts the Volante of a failure sufficiently to shorten her tack, and casts upon her alone the responsibility for the accident. It is thus seen that the vital question of the case is one of fact—a question of distance—namely, the distance from the tow at which the Clytie was when she came head to wind.

Before passing to the consideration of the question of this distance I turn back to notice the point made in behalf of the Volante, that whatever failure of duty there may have been on the part of the Volante after the Clytie had approached so near as to render it impossible for her to luff clear of the Volante's stern, the Clytie was guilty of fault for not either tacking under the Volante's stern as soon as she had come by the wind, at which time, as it is contended, it was possible for her so to do, or for not slacking her speed or casting anchor at that time, and so to avoid being afterwards placed in a position where she would be forced to run into the Volante or the tow unless the Volante afforded a way of escape by shortening her tack.

Here, too, the parties differ upon a question of fact. On the part of the claimant it is insisted that there was no time after the Clytie came to the wind when she was not too near the Volante to permit of her passing under the Volante's stern. But the weight of the evidence upon this question appears to be in favor of the Volante. Indeed, if at the time the Clytie did tack, she caught the Volante's mainsail with her jib-boom, she being then head to the wind and the Volante having then tacked and filled away to the eastward, it seems certain that if at an earlier period, when she was not so close to the Volante, and when the Volante was still moving to westward on the port tack, the Clytie had tacked, she would have cleared the Volante entirely. Such being the fact, if the Clytie had been a steamboat, able to stop at pleasure, or if the vessels had been in the open sea, it would be difficult to say that the Clytie was not in fault for not taking steps to avoid getting into a position of danger under the lee of the vessel ahead. But,

considering that the Clytie did not get upon the wind until some distance over from buoy No. 16, and in view of the importance of keeping herself in full control when the working room was so narrow and so many other vessels were approaching from behind—the vessels then being opposite Palmer's island, and, according to Mr. Center, having only from four hundred to five hundred feet of working room—I am inclined to believe that the Clytie was justified in holding her reach, relying upon the Volante's shortening her tack when she approached the tow, in case the Clytie should then have approached so near as to render action on the part of the Volante necessary to avoid collision.

In reaching this conclusion, based as it is upon the peculiar situation of these vessels, I do not, as I conceive, trench upon the established rule applicable to the overtaking vessel under ordinary circumstances, nor do I go contrary to any adjudged case that I have been able to discover after careful search in the reports, not omitting the cases of The Nellie D. [Case No. 10,097]; The Charlotte Raab [Id. 2,622]; Whitteredge v. Dill, 23 How. [64 U. S.] 453; The Priscilla, 1 Asp. 469.

Manifestly the Clytie could not have borne away as soon as she had come by the wind without danger of becoming involved with some of the nineteen yachts that were beating out behind her, and surely she was not bound to heave to or anchor in mid-channel under such circumstances. That those on board the Volante did not at the time expect the Clytie under the circumstances to abandon her tack, but anticipated that she would hold on and rely upon having room left her by the Volante in which to come to the wind upon reaching the tow, is, moreover, quite evident.

I am thus again brought to the vital question of the case, namely, as to the distance at which the Clytie was from the tow at the time when she was in stays head to wind. The evidence bearing upon this question consists of estimates of the distance given by witnesses upon the stand, some of whom were on board the Volante, some on the Clytie, some on the tow, and some on other yachts in the squadron. Besides these estimates there are various facts proved in regard to position, bearing, speed and movements of the respective yachts which serve to show this distance. The testimony of Mr. Center goes to show that the Clytie came head to wind when over two hundred feet distant from the tow. Dayton, who was on board the yacht Rambler, in the tow, puts the Clytie one hundred and forty feet from the tow when head to wind. Thomas, who was also on the Rambler, makes the distance sixty feet. Mr. Brooks, the claimant, gives the distance at twenty-five or thirty feet. Belmont, the sailing-master of the Clytie, says twenty-five feet. Lyons and Adams, who were on board the Clytie, say forty feet, and Jones says thirty feet. In this variety of estimates it is forcibly argued in behalf of the Clytie that the judgment of the competent men who were on board the Clytie and charged with the duty of determining when it was necessary to come into the wind, is more reliable than estimates made after this lapse of time, and affords a sure foundation for the judgment of the court. But while the presumption certainly is in favor of the correctness of the judgment formed on board the Clytie in regard to the time when it was necessary to put their helm down, there are in the case facts proved by these same persons which show the judgment thus formed to have been erroneous, and that the Clytie did not stand as near to the tow as she could have done with safety. It has already been stated that the Clytie could go within twenty-five feet of the tow without danger. This fact is not open to be disputed by the claimant, for the sailing-master of the Clytie fixes that as the distance at which she was in fact, and Mr. Brooks himself believed that she would come head to wind within twenty-five or thirty feet of the tow. It is also in proof that the Volante put her helm down before the Clytie did, and tacked very quickly without losing her headway. The Clytie took some time—fifty seconds, according to the best estimate Mr. Brooks can give—to come head to wind, and then she forereached a considerable distance on a line parallel with the tow. While the Clytie was thus moving parallel with the tow, Mr. Brooks says he noticed the Volante to be on a course across the line of the Clytie's direction, about fifty feet away from the Clytie and coming with a heavy full, giving her a speed of three knots or more. This position of the Volante, after she had tacked, on the starboard bow of the Clytie, shows clearly that the Clytie came head to wind much more than twenty-five feet from the tow. Again, several of the claimant's witnesses show that the Volante made her tack and gathered headway between the tow and the line of the Clytie's direction as she was head to wind, and the Volante was sixty-five feet long including boom. Mr. Brooks also says, "If the Volante had kept on a little further and then gone about she would have been safe." The distance between the Clytie when head to wind and the tow was therefore more than sufficient for a vessel sixty-five feet long to tack and gather headway. This shows the distance to have been greater than is estimated by the claimant's witnesses.

Again, the sailing master of the Clytie says that the Volante should have luffed when she bore four points on the Clytie's starboard bow; at another place that she could have luffed when she was two or three points on the Clytie's starboard bow; and at another place, that the Volante ought to have luffed when she had gone about two lengths

on her starboard tack. This testimony, by the claimant's sailing master, shows the distance in question to have been greater than the claimant supposes. So also Mr. Brooks says, that if the Volante, when she was two or three points on the Clytie's starboard bow, had luffed, there would have been no collision. If there was room for the Volante, being between the Clytie and the tow, and about fifty feet ahead, to bear two or three points on the Clytie's starboard bow and there luff, clearly the distance between the Clytie and the tow was more than one hundred feet.

In addition to these facts, proved by the claimant's own witnesses, there is the fact stated by the mate of the Active, a yacht to the leeward of the Clytie, that his yacht on her port tack passed the Clytie's stern when the Clytie was head to the wind, and went several lengths further to westward, and then tacked in the wake or rather to eastward of the wake of the last boat of the tow. It is true that this same witness says that the Clytie went close to the tow and near as he would dare to go, but his opinion is overthrown by his act, for he went with his own boat at the least one hundred and fifty feet nearer the line of the tow than the Clytie did. The Clytie having the ability, as she herself shows, to come to wind within twenty-five feet of the tow, and the position requiring that she should be only some six feet nearer the tow than she was, to enable her to clear the Volante, the facts above mentioned plainly show that the Clytie had room to tack at the tow without coming in contact with either the Volante or the tow. This conclusion is decisive of the controversy, for it follows that the Volante having by accident or design—and it matters not which—left room for the Clytie to come to the wind without hitting either the Volante or the tow, was guilty of no fault, and that the fault which caused the collision was the failure of the Clytie to go as near to the tow as she could with safety.

Another fault has been strongly urged against the Clytie, namely, that after she had come head to wind and when she saw the Volante gathering way across her bows and likely to be caught in passing, she did not swing to westward the six feet that was needed to avoid collision.

The Clytie's sailing master upon this point testifies that when his vessel was within a point of head to wind he steadied his helm and kept it steady a few seconds, and when he was head to wind he ported his helm a little. There may be room for the surmise that putting the helm hard-a-port at that time would have caused a failure to tack; but no witness, as I recollect, has testified that such a result would have been likely to follow such a movement of the helm. The only excuse for not putting the helm hard-a-port instead of porting it a little, given by the sailing master, is that the vessel's headway was then slow and the helm had no effect. But this excuse cannot be received in the face of the specific statement in the answer that at the time of the collision the vessel was going fast enough to steer well. It should also be noticed in this connection, as bearing upon this and other questions of the case, that these two vessels were yachts, subject of course to the sailing rules applicable to all sailing vessels, and to no other, but possessing ability to move rapidly and manoeuvre quickly, supposed to be fully equipped, and in the charge of skilful men. A prompt employment of their full capacity to avoid collisions may be justly required of such vessels in all cases of danger. What a yacht is willing to do for the purpose of winning a wager, she is in a case of necessity bound to do for the purpose of avoiding collision. While, therefore, it may be said to be requiring much of the Clytie to say that she could have avoided the collision by putting her helm hard-a-port after she had come head to wind, in view of the evidence and the answer, it is not easy to absolve her from fault in this respect.

There remains to consider the point made in behalf of the Clytie, that the Volante was in fault for not luffing up into the wind as soon as she filled on the starboard tack, and thus avoiding the Clytie, then coming head to wind. It is possible that the Volante, being a very quick vessel, could have done this. Such is the opinion of those on the Clytie. But whether the danger of collision then imminent would be lessened by luffing or keeping full on the part of the Volante was a close question. The decision made carried her within six feet of clear, and no one can say with certainty that by luffing she would have done better. It cannot, I think, be imputed to the Volante as a fault, that of two doubtful measures she adopted one that so nearly carried her clear.

I have now examined all the questions in this case as to which my opinion has been asked. The result of that examination is the conclusion that the collision mentioned in the libel was caused solely by the fault of the Clytie, and that the libellants are entitled to recover herein the damages sustained by reason thereof. There must therefore be a decree in favor of the libellants, with an order of reference to ascertain the amount.

Case No. 2,914.

The CLYTIE.

[The case reported in 8 Wkly. Notes Cas. 188, under the above title, is the same case as Peck v. Laughlin, Case No. 10,890.]

CLYTIE, The (HITCHCOCK v.). See Case No. 2,913.

COAL BARGES (JONES v.). See Case No. 7,458.

COAL BLUFF NO. 2, The (HARTUPEE v.). See Case No. 6,172.

COAL BLUFF NO. 2, The (McCASKEY v.). See Case No. 8,687.

COAL VALLEY, The (BAYARD, The, v.). See Case No. 1,128.

Case No. 2,915.

In re COAN & TEN BROEKE MANUF'G CO.

[6 Biss. 315;[1] 12 N. B. R. 203; 7 Chi. Leg. News, 260.]

District Court, N. D. Illinois. March, 1875.

BANKRUPTCY—SALE OF CONSIGNOR'S GOODS—LIEN.

A consignor whose property was sold prior to the bankruptcy, and the proceeds mingled with the general assets, has no lien or specific claim against the estate; he can only share with the other creditors.

[Cited in Illinois Trust & Sav. Bank v. First Nat. Bank, 15 Fed. 860.]

In bankruptcy. This was a petition by B. Manville & Co., and other creditors of the bankrupt, seeking to establish a trust fund, and asking payment in full of their claims from the money in the hands of the assignee. The bankrupt [Coan & Ten Broeke Carriage Manufacturing Company], a corporation doing business in the city of Chicago, as a manufacturer and dealer in carriages, was in the habit of receiving carriages on consignment from other manufacturers and dealers, keeping an open account with each one of them, selling for cash and on credit, or exchanging for material, and sometimes also paying in material. At the time of the bankruptcy, they were indebted to some of the petitioners for carriages thus sold, and among the stock coming to the hands of the assignee, were other carriages thus sent on consignment, all of which, however, were sold by the assignee, there being nothing at the time to indicate that they were not the property of the bankrupt, and the consignors having made no claim to any specific carriages. The proceeds of such as had been sold prior to the bankruptcy had not been kept as any special fund, but had gone into the general assets of the corporation.

F. C. Ingalls, for petitioners.

BLODGETT, District Judge. The controlling question in this case is, whether the proceeds of these consigned carriages came within the clause in the 14th section of the bankrupt act [of 1867 (14 Stat. 522)], which provides that "no property held by the bankrupt in trust shall pass by such assignment." It is true that in examining the text-books and cases on the subject of trusts, we find many expressions like these,—that a factor or agent is a trustee for his principal, that a bank is a trustee for its depositors, and even that a debtor is a trustee for his creditor. The courts of New York and Massachusetts have frequently decided cases upon these principles, and, founded upon such expression, the counsel for petitioners has framed his argument, that they have a lien upon these proceeds as a species of trust fund, and are entitled to payment, to the exclusion of the general creditors of the bankrupt.

A proper construction, however, of this clause in the bankrupt act, will only apply it to property still held in specie, and which can be distinguished from the other property of the bankrupt, or where the proceeds constitute a separate and distinct fund, not to cases where they have become mingled with the general assets of the bankrupt, even by his wrongful act.

Here there is no consigned property in the hands of the assignee which the petitioners can claim as belonging to themselves, nor any distinct fund which can be recognized or traced as the specific proceeds of the property sent on consignment by these petitioners. The petition must, therefore, be dismissed.

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

COATES (DUNDORE v.). See Case No. 4,142.

Case No. 2,916.

COATES v. MUSE et al.

[1 Brock. 529.][1]

Circuit Court, D. Virginia. June 4, 1821.

DECREE AGAINST ADMINISTRATORS—ENFORCEMENT—ACCOUNTING—POWER OF COMMISSIONER—TAKING UP REPORT—PRACTICE—OPENING DECREE.

1. A joint decree was rendered against T. M. and E. M. administrators, with the will annexed of H. M., and his principal devisees and legatees, for a considerable sum of money, being the amount of unadministered assets in their hands. Before this decree was satisfied T. M. died, having appointed his co-administrator, his own executor, who qualified as such. The plaintiff filed her bill, to revive the decree against E. M., both in his character of surviving administrator of H. M., and as executor of T. M. E. M. also died, without answering the plaintiff's bill, and a bill of revivor, was filed against his administrator, and also against the administrator, de bonis non, of T. M. These last defendants having answered this bill, the court directed them to settle their accounts of their administration of the estates of E. M. and T. M. respectively, and also of the administration of E. M. and T. M. of the estate of H. M., but did not require an account of the administration, of the estate of T. M., by E. M. his executor. The commissioner, after due notice to the defendants, proceeded to execute the decretal order of the court, the defendants failing to attend, and reported the proportions, by which the original decree ought to be charged on the estates of T. M. and E. M. At the same term to which this report was made, the report was affirmed, and the matter thereof decreed, no counsel appearing for the defendants. Subsequently R. B. one of the administrators, de bonis non, of T. M., applied for an injunction to stay proceedings under the last mentioned decree, so far as it affected the estate of T. M., assign-

[1] [Reported by John W. Brockenbrough, Esq.]

ing various errors in the proceedings above recited, and praying that the decree might be opened, and the alleged errors corrected. The court *held*: That there was no error in failing to direct an account of the administration of E. M., of the estate of T. M., such an account not being called for by plaintiff or defendants. Although in a suit against the representatives of an original debtor, the subject may be pursued further than those representatives, the plaintiff is not bound to do so. If E. M., as executor of T. M., is indebted to the estate of his testator, he is not distinguishable, so far as respects the claim of the plaintiff, from any other debtor.

2. That the commissioner, in proceeding to act ex-parte, on the defendants failing to appear, adopted a course of very doubtful propriety. At all events, the defendants would, on motion, be allowed to repair their fault, especially if their non-attendance could be excused.

3. That there is no positive rule in this court, forbidding a report to be considered at the term to which it is made. The general practice has been, to permit a report, in any degree complex, to lie for a second term, for consideration and exception, on the motion of one of the parties. In plain cases, the report is generally taken up at the first term.

4. That the two administrators of H. M., being also his devisees and legatees, and having acted together in the collection, and payment of moneys, it is presumable that they arranged between themselves, their respective claims upon the estate of their testator, and (in the absence of testimony to the contrary) that each retained in his own hands, an equal share of the estate. And as they, knowing the state of their own affairs, permitted a decree to be rendered jointly against them, the just inference is, that each was bound for an equal portion of that decree. If either had paid off the whole of the decree, he, so paying, might have called on the other for a moiety of the decree so paid. And the subsequent decree of this court ought, therefore, to have been against the representatives of each, in the first instance, for a moiety only.

5. That this decree was not a final decree, so as to preclude the court from opening it to let in its real merits, which may have been excluded by any excusable misapprehension of the party, or error, or irregularity of the court.

MARSHALL, Circuit Justice. In 1805, the plaintiff in this cause, instituted her suit in this court, against Thomas Muse and Elliott Muse, who were administrators, with the will annexed, of Hudson Muse, deceased, and also, his principal devisees and legatees, to obtain payment of a considerable sum of money, due from Hudson Muse, in his lifetime, to the plaintiff's testator. Others of the legatees of Hudson Muse, were also made parties, but against them, no decree was ever given. The estate of Hudson Muse, except the sums which were disbursed in the payment of debts, and some small portions of the legacies, which had been paid, the amount of which is not ascertained, was retained in the hands of the administrators. Their accounts were referred, and the commissioner reported, that the sum of $7493.76, remained in the hands of the administrators, for which sum, a decree was pronounced on the 3d of June, 1811. In 1817, the plaintiff filed her bill in this court, for the purpose of reviving this decree, and carrying it into effect, against Elliott Muse, as executor of Thomas Muse, and surviving administrator of Hudson Muse. Elliott Muse, also, departed this life, without answering this bill, upon which, in June, 1818, a bill of revivor was filed against Zachariah Crittenden, the administrator of the estate of Elliott Muse, deceased, and Robert Blakey and Harry Gaines, the administrators, with the will annexed, de bonis non, of Thomas Muse, and against Richard Corbin, the executor of John T. Corbin, who was a surety in the administration bond of Thomas and Elliott Muse, executed by them, as administrators of Hudson Muse. In May, 1819, the defendants, Harry Gaines, and Robert Blakey, administrators of the estate of Thomas Muse, unadministered by Elliott Muse, filed their answer, stating, that on the books of Elliott Muse, the estate of Thomas Muse is debited with its proportion of the debt now claimed, and the whole is stated to be settled with W. C. Williams, the attorney for the plaintiff: that they had understood, that Elliott Muse executed a mortgage to W. C. Williams, for the security of the debt which, through negligence, was never recorded. They, therefore, claimed to be discharged. In July, 1819, Zachariah Crittenden, administrator of Elliott Muse, deceased, filed his answer, stating, that he had fully administered, before any knowledge of the decree rendered in favour of the plaintiff.

At the May term of this court, 1820, the court directed the defendants, Gaines and Blakey, to settle the account of the administration of Thomas Muse, of the estate of Hudson Muse, deceased, and also, an account of their own administration of the estate of Thomas Muse. The court also directed the defendant, Crittenden, to settle the account of the administration of Elliott Muse, of the estate of Hudson Muse, and his own administration, of the estate of Elliott Muse, before one of the commissioners of this court. In October, 1820, due notice having been given to the defendants, the commissioner proceeded to execute this decretal order, and the defendants having failed to attend, he reported the proportions, by which the original decree ought to be charged on the estates of Thomas and Elliott Muse. His report charges $5155.02, part of this decree, on the estate of Thomas Muse, and $2338.74, the residue thereof, on the estate of Elliott Muse. This report was filed on the 14th of October, 1820. It states the principles on which the commissioner proceeded, in thus apportioning the debt due to the plaintiff, and also states some other matters, supposed by him to shed some light on the situation of the defendants, with regard to each other. At the November term, 1820, this report was confirmed, and the matter thereof decreed, no counsel appearing for the defendants. In January, 1821, Robert Blakey, one of the administrators of Thomas Muse, deceased, applied to one of the judges

of this court, for an injunction to stay, proceedings on this decree, so far as respected the estate of Thomas Muse, praying that the decree might be opened, and the plaintiff have the relief to which he might be decided to be entitled. The injunction was granted, to continue to the first day of this term, and the whole case now came on to be decided on its merits.

In his bill for an injunction, the plaintiff states sundry errors in the proceedings and decree, for which he thinks it ought to be opened, and set aside, and also, excuses his non-attendance on the commissioner, and his neglect of the case in this court. The errors alleged, are: 1st. That the decretal order for an account, did not direct an account of the administration of the estate of Thomas Muse, by Elliott Muse. 2d. That the commissioner has made his report ex-parte, not being authorized so to do, by the order under which he acted. 3d. That the court acted on the report during the term to which it was made, instead of leaving it to the next term for exceptions. 4th. That the decree is not warranted by the report, since it takes no notice of a sum reported to be due from the estate of Elliott Muse, to that of Thomas Muse, to an amount equal to the whole sum due to the plaintiff. These errors as assigned, will be severally considered.

1st. An account of the administration of Elliott Muse, of the estate of Thomas Muse, ought to have been directed. That this account might have been directed, especially as all the parties were before the court, will not be denied. That it ought to have been directed, is not so obvious. If Elliott Muse, as administrator of Thomas Muse, is indebted to that estate, he is not distinguishable, so far as respects the claim of the plaintiff, from any other debtor. Although, in a suit against the representatives of an original debtor, the subject may be pursued further than those representatives, I know of no case in which it has been decided, that the plaintiff is bound to do so.[2] In this particular case, the plaintiff, in her bill, has not required, that this administration account should be settled. It is impossible to say what delays might attend its settlement; and though the plaintiff would be bound to submit to these delays, had she made any demand on the representatives of Elliott Muse, in virtue of his administration of the estate of Thomas Muse, it would be unreasonable to impose them on her should they be considerable, when she makes no such demand. In the bill praying the injunction, this supposed error is more relied on, because, as is alleged, the defendants, in their answer, demand such account. Had this demand been really made, it would probably have been attended to, so far as was consistent with a just regard to the rights of the plaintiff, but might have been disregarded without error. In such a case, the court would be regulated by circumstances. But I understand the answer very differently. I can discover in it no claim for this account; nor was it claimed at the hearing. It would have been rather an extraordinary order, had this court directed an administration account to be taken, which was neither required by the plaintiff or defendant, and did not appear to be essential in the cause.

2d. The report, itself, being made by the commissioner ex parte, is considered as a nullity, because it was not authorized by the decretal order. Undoubtedly the decretal order directs the account to be made up by the defendants. They are to be the actors, and the order does not direct the commissioner to proceed ex-parte, on their failing to appear. Of the propriety of proceeding ex-parte, under such an order, without notice, therefore, to the defendants, I am not perfectly satisfied. Undoubtedly, the court would, on motion, have allowed the defendants, or either of them, to repair their fault, especially if their non-attendance could be excused, as it is in this case; and would feel much disposed, even after the report was acted on, to let in a just defence, if in its power.

3d. The court is also supposed to have erred, in taking up the report at the first term, contrary to its own rule. I believe no positive rule has been made on this subject. Perhaps one ought to have been made. There has been a practice, and the court ought, undoubtedly, to respect its own practice. That, to the best of my recollection, is to permit original reports, in any degree complex, to lie to a second term for consideration and exception. This is generally done on the application of one of the parties. In plain cases the report has frequently, I might say commonly, been taken up at the first term. I cannot pronounce it an error to take up a report at the first term; but I would listen with great favour to any objections made to a report so taken up, and to any excuse for not having made those objections in the proper time, if the cause were in a situation to allow me to listen to them. This is, undoubtedly, a case in which the report would have been permitted to lie, if desired.

4th. The fourth error assigned is in the decree. It is, that the whole sum is not decreed against the estate of Elliott Muse, since that estate appears to be indebted to the estate of Thomas Muse, in a larger sum than the plaintiff claims from both. The representative of Elliott Muse was not required to settle his administration of the estate of Thomas Muse, nor did he attempt to settle it. The representatives of those two estates were not directed to settle accounts between them, nor has either of them made the attempt. The commissioner, however, has, as a volunteer, reported the inventory and appraisement

[2] NOTE, by Chief Justice Marshall. It has been determined in this court, on full consideration, I think in a suit against Johnson's representatives (see Corbet v. Johnson's Heirs [Case No. 3,218]), that he is not bound to do so.

of the estate of Thomas Muse, and has supposed his executor to be indebted to the full amount, whatever debts he may have discharged; and that, without regard to the answer of the defendants, his administrators, in which they admit themselves to be in possession of part of that very estate. If the court had acted on the presumption, that this debt was actually due, its decree would have been equally without example, and without excuse.

A much more serious objection to the decree has been made in argument. The report, and, consequently, the decree affirming it, is said to be erroneous in this, that it has adopted a principle in apportioning the debt, which is not authorized by any testimony before the commissioner. He has charged each administrator with the amount of his own purchase at the sale of the estate, and has divided the residue of the debts equally between them. I think this objection to the report, and the decree, well founded. Thomas and Elliott Muse considered themselves in the character of devisees and legatees, as well as administrators of Hudson Muse. They acted together, so far as the court can perceive, in the collection and payment of moneys. There is nothing unreasonable in the supposition, that they arranged between themselves their claims upon the estate of Hudson Muse, and that each retained in his own hands, computing his particular debt, as much of the estate as the other. If this is not extremely improbable, and is not contradicted by testimony, the situation in which the cause stood when it came before the commissioner, a situation in which it was placed by the parties themselves, required that this should be assumed as the basis of the report and of the decree. Thomas and Elliott Muse were acquainted with their own transactions. They must be supposed to have understood their own situation with the estate, and with each other. Possessing this understanding, and called upon to settle their administration account, the report states a balance in their hands, for which a decree is rendered, binding them equally. Had they been liable for this debt in different proportions, the court would have decreed against them severally, and according to their proportions. But they permit a report, stating a balance in the hands of both, and a decree upon that report, binding them equally. This decree constitutes a joint debt, of which either paying the whole, could recover a moiety from the other. In the absence of all testimony, showing that this decree ought to be satisfied in unequal proportions, Thomas or Elliott Muse, having satisfied it, could have called on the other for contribution, and this demand could not have been repelled by light presumptions. I am, therefore, of opinion, that the decree, in the actual state of the testimony, ought to have been revived equally, and that the representatives of each of the parties, at least in the first instance, ought to have been subjected only to a moiety of it. Upon these principles the decree ought to have made against the representatives of Thomas Muse for $3746.88, with the interest which accrued thereon. If it is final, and beyond the reach of the court, it ought to stand enjoined for the residue. If the court may now open it, the reasons for doing so, which are stated in the bill, and have been noticed in this opinion, and the excuse alleged in the bill for not appearing before the commissioner, are I think, sufficient to justify its being opened, and to induce the court now to make the order, which would have been made on the application of the party at the last term. I think, upon authority, the decree may be now opened. The case of Templeman v. Steptoe, 1 Manuf. 339, goes far in showing that this decree is not final. I had been rather inclined to think otherwise on the reason of the thing, but on that point, I give no opinion. I think the authorities quoted at the bar, and especially that from 1 Ves. 205, and that in Amb. 89,[3] are strong authorities for showing that a court of equity, may, on sufficient circumstances, open a decree, and let in the real merits of the cause, which have been excluded by any excusable misapprehension of the party, or irregularity, or error of the court. I shall follow those precedents in this case, and shall open the decree, and refer the accounts back to the commissioner, taking care to guard the plaintiff against unreasonable delay.

Decree: The court being satisfied that the decree pronounced in the first suit, at the last term, is erroneous in apportioning on the estate of Thomas Muse, a larger part of the debt due to the plaintiff in that suit, than ought to be charged on said estate: and being also satisfied with the excuse made by the said Robert Blakey for his non-attendance on the commissioner: and for his failure to make his objections to the report on its return to this court, doth open and set aside the decree, made in the said first cause, at the last term, and doth refer the cause to one of the commissioners, to execute the order made on the 5th day of May, 1820; and he is further directed to receive any proper evidence, which may be offered to show, that any part of the debt claimed by the plaintiff, in said first suit, has been paid, or that it ought to be apportioned on the estates of the intestates, respectively, of the defendants, by a different rule from that adopted in the report of the 7th of October last. The commissioner is directed to proceed ex-parte, if either of the defendants shall fail to attend. And the commissioner is directed to make his report to the court at the next term.

[NOTE. The commissioner reported, and a decree was pronounced directing Crittenden, as

[3] Kemp v. Squire, 1 Ves. Sr. 205, and Cunyngham v. Cunyngham, Amb. 89.

administrator, to pay the sum of $3,731.32 with interest, out of the assets in his hands, and reserved its decision as to the ultimate responsibility of the parties. Case No. 2,917. For subsequent proceedings herein, see Case No. 2,918.]

Case No. 2,917.

COATES v. MUSE et al.

[1 Brock. 539.][1]

Circuit Court, D. Virginia. May Term, 1822.

DECREE AGAINST EXECUTORS—UNEQUAL LIABILITY—CONSTRUCTION OF STATE STATUTE.

1. Where a decree has been entered against two executors jointly, the effect of the decree is to charge each executor equally, whether it is so expressed, or not; but on an application, at a subsequent time, to carry the decree into effect, if it be shown by proof that the defendants were unequally indebted, the decree will be revived against each, according to his liability. But the fact, that the executors were debtors to the estate, in unequal sums, for purchases made at the sale of the estate, is no proof of their unequal liability.

2. Quaere: Is a joint decree against two persons, one of whom dies before the decree is carried into effect, within the influence of the Virginia act of assembly, "concerning partitions, joint rights, and obligations" (1 Rev. Code, c. 98, § 3), so that it may be revived against the representatives of the deceased defendant; or are those representatives discharged, notwithstanding the act of assembly?

3. The exposition of the acts of the several state legislatures, is the peculiar and appropriate duty of the state courts, and the federal courts will always feel great reluctance in breaking the way in the exposition of such statutes, and will not do so, unless really necessary for the decision of the cases before them.

[Cited in Beals v. Hale, 4 How. (45 U. S.) 54. Quoted in Johnston v. Straus, 26 Fed. 69.]

4. Construction of the 60th section (1 Rev. Code, c. 104) of the act "concerning executors," &c. B, the executor of A, commits a devastavit of the estate of his testator. C, the executor or administrator of B, is bound to pay the debts due to the estate of A, before any proper debts due to B's own creditors. Although the words of the section require the executor, or administrator of the executor, &c., to pay what shall be due to legatees, or distributees, of the first decedent; yet it is clear, that those debts may be paid to the executor, or administrator of the first decedent, as well as to his legatees, and distributees. And this superior dignity of debts due to the first decedent, attaches as well to the creditors of that decedent, as to his personal representative, and those creditors may sue the representatives of the last executor or administrator, and make him liable for the amount of their claims.

[Cited in brief in Johnston v. Straus, 26 Fed. 67.]

This is the same case reported in 1 Brock. 529 [Case No. 2,916], quod vide. In pursuance of the decree of the 4th of June, 1821, the commissioner made his report, and the court, reserving to a future day its decision, on the ultimate responsibility of the parties, in December, 1821, rendered an interlocutory decree, directing the administrator of Elliott Muse, to pay the sum of $3731.32 to the plaintiff, out of the assets of Elliott Muse's estate, unadministered by him. At the present term, the administrator exhibited to the court, the copy of the record of proceedings, in two suits then pending in a court of chancery of the state, and moved the court to set aside the interlocutory decree, of December, 1821, subjecting the assets in his hands, of the estate of Elliott Muse, to the payment of the claim of the plaintiff in this cause.

MARSHALL, Circuit Justice. The first question which arises in this cause is: In what proportion was the debt due to the plaintiff, originally chargeable on the estate of Thomas and Elliott Muse? By the decree of this court, at the May term, 1811, Thomas and Elliott Muse, administrators of Hudson Muse, deceased, were directed to pay to the plaintiff, the sum of $7493.76, that being the amount of the assets of Hudson Muse in their hands, to be administered. This decree is not expressed to be made by consent of parties; but there is much reason to believe that such was the fact. In general, one executor is not liable for the acts of his co-executor, and it is certain that this court would not have made a joint decree against the defendants, had not an acquiescence in such decree been expressed; or had not the court understood, that there would be so much difficulty in ascertaining their respective liabilities before a commissioner, that the defendants preferred making the adjustment between themselves. But, whatever may have been the motive for the decree, its effect certainly was to charge Thomas and Elliott Muse equally. It cannot, however, be doubted, that if, on an application to carry this decree into execution, it should be shown to the court, that the defendants were unequally indebted to the estate of the deceased, the decree would be revived against each, according to his liability. The commissioner has supposed, that this inequality of liability is proved by the fact, that Thomas and Elliott Muse, were debtors in unequal sums, for purchases made at the sale of Hudson Muse's estate. He supposes, that precisely the same amount of debts was collected by each, and that Thomas Muse is chargeable beyond Elliott Muse, in the sum which his purchases exceed those made by Elliott Muse. This supposition the court considers as inadmissible, because the defendants would have resisted a joint decree, had they divided the outstanding debts, without regard to their individual debts; and, because also, it is most probable, especially since they considered themselves as entitled to the estate of Hudson Muse, that each collected as much of the outstanding debts, as would place him on an equality with the other. The fact, then, that they purchased unequally at the sale, does not authorize any inference, opposed to the decree of 1811. The entry made by Elliott Muse, as representative of Thomas Muse, is undoubtedly satisfactory evidence, that he did not think the estate of

[1] [Reported by John W. Brockenbrough, Esq.]

Thomas Muse liable to him beyond the sum charged to it; but does not, perhaps, sufficiently prove, that the estate of Thomas Muse was indebted in that sum.[2] That entry shows the extent of Elliott Muse's claim, when he supposed himself entitled to the decree, but cannot demonstrate the justice of that claim. The sum charged to the estate of Thomas Muse, however, exceeds so little a moiety of the decree, with interest, as to make this an unimportant inquiry. I shall consider Thomas and Elliott Muse, as originally liable for this decree in moieties.

The second question, depends upon the construction of the "act concerning partitions, and joint rights, and obligations." Soon after the decree was pronounced, Thomas Muse died; and the question is, whether the decree survived, so that his representatives were discharged at law; or, whether it might have been revived as against them. At common law, the rule undoubtedly is, that a judgment or decree against two persons, is joint and not several, that it survives against the survivor, and cannot be enforced, at law, against the representatives of the deceased; nor in equity, farther than those representatives are equitably bound, in consequence of being equitable debtors. But the legislature of Virginia, has enacted, that, "the representative of one jointly bound with another, for the payment of a debt, or for performance or forbearance of any act, or for any other thing, and dying in the lifetime of the latter, may be charged by virtue of such obligation, in the same manner as such representatives might have been charged, if the obligors had been bound severally, as well as jointly." 1 Rev. Code, c. 98, § 3. The question is, whether this section of the act, extends to judgments and decrees, or is confined to obligations, created by the act of the party bound. This question, as I understand, is now, for the first time, raised in a court of justice. It is always, with much reluctance, that I break the way, in expounding the statute of a state; for the exposition of the acts of every legislature is, I think, the peculiar and appropriate duty of the tribunals, created by that legislature. Although, if a case depending on a statute, not yet construed by the appropriate tribunal, comes on to be tried, the judge is under the necessity of construing the statute, because it forms a part of the case, yet he will yield to this necessity, only where it is real, and when the case depends upon the statute. The reluctance with which he yields to it is increased, when, as in this case, the language of the act is sufficiently ambiguous to admit of different constructions among intelligent gentlemen of the profession. In such a case, he will be particularly anxious to avoid giving a first construction; and will avoid it, if the case can be otherwise decided. "The representative of one jointly bound with another," is the subject of the act; and this description is, certainly, broad enough to comprehend a person bound by act of law, as well as one who is bound by his own act. The statute proceeds: "May be charged, by virtue of such obligation, in the same manner as such representatives might have been charged, if the obligors had been bound severally, as well as jointly." These words may be considered as restraining the general term used in the first part of the sentence. It is true, that the words "such obligation," referring, directly, to the words "one jointly bound with another," may very naturally have been used in a sense co-extensive with the first words, and may, without violence, or departure from their usual sense, be understood to designate any obligation, whether created by the act of law or of a party; but the subsequent words produce more difficulty. The representatives of the person dying first, are to be charged in the same manner as they might have been charged "if the obligors had been bound severally, as well as jointly."

The word "obligors," in the last part of the sentence, was certainly intended to be co-extensive with the words "one jointly bound with another," in the first part of it. These different words were, unquestionably, introduced by the legislature, to describe the same persons and the same obligation; but the word "obligors" seems to me to designate, exclusively, those who bind themselves, the actors, in creating an obligation. Those bound by a judgment or decree, are never, I think, denominated obligors. The following words add strength to this construction. They are to be charged, as if the obligors had been bound "severally as well as jointly." Now, a judgment never, and a decree very rarely, binds severally as well as jointly. A judgment, or decree, against two, is a joint, and never a joint and several judgment or decree; unless, indeed, in a decree, this quality be particularly expressed. These phrases in the section, which are entirely adapted to obligations created by the act of the party, satisfy me, that such obligations, alone, were in the mind of the legislature, when the law was framed; and I should feel no difficulty in saying, that its provisions ought to be limited to them, were it not that the obvious and general intention of the act would be defeated by this construction.

The obvious intention of the act is, that all obligations, which are joint in their terms, should be several, as well as joint, in their legal operation and effect. This policy is beneficial and just to creditors, because they are not defrauded, by the death of one of the obligors, of any part of the security for which they originally stipulated; and it is justice to the obligors themselves, because it leaves the representatives of each, bound to precisely the same extent to which the original obligor

[2] In relation to this entry, see the last opinion of the chief justice, in 1 Brock. 551 [Case No. 2,918].

probably intended to bind himself. The legislature stops short, without effecting its object, if the provision does not apply to the judgment, as well as to the contract on which that judgment is founded. It would be strange, if, in severing that which the parties themselves had made joint, the legislature had intended to leave the law in such a state as still to join, by its own operation, that which the parties had severed, or that which the act was made for the purpose of severing. If the legislature, when framing this law, had been asked: "Do you intend, that a judgment shall bind those jointly, and not severally, who had bound themselves severally, as well as jointly; or that the judgment shall be joint on contracts which this legislature intended to sever?" the answer, it is probable, would have been in the negative. It may, then, be urged with plausibility, and, perhaps, with truth, that this is a case in which the literal construction of an act is opposed to its spirit, and would defeat, in part, the object of the legislature; that it is a case in which words of some ambiguity are used, which, construed according to their common acceptation, would not reach a case within the mischief intended to be provided against. I feel the force of this reasoning, but my general rule of construction, and I think it a good one, is to adhere to the letter of the statute, taking the whole together; and I would not readily depart from that rule in this case. It is, however, no weak argument in favour of the more liberal construction, that no mischief can come from its adoption, and the consequence of a contrary construction, would, I think, be the multiplication of suits. Creditors would bring, in many instances, as many actions as there are parties to the contract on which they sue. Without expressly adopting either construction I shall inquire whether the one or the other may not lead to the same result. If the act of assembly so changes the law, that this decree may be revived against the representatives of Thomas Muse, then those representatives would be clearly liable for one moiety of it; but if, in consequence of transactions subsequent thereto, or of circumstances not known to the court when it was pronounced, the representatives of Thomas Muse ought to recover from those of Elliott Muse, the sum they pay to the plaintiff, or any part of it, then the court would decree, in the first instance, that the estate of Elliott Muse should pay to the plaintiff, the sum for which they would be liable to the estate of Thomas Muse, provided that might be done without delaying the plaintiff, or in any manner prejudicing him.

If the decree survives, and could not be regularly revived against the representatives of Thomas Muse, still the original equity of the plaintiff against him for a moiety of the decree, would not be destroyed. This equity may indeed be rebutted by equitable circumstances; but those circumstances must, I think, derive some of their force from the conduct of the creditor. Transactions between the debtors alone, might be a reason for decreeing in the first instance against the estate of one of them, but not for such a postponement of the rights of the creditor as would materially injure him. We should be brought, then, to the same result in whichever way the statute be construed, unless there are transactions between the parties, which ought to postpone the decree, as against the estate of Thomas Muse, under one construction, and not under the other. His counsel contends that there are such circumstances. On the death of Thomas Muse, Elliott Muse qualified as his executor, and has died greatly indebted to his estate. It is contended that as the representatives both of Thomas and Elliott Muse are before the court, and as the representatives of Elliott Muse, will be accountable to those of Thomas Muse, for the estate of Thomas Muse wasted by Elliott Muse, that this court will decree directly against those representatives, so far as they are liable to the representatives of Thomas Muse. This is undoubtedly the course of justice, and the course of the court, so far as it can be conformed to, without delays and perplexities injurious to the creditor. In a plain case, the court will never hesitate to decree directly against a party, who is ultimately responsible. But in a case where great delay must be encountered to establish this ultimate responsibility, the court does not think itself at liberty to impose these delays and difficulties on the creditor. If Elliott Muse were stil living, and the report of the commissioner were to be confirmed, the court could not hesitate to decree against him to the full amount of the debt, for he is shown to be the debtor of Thomas Muse in a still larger sum. But Elliott Muse is dead, and his representatives are responsible under any construction of the laws of Virginia, so far only as assets have come to their hands. Whether they are responsible to that extent, or not, depends upon the construction of the 60th section of the act (1 Rev. Code, c. 104) for regulating the conduct of executors and administrators, and on the operation of a paper given to Elliott Muse by William C. Williams, then the attorney for the plaintiff. The words of the act of assembly are, "The executors or administrators, of a guardian, of a committee, or of any other person who shall have been chargeable with, or accountable for, the estate of a ward, an idiot or a lunatic, or the estate of a dead person, committed to their testator or intestate, by a court of record, shall pay so much as shall be due from their testator or intestate, to the ward, idiot, or lunatic, or to the legatees or persons entitled to distribution, before any proper debt of their testator or intestate."

The question is, whether the priority given by this section, extends to creditors, or is confined to the claims of the ward, idiot, &c. and legatees or distributees of the de-

ceased. In the case of a ward, or of an idiot or lunatic, the question cannot well arise; and I am not sure that this circumstance may not in some degree, affect the construction of the act, in its application to the case of legatees and distributees, who are thus connected in the same provision with the ward, and the idiot or lunatic. There are, however, some considerations, which powerfully oppose this construction of the act. The executor, or administrator, holds the estate of his testator, or intestate, as a trustee, first for creditors, and, then, for legatees, or distributees. This rule is so intermingled with all the principles of our law, its observance is so imperiously exacted by the most sacred injunctions of justice and morals, that the legislature cannot be supposed to impair it, unless the language be such, that the construction is inevitable. Express words, only, can change the order which debts and legacies, or distributive shares hold to each other. The executor of an executor, is often the executor of the first testator. The debt due from his immediate, to his original testator, represents the property converted by that immediate testator, to his own use, and is assets in his hands, first, to satisfy the claim of the creditors of the first testator, and then, the claims of legatees. In a contest between those creditors and legatees, all our experience, all our legal education, every thing we derive from observation or instruction, informs us, that the creditors must prevail. In such a state of things, the priority of a legatee over a creditor of the last testator, is, by an implication so necessary as to be inevitable, the priority of a creditor of the first testator, whose claim is so superior in dignity, to that of the legatee, as to enable him to wrest the property from the legatee, after it shall be delivered to him.

The case is not materially varied, if the representative of the administrator, or of the last testator, be not also the representative of the first. If an executor or administrator die, indebted to the estate of his testator, or intestate, that debt charges his estate in the hands of his representative. It is a debt, the dignity of which depends upon the law. This debt, in the regular course of things, is to be sued for, by the representative of the original testator. When it comes to the hands of that representative, it is assets to be paid in the course of administration, first to creditors, and then to legatees, or distributees. The law must be very clear, and very positive, indeed, which would make a difference between these assets, and those which had remained unchanged, and which came to his hands, as they came to the hands of the first representative. If we examine the section under consideration, it makes no such difference. It does not say, that the executor or administrator, shall pay to the legatees, or distributees, as much as shall be due from their testator, or intestate, before any other debts whatever. It does not reverse the long established order of things, and give a preference under any circumstances, to a man's legatees, or distributees, over his own creditors; but declares, that the executors, or administrators of any person, "who shall have been chargeable with, or accountable for," "the estate of a dead person, committed to their testator, or intestate, by a court of record, shall pay so much as shall be due from their testator, or intestate, to the legatees, or persons entitled to distribution, before any proper debt of their testator, or intestate." The words, "to the legatees, or persons entitled to distribution," are not connected with the word "pay," but with the word "due." The law does not command, that payment shall be made to the distributees, or legatees, but, generally, that payment shall be made of what is "due to the legatees, or distributees of the dead person," "before any proper debt of their testator, or intestate." Payment shall be made, to whom? The act does not tell us, but the answer must be, to the person authorized by law to receive it. This person is the representative of the original testator, in whose hands this debt becomes assets, not distinguishable from other assets; not more liable than other assets to the claims of legatees, or distributees, nor less liable to the claims of creditors; for the law does not give any priority, except over the proper debts of the last testator, or intestate. For these reasons, I think it impossible to resist the conviction, that this section gives a priority to debts due to the estate of a dead person, committed to the hands of the last decedent in his lifetime, over the proper debts of such decedent, but interferes no farther with the subject. If, then, this suit had been instituted by the representative of Thomas Muse, against the representative of Elliott Muse, the defendant could not, if the foregoing reasoning be just, have resisted the claim, by setting up the payment of the proper debts of his testator, but would have been liable, in like manner, as if the suit had been instituted by the legatees, or distributees of Thomas Muse, against the present defendants. Is the defence the stronger, when made to a suit brought by the creditors? I think it is not. The right of the creditors to bring the suit, cannot be questioned. It is every day's practice, and has not been controverted in this case. If the right to sue be admitted, and the act of assembly, as has been already shown, attaches the superior dignity it gives, to the debt, and not to the character of the plaintiff, it follows, that if the debt be still due, and its priority has not been lost by any act of the creditor, it is of superior dignity to any proper debt of Elliott Muse, and the assets, which have been disbursed in the payment of such debts, have been wasted, and must still be accounted for, by the representative of Elliott Muse.

Decree.—The defendant, Zachariah U. Crittenden, administrator of Elliott Muse, exhibited to the court the copy of the record of the proceedings, in a suit now pending in the supreme court of chancery for the Williamsburg district, in which Richard M. Segar, sheriff and committee of the estate of Henry Heffernan, deceased, and others are plaintiffs, and the said Crittenden, as administrator of Elliott Muse and others, are defendants, and moved the court to set aside the decree rendered in this cause, on the 19th day of December, 1821, subjecting the assets in his hands, of the estate of Elliott Muse, for the payment of the claim of the plaintiff in this cause. And the court, on consideration of the said motion, doth order, that the same be overruled. And the court being of opinion, that the said decree of the 19th of December, 1821, ought to have directed, that the sum of money therein mentioned, and decreed to be paid by the said defendant, Zachariah U. Crittenden, administrator of Elliott Muse, out of the assets of his intestate in his hands to be administered, if not paid out of the assets of said intestate in his hands to be administered, should be paid out of the proper goods and chattels of the said Crittenden, doth adjudge, order, and decree, as additional to, and amendatory of the said decree, of the 19th of December, 1821, that the sum of money therein decreed to be paid, by the said Crittenden, administrator of Elliott Muse, if the same be not levied of the goods and chattels of the said Elliott Muse, in his hands to be administered, be levied of the proper goods and chattels of the said Crittenden.

[NOTE. For subsequent proceedings had herein, see Case No. 2,918.]

Case No. 2,918.

COATES v. MUSE et al.

[1 Brock. 551.][1]

Circuit Court, D. Virginia. Nov. Term, 1823.

LIABILITY OF EXECUTOR — PRIORITY OF DEBT OF DECEDENT—EQUITABLE TRANSFER OF DECREE.

1. There having been a joint decree in 1811, against E. M. and T. M., administrators of H. M., and one of the said administrators, T. M., having died, the survivor, E. M., was appointed his executor. To secure to the plaintiff in the decree the payment thereof, the surviving administrator, E. M., executed in 1813, a deed of trust, or mortgage, on a tract of land, which deed the attorney of the plaintiff accepted, and acknowledged under his hand, that the said E. M. was entitled to the benefit of the decree. The said deed, though held by the plaintiff's attorney, was never recorded, nor enforced by him, but on the contrary, the said E. M. sold the land, and he then died. On the books of E. M., as executor of T. M., were found two entries, by which he gave credit to himself, as such executor, for T. M.'s proportion of that decree, which entries amount to an admission, that the estate was no further liable, and that he, E. M., should pay the residue of the decree. *Held*: That as E. M. sold the land, and did not account for the proceeds, he became liable to the plaintiff in the same sum, as if the transaction had never taken place.

2. As to the liability of the estate of T. M. to the plaintiff. A decree, though not assignable at law, is yet transferable for valuable consideration, and a court of equity will support the transfer. If, therefore, the estate of T. M. had been represented by any other person than E. M., and such representative had, without knowledge of the fraudulent sale of the land, paid to E. M., the transferee of the decree, his proportion of the decree, the court would have sustained the payment: but as no money was really paid to the creditor, by the representative of T. M., and as E. M., who committed the fraud, was the executor of T. M., the creditor ought not (notwithstanding the entry of the credit aforesaid), to lose his recourse against the estate of T. M. But, as it was ascertained by the report of a commissioner, that E. M., as executor of T. M., was indebted to the estate of the latter, in the full sum claimed by the plaintiff, from the estate of T. M., and as the debt so due from the estate of E. M., to that of T. M., is one of the first dignity, under the act of assembly, the plaintiff should stand in the place of T. M.'s representative, and be considered as a creditor of the highest dignity, and obtain a decree directly against the representative of E. M., for the full amount due from that estate, to T. M.'s estate.

3. As to the balance (over and above the aforesaid sum due to T. M.'s estate) of the decree of 1811, now to be decreed against the representative of E. M. The effect of the agreement between the attorney of the plaintiff, (with the concurrence of his agent, or attorney in fact,) was to transfer the decree to E. M., and to put the mortgage as a substitute for the decree. The plaintiff could not, thereafter, proceed against either E. M., or T. M., on the decree, but on the mortgage alone. The debt, therefore, lost its dignity, and became as between the creditor, and representatives of E. M., a debt by specialty alone, and is to be postponed, in decreeing against those representatives, to other debts of greater dignity than specialties.

MARSHALL, Circuit Justice. On the 4th day of June, 1821, the court considering a bill filed in January, 1821, as being both a bill enjoining the decree rendered at the November term, 1820, and a petition for a rehearing, opened the decree rendered in November, 1820, and referred the accounts to the commissioner for a resettlement, with instructions to settle, also, the administration of the estate of Thomas Muse, by Elliott Muse. [Case No. 2,916.] In December, 1821, the commissioner made his report, which was taken up a few days thereafter, and a decree pronounced, directing Z. U. Crittenden, administrator, &c., of Elliott Muse, deceased, out of the assets of his testator, in his hands to be administered, to pay the plaintiff the sum of $3731.32, with interest on $3171.42, from the 20th of November, 1821, till paid; and the court reserved, to a future day, its decision on the ultimate responsibility of the parties. [Id. 2,917.] In May term, 1822, the said defendant, Z. U. Crittenden, administrator, &c., produced two records of suits, pending against him as administrator, in the state court, in Williamsburg, on claims of the highest dignity, and prayed, that the inter-

[1] [Reported by John W. Brockenbrough, Esq.]

locutory decree of the preceding term, might be set aside. The court overruled this motion, and directed that decree to be satisfied out of the private estate of the said Crittenden, if assets of his intestate could not be found. The cause comes on again to be heard on all the papers, and it is contended by the defendant, Crittenden, administrator, &c., of Elliott Muse, that the original decree, pronounced, in 1811, against Elliott Muse and Thomas Muse, administrators of Hudson Muse, has lost its dignity, as against the representatives of those defendants, in consequence of a receipt and agreement, in these words: "Elliott Muse, Esq., has adjusted with me, by securing the same to be paid, the amount of the decree against the administrators of Hudson Muse, deceased, and is entitled to the benefit of the decree, as to that part of the debt, but not as to the house and lot in Urbanna, which is the fund for payment of the residue of the plaintiff's demand. Wm. C. Williams, Attorney for Plaintiff. 18th March, 1813." It was admitted before the commissioner, by the agent for the plaintiff, that a deed of trust or mortgage was, about this time, executed by the said Elliott Muse, to secure the payment of the decree, but that the said deed was held by the plaintiff's attorney, was never recorded or enforced; and it is admitted by Z. U. Crittenden, that Elliott Muse afterwards sold the land.

The principle on which the decree of November, 1820, was opened in May term, 1821, was that the decree of May, 1811, ought to be apportioned equally on the estates of Elliott and Thomas Muse, unless the representatives of one of those estates, could show that the other ought to be charged with more than a moiety of that decree. That principle is still believed to be correct. The accounts, as now exhibited to the court, furnish no evidence on this subject, other than two entries on the books of Elliott Muse, as executor of Thomas Muse, in which he credits himself as follows: "1813, March 9th, to cash in discharge of testator's proportion of decree, Coates's Executrix v. Muse's Administrators, including interest and costs of suit, $2411.54½. June 19th, to amount of your proportion of a balance not charged in a former account of a decree in fed. ct. Muse's Administrator v. Coates's Executors, $1602.90."

The respective liabilities of Elliott and Thomas Muse, having been known only to themselves, this is the only testimony now attainable on this point. The entries of Elliott Muse cannot increase the liability of Thomas Muse, but may diminish it. If, therefore, these two sums which were obviously intended to comprise Thomas Muse's part of the decree be less than a moiety of the decree with interest and costs, these entries amount to an admission on the part of Elliott Muse, that the estate of Thomas Muse was not liable farther, and that he ought himself to pay the residue. This conclusion is rendered irresistible, by the circumstance, that at the date of the last entry, Elliott Muse considered the whole decree as being transferred to him by the paper of the 18th of March, 1813, executed by the attorney of the plaintiff, and of course, charged the estate of his testator with the whole sum for which it was liable on the decree. The deed of trust, which is supposed to be referred to in this paper of the 18th of March, 1813, is prepared in blank in one handwriting, and afterwards filled up in another. It is dated the 18th of March, 1811, three months before the decree was rendered, and is filled up to John Gray, agent for the plaintiff. It was, obviously from the expressions of the deed, filled up in the year 1813, before the 3d of June, and was probably filled up and executed on the 18th of March, 1813, when the receipt or assignment was executed. This deed having never been recorded, and Elliott Muse having sold the land, and received the money, for which he has never accounted, it is obvious, that he must remain liable to the plaintiff in the same sum as if this transaction had never taken place. Were Elliott Muse alive and solvent, there could be no difficulty in decreeing him to pay the whole sum. But he is dead insolvent, and the whole difficulty of the case consists in determining, how far the representative of Elliott Muse is chargeable with a devastavit for having paid debts of inferior dignity to the decree of the 3d of June, 1811. A decree is not, in law, assignable, but is like any other chose in action, transferable for a valuable consideration, and a court of equity will support the transfer. If, therefore, the estate of Thomas Muse, had been represented by any other than Elliott Muse, and such representative had, without knowledge of the fraud, paid his part of the decree to Elliott Muse, this court would unquestionably have sustained the payment. But as no money was really paid by the estate of Thomas Muse, nor any injury sustained by his estate, in consequence of this credit in his account by Elliott Muse; as the person committing the fraud was the representative of Thomas Muse, it seems unreasonable to deprive the creditor of his recourse against Thomas Muse, for so much as was equitably due from his estate. Had Elliott Muse never made this entry in his accounts, it would be admitted, that the liability of Thomas Muse remained; and I cannot think, that this entry changes his liability, unless it should appear that he has sustained an injury from it. The question of dignity is unimportant in this part of the case, because the estate of Thomas Muse is solvent. In a suit instituted in a court of chancery for the state, an account was taken of the administration of Elliott Muse, of the

estate of Thomas Muse, and the balance reported against the executor, is $314.54¾. But this report is understood to credit the executor for the sum charged, as being paid to the executor of Coates. Those sums are, therefore, to be added to this balance, and they will leave Elliott Muse indebted to the estate of Thomas Muse, in the full sum now claimed by the plaintiff from the estate of Thomas Muse. This debt, from the representative of Elliott Muse, to the estate of Thomas Muse, is, undeniably, a debt of the first dignity.

It is contended on the part of the representative of Thomas Muse, that as all the parties are before the court, the representative of Elliott Muse, ought to be decreed to pay to the plaintiff, the sum due from the estate of Thomas Muse: and the court is of that opinion. The plaintiff, therefore, is in the place of a representative of Thomas Muse, as to that part of the decree, and is in virtue of the rights of that representative, a creditor of the highest dignity. Z. U. Crittenden, the administrator of Elliott Muse, deceased, will, therefore be directed to pay to the plaintiff, the sum of $——, that being the sum the plaintiff has a right to demand from the estate of Thomas Muse, and which is due to that estate, from the representative of Elliott Muse. The decree which ought to be pronounced against Z. U. Crittenden, the administrator of Elliott Muse, deceased, for the residue of the decree of the 3d of June, 1811, remains to be considered. It is contended by the plaintiff, that the whole transaction between William C. Williams, the attorney for the plaintiff, and Elliott Muse, on the 18th of March, 1813, ought to be considered as a nullity, in consequence of the fraud committed by Elliott Muse, in selling the mortgaged property, and converting the money to his own use. I cannot concur in this opinion. There is certainly no positive evidence of the concurrence of the plaintiff's agent, in the arrangement of the 18th of March, 1813, but when it is recollected, that the name of the agent is introduced into the deed of mortgage, that the agent himself, states the deed to have been executed, about the time the paper of the 18th of March was signed, that there must have been a free course of communication between the attorney at law, and the agent, I must conclude, that the agreement of the 18th of March, was made with the knowledge and consent of the agent. The effect of that agreement was, to take the deed of mortgage in satisfaction of the decree, and to transfer the decree itself, so far as relates to the question now before the court, to Elliott Muse. The motives for making this arrangement were, at the time, satisfactory to both parties, and the court has no right to suppose they were inadequate. The contract was, then, at the time, a fair and valid contract, the obligation of which, neither could controvert. Had an attempt been made, immediately to enforce the decree of 1811, the court would not have enforced it; and if the plaintiff could have proceeded without the aid of the court, she would have been enjoined. Had the deed been recorded, or had Elliott Muse abstained from selling the property, the plaintiff could never, in the face of the agreement of March, 1813, have proceeded on the original decree. She could only have proceeded on the mortgage. Had the mortgaged property been insufficient to satisfy the decree, the plaintiff could not have proceeded against Elliott or Thomas Muse, or their representatives, for the sum remaining unsatisfied. The neglect of the plaintiff to record her mortgage, and the fraud of Elliott Muse, in selling the property, and misapplying the money, leave Elliott Muse responsible on the deed of mortgage, but not on the original decree. The debt, therefore, is a debt by specialty only; and as the suits instituted in the state court, are for debts of higher dignity, than a debt by specialty, the claim of the plaintiff, for the debt due from Elliott Muse must be postponed, to the claims of some of the plaintiffs in the state court. The decree of the third of June, 1811, comprehended the sum of £429. 9s., equal to $1431.50, not then collected, but in suit. This sum was considered as assets in hand, because the parties expressed a confidence, that it would be collected, and because the counsel for the plaintiff assured the court, of an arrangement being made, by which the decree would not be enforced, till this money should be received. Under these representations, the court gave, improperly, a decree for the whole sum, as if the assets had been in the hands of the administrators. If this money has not been collected; and if the failure to collect it, arises from no default of the administrators—if due diligence has been used, this error in the decree of 1811, ought not to prejudice them, but ought now to be corrected.

Final Decree: This cause came on to be further heard, on the papers formerly read, and two abstracts of records filed by the defendants, and marked, respectively, Z. and Y., and was argued by counsel: on consideration whereof, the court confirming the report of Commissioner Barton, of the administration of the defendant, Robert Blakely, on the estate of Thomas Muse, and the first statement of the said commissioner, of the administration of the defendant, Z. U. Crittenden, on the estate of Elliott Muse, and being of opinion: 1st. That the outstanding claims, amounting to £429. 9s., which were considered in rendering the decree of the 3d of June, 1811, as part of the assets of Hudson Muse's estate, in the hands of his administrators, were not assets, as they had not been reduced to possession, and that they ought not to be considered assets, chargeable to the defendants, or their intestates, because they have not been collected, and the failure to collect them

is not imputable to culpable neglect, and, therefore, that the amount of those claims ought to be deducted from the said decree of 3d of June, 1811, and that the plaintiff is entitled to an assignment, without recourse, from the administrator of Elliott Muse, of the said claims. 2dly. That the estate of Thomas Muse, is still responsible to the plaintiff, for that part of said decree of the 3d of June, 1811, that ought to have been paid by the said Thomas Muse, but that the estate of Thomas Muse is not responsible for more than the two sums of $2411.54, of the 13th of March, 1813, and $1602, of the 19th of June, 1813, charged to that estate, by Elliott Muse, in his account of his administration, on the estate of Thomas Muse, as the proportion of the said decree, payable by that decree. 3dly. That as it manifestly appears, that the estate of Elliott Muse, is, on account of his administration of the estate of Thomas Muse, indebted to that estate in a larger sum than is chargeable on Thomas Muse's estate, for the proportion of the plaintiff's claim, payable by Thomas Muse; and the responsibility of Elliott Muse's, to Thomas Muse's estate, being a debt of the first dignity, the estate of Elliott Muse should, as far as the assets extend, be, in the first instance, subjected to the payment of the plaintiff's claim, to the exoneration of the estate of Thomas Muse. And it appearing by a statement made, from the papers in the case, (which statement is marked "statement for final decree," and is received as a statement made by a commissioner,) that the balance due the plaintiff, after deducting the said claims of £429. 9s., and subsequent payment is $4735.32, with interest from 20th November, 1821, till paid; that the responsibility of the estate of Thomas Muse, for the said two sums of $2411.54, and $1602, in 1813, exceed the said balance due the plaintiff; that the amount of assets, for which the administrator of Elliott Muse is chargeable, is $3608.35 with interest on $3218.36, from 20th November, 1821: The court doth adjudge, order, and decree, that the defendant, Z. U. Crittenden, administrator, do, out of the assets of his intestate, &c., if so much thereof he hath, and if not, out of his own proper goods and chattels, pay to the plaintiff, $3608.35 with interest, on $3218.36, from 20th November, 1821, till paid, and one moiety of the costs of this suit: that the defendant, Robert Blakey, administrator of Thomas Muse, do out of the assets of his intestate in his hands, &c., if not, then out of his own proper goods and chattels, pay to the plaintiff, the sum of $1126.97 with interest, from 20th November, 1821, till paid, and the other moiety of the costs. And the court doth further order, &c., that Z. U. Crittenden, administrator of Elliott Muse, survivor of Thomas and Elliott Muse, administrator, with will annexed, of Hudson Muse, do assign to the plaintiff, or her duly authorized attorney, the said claims, evidenced by the said abstracts of records, marked Z and Y; but the assets to be without recourse against Crittenden. And liberty is reserved to the plaintiff, to apply to the court for a further decree against the administrator of Thomas Muse, for so much of the amount hereby decreed to be paid by the administrator of Elliott Muse, as the plaintiff may fail to obtain on that decree, from that administrator, or those responsible for his due administration of the assets of his intestate.

COBANKS v. The MIDLAND. See Case No. 12,068.

Case No. 2,919.

COBANKS v. The ROSLYN.

[The case reported under above title in 23 Int. Rev. Rec. 176, is the same as Case No. 12,068.]

Case No. 2,920.

In re COBB.

[1 N. B. R. (1868) 414 (Quarto, 106);[1] 1 Am. Law T. Rep. Bankr. 59.]

District Court, D. Indiana.

BANKRUPTCY—EXEMPTION—"HEAD OF FAMILY."

1. Section 14 of the bankrupt act [of 1867 (14 Stat. 522; Rev. St. § 5045)] must be so construed that over and above the necessary household and kitchen furniture, the assignee may, in his discretion, exempt, in favor of the bankrupt, "such other articles and necessaries" as he may think right, so that such exemption, together with the household and kitchen furniture allowed to be retained by him, shall not exceed $500.

2. The fact that the wife may have, as her separate property, household and kitchen furniture in use in the house in which the bankrupt resides, can make no difference as to the amount of exempt property to be allowed him.

3. The bankrupt is also entitled to retain $300 worth of real or personal property as the exemption allowed by the state where he resides.

4. The assignee must select the property to be exempt under the bankrupt law, and should refuse to set apart mere articles of luxury, as gold watches or pianos, &c.

[Cited in Re Steele, Case No. 13,346.]

5. The bankrupt may select the property exempt under the state law, and it is for him to choose or reject articles of mere luxury.

[6. Cited in Re Taylor, Case No. 13,775, to the point that, to constitute a head of a family, it is not essential that a man shall have either a wife or child; it is enough if his household consist of hired servants.]

In the course of proceedings in this case, the question arose upon the setting apart, by the assignee, property under the exemption clause of the bankrupt law, and came before the judge for his decision.

McDONALD, District Judge. In June last, Van Buren Cobb, of Morgan county, Indi-

[1] [Reprinted from 1 N. B. R. 414 (Quarto, 106), by permission.]

ana, was declared a bankrupt by this court. The matter was then referred to the proper register; and subsequently, at a meeting of his creditors, William B. Taylor was appointed his assignee. Under the 14th section of the bankrupt act, the assignee set apart to Cobb certain property, as being exempted from the provisions of that act. Cobb had other property which he claimed as being also exempted; but the assignee disallowed his claim. To this ruling of the assignee the bankrupt excepted, and the exception thus taken is now before this court for decision. The ruling of the assignee was substantially as follows: "I allow you to retain, as exempt from the provisions of the 14th section of the act, and also in connection therewith, and under and by virtue of an act of the legislature of the state of Indiana, to exempt property from sale in certain cases, the sum of $300. I allow you the necessary provision on hand, amounting to $51.50, as shown by the appraisement. I refuse to allow you to retain any more property of any description whatever, for the following reasons, to wit: 1. Because your wife is owner in fee of 80 acres of land in this (Morgan) county, of the value of $1,000. Also, she is the owner of a house and lot—your residence—in Martinsville, in said county, of the value of $2,000. Also, she is the owner of parlor furniture in your house of the value of $123; one bed and bedding, $40; one set of queen's ware, $7; one old bureau, table, &c. $10; to which add value of real estate, $1,000. Total, $3,180. 2. Because, in my opinion, your condition, under these circumstances, is much better than that of a number of your creditors." By the record it appears that the $300 allowed by the assignee to Cobb, was allowed under the state law, and consisted of a title bond for the conveyance of certain real estate. The record also shows that all the other property of the bankrupt turned over to the assignees was of the value of $267, including household and kitchen furniture appraised at $175. The record also shows that the bankrupt is a householder in this state; and that his family consists of a wife and three small children. Whether, under these circumstances, and on a fair construction of the 14th section of the bankrupt act, the decision of the assignee was right, is the question before the court. The provisions of the section in question, so far as they touch the points under consideration, are as follows: "That there shall be exempted from the operation of the provisions of this section, the necessary household and kitchen furniture, and such other articles and necessaries of such bankrupt as the assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of $500; and also the wearing apparel of such bankrupt, and that of his wife and children, and the uniform, arms, and equipments of any person who is or has been a soldier in the militia or in the service of the United States; and such other property as now is, or hereafter shall be, exempted from attachment or seizure, or levy on execution, by the laws of the United States, and such other property not included in the foregoing exemption as is exempted from levy and sale upon execution, or other process or order of any court, by the laws of the state in which the bankrupt has his domicil, at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such state exemption laws in force in the year 1864."

As, in almost every case of bankruptcy, question must arise on the meaning of the language above quoted, I venture to lay down the following rules for the guidance of assignees: First. Every bankrupt, who is a householder in this state is absolutely entitled to have his necessary household and kitchen furniture exempted from the operation of the bankrupt act, to any amount not exceeding $500. It is true that, under this rule, the furniture so exempted must be "necessary" household and kitchen furniture. It cannot be necessary, in the sense of the law, unless the bankrupt is a householder—the head of a family. It is not important to this purpose that he should have a wife or children; his household may consist of a servant or servants, or any person residing with him or under his control. And, in any such case the assignee must, in the first instance, judge and decide what particular articles are "necessary" and what are not. The act evidently intends that every bankrupt householder shall be permitted to retain as much household kitchen furniture as may be reasonably necessary to enable him to keep house in a plain and convenient manner, provided that the value of the whole shall not exceed $500. And I suppose that, in such case, the fact that the wife may have, as her separate property, household and kitchen furniture in use in the house in which the bankrupt resides, can make no difference. By the statutes of Indiana, such separate property does not belong to him; he has no right to its possession or control; and she may, at any moment, and against her husband's will, remove and dispose of it. Now it is not to be believed that the bankrupt act ever intended to make a bankrupt dependent on his wife for the necessary means of keeping house. I think, therefore, that in this case, the assignee erred in refusing to the bankrupt his necessary household and kitchen furniture, because his wife was the owner of some real estate and of $180 worth of household property. But, even if the wife's household effects ought to have been considered by the assignee, still I think he erred in refusing to allow the bankrupt to retain any portion of his necessary household and kitchen furniture. The whole of it amounted only to $175. The wife's prop-

erty in the house was of little value,—parlor furniture, worth $123; a bed and bedding, worth $40; a set of queen's ware, worth $7; an old bureau and table, worth $10,—that is all. A court may, I think, very well take official notice that these articles did not compose all the "necessary" to enable a man to keep house with a wife and three young children. If to this the assignee had added the $175 worth of furniture belonging to the bankrupt, it would together only have amounted to $355 worth of household and kitchen furniture—surely little enough for the necessary furniture in the house of such a family. And if to all this we add the $51.50, allowed by the assignee as "provision," the whole would amount to no more than $406.50—$93.50 less than the act contemplates as exempt. Second. The act must be so construed, that over and above the necessary household and kitchen furniture, the assignee may, in his discretion, exempt in favor of the bankrupt, "such other articles and necessaries" as he may think right, so that such exemption, together with the household and kitchen furniture allowed to be retained by him, shall not exceed $500. But, under this rule, the assignee must, in the language of the act, "have reference in the amount to the family, condition, and circumstances of the bankrupt." In relation to "such other articles and necessaries" as fall within this rule, the assignee has a discretionary power; but in no other case arising under the 14th section of the act. And even here his discretion must be a sound, legal discretion. He should look to the policy and spirit of the law; and, in my opinion, he should in no case allow the bankrupt, under the words, "such other articles and necessaries," anything of mere luxury or ornament. Gold watches, pianos, and the like, for example, I think are not embraced in the discretionary powers of the assignee.

In the case under consideration, the assignee did, in the exercise of this discretionary power, permit the bankrupt to retain "provisions" of the value of $51.50. In this he did right. And under the last rule announced, he committed no error. Third. Every bankrupt who is a householder in this state, is absolutely entitled, over and above the exemptions already noticed, to retain, free from all claims in favor of creditors, property either personal or real, to the value of $300. This right arises from the provision in the 14th section of the bankrupt act, which excepts from its operation such property as by state laws may be exempted from levy and sale on execution. The act of the legislature of Indiana on this subject provides: "That an amount of property not exceeding in value $300, owned by any resident householder, shall not be liable to sale on execution or any other final process from a court for any debt growing out of, or founded on, any contract, express or implied." 2 Gavin & H. St. 368. Under this provision of our state law, thus made a part of the bankrupt act, every bankrupt householder is absolutely entitled to retain property to the value of $300, and he may select any property to that amount, whether it be real or personal, and whether it be articles of mere luxury and ornament, or such as are useful and necessary to the comfortable subsistence of himself and family. In this case, I do not enter into an inquiry whether this provision of the bankrupt act embodying state exemption laws is unconstitutional as not giving a "uniform law on the subject of bankruptcies throughout the United States," as required by the eighth section of the first article of the federal constitution. This may become a grave question for the court. But as it has not been urged in the present case, I give no opinion concerning it. In the case at bar, it appears that under the provision of the bankrupt act adopting the state law, the assignee has set apart to the bankrupt property of the value of $300. So far as this matter is concerned, therefore, I decide that he has committed no error. Upon the whole, the only error committed by the assignee, is his refusal to turn over to the bankrupt his $175 worth of household and kitchen furniture. As to this point only, his decision is reversed; and he is ordered forthwith to deliver to the bankrupt that furniture.

COBB (BUCK v.). See Case No. 2,079.

Case No. 2,921.

COBB et al. v. GLOBE MUT. LIFE INS. CO.

[3 Hughes, 452; 6 Reporter, 515; 2 Va. Law J. 52.] [1]

Circuit Court, E. D. Virginia. Dec. 3, 1877.

PRACTICE ON REMOVAL.

1. In order to remove a suit from a state court to a United States court, under the judiciary act of March 3d, 1875 [18 Stat. 470], the mere filing of the petition and bond in the state court by the party entitled to remove the suit is sufficient; and the jurisdiction to determine whether or not the case was removable and was properly removed, and a sufficient bond given, is in the United States circuit court, and not in the state court.

2. The United States circuit court in which the copy of the record of the state court in a removed suit must be filed, and in which the party making the removal must enter his appearance, is the court held at the place in which the suit in the state court was brought, or the place of holding the United States court most convenient to that place.

[3. Cited in Woolridge v. McKenna, 8 Fed. 667, to the point that the right of removal is lost where the transcript of record is not filed within the time prescribed by law, although the removal be obstructed by the state court refusing it.]

In equity. On the 12th November, 1877, the defendant company filed its petition in

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission. 6 Reporter, 515, contains only a partial report.]

this court, of which the following is the material part: "Your petitioner, the Globe Mutual Life Insurance Company, a corporation duly incorporated by the laws of the state of New York, would respectfully represent to the court that, on the 3d of August, in the year 1877, Cora A. Cobb, Richard H. Cobb, Annie L. Cobb and Caroline F. Cobb, by L. R. Edwards, their next friend, sued out of the corporation court of the city of Norfolk, a summons against the petitioner, wherein it was required that the said company should answer a claim alleged to be due to the said plaintiffs upon a policy of insurance which the company had issued upon the life of one Henry V. Cobb, which said policy was for the sum of $5,000, alleging also in their declaration that the said H. V. Cobb had departed this life, and, therefore, the said policy is due and forfeited. Your petitioner would further state to the court, that William C. Carrington was retained as counsel for the company to attend to its interests in this cause. That the case was duly proceeded with and matured in the said corporation court of the city of Norfolk. That the counsel, William C. Carrington, was notified that the case was set for trial on a certain day, to wit, the 14th of September, 1877. That the said Carrington was at that time confined to his bed by sickness, and had been so for more than two months previous to that time. That it was wholly impossible for him to attend the trial of the cause on that day. That in consequence thereof he requested a member of the Richmond bar to go to Norfolk and state the condition in which he was, and to ask the court for a continuance until the next term of said court. That the attorney went to Norfolk and stated that he appeared not for the company, but for Mr. Carrington, who was unable to attend. The court refused to continue until its next term, but set the cause for hearing on the 18th of said month. It is proper to state here that this last appointment was with the consent of Mr. Carrington's representative. That up to this time no plea of any kind had been put in by the company. When the 18th of September came, it was still impossible for Mr. Carrington to appear, he being still confined to his bed, and he sent instructions to Messrs. McIntosh & Brooke to appear for the company, and at the same time requested them to make a motion for the removal of the cause to the United States court, upon the ground that the said company was a foreign corporation, and, therefore, entitled to said removal. This motion the court overruled, upon the ground that the company having once appeared and agreed that the cause should be tried on a certain day, thereby submitted to the jurisdiction, and consequently lost its right to a removal."

The following is the clerk's memorandum of proceedings in the cause in the state court:

"1877. — August Rules — Declaration and policy filed and common order.

"September Rules.—Common order confirmed and writ of inquiry.

"September 14.—Defendant appeared by attorney, and motion for continuance overruled. Motion to file two special pleas. Motion of plaintiff to reject special pleas sustained, and cause adjourned.

"September 19.—Verdict, judgment, and four bills of exceptions.

"September 22.—Fifth bill of exceptions filed.

"September term, 1877, of the corporation court adjourned September 25th, 1877.

"October 9.—Order of judge in vacation, suspending execution for sixty days upon notice given and statement by defendant of intention to apply to court of appeals for writ of error.

"October 17, 1877.—Bond under above order of 9th October given by defendant. Date of delivery of record to defendant's counsel, D. T. Brooke, a few days before the 7th of November, 1877, when the same was paid for.

"Teste: W. H. Hunter, C. C."

Memorandum of defendant's counsel: "Our recollection is, that the copy of the record was delivered to us on Saturday, 3d of November, and one of the pleas being omitted, we returned the record for correction Monday, November 5th, which was done at once, we think, the same day. McIntosh & Brooke."

On 12th of November, 1877, a writ of certiorari was issued by the clerk of the United States circuit court, on application of the defendant, to the clerk of the corporation court of Norfolk, returnable at Richmond forthwith. The plaintiff now (December 3d, 1877) moves to quash the writ of certiorari and dismiss the defendant's petition.

HUGHES, District Judge. The constitution of the United States extends the judicial power of the United States to "all controversies between citizens of different states," so far as it shall be vested by act of congress in the United States courts. Section 3 of the judiciary act of congress of March 3, 1875, provides that any suit in a state court in which there shall be a controversy between citizens of different states, and in which the value in controversy exceeds $500, may be removed into the circuit court of the United States for the district where the suit is pending, on the petition of any party to such suit. The act directs, that if such party files his petition for removal in the state court at the term at which the suit could be first tried and before the trial, and also files therewith a bond, with sufficient security, for his entering in said United States circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said United States circuit court if its decision should be against him—it shall then be the duty of the

state court to accept said petition and bond, and proceed no further in such suit. It further directs that, on the said copy being entered as aforesaid in said United States circuit court, the cause shall then proceed in the same manner as if it had been originally commenced in the said United States circuit court.

Section 5 provides, that if it shall at any time appear to the satisfaction of said United States circuit court, etc., that such suit does not really and substantially involve a controversy properly within its jurisdiction, or that the parties to said suit have been improperly or collusively made or joined for the purpose of creating a case cognizable or removable under this act, the United States circuit court shall proceed no further therein, but shall dismiss the suit, or remand it to the court from which it was removed. Section 7 provides that in the event that the session of the United States circuit court held next after the filing, in the state court, of the petition and bond for removal, should commence earlier than twenty days thereafter, then the party obtaining the removal may have twenty days within which to present the copy of the record to the said United States circuit court. This is the latest enactment of congress on the subject and revises all previous acts, and repeals them so far as they are inconsistent with its provisions. It will be seen that the constitution of the United States gives either party to a controversy, in which the parties are residents of different states, the privilege of having his rights determined by a court of the United States; and gives congress the authority to prescribe, by law, how and under what conditions that right may be exercised, in those cases where the suit has been brought in a state court. Section 3 of the judiciary act of 1875 makes the mere filing in the state court, of the petition and the bond, all that is necessary to stay the proceedings of the state court, and makes it "the duty of the state court," on this filing, to suspend its proceedings. Section 5, in as plain terms as the English language affords, gives to the United States circuit court complete jurisdiction to determine whether the suit was one that could be properly removed; and to decide, after making such determination, what to do with the suit; whether to proceed in it, or to remand it to the state court, or to dismiss it outright. Such is the spirit, such the language, such the intention, and such the force and effect of the act of congress of March 3, 1875 (18 Stat. 470–473), which being passed in pursuance of the paramount organic law, is thereby, as to this particular subject, paramount to any law of state enactment or adoption, relating to the jurisdiction of the state court. By the filing of the petition and bond in the state court, showing that the controversy is one "between citizens of different states," the jurisdiction of the state court from that moment ceases, and all that that court may do in the matter afterwards is coram non judice, null and void. The question of the sufficiency of the bond itself, the competency of the petition, the validity of the removal, and each and all questions arising upon the petition, are taken away by this law from the state court, and reserved by section 5 for the United States circuit court, to be passed upon in the exercise of the unembarrassed and undivided jurisdiction which this act gives it, under the authority of the constitution, over all "controversies between citizens of different states."

Practically, the action of the corporation court of Norfolk defeated the constitutional right to which the defendant company in this suit was entitled,—to have its controversy tried and determined in a federal court. The motion for removal on the 18th of September, accompanied by petition and bond, was overruled by that court, although it was in time, being made at the term of the state court "at which it would be first tried, and before the trial." I suppose that court acted on some law of congress relating to removals of suits, of prior date to the act of 1875 now in force. The mere fact that counsel not regularly employed, and acting for the regular counsel, who was sick in another city, had moved for a continuance on or about the first day of the term, had no effect in law on a question of constitutional right, and could not deprive the client of the moving counsel of his right to avail himself of the privilege of removal which he still had upon filing petition and bond at that term and before a trial. The effect of the refusal of the state court to allow the removal though nil in law, yet practically resulted in putting the defendant to the care and labor and expense of preparing for and going through a trial, and afterwards of securing an appeal to the appellate state court, from the decision against him of the corporation court of Norfolk.

The defendant by counsel, in argument, avers that in consequence of being thus preoccupied and engaged with the defence and appeal, it neglected to file a copy of the record of the state court in this court within the twenty days prescribed by the judiciary act of 1875, § 5. The record of the state court was not filed, either on the 1st of October, which was the commencement of the term of this court at Richmond, or within twenty days from the 18th of September in the court at Richmond, or in this court on the first day of its fall term at Norfolk, which was the 5th of November. Not having been filed within the time allowed by law, the suit has not been removed to this court.

I will say a word passim as to the place to which the suit should have been removed. The suit having been brought in the state court at Norfolk, the proper place to which it should have been removed was to the United States circuit court at Norfolk; and the proper time at which to file the record

there was at the November term, which commenced on the 5th day of that month. The case was not properly removable to the United States circuit court at Richmond, the fall term of which began on the 1st of October. The plaintiff in the suit had a right to have the suit heard in the United States circuit court at the place at which it was brought, if a United States circuit court was held there; and it would have been erroneous for the defendant to have removed it to the United States circuit court at Richmond. The copy of the record of the state court not having been filed in the United States circuit court at Norfolk before the first day of its November term, nor the defendant's appearance entered there on that day, it follows that the suit has not been removed in the manner prescribed by the judiciary act of 1875, and this court is, therefore, without jurisdiction to entertain or proceed in it.

The fact that the defendant lost his right of removal in consequence of the action of the state court, cannot operate in any way to confer upon this court a jurisdiction which was not secured to it by a compliance, on defendant's part, with the requirements of the act of 1875. He should have filed his record and entered his appearance on the first day of the November term of this court at Norfolk, independently of and notwithstanding the action of the state court. It is to be regretted that the defendant has lost a constitutional right; but there is no power of redress lodged in this court under the circumstances attending this case. The right of choosing the forum is given by the constitution and laws to either party to the controversy. It is the will of the party, expressed in the manner prescribed by law, which determines the forum; and his expression of that will ought not to be treated by the state court as an act invidious towards itself. Though in form the party chooses between courts, his choice is really a preference between a jury selected, as in the United States court, from a large district of country, and a jury selected, as in the state court, from a single county or town. It is the will of the party to the suit, I repeat, which determines the forum which shall try and decide the controversy. Unless that will is expressed to the contrary, the state court has full jurisdiction of the suit and of all questions incidental to it. After its expression, this full jurisdiction passes by the will of the petitioner, and not by any seeking of the federal court, to the federal forum. The federal court has then no more power to decline the jurisdiction than the state court to retain it. Nothing could be more unseemly than a struggle between the two courts for a jurisdiction which the law and constitution of the land makes subject alone to the bona fide volition of either party to the controversy. For a long time congress gave this right to the non-resident defendant alone—not exhausting the power and discretion intrusted to it by the national constitution. Now, however, that right is given to "either party" (18 Stat. 471, § 2,) to a controversy between citizens of different states, whether resident or non-resident, whether plaintiff or defendant. The enlargement thus of this right by congress is in pursuance of an express provision of the national constitution as it came from its illustrious framers in 1787, and is not a just ground of criticism or complaint by any state court. The motion to quash the writ of certiorari and to dismiss defendant's petition is therefore granted.

Case No. 2,922.

COBB v. HAMLIN.

[3 Cliff. 191;[1] 8 Int. Rev. Rec. 121.]

Circuit Court, D. Massachusetts. Oct. Term, 1868.

CUSTOMS DUTIES—ACT OF MARCH 3, 1865—DUTIABLE VALUE—MARKET VALUE.

1. Under the act of the 3d of March, 1865 [13 Stat. 493], the dutiable value of imported merchandise is the actual market value, or wholesale price thereof at the period of exportation to the United States, in the principal markets of the country from which the same was exported, without any addition for commissions, brokerage, costs of transportation, shipment, or transshipment, or other like costs in placing the goods on shipboard.

2. Where goods are purchased in the foreign market in bulk, and subsequently to the purchase put into the packages, boxes, or coverings by the buyer for convenience or preservation, actual market value does not include such packing, under the act of March 3, 1865.

[Cited in Meyers v. Shurtleff, 23 Fed. 579. Explained in Oberteuffer v. Robertson, 24 Fed. 853.]

[3. Cited in Harding v. Whitney, Case No. 6,052, as to the rule for assessing duties under the provisions of the act of August 30, 1842, § 16 (5 Stat. 563), by which all costs and charges are to be included in the actual "market value."]

At law. Assumpsit [by Samuel C. Cobb against Hannibal Hamlin] to recover certain duties paid under protest. Facts agreed, of which the following are the material ones:—Five invoices of lemons and oranges packed in boxes were imported from Palermo, Sicily, into the port of Boston, and were duly entered for consumption or warehousing by the plaintiff, as consignee of the respective invoices. They were imported and entered at the custom-house between the 18th of November, 1865, and the 14th of April, 1866. The parties agreed that the lemons and oranges were purchased at Palermo by the shippers in bulk, at certain rates by the thousand, and were then "one by one" wrapped in paper and packed in boxes furnished by the purchaser, for the purpose of preserving the fruit, and for more convenient shipment. The net cost and value of the lemons and oranges in bulk, embraced in the five invoices, was, at the

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

place of exportation, $8,549, exclusive of the cost of the boxes and packing; and all other costs and charges for the boxes, nails, packing-paper, charges of shipment, and other charges, besides the cost and value of the lemons and oranges imported, were $7,852 [as shown by the agreed statement].[2] The finding of the appraisers was, that the invoice value of the cost of the lemons and oranges was, as purchased in bulk, correct, but they added the sum of $7,872, as the costs and charges for the boxes and packing, etc., and for the other charges, which was agreed to be correct in amount, if it was properly to be added, in ascertaining the dutiable value of the merchandise. The amount of the duties assessed and collected was $3,836.75, of which $1,864.50 were assessed on the costs and charges, added to the invoice value. The plaintiff duly protested, and seasonably appealed to the secretary of the treasury, but the department affirmed the doings of the collector. Dissatisfied with the decision of the department, the plaintiff instituted this suit to recover back the duties assessed upon the costs and charges, which he insisted were illegally exacted. Judgment was to be rendered in favor of the plaintiff for that sum, if none of the costs and charges, as expressed in the invoices, were properly added to the invoice value of the lemons and oranges, in order to ascertain the dutiable value of the importation, with interest from such time as the court might determine to be just and right. But if the court should be of the opinion that the whole amount of the costs and charges was properly added to the invoice value of the oranges and lemons, as purchased in bulk, then the judgment was to be for the defendant.

Jewell and Gaston, for plaintiff.

The words "actual market value" and "wholesale price" have received judicial construction, and this construction excludes costs, charges, and boxes, etc. Barnard v. Morton [Case No. 1,005]; Grinnell v. Lawrence [Id. 5,831]; Wilson v. Maxwell [Id. 17,824]; Wilbur v. Lawrence [Id. 17,635]; Belcher v. Linn, 24 How. [65 U. S.] 535; Knight v. Schell, 24 How. [65 U. S.] 530; Reg. Treas. Dept. 1857, p. 177, § 305; Id. p. 177, § 306; Id. p. 193, § 364. Under former laws which included costs and charges in the dutiable value, the "sacks, hogsheads, etc." were included in the costs and charges, and were added to the appraised value of the commodity. Belcher v. Linn, 24 How. [65 U. S.] 535, and other cases cited above. That it was the intention of congress to create a new and different rule, which should exclude all costs and charges from the dutiable value, is seen by comparing the phraseology of the seventh section of the act of 1865 with that of previous acts. 1. Compare first part of section 7, Act 1865 [13 Stat. 493], with section 1, Act March 3, 1851 (9 Stat. 629). 2. Compare same with section 16, Act Aug. 30, 1842 (5 Stat. 563). 3. Compare the rest of section 7, Act 1865, beginning at twelfth line, with section 23, Act June 30, 1864 (13 Stat. 226).

If a subsequent statute professes, or manifestly intends, to regulate the whole subject to which it relates, it repeals all former statutes so far as it differs from them. Daviess v. Fairbairn, 3 How. [44 U. S.] 636; Dexter & Limerick Plank-Road Co. v. Allen, 16 Barb. 15; Illinois & M. Canal v. Chicago, 14 Ill. 342. If the act of 1865 contained no repealing clauses, it would make a complete and perfect rule for assessing duties on the merchandise in question, excluding all costs and charges, and would by necessary implication repeal all previous statutes providing a different rule. Farr v. Brackett, 30 Vt. 344. But the act of 1865 goes further, and in express terms repeals the act of 1864; and all acts and parts of acts requiring duties to be assessed upon commissions, brokerages, costs of transportation, shipment, and other like costs and charges incurred in placing any goods, wares, or merchandise on shipboard, and all acts and parts of acts inconsistent with its provisions. All acts which provide a different rule for assessing duties are inconsistent with the act. The words "costs and charges" include boxes. Barnard v. Morton [Case No. 1,005]; Belcher v. Linn, 24 How. [65 U. S.] 535; Knight v. Schell, 24 How. [65 U. S.] 530.

"Laws imposing duties are never construed beyond the natural import of the language used, and duties are never imposed upon the citizens upon doubtful interpretations, for every duty imposes a burden upon the public at large, and is construed strictly, and must be made out in a clear and determinate manner from the language of the statute." Adams v. Bancroft [Case No. 44]; Powers v. Barney [Id. 11,361]. "Revenue and duty acts are to be construed according to the true import and meaning of their terms; and when the legislative intention is ascertained, that, and that only, is to be our guide in interpreting them." U. S. v. Breed [Id. 14,638]. "Statutes levying duties on citizens or subjects are to be construed most strongly against the government, and in favor of the citizen." U. S. v. Wigglesworth [Id. 16,690]; U. S. v. Morse [Id. 15,820]. "As congress wishes to foster an honest and honorable commerce by its laws, no less than to obtain revenue, it is neither the true policy nor the right of departments or of the courts, nor is it presumed to be their desire, to thwart the views of congress, or embarrass mercantile business when not attended by equivocation and fraud, or to throw doubts or difficulties over the liberal course proper to be pursued generally towards the community in any branch of

[2][From 8 Int. Rev. Rec. 121.]

trade." Marriott v. Brune, 9 How. [50 U. S.] 635.

W. A. Field, Asst. U. S. Atty.

1. Some of the statutes relating to the dutiable value of merchandise and what are to be included in making up the value on which ad valorem duties were or are to be levied are the following: Section 17, c. 5, 1789 (1 Stat. 41); section 39, c. 35, 1790 (1 Stat. 167); section 3, c. 17, 1795 (1 Stat. 411); section 61, c. 22, 1799 (1 Stat. 673); chapter 51, 1817 (3 Stat. 369); section 4, c. 79, 1818 (3 Stat. 434); section 5, c. 21, 1823 (3 Stat. 732); sections 7, 15, c. 227, 1832 (4 Stat. 591, 593); section 16, c. 270, 1842 (5 Stat. 563); section 1, c. 38, 1851 (9 Stat. 629); section 28, c. 68, 1861 (12 Stat. 197); section 24, c. 171, 1864 (13 Stat. 217); repealed by section 4, c. 80, 1865 (13 Stat. 493); section 9, c. 298, 1866 (14 Stat. 330).

Up to 1823 the cost was the basis of dutiable value, a percentage was usually added, and the cost of outside packages was in general excluded; by the act of 1823 (section 5) the actual cost if purchased; the actual value if procured otherwise than by purchase, and at the time and place when and where the merchandise was purchased or procured; the appraised value if appraised, with all charges added, except insurance, made the dutiable value. Section 15 of act of 1832 is substantially the same as the section 5, Act 1823, except the addition of a percentage is omitted. Section 16, Act 1842, makes the dutiable value the actual market value or wholesale price, at the time when purchased, in the principal markets of the country, with all costs and charges, except insurance, added, including charge for commissions. Section 9, Act 1851, extends to all merchandise whether purchased or not, and makes the period of exportation the time, and no other material changes. Section 28, c. 68, 1861, makes day of actual shipment the time, the words "period of exportation" having been held to be the day of sailing. Section 24, c. 171, 1864, makes the actual value of such goods on shipboard at the last place of shipment the dutiable value, adding the cost of transportation from the place of growth, etc., of shipment or transshipment, and all expenses included by land or water to the vessel in which shipment is made to the United States, the value of the sack, box, or covering of any kind, commission, etc., brokerage, export duties, and all costs and charges paid or incurred for placing such goods on shipboard, and all other proper charges specified by law. Section 7, c. 80, 1865, makes the actual market value or wholesale price at the period of exportation to the United States, in the principal markets of the country whence exported, the dutiable value, and expressly repeals the section 24, of the act of 1864, and all acts or parts of acts requiring duties assessed upon commission, brokerage, cost of transportation, shipment, transshipment, and other like costs and charges incurred in placing the merchandise on shipboard, and repeals all acts and parts of acts inconsistent with this act. This act took effect on April 1, 1865, and the seventh section remained in force until the act of July 28, 1866, section 9 of which (14 Stat. 330) substantially enacts the section 24 of the act of 1864, except the one makes the actual value on shipboard at the last place of shipment the dutiable, and the other, the actual wholesale price or general market value, at the time of exportation, in the principal markets of the country from whence the same shall have been imported, the dutiable value. The main change in the law of 1865, from that of 1864, is a return to the system of valuation on the basis of the market values in the principal markets of the country, and not a valuation of actual value at the last place of shipment, made up of the actual value at the place of growth, with the charges of transportation and shipment added. There is no express repeal of either the act of 1851 or the act of 1842. General Regulations, pp. 76, 77; also section 370. And such are the decisions of the courts. Barnard v. Morton [supra]; Gant v. Peaslee [Case No. 5,212]; Warren v. Peaslee [Id. 17,198].

Excepting commission, brokerage, and insurance, there were two classes of costs and charges, the first being the costs and charges of putting the merchandise into the form in which it entered into trade and commerce, as putting lemons into boxes; and the second being the cost of transporting this merchandise to the place of shipment and putting it on board. In the law of 1865, it seems to have been regarded that the importation began when the merchandise began to be transported. Section 9 names commission, brokerage, cost of transportation, shipment, transshipment, and other like costs and charges incurred in placing any goods, wares, and merchandise on shipboard.

Repeals by implication are not favored, and are carried no further than direct and absolute repugnancy or inconsistency requires. The section 9, of the act of 1865, is not repugnant to either the act of 1842 or 1851, in the matter of adding the first class of charges in making up the dutiable value, and the language of the section 9, by a well-known rule of construction, excludes any such intention. The section 31, of the act of 1861, expressly repeals all acts and parts of acts repugnant to its provisions, and section 28 of the same act is, that the duty shall be estimated upon the value on the day of actual shipment; yet the practice of the department was, to regard the act of 1861 as only changing, in the specified cases, the time to which the valuation relates, from the period of exportation to the day of actual shipment, as the act of 1851 had changed the act of 1842, which in certain cases fixed the time when the merchandise was purchased as the time to which the valuation relates, and the department insisted upon the same addition of costs and charges

under the act of 1861, as under the acts of 1851 and 1842.

This question is very different from one that arises under specific duties, that is, where the law imposes a duty of five cents per pound on merchandise. The law may establish an arbitrary tare for boxes, barrels, and bales, and then the rule established by law must prevail; but in the absence of all law expressly establishing the tare, it might perhaps be held that the five cents per pound is leviable only upon the net weight. See Wilson v. Maxwell [Case No. 17,824]. This case is also distinguishable from a case where the merchandise is for convenience packed in a box, which merchandise is not customarily bought and sold by the box, and a box of which has no well-known commercial meaning. Oranges and lemons in boxes are for commercial and tariff purposes like molasses in hogsheads, or liquors in casks, barrels, and bottles; the boxes, hogsheads, casks, barrels, and bottles are not regarded as independent importations, and are not dutiable as such, but as incidental and annexed to their contents, forming altogether well-known articles in commerce and trade.

CLIFFORD, Circuit Justice. Collectors of the customs within whose districts merchandise subject to an ad valorem rate of duty was imported or entered, were required by the act of the 3d of March, 1865, to cause the actual market value or wholesale price thereof, at the period of the exportation to the United States, in the principal markets of the country from which the same was imported into the United States, to be appraised, and the act provided that such appraised value should be considered the value upon which the duty should be assessed. 13 Stat. 493.

Throughout the period of these importations the act of the 3d of March, 1865, was in full force and operation. Reference to the ninth section of the act will show that it went into operation on the 1st of April after it was passed, and it continued in force until the 10th of August of the following year. 14 Stat. 328. Actual market value of imported merchandise subject to any ad valorem rate of duty was required by the sixteenth section of the act of the 30th of August, 1842, to be estimated, ascertained, and appraised as it was in the principal markets of the country from which the same was imported, and at the time when the merchandise was purchased, and the provision was, that to such value or price should be added, as the true value upon which the duties should be assessed, all the costs and charges, except insurance, and including in every case a charge for commissions at the usual rates. 5 Stat. 563.

The same provision was incorporated into the appraisement act of the 3d of March, 1851, except that the requirement in that act is, that the actual market value or wholesale price of the merchandise shall be appraised, estimated, and ascertained at the period and place of exportation. 9 Stat. 629. Costs and charges, as distinguished from the actual market value of the merchandise, were under those acts properly added to such market value, as the means of ascertaining the dutiable value of the importation at the port where the merchandise was entered. Knight v. Schell, 24 How. [65 U. S.] 531. Whenever a properly certified bill of lading is presented, showing the day of actual shipment, the twenty-eighth section of the act of the 2d of March, 1861, provides that the duty shall be estimated and collected on the day of actual shipment. 12 Stat. 197.

In determining the valuation of goods imported from foreign countries, the twenty-fourth section of the act of the 30th of June, 1864, provides that the actual value of such goods on shipboard at the last place of shipment to the United States shall be deemed the dutiable value, except in certain cases not necessary to be noticed. Such value, the same section provides, shall be ascertained by adding to the value of the goods at the place of growth, production, or manufacture, the cost of transportation, shipment, and transshipment, with all the expenses incurred from the place of growth, production, or manufacture, whether by land or water, to the vessel in which shipment is made to the United States, and the value of the sack, box, or covering of any kind in which such goods are contained, commission at the usual rate, in no case less than two and one half per centum brokerage, and all export duties, together with all costs and charges paid or incurred for placing said goods on shipboard, and all other charges specified by law. 13 Stat. 217. Comment upon that provision is unnecessary, as it is clear that if the respective importations in this case had been made under it, the plaintiff would have no claim to recover back any portion of the duties assessed by the collector. But the lemons and oranges in this case were imported under the act of the 3d of March, 1865, which required the collector within whose district the same were entered to cause the actual market value or wholesale price thereof at the period of the exportation to the United States, in the principal markets of the country from which the same was imported, to be appraised; and the same section also provides in express terms "that such appraised value shall be considered the value upon which the duty shall be assessed." Still the views of the department might be sustained if the twenty-third section had been continued in force; but that section is in terms repealed by the second provision of the seventh section of the act under which the respective importations were made. 13 Stat. 494. Section seven also enacts that all acts and parts of acts requiring duties to be assessed upon commissions, brokerage, cost of transportation, shipment, transshipment, and other like

costs and charges incurred in placing any goods, wares, or merchandise on shipboard, shall be repealed, and expressly provides, in conclusion, that all acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

Expressed, as the intention of congress is in that provision, in plain and unambiguous language, it furnishes the absolute rule of decision which is obligatory upon the court. Under that provision, therefore, the dutiable value of imported merchandise is the actual market value or wholesale price thereof at the period of exportation to the United States, in the principal markets of the country from which the same was imported into the United States, without any addition for commissions, brokerage, costs of transportation, shipment, or transshipment, or other like costs and charges in placing the goods on shipboard.

If any confirmation of this view be needed, except what is derived from the language employed, it is found in the fact that congress on the 28th of July, 1866, re-enacted in substance and legal effect the provision requiring that all such costs and charges should be added to the actual market value, as the basis for the assessment of the duties. 14 Stat. 330. Considered in any point of view, it is quite clear that the dutiable value of merchandise imported between the 1st of April, 1865, and the 10th of August of the following year, when the existing act went into operation, was only the actual market value thereof, to be appraised, estimated, and ascertained as before explained.

Such being our conclusion, it only remains to ascertain whether the costs and charges in this case are properly to be regarded as an element of the actual market value of the merchandise within the meaning of that act of congress. Some descriptions of goods are purchased and sold in the foreign market in bulk, and are subsequently to the purchase and sale put into boxes, packages, or coverings, by the purchaser, for the preservation of the merchandise and the convenience of shipping. Other descriptions are put into boxes, packages, or coverings by the producer, manufacturer, or wholesale merchant in the foreign country, and the merchandise is there purchased and sold for exportation in the boxes, packages, or coverings in which it is so placed by the producer, manufacturer, or wholesale merchant. The actual market value in the former case does not include the cost of the box, package, or covering within the meaning of that act of congress, as the boxes, packages, or coverings in such cases are purchased by the shipper, as the means of preserving the goods, and for the convenience of shipment. But no doubt is entertained that the words "actual market value," without more, would include the cost of the box, package, or covering in all cases where the merchandise in question was actually purchased in the box, package, or covering, and is usually so purchased and sold for shipment in the foreign market, and where the price includes the box, package, or covering as well as the goods therein contained. Barnard v. Morton [Case No. 1,005]; Grinnell v. Lawrence [Id. 5,831]; Belcher v. Linn, 24 How. [65 U. S.] 535; Knight v. Schell, 24 How. [65 U. S.] 530; Wilson v. Maxwell [Case No. 17,824].

The defendant as well as the plaintiff agrees, that the general custom of shippers of lemons and oranges at Palermo is, if the fruit is purchased in bulk, to have it packed in boxes for shipment in substantially the same manner as the lemons and oranges were packed in this case. All of the lemons and oranges in this case were purchased in bulk at a certain rate by the thousand, and were afterwards selected and packed "one by one" in boxes, and transported to the place of shipment. Evidently the expense of the boxes and the labor of selecting and packing the fruit were wholly separate from the price paid in the purchase of the same, and it is equally clear that it was incurred to preserve the fruit, and for the convenience of shipment. Undoubtedly such fruit is usually bought and sold here, by wholesale merchants and jobbers, in the boxes, and without any additional charge for the box, but that circumstance cannot affect the question under consideration, as the inquiry is as to the actual market value or wholesale price of the merchandise in the principal markets of the country from which the same was imported.

Judgment for the plaintiff for the sum of $1,864.50, with interest from the time of actual payment.

Case No. 2,923.

COBB v. HAYDOCK et al.

[Brunner, Col. Cas. 91;[1] 4 Day, 472.]

Circuit Court, D. Connecticut. 1810.

SET-OFF—JOINT DEBT AGAINST INDIVIDUAL DEBT.

Where a judgment has been obtained against one of two joint makers of a promissory note, by an indorsee thereof, the former cannot, either at law or in equity, set off a note given by the payee to him individually.

This was a bill in equity praying for a set-off. The case, as it appeared from the bill and answer, was as follows: "The respondents [Henry Haydock & Son] recovered judgment before this court, at this term, against the complainant [Judethan Cobb] in a suit in the name of Stephen Howard, brought on a promissory note for $1,016.68, executed by the complainant and Ashbel Stanley, dated the 24th of February, 1796, payable to Howard on the 1st of October following, with interest after six months. On the 22d of December, 1795, the respondents sold goods to Howard to the amount of £371 9s. 10d. New York currency, on credit; and on the 26th of

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

April following they received from him said note in payment, it being agreed that the surplus should be paid in goods at that time, which were accordingly delivered. Stanley was present at this transaction. One of the respondents asked him if the note was good, and would be paid, to which he answered in the affirmative, observing that he was as willing to pay it to them as to any one. Soon after the assignment of the note the respondents directed their clerk to give notice to the complainant, which they believe was done without delay. The complainant, however, denied having received notice of the assignment until October, 1796. On the 24th of March, 1796, Howard being justly indebted to the complainant in the sum of £100 lawful money of Connecticut, to secure the payment thereof gave his promissory note for that amount, payable to the complainant on demand, with interest after fourteen months. On the 1st of April, 1796, Howard became insolvent, and absconded, having never paid any part of this note. Stanley is a certificated bankrupt, and the complainant has no remedy at law that will be available. The respondents, at the time they received the note first mentioned, had no knowledge of Howard's indebtedness to the complainant, or that he had ever given him a note as above stated. They avowed their intention to sue out execution on the judgment against the complainant. The bill therefore prayed the court, as a court of chancery, to decree the said sum of £100, and interest may be set off and applied in part satisfaction of said judgment, and to grant an injunction for a stay of proceedings.

J. T. Peters, for complainant, contended that the court ought to decree a set-off in this case, on the principle that an assignee takes a note subject to the same equity to which it was subject in the hands of the assignor. Haydock & Son had no more right here than Howard would have had if he had retained the note. In that case there could not have been a question as to the complainant's right of set-off. The case of Mitchell v. Oldfield, 4 Term R. 123, was cited.

Mr. Daggett, for respondents, said that a note executed in Connecticut, and negotiated in New York, might, in the state of New York, be sued in the name of the assignee. Lodge v. Phelps, 1 Johns. Cas. 139. Stanley told Haydock & Son at the time of the assignment that the note was due, and he was willing to pay it. The declarations of Stanley are to be imputed to Cobb. The acknowledgment of one co-partner saves a debt out of the statute of limitations. Whitcomb v. Whiting, Doug. 652. Set-offs are made only in case of mutual debts between the same parties. This is true in chancery as well as in law. Ex parte Ockenden, 1 Atk. 237. If I have a note against B. and afterwards execute a note payable to him or order, that he may sell it and raise money, and yet neglect to deduct my own note against him, it is more equitable for me to pay the note thus sold, than for the assignee to lose it.

LIVINGSTON, Circuit Justice. In deciding this cause we shall have no reference to the case of Lodge v. Phelps [supra]. Who has the greatest equity to this money, Cobb or Haydock & Son? The note in question is a joint note against Cobb and Stanley. Before receiving an assignment Haydock & Son consult Stanley, and are assured that the note will be paid. Haydock & Son then sell their goods on the specific security of this note. Cobb stands in a different situation. He trusted to the personal security of Howard. The equity of the case is most clearly in favor of Haydock & Son. But if this case were to be decided at common law the result would be the same. Here is a joint note against Cobb and Stanley. Howard's note to Cobb alone could not have been set off at law against the note of Cobb and Stanley to him, if no assignment had been made. The note of Howard is not reduced to judgment, and therefore the case of Mitchell v. Oldfield [supra] does not apply. Bill dismissed with costs.

Case No. 2,924.

COBB v. HOWARD et al.

[3 Blatchf. 524.] [1]

Circuit Court, S. D. New York. Sept. 23, 1856.[2]

ADMIRALTY — BREACH OF CONTRACT OF PASSAGE — SUIT BY TRANSFEREE OF TICKET.

1. It is every day's practice, in the admiralty, to allow suits to be brought in the name of the assignee of a chose in action.

[Quoted in The Sarah J. Weed, Case No. 12,350. Cited in Minturn v. Alexandre, 5 Fed. 119.]

2. The transferee of a passage-ticket can bring an action in personam in his own name, in the admiralty, for a breach of the contract contained in the ticket.

3. Where A. contracted, at New York, to have a vessel at Panama at a certain time, to carry passengers to San Francisco, and received their fare in advance, but the vessel, being disabled, by stress of weather, on her voyage from New York to Panama, did not arrive there by the time specified, *held*, that this was no excuse for the non-fulfilment of the contract, and that A. was liable to return the passage-money.

4. Until a passenger becomes connected with a vessel as a passenger on board, he is in no way subject to her casualties or misfortunes occurring through stress of weather or otherwise.

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

This was a libel in personam, filed in the district court, to recover the sum of $1,500

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

[2] [Affirming Case No. 2,925.]

and interest, for the breach of a contract, made at New York, to convey ten passengers in the steamship New Orleans from Panama to San Francisco, the vessel to leave on her trip in the month of April, 1850. The fare paid was $150 for each passenger, and an engagement was given for each passage in the form of a ticket. The ten purchasers presented themselves at Panama on the 1st of April, to take their passage; but the vessel had not then arrived, and did not arrive till the month of August following. She left the port of New York in February, but encountered rough and stormy weather, and was obliged to put into St. Thomas for repairs, where she was detained a long time; and this was probably known to the passengers at Panama. The brig Anna, belonging to the libellant [William Cobb] was at that place in April, and sailed from thence to San Francisco on the 3d of the month. The ten passengers took passage in her, and transferred their tickets to her master for their fare, and he transferred them to the libellant. The district court decreed in favor of the libellant [Case No. 2,925], and the respondents [John T. Howard and others] appealed to this court.

Welcome R. Beebe and Charles Donohue, for libellant.

Francis B. Cutting and John Sherwood, for respondents.

NELSON, Circuit Justice. It is objected that this suit is not brought in the name of the original parties to the contract; but it is every day's practice, in the admiralty, to allow suits to be brought in the name of the assignee of a chose in action. The libellant is the real owner of the tickets, and, therefore, the proper person to bring the suit, and in his own name.

It is also objected, that the disabling of the New Orleans by stress of weather excuses the fulfilment of the contract at the time provided for. How this might be in a case where the passenger was on the vessel at the time of the casualty which caused the delay in the voyage, it is not now necessary to determine. Certainly, until the passenger becomes connected with the vessel as a passenger on board, he is in no way subject to her casualties and misfortunes, occurring through stress of weather or otherwise. He is a stranger to her. The contract bound the owner to have his vessel at the place and time designated. He had stipulated that as part of the consideration for the price paid, and had assumed the responsibility of performance; and the failure operated as a breach of the engagement, and made him liable to return the price paid. The winds and waves, or the weather, are no excuse for the non-fulfilment of the contract as to the time of the commencement of the voyage. If those circumstances had been intended as elements of it, they should have been expressly provided for by the owner; and then all parties concerned would have understood it.

It is said that the passengers should have waited at Panama through the month of April, and that the owner had the whole month to furnish his vessel there. Admitting that he had the month, the utmost that can be claimed is, that the passengers took the risk, if the vessel arrived within the month, of losing their right to demand a return of the fare. There was no abandonment of the voyage, for the tickets for the passage-money were appropriated to the completion of it. The passengers doubtless knew the disabled condition of the New Orleans, and that she could not arrive at Panama in time to fulfil her engagement; and it would have been an idle act to have waited through the month, especially as there seems to have been no provision made by the owners for the substitution of another vessel, nor indeed, for aught that appears, any interest or concern taken in the matter.

The decree below was right, and should be affirmed.

Case No. 2,925.

COBB v. HOWARD et al.

[10 N. Y. Leg. Obs. 353.]

District Court, S. D. New York. April 30, 1852.[1]

ADMIRALTY—BREACH OF CONTRACT OF PASSAGE—SUIT BY ASSIGNEE OF PASSENGERS—JOINDER OF DEMANDS—PLEADING AND PROOF.

1. The assignee of a maritime contract, not negotiable, may sue upon it in admiralty in his own name; and may unite in one action several demands against the same defendant, although derived from different assignees.

2. A ticket issued by a ship owner, acknowledging the receipt of money for a passage in the ship, imports an engagement on his part to give the conveyance, and on failure to furnish it to the person paying the money, an action will lie for recovering it back in the name of his assignee.

3. Such contract made in New York, to convey a passenger in a specified steamship from Panama to San Francisco, in the month of April, is broken if the ship fails to arrive at Panama during that month.

4. The owner has the entire month within which to perform the undertaking; but an offer to furnish the passage in a different ship is not a satisfaction of the contract.

5. If the steamship does not arrive at that port until after the month of April, the passage money is recoverable, although the passenger did not wait in Panama the expiration of the month, but shipped therefrom on the 3d of April.

6. Neither party can give proofs against or out of the allegations of the pleadings.

7. Formal amendments may be allowed at any stage of a cause.

[In admiralty. Libel by William Cobb against John T. Howard and others for breach of a passenger contract.]

[1] [Affirmed in Case No. 2,924.]

BETTS, District Judge. The important traffic in the transportation of passengers, by steamships between New York and California, from its great extent and the numerous complications attending its execution, will doubtless present interesting questions for adjustment by the courts of law.

The defendants established a line of steamers in that trade, composed of vessels plying on this side of the continent, between New York and Chagres, and on the other, between Panama and California, designed to be so arranged that passengers arriving by either route would find a ship ready to receive and transport them to their destination on the other; and accordingly passages could be secured and the passage money paid at either place of departure for the entire water route between New York and San Francisco, the same as if not interrupted by any transhipment and land conveyance; or passages and berths might be secured at either place on board a particular ship from the Peninsula, without regard to the manner in which the passengers arrived at her place of departure. The defendants prepared an additional steamship, the New Orleans, which was to be added to their line, and to leave New York for San Francisco in February, 1850. She was to commence her trips at Panama and depart from that place in April thereafter with passengers to San Francisco. Tickets for passages and berths on board the New Orleans from Panama to San Francisco were sold in New York to a large amount. In January and February, 1850, the fourteen tickets mentioned in the pleadings, and produced by the libellant as the foundation of his demand in this case, were thus purchased here by individuals, and the sums of money specified in them respectively, were at the time paid to the defendants by the purchasers.

The tickets were printed forms, uniform in substance, having blanks filled in with writing to meet the facts of each particular case. The printed part was as follows:

First Cabin Ticket. Pacific Steamship New Orleans. J. Howard and Sons, Agents, 34 Broadway.

No. ——— Voyage ——— New York, ———
Received ——— dollars for the passage of ——— in the steamship New Orleans, from ——— in the month of ——— to the anchorage of ——— (Signed) J. Howard & Son.
State room ——— J. W. Corrington.
Berth ———

The first cabin ticket, filled up, reads:

No. 11 (printed reading as above). Voyage 1. New York, Feb. 11, 1850.
Received three hundred dollars for the passage of Mr. Kraft, in the steamship New Orleans, from Panama, in the month of April, to the anchorage of San Francisco.
State room 3. (Signed as above.)
Berth 8.

The second cabin tickets varied from that only in heading, "second cabin ticket," and in the amount of cash received, being $150 in each case, instead of $300.

The evidence is not direct and positive that each ticket was paid for by and delivered to the person whose name is written in it, but is sufficient to raise a satisfactory presumption that such was the fact, and that the purchaser proceeded with it to Panama, and was at that place, on the first day of April, to have advantage of the passage secured him by the ticket. The steamer New Orleans not being at Panama, ten of the persons named in the second cabin tickets took passage on the first day of April on board the bark Anna, owned by the libellant and commanded by Charles T. Robinson, and sailed in her for San Francisco on the third of April. Each of these persons paid for his passage with the ticket he had received from the defendants, which was accepted by Lane, the agent of the bark, at the valuation of $160, in full, for the passage money to San Francisco, to which place the passengers were transported by the vessel. These tickets were assigned by Lane to the libellant, in writing, on the 6th of August thereafter.

It is proved that tickets issued in New York for the same voyage on board the New Orleans, were sold in Panama to a large amount,—about $51,000,—and such sales were publicly made with the knowledge and approval of Folger, who was then there acting as general agent of the defendants in the business of their steamships, and that they were purchased and received in that market as evidence of money payable by the defendants to the holders. This evidence was objected to on the part of the defendants. The defendants had notice from their agent, Folger, by letter dated August 6, 1850, at Panama, that Mr. Lane was owner of the fourteen tickets now in question, and that the agent had promised him they would be redeemed in New York if sent there. This testimony was also objected to by the defendants. The defendants proved they had disavowed to Folger and repudiated his acts or declarations in relation to their responsibility for the tickets purchased at Panama. This evidence was objected to on the part of the libellant. The other two second cabin tickets and the two first cabin tickets were purchased in Panama by Lane, the agent of the bark; the consideration paid for them or the time of their purchase was not proved. They were bought of Garretson & Fritz, brokers at Panama. No direct transfer of the tickets by the passengers in writing was produced, and except in respect to ten given to the agent of the bark in payment for their passages by the persons named in them, is there any evidence who acquired the tickets from the persons to whom they were originally delivered.

The libellant places his right to a recovery upon the ground that the respondents having received the money specified in the tickets upon the promise to carry the persons paying it in the steamship New Orleans from Panama to San Francisco, they are responsible to those persons for the amount paid, having

failed performing the contract upon which the money was paid. That the whole amount is in their hands, money had and received by them for the use of the persons respectively who advanced it, and that the libellant, as the lawful owner of the certificates acknowledging the receipt of the money, is substituted in their places and rights and is entitled to recover it in this court in his own name.

The defence to the action is placed upon various points, some of them purely technical, and others contesting the legal liability of the defendants to any party or in any form of action under the facts of the case; for it is insisted that if the persons to whom the certificates or tickets were issued had sued for the recovery of the money advanced, there is no breach of the contract between them and the defendants proved in the case upon which a recovery could be founded. This position, I apprehend, would not be found tenable. The receipt given on payment of the passage price to the defendants necessarily imports an engagement on their part for that consideration to supply the persons paying the money a passage in the steamship New Orleans from Panama to San Francisco, in the month of April, 1850, and the use of a particular berth on board her. A refusal or omission to furnish either would be a breach of the agreement by the defendants, and they would thereby render themselves answerable to the person they contracted with for the consideration money advanced, if not for consequential damages. A contract to transport passengers by sea binds the owner and ship, and in case of its violation in any important particular, the party with whom it is made may recover back his passage money advanced, without offering to go in the ship, although she performs the voyage agreed for. The Pacific [Case No. 10,643].

The contract in this case was entered into at New York and the money was paid there, but on the part of the defendants it was executory, to be entered upon at Panama in the month of April thereafter, by taking the persons contracted with, on board the ship New Orleans and transporting them thence to San Francisco. I think upon the terms of the engagement the defendants had the entire month of April within which to enter upon the execution of the contract. If their ship was at Panama, ready to fulfil the undertaking at any time during that month, they would have complied with their engagement, and would be no way answerable to the passengers who failed to be there to accept such performance. I do not accede to the construction put upon the contract by the libellants' counsel, that the agreement as to time was for the April trip, intending thereby its commencement at Panama on the first day of April, subject only to temporary and unavoidable delays. The ship had to make her voyage from New York to Panama, and although she entered upon it on the 25th day of February, yet obviously it was contemplated between the parties she might not fulfil the expectation that she would reach Panama by the first of April, and to avoid all controversy in respect to her punctual arrival the stipulation was made to embrace the entire month. The passengers left New York for Panama between the 15th of March and the first of April, and as the ship had left this port on the 25th day of February preceding, and as appears upon the pleadings, had been disabled and compelled to put into St. Thomas for repairs, it is no more than a reasonable presumption that those facts were known at Panama on the first of April. The conduct of the agent of the defendants at that place clearly indicates that the condition of the ship was notorious, and that it was then well known she would be unable to reach that port within the month. She did not arrive there until the 23d of August thereafter. The agent took no steps in regard to the passengers; tickets which were bought by them to Panama for that ship were sold to an amount exceeding $50,000, and the evidence is that the agent was cognizant of those facts, and although when applied to he refused to refund the money to the holders, because he was not supplied with means to do it, yet gave assurance that they would undoubtedly be redeemed in New York by the defendants if sent there.

Without entering into enlarged comments upon this branch of the case, I think the true interpretation of the transaction is, that the ship owners would be acquitted of their obligation if they had the ship at Panama ready to perform their contract at any time during the month of April. But it is manifest that the holder of a ticket was entitled to be conveyed in that ship, and could compel the owners to refund the passage money paid them on failure to furnish the passage agreed for in the ship New Orleans. The offer to furnish a passage in another competent and safe vessel might, in this court as in equity, acquit them of responsibility in damages for failing to supply the particular conveyance contracted for, especially if proved that the defendants were prevented meeting their engagement by other causes than their own refusal or negligence, but it would not authorize them to retain the money advanced and insist on transporting the passenger in a different manner. This principle is plainly covered by the decision in the case of The Pacific [supra]. The passengers had a right to abandon the voyage and demand and recover back their passage money, on the failure of the ship owners to furnish them the passage contracted for. It might be different had they entered upon the voyage on board the ship and she had become disabled during its progress. In that case the rule in respect to cargo might apply, and the ship owners be entitled to retain the

money advanced on offering to transport the passengers in another vessel to their place of destination, and so also the reciprocal obligation on the owners might have arisen to forward the passengers at any expense.

The objection was raised by the answer and strenuously insisted on in the argument for the defendants, that this action could not be maintained in the name of the libellant, for two causes; first, that his demand rested upon choses in action and not upon any negotiable securities, and if the defendants are under any liability it is one personal to the parties taking the passage, and is not transferable to a third person; and secondly, if a debt accrues from the transaction to the passengers which is assignable, it is separate and distinct to each passenger, and the various demands when severally assigned cannot be united and compose one debt suable as an entirety by the assignee; and that the assignee in neither case can set up any title to the debt but by means of a written assignment. These exceptions resolve themselves into two heads—the form of the action and the sufficiency of the proof offered to support it. Under the first, the point is taken, that no right can be acquired to a chose in action by a third party without a formal written assignment transferring it; and that if legally transferred, an action upon it can be maintained only in the name of the obligee and assignor. In admiralty a party sues upon the right vested in him, and no distinction in the form of action is made between liabilities incurred directly to the libellant and those which came to him by assignment or succession, having been the property of others. The real parties in interest are the nominal ones in the proceedings. This is substantially so in equity. Story, Eq. Pl. § 153, note 1, p. 189. The action, then, is properly in the name of the party who owns the claim, and there is no necessity of distinct actions to enforce against the same party claims acquired from different sources, any more because the debts were originally created to different parties from whom they vest in the libellant, than if they had been incurred directly to the libellant, but upon diverse and independent considerations. The indebtment has become single, both in respect to the party demanding its payment and the one sought to be charged with it. Under such circumstances, the courts would compel a consolidation of the actions, had suit been brought upon each separate debt.

The other objection presents the point only, as to what is adequate proof of the transfer of a chose in action. The common and perhaps the simpler method is to make a written assignment; yet in principle no additional right is created by the assignment in writing. In some instances it may furnish a more easy and satisfactory mode of proof, whilst in others, it will impose embarrassing difficulties in the way of establishing the fact that an assignment was made. In this case the testimony is explicit, that ten of these tickets were transferred to the libellant by delivery to his agent or the captain of his vessel, by whom they were received as cash, each for the sum of $160, and the person owning and so delivering the ticket was, in consideration of that assignment, transported in the libellant's vessel from Panama to San Francisco. Each of those tickets was evidence of a debt of $150. The sufficiency of the consideration and its actual receipt by the person to whom the ticket was issued and who transferred it to the libellant's agent is thus proved beyond question. This point has been considered and directly decided in the state of Maine. The court held that a chose in action may be assigned for a valuable consideration by the delivery of the evidence of the debt, without any written transfer. Littlefield v. Smith, 5 Shep. [17 Me.] 327; Spafford v. Page, 15 Vt. 490. A mere delivery to another by the creditor of the evidence of debt due him by a third party, without explanatory proof, might be held to import no more than an authority to collect the debt for the benefit of the creditor; but in respect to the ten specified certificates, they thus became the absolute property of the libellant, and he is entitled to recover the debt acknowledged by them, by action in his own name. There is no evidence proving that the remaining four tickets (one to Kraft for $300, one to Fox for $300, one to Kloppensteen for $150, and one to Bessara for $150) were sold by those parties or transferred by them to the libellant, or to Garrison & Fritz, or Lane, his agents, or any other person acting for him, nor that any consideration was ever paid by the libellant for them. That he did so is inferred only from the fact, that he has them in his possession and received them from his said agents. No evidence is given that any consideration was paid for them to the original owners of those debts. The naked possession of those papers does not, accordingly amount to evidence of a legal ownership of the debts acknowledged by them, and those portions of the libellant's demand must be rejected.

It is insisted, both in the oral argument and the written brief submitted by the counsel for the responuents, that no recovery can be had upon the evidence before the court, because it does not conform to and support the libel, and also because of itself it fixes no responsibility on the respondents to the assignors of those tickets. It is a fundamental principle with courts proceeding according to the course of the civil law, that no remedy or defence can be accorded parties litigant out of their pleadings. Things not specifically alleged may be sometimes implied, and a decree be rendered according to the right, when that right is not specifically asserted in the pleadings; but if the proofs conflict with the allegations by setting up a

different case, or show that whatever may be the right or equity of the party it is not as represented in the pleadings, then no decree can be had upon such proofs, and the rule, become nearly an axiom in this respect, that the decision will be secundum allegata et probata, takes effect in its full force. Nangatuck Nav. Co. v. The Rhode Island [Case No. 11,745].

On examining the libel critically it would seem to have been drawn up in a very hurried manner, or to have been copied most carelessly, as the language employed in some of the allegations is palpably opposed to the meaning intended to have been expressed, and in one instance, at least, renders the fact stated as the foundation of the claim wholly nugatory. For instance, in some articles it is averred that the defendants agreed to furnish the passenger named with two cabin passages in the ship New Orleans; in one it is asserted that the libellant made the engagement to furnish the passage, and in all the articles it is asserted that the respondents agreed to carry the baggage of the passenger; sometimes it is said in the ship, and in others in the cabin, and in several instances the agreement charged is, to furnish the passenger "with two cabin passages for himself and baggage," expressions well bearing the construction that the respondents were to furnish distinct or double accommodations in the cabin to such passengers. It is averred that all the contracts were in writing, and then it is asserted, "that of said persons above mentioned, or either of them respectively, were not at Panama when the vessel should sail as advertised, he who was absent should forfeit half the amount paid." The breaches of the contract are stated to be that, "putting faith and confidence in the said undertaking of the respondents, and impelled by the named forfeiture, the several libellants left the city of New York and arrived at Panama so as to meet the said steamship, which was to convey, in the month of April, to San Francisco, but though they arrived there before the time appointed, and remained there until long after the time appointed for the sailing of said steamer from Panama, and long after the time they were to be furnished with a passage as above stated, the said steamship New Orleans did not come there, nor did the respondents furnish the several persons above named with a passage on board said steamship, or any other steamer." The libel then avers, that the agent of the respondents at Panama not being able to send said persons by the steamship New Orleans or otherwise on his own account, applied to the libellant to furnish them passages to San Francisco and take therefor from them the said contracts, and that the respondents would, in consideration thereof, pay said claim to the libellant, and that the libellant in pursuance thereof did furnish said passages and took therefor the claims of said persons against the respondents. Yet the article containing this statement does not connect with it any averment or charge that the respondents failed to fulfil the agreement, and is therefor nugatory as a pleading; but the next article in the libel makes an independent charge, that the libellant, at the request of the respondents, furnished such passages and took in satisfaction thereof these claims on the respondents, and holds their contract, and has frequently demanded payment thereof which they neglect and refuse to make to him and if the proofs comport with these averments, it is sufficient to support the action without the aid of the antecedent allegation. The answer admits the issuing of all the tickets except one to Mr. Kraft, it denies that the respondents or their agent applied to the libellant to transport the passengers claimed from Panama to San Francisco, or to take the said contracts or claims in satisfaction of such passages, or that their agent or any one for them agreed to pay said claims to the libellant; and also denies all knowledge that the passengers were carried by the libellant on the terms stated in the libel.

The answer admits that the steamship New Orleans left New York the 25th of February, 1850, and did not arrive at Panama until the 23d of August thereafter, but asserts she was then ready and prepared to take said passengers to San Francisco. The answer further takes exception to the sufficiency of the libel as to certainty in respect to the grounds of this action or the items and particularly of the libellant's account, and as to the time and manner and under what circumstances the libellant became owner of the claims of said passengers, or what those claims were. The blunders in the libel in making the libellant engage to furnish the passage in the New Orleans; in averring that passengers were to have two cabins, and using "of" for "if" in article four, are not calculated to mislead the respondents in any respect, as the meaning of the libel is obvious, and therefore, according to the rules of practice in admiralty courts, the mistakes may be amended at any stage of the cause. Ben. Adm. §§ 358, 483. The same principle applies to a good extent to amendments in matters of substance. Id. But if the amendments allowed are of a character to change essentially the ground or mode of defence, the party receiving the favor will be put under equitable conditions towards the other. Upon these principles, the third article of the libel would, on the motion of the libellant, be amended by order of the court, so that the promise alleged to be made by the libellant to Abel Hall should be stated to be made by the respondents, and that wherever the term "two cabin passage" occurs in the 4th article of the libel, the same be amended to read "second cabin passage," and that the particle "of" said "persons," in the last paragraph of the same article, be

amended by substituting "if," and also in the next article of the libel (likewise numbered "fourth"), the statement "the several libellants left," be amended to read "the said several persons left," and after the word "convey," in the same article, to insert "them." These errors are clearly clerical mistakes, and are so palpable as not to be calculated to mislead any one as to the meaning of the libel, and it would be entirely contrary to the usage of the court to turn the libellant round, or subject him to any delay on their account. Betts, Adm. p. 57; Sup. Ct. Rule 24. In disposing of the cause I shall reserve the right to the libellant to move those amendments of course, at any time before the final decree is entered. Various other particulars in the libel, objected to by the respondents as defective pleading, fall more appropriately under the class of variations of proofs from the allegations; such as the averments that all the contract was in writing; that the respondents engaged to transport the baggage of the passengers; that the passenger absent from Panama, when the steamer arrived there, should forfeit half the amount he had paid, etc., etc.

Upon the merits of the case, when the errors before specified, shall be amended, and considering the action to be the same as if prosecuted in the name of each passenger, the questions are whether the libellant claims upon the contract actually made by the parties, and whether he offers competent and sufficient proof in support of the action. The libellant may rightfully charge the contract according to its legal import, and he is not confined to stating it in the words of the written paper. It will then be for the court to determine whether his evidence sustains the agreement he counts upon. It is plain enough that an acknowledgment, in writing, by one party of the receipt of a sum of money from another for a consideration, to be afterwards rendered by the one receiving it, raises the implication of a promise to perform the condition on which the money was advanced, and in case of failure so to do, furnishes the promisee a right of action to be recompensed in damages for the breach, at least to the amount of the money paid, or to recover it back on suit for that object. The libellant, as the transferee of the claims of persons who paid the money, is clothed with their rights in this respect, and if the contract set up in the libel was no other than such implied one, there would be nothing in the way of his recovering those sums of money with interest, all demand of damages beyond that being disclaimed on the trial. It is, however, objected to his recovery in this case, that he has laid the contract in his libel, as containing the double engagement to transport the persons paying the money and also their baggage in the ship, and alleged the contract to be in writing, and that he cannot recover upon these allegations without proving the contract thus set forth. There is no evidence in the case, direct or implied, that the respondents engaged to transport the baggage of the passengers with the persons for the consideration paid. This might, probably, be presumed had any evidence been given that such was the usage of the trade, but the court cannot infer, as matter of law, that the passenger acquired by the contract he produces, anything beyond the right of a personal passage. But this objection, it appears to me, does not exclude the evidence offered nor prevent its availing the libellant so far as it is pertinent to the case.

It is to be observed that no specific issue is taken upon the averment of the form or contents of the contract. The answer puts in a general denial. This necessarily imposes on the libellant the obligation of supporting the averment in all its material parts, and charging that the contract included undertakings not proved to be embraced by it, does not necessarily prevent the libellant having the advantage of those which do exist. It might be otherwise if the action was by the respondents, for the carriage, and they averred they had carried the passenger and his baggage and only proved the carriage of the person, for the proof of part performance only would admit that the party had done less than he agreed to do, and might disable him from maintaining an action upon such imperfect execution of his agreement. But an averment that the defendants agreed to do two things by written contract, and when the contract is produced, it is found that only one was agreed to be done, does not destroy the right of the promisee to the performance of the actual contract. If the difference makes to the advantage of the respondents in any way, it is only in this, that the variance is of a character to estop the libellant making claim under the contract set up in the libel. It does not appear to me that this variance affects the merits of the case. The libellant proves the payment of the passage money and the promise of the defendants to supply the passage as averred, and that they have not fulfilled such agreement, but he fails to prove any further or additional undertaking on their part. The allegation of such other agreement may well be treated as mere surplusage on these pleadings, because if the respondents had proved a performance of the other part, or a satisfaction of the agreement, or any legal defence to it, manifestly the libellant could not maintain an action for not carrying the baggage. No engagement to do it is proved, but if the obligation may be regarded as incident to the undertaking to transport the person, it would be merged in and fall with the principal agreement when that should be defeated.

Upon the whole the right of the case appears to me to be clearly with the libellant as to the ten tickets given him by the passengers themselves, and for which he fur-

nished them passages on board his ship from Panama to San Francisco, and I shall decree that he recover against the respondents the monies they received from those tickets amounting to $1,500, with interest on each from the time the money was paid them therefor, and costs of suit. The claim of the libellant as to the remaining four tickets, amounting to $900 and interest, is dismissed, but without prejudice to his suing and recovering for the same hereafter, on competent proof that they were acquired by him bona fide from or through the original owners. Order accordingly.

[NOTE. The respondents appealed to the circuit court, which affirmed the decree herein. Case No. 2,924, next preceding.]

COBB (HOWARD v.). See Cases Nos. 6,755 and 6,756.

COBB (HOWE v.). See Case No. 6,767.

COBB (McCLOSKEY v.). See Case No. 8,702.

COBB (UNITED STATES v.). See Case No. 14,820.

COBIN (OWSLEY v.). See Case No. 10,636.

Case No. 2,926.

COBLENS v. ABEL.

[1 Woolw. 293.] [1]

Circuit Court, D. Missouri. Oct. Term, 1868.

OF THE LIABILITY OF INTERNAL REVENUE OFFICERS FOR ILLEGAL ASSESSMENTS, AND WHEN SUITS MAY BE BROUGHT AGAINST THEM THEREFOR.

1. It is but common justice to hold answerable in damages an executive officer who, under color of his office, commits an illegal trespass upon the rights of a citizen.

2. The internal revenue act of July 13, 1866 (14 Stat. 98), contemplates such cases and such prosecutions.

3. But the right to sue for such injuries may be, and in that act is, regulated, so that the action must be brought within, or shall not be brought until the expiration of, a specified time.

4. The object of the provision is to give to the commissioner, who is authorized "to remit, refund, or pay back taxes illegally assessed or collected," and to pay the costs and expenses of suits, and the judgments recovered therein, an opportunity to learn the facts of the case, and determine what is right to be done.

5. If he delays his decision six months after the appeal, the action may then be brought.

At law. On the 14th of May, 1867, Coblens sued Abel in the circuit court of the state of Missouri, for St. Louis county, in respect of a certain illegal assessment, as he alleged, made and collected by the defendant as collector of the internal revenue of the United States. On the 18th of November following, and before a trial of the said suit, Abel sued out of this court a writ of certiorari, for the removal of the cause, under the act of July 13, 1866 (14 Stat. p. 171, § 67). This being done, on the 9th of May, 1868, the plaintiff filed in this court his declaration in trespass on the case, in which he alleged that the defendant, on the 14th day of May, 1867, as collector of internal revenue of the United States for the first district in Missouri, issued to his deputy his distress-warrant, by virtue whereof the said deputy was about to seize sufficient of the property of the plaintiff, out of which to make $668.92, whereby he compelled the plaintiff to pay that sum, on account of an alleged tax due from the plaintiff to the United States. To which declaration the defendant pled the general issue.

At the present sittings of the court, the cause came on to be tried before the judges, a jury having been waived by the parties. The fact of the distress, and the payment under the same, and under protest, was admitted. The plaintiff introduced evidence to show, and he did prove to the satisfaction of the court, that the return of his income which he had made was an honest one; so that it followed that the assessment made upon him as if it were not honest, was improper. But he did not show, and in fact the record showed, that no appeal had been taken to the commissioner of internal revenue from the action of the assessor and collector, or either of them.

Mr. Krum, for plaintiff.
Mr. Noble, Dist. Atty., for defendant.

MILLER, Circuit Justice, held that the assessor and collector had unjustly and unlawfully collected from the plaintiff the amount alleged in the declaration; and that, but for the provisions of the act of congress, the right of action was made out. The learned judge then read the following sections of the "Act to reduce internal taxation, and to amend an act entitled 'An act to provide internal revenue,'" &c., approved July 13, 1866 (14 Stat. 98):

"That the commissioner of internal revenue, subject to regulations prescribed by the secretary of the treasury, shall be and is hereby authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that shall appear to be unjustly assessed, or excessive in amount, or in any manner wrongfully collected, and also repay to collectors and deputy collectors the full amount of such sums of money as shall or may be recovered against them, or any of them, in any court for any internal taxes or licenses collected by them, with the costs and expenses of suit, and all damages and costs recovered against assessors, assistant assessors, collectors, deputy collectors, and inspectors, in any suit which shall be brought against them, or any of them, by reason of anything that shall or may be done, in the due performance of their

[1] [Reported by James M. Woolworth, Esq., and here reprinted by permission.]

official duties; and all judgments, and moneys recovered or received for taxes, costs, forfeitures, and penalties, shall be paid to the collector, as internal taxes are required to be paid: provided that where a second assessment may have been made in case of a list statement, or return which, in the opinion of the assessor or assistant assessor, was false or fraudulent, or contained any under statement or under valuation, such assessment shall not be remitted, nor shall taxes collected under such assessment be recovered, refunded, or paid back, unless it is proved that said list, statement, or return was not false or fraudulent, and did not contain any under statement or under valuation." Page 111.

"No suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the commissioner of internal revenue, according to the provisions of law in that regard, and the regulations of the secretary of the treasury, established in pursuance thereof; and a decision of said commissioner shall be had thereon, unless such suit shall be brought within six months from the time of said decision, or within six months from the time this act takes effect: provided that if said decision shall be delayed more than six months from the date of such appeal, then said suit may be brought at any time within twelve months from the date of such appeal." Page 152.

His honor then said, that it was but common justice that an executive officer, who, under cover of the authority with which he is by law invested, commits an illegal trespass upon the rights of a citizen, should be held to answer for the injury he has inflicted in a court of law. Actions of this nature are daily brought and maintained. We should be little inclined to sustain an act which overturned this principle. The sections of the law just read do not do so. The provision first cited clearly contemplates cases of "taxes erroneously or illegally assessed and collected," and "penalties collected without authority." And it also contemplates that suits will be brought against the internal revenue officers for injuries thus sustained, and that judgments for the damages will be recovered; for it provides that the commissioner may repay to them "the full amount of such sums of money as shall or may be recovered against them, or any of them, in any court, for any internal taxes or licenses collected by them, with the costs and expenses of suit, and all damages and costs recovered against assessors, &c., in any suit which shall be brought against them." The case before us is such a case against this plaintiff. Taxes have been "erroneously and illegally assessed and collected," "the full amount" of which he is entitled to "recover against" this defendant.

At the same time, this right of action may be regulated by the government whose officer has transcended his authority. It is competent for it to say how soon the action shall be brought; and equally so, how long a time shall elapse before the action shall be brought. It may provide, and it is highly proper that it should provide, that due time shall be allowed to its officers to inquire into the facts of the case, and determine whether restitution ought to be at once made, or whether the claim should be subjected to a judicial investigation. Especially is this the case when, as here, the restitution is to be made, or the means to satisfy the judgment are to be furnished, out of its own funds. Accordingly, congress has provided that no suit for the causes mentioned above shall be maintained in any court, "until appeal shall have been duly made to the commissioner of internal revenue," and his decision had thereon.

The object of the provision is to afford to that officer an opportunity to inform himself of the facts of the case, and determine what is right in the premises. He is the officer who is "to remit, refund, and pay back the taxes erroneously or illegally assessed or collected." Certainly, nothing can be more proper than that the aggrieved party should bring the facts fully before him, so that he may determine whether he will or will not subject the government to the expenses and costs of suit, which he is also authorized to pay, and which he ought to pay out of the funds of the government. That is what the last cited section required this plaintiff to do, before he subjected the government, whose officer the defendant is, and out of whose treasury the judgment would be paid, to the expenses and costs of this suit. He did not do so. He cannot maintain this action for that reason.

It is no answer to say that the decision of the commissioner may be withheld, and that, as the law requires it to be first had, the right of action, upon the construction which we have given the law, may never accrue. If upon the appeal duly taken to the commissioner, he withholds his decision more than six months, the action may then be brought. This is expressly provided in the act, which says, that "if the decision shall be delayed more than six months from the date of such appeal, then said suit may be brought," &c. The plaintiff has not, by the evidence submitted by him, sustained this action, because he has not appealed to the commissioner, and had his decision on the acts of the collector here complained of, or waited six months for the decision to be made.

The plaintiff took a non-suit.

Case No. 2,927.

COBLIDGE v. GUTHRIE.

[The case cited under above title in 2 Brightly's Dig. 352, is the same as Case No. 3,185.]

COBURN (CROPPER v.). See Case No. 3,416.

COCHECO MANUF'G CO (SPRAGUE v.). See Case No. 13,249.

COCHRAN (GERNON v.). See Case No. 5,368.

COCHRAN (LAKE SHORE & M. S. R. CO. v.). See Case No. 7,996.

Case No. 2,927a.

COCHRAN v. McLEAN.

[Betts' Scr. Bk. 114.]

District Court, S. D. New York. Jan. 22, 1839.

SEAMEN'S WAGES—FOREIGN VESSEL.

[The court will not entertain a libel for wages by seamen of a British vessel, where it does not appear that they have been discharged the ship, and disabled from performing their contract, or from seeking redress in their home tribunals, by any wrongful act of the master, and where the shipping articles provide that they shall not be entitled to their discharge or to wages until the completion of the voyage.]

[Cited in Wood v. The Infanta, Case No. 17,947a.]

[In admiralty. Libel in personam by William Cochran and others, crew of the British ship Colchester, against Allen McLean, her master, for wages.]

BETTS, District Judge. The libel demands wages earned on a voyage from Liverpool to New York. Another action is brought by the same libellants to recover the value of their clothing detained by respondent. The allegation of the libellants is, that they faithfully performed the voyage to this port, and that on the 5th day of September last, they were fully discharged the ship without being paid their wages. The answer excepts to the jurisdiction of the court over the subject matter, the vessel being a British ship, and the crew British subjects, and the matter only cognizable in the British courts. It avers that the libellants were guilty of mutinous conduct on the voyage, and of insubordinate and disorderly conduct in the port; and finally, on the 4th September, deserted the ship, and have since refused to return to their duty, although the respondent has offered to receive them and pay off their board bills in New York. It insists upon a forfeiture of wages and clothes for these causes. The shipping articles put in evidence show a contract by the libellants to perform a voyage from Liverpool to the United States or British America, and back to a port of discharge in Great Britain. It is stipulated in the articles, that 24 hours' absence from the ship during the voyage, under any circumstances, except by permission of the master, shall, if he elects, be deemed a desertion; that actual desertion shall forfeit all the clothes, effects, wages, and emoluments of the deserters; and that no seaman shall be entitled to his discharge or any wages, until the completion of the voyage. On the 4th September the libellants left the ship without permission of the captain or mate, and went to the consul's office to make complaints. The consul summoned the captain to attend at his office that day. He disregarded the summons, and the consul sent back the libellants to the ship with a note to the master to receive the crew. The master would not take the letter, but a very contradictory account is given of the cause and manner of that refusal by the libellants (in testifying for each other), and the custom house officer who was present. The men represent that the master tore up the letter and peremptorily ordered them on shore, telling them to go back and see what more the consul could do for them. The officer says one of the crew came upon the quarter deck, he seemed excited by liquor, and told the captain he had the consul's order to come on board, and he would be damned if the captain must not take him.

It appears by the testimony of the first mate that the libellants left at 9 a. m. on the 4th, declaring they would do no more work, and were all logged as deserters. Mr. Lester, the custom house officer, says it was understood, from conversations of all the crew, whilst the ship was unloading, that the men did not intend to return in the vessel. The vice consul says the crew preferred complaints when the ship came in, and indeed it is fully proved they left her at that time in a disorderly and mutinous manner, and that he ordered them to go back and discharge the cargo. On the 4th, after she was unladen, they came again, when he summoned the master, and then sent the crew back with a letter. All these facts tend strongly to support the answer that the master never discharged the crew, and that their leaving the vessel was without his consent, and wrongfully. When the master came to the consul's, the 5th, though he refused to pay wages or deliver up the seamen's clothes, the consul says he offered to take them home in the ship, but without wages. This then seems to me to dispose of the whole case. Whatever the consul might have found reprehensible in the temper or manner of the master, the latter has a right under the articles to refuse the seamen's wages until their return home, where the whole matter in dispute would be rightfully litigated and adjusted, and I must say no satisfactory reason is supplied by the consul for interfering with the men or master, and assuming authority to break up their engagement to the ship. If he could, under powers given by his own government, do this, the powers have not been disclosed to this court, and their sufficiency as a protection to the crew for leaving the ship and violating their articles can be more fitly passed upon in tribunals of Great Britain, where all parties owe allegiance, where it was contemplated in the contract that all questions respecting wages

should be settled. It is manifest upon the authorities that courts of admiralty exercise a discretion in entertaining suits in behalf of foreign seamen against a foreign ship or master, and I cannot discern any principle of policy or national courtesy entitled to more serious regard in directing or influencing that discretion than that which goes to maintain the fidelity of seamen to their contract, and the preservation of the entire purposes of the voyage.

Wnen a voyage is broken up, and thereby the seamen are left destitute in a foreign country, or if they are put out of a ship by the wrongful act of the master or owners, it is consonant to the general usages of maritime courts, and seems to me every way fitting, that a remedy should then be afforded them in such foreign courts for the recovery of the moneys due them; but, independent of considerations of general policy which in my judgment very fully enter into the decisions of questions of jurisdiction of this character, it is plain that, giving effect to the agreements between the parties, no right of action exists until the performance by the seamen of the entire voyage. And this tribunal, by entertaining jurisdiction of a suit circumstanced like the present, where the opportunity was open to the parties to return to their own country, would not only sanction a violation of duty by the men, but would establish and enforce rights in their behalf in express contradiction of their own stipulations. It is furthermore to be remarked that, if their rights are to be measured by their own allegations, compared with the proofs, it is manifest that they had incurred a forfeiture of wages within the direct provisions of their articles, having been absent from the ship more than twenty-four hours without permission of the master. They aver that he discharged them on the 5th September, and probably their own testimony, which at first view seems to represent the interview on the 4th on their return from the consul's as their discharge, better comports with the averment of the libel, and that all the discharge actually given was the refusal announced by the master to the consul on the 5th, to receive the men back and reinstate them in their right to wages. The statement given by the crew of what passed on the 4th when they presented the consul's letter to the captain is not very connected or distinct. Dawson says, in his deposition taken the 20th September: "When the crew came to the ship a second time on the 4th, with another letter from the consul, the master took it up and tore it, and told us to go about our business, and go to the consul and see what more he had to do for us." McKenzie, examined the 22d, states the result of the interview in the same words, except he does not say the captain tore the letter,—he threw it down on the deck. Flaws, examined the 24th, says the crew gave the captain the letter and told him what the consul said: "The captain told us to go about our business and go to the consul, and see what more he had to say to us." After he read the note he tore it, and threw it on the quarter deck. Williamson, examined the 24th, says: "The captain told the man to put the letter on the chair. He then, a little after took it up, opened it, laughed, and tore it to pieces, and told us to go to the consul and see what more he had for us to do,—that he had nothing more for us to do."

Cochran, who seems a leading man with the crew, was examined and cross-examined on the 20th, and re-examined the 21st, and again re-examined the 22d September, and was again examined viva voce in court on the 27th December. On the 20th, he represents the particular interview on the 4th to be that the crew gave the letter to the captain; "and he told us to go about our business, and go to the consul again, and see if he had anything more for us to do. We told him the consul told us to go down to the ship again, as usual, and the captain told us to go to the consul again, saying, 'I have nothing more for you to do.'" On his cross-examination he said, when they left the ship in the morning, "we told the captain we were going to the consul's; he told us to go and stop there." Upon his second direct examination he stated that the crew were examined by the consul, and he decided they were to be discharged from the vessel and to have their wages, and on that cross-examination he says, "has never offered to the captain to come on board to do duty." On his examination in court, he says the captain would not take the letter, made witness lay it down on the companion way, and then took it up, tore it to pieces, ordered them all ashore, and pushed witness off, and told him to go about his business. The next day the captain came to the consul's office, and the consul told him to take the men on board, which he refused to do, or to pay wages. On his cross-examination he says, after the crew had been ashore about five weeks the captain offered to take them on board and pay their board bills ashore, but the crew would not go.

Taking the case as the libellants prove it themselves, it is not shown that there was any direct offer by the men to return to duty, or refusal by the captain to receive them, on the 4th September. He refused undoubtedly to acknowledge the authority of the consul, or to have anything to do with the men in obedience to that authority; but Cochran says expressly he never offered to go back to duty, nor is there enough in the statements of any of the libellants to justify the conclusion that all or any of them proffered themselves to the ship again, and to return immediately to their duties and subordination there. On the other hand, very forcible proofs are produced, showing that the men left the ship on the 4th September in open contempt of the orders of the mate

and captain, and the evidence is clear that the opportunity was kept open for them to the last day the ship remained here, to return with her to their port of destination and discharge.

This court will proceed cautiously in passing upon the dealings between foreign consuls and the masters and crews of vessels belonging to their governments. It appreciates the delicacy of questions of that character. It will presume that the consul had sufficient reason for advising the crew not to go with the vessel, and for directing the master to pay their wages here; and that these reasons will satisfactorily excuse the proceeding to his own government, as also the maintaining the men here to this day. I am constrained, however, to say that no case has been disclosed to this court which demonstrates the necessity of such measures, or their propriety, to a degree that raises in behalf of these men a right of action, founded thereon, to demand and recover wages here, and thus have the breaking up of their contract pronounced proper and justifiable. This court does not inquire or decide whether the forfeiture set up by the answer and stipulated in the articles is absolute, or is to be construed only as a penalty, conformity to the rule usually applied to American articles. I leave the merits of the action and defence untouched as appertaining to the home tribunals of the parties, and I only pronounce that the libellants were not by any wrongful act of the master prevented returning in the ship and completing the voyage according to their contract, and that therefore no suit can be sustained here upon those open articles. I regard it as a settled rule, upon the whole current of authorities, that suits will not be entertained in admiralty courts on behalf of foreign seamen for the recovery of wages, unless it be made to appear that the voyage is broken up, and that they are discharged the ship, and disabled from performing their contract, and seeking redress in their home tribunals, by the wrongful act of the master. Judge Story collects the leading cases upon this subject which have occurred in this country and the English courts, and that controlling principle runs throughout the decisions on the multifarious combination of facts. Abb. Shipp. 478, note [Hoover v. Reilly, Case No. 6,677]; Willendson v. The Forsoket [Id. 17,682], is essentially this case as to all the prominent facts, and in that Judge Peters refused to sustain the sailors' suit. Vide Davis v. Leslie [Id. 3,639].

COCHRAN, The NEIL. See Case No. 10,087.

COCHRAN (SPARHAWK v.). See Case No. 13,203.

COCHRAN (UNITED STATES v.). See Case No. 14,821.

COCHRANE, In re. See Cases Nos. 6,109 and 6,110.

COCHRANE (BADISCHE ANILIN & SODA FABRIK v.). See Case No. 719.

Case No. 2,928.

COCHRANE v. SWARTOUT.

[47 Niles' Reg. 157.]

District Court, S. D. New York. Oct. 31, 1834.

MEANING OF "COAL" IN TARIFF ACT—WEIGHT OF EVIDENCE.

[1. In ascertaining whether or not coke is within the designation of "coal" in the tariff act, the intention of congress may be inquired into, as well as the commercial sense of the term, as understood by merchants.]

[2. While in some cases, a jury may decide a question of fact according to the number of witnesses, yet, when the testimony is mere matter of opinion, they must consider the intelligence of the witnesses, and the manner in which they testify.]

At law. This was a suit [against Samuel Swartout, collector of the port of New York] to recover the amount of certain duties paid by the plaintiff [Rupert J. Cochrane] on a quantity of coke imported from England, and on which the collector had charged a duty of 6 cents a bushel, the plaintiff contending that the article was free, as non-enumerated in the tariff. As there are some parts of this country where the article may not be known under the name of "coke," it may be proper to remark that it is charred coal, from which the bitumen, sulphur, ammonia and other volatile matter has been extracted by fire, and the article reduced to a sort of cinder. In this state it is better adapted for some particular branches of iron manufacture, than coal in its natural form, and in England immense quantities of coal are charred or coked in ovens to fit it for manufacturing purposes. Formerly the article was scarcely used in England except by smiths or iron manufacturers; but since coal gas has come into general use for lighting towns and cities, coke is produced in such large quantities and sold so much cheaper than coal, that the poorer classes in England use it as fuel for domestic purposes, which it answers tolerably well, producing a clear bright fire devoid of smoke or sulphur, something like anthracite, but not so intense or lasting.

A question was raised by Mr. Price as to whether the plaintiff could maintain the present suit, independent of the facts of the case, inasmuch as he had voluntarily paid the bond which he passed on the entry of the goods, instead of protesting against the legality of the duty and refusing to pay his bond. This question was reserved for further consideration by the court.

Several witnesses were examined on both sides, but nothing of a very decisive nature could be gleaned from their evidence, as regarded the character or denomination of the article in question. Some of the witnesses

said the article was called "coke," or "charred coal," and that these terms were never considered to mean coal in its natural state. Other witnesses deposed that the article, though having gone through the process of charring, is still coal. It also appeared that, on one or two occasions when the article was imported here, it was invoiced by the name of "coke," though it paid a duty as coal. All the witnesses agreed that if they sent an order for coal, without specifying the quality, and were sent coke, they should not consider their order complied with.

Before THOMPSON, Circuit Justice, and BETTS, District Judge.

THOMPSON, Circuit Justice, charged the jury that they were to take it for granted that the plaintiff could maintain the present suit against the defendant,—the question on that part of the subject having been reserved by the court for further consideration. The only question then to be considered was whether the article in question, which had paid 6 cents a bushel, was subject to that duty; or whether it was coal, within the meaning of the tariff law. They had been told that they were to decide the question according to the greater number of witnesses. This proposition might hold good in some cases, but not where the question depended upon the opinion of witnesses. In reference to a fact, the jury might depend upon the number of witnesses, and in that case the evidence of the greater number would be a safe criterion to judge by; but, in a mere matter of opinion, the jury were to found their judgment on the intelligence of the respective witnesses and their manner of giving testimony, and by that means ascertain whether they could place more confidence on one side than the other. If the mere number of witnesses was to be relied on, the trial of a case might take up entire weeks, as a party might bring a thousand witnesses into court. Therefore the jury would judge from the intelligence of the witnesses, and from that source draw a line which would lead them to the truth.

With respect to the construction of the law, the general rule was that, if the jury entertained any doubt as to its meaning, they would then resort to collateral circumstances to assist themselves in ascertaining it, but the cardinal rule of inquiry was, what was the intention of congress in passing the law? The rule settled by the supreme court, and in which this court fully acquiesced, in relation to the law, was that they were to apply to it the practical commercial sense of the words, and use them as understood by merchants. But this rule had been pressed by the plaintiff further than the court was inclined to admit it. It was not because men were merchants that the jury were to be entirely bound by their opinions. The only reason why their opinions should have more weight than those of others was because they were supposed to be better acquainted with articles of commerce. The question to be considered was whether the article was known as a fair commercial article of trade, and imported and used as such. If the article had been imported here for many years as coke, the court would not hesitate to say that it was not coal; and that, as congress was presumed to be acquainted with mercantile terms, it intended that the article should be free. Was then the article known by the name of "coke," as contradistinguished from coal? If the jury were of that opinion, then it was not subject to duty; but if they thought that congress had included it under the generic term of "coal," then it was subject to duty. Nor would it be doing any violence to language to call it coal; some of the witnesses said it was coal, although it had been rendered pure, or nearly pure, by having gone through an operation by which the various particles were extracted from it by heat. A witness had been asked, at what point of the operation did it become coke? and he answered that, when it ceases to smoke, it becomes coke. Now they could not tell if this was the case with the article in question, nor was there any evidence to show them that this was the kind of article imported by the plaintiff. But, supposing that it was, did congress mean that it should be free? Was there anything in the law to induce them to believe that the legislature so intended; or was the article so advantageous to their manufactures, or anything else, as to be fair to assume that the legislature meant to class it under the generic name of "coal"? Witnesses had been asked whether, if they sent for coal, would coke be sent them. The court believed that men never do their business in that way, or send for coal without designating the kind; therefore, the jury could not infer anything from the answer given to that question.

On the whole, the question was one of fact, and the court submitted it to the jury. If they thought that the legislature meant to include coals of all kinds, and that this article came under the generic name of "coal," then the plaintiff could not recover; but, if they thought that the legislature did not mean to include the article under the generic name, then their verdict would be for the plaintiff.

The jury retired for nearly three hours, and, there being no likelihood of their agreeing, they were then discharged.

Case No. 2,929.

COCHRANE v. WATERMAN.

[1 McA. Pat. Cas. 52; Cranch, Pat. Dec. 121.]

Circuit Court, District of Columbia. Nov., 1844.

PATENTS—INVENTION—CAVEAT.

[1. The application of an endless screw working in the cogs on the periphery of a quadrant to the moving and holding of a rudder does not involve invention.]

[2. The fact that a patent is inadvertently granted while a caveat is pending does not of itself vacate the patent, or authorize the granting of a patent to the other party, unless he shows priority of invention.]

[Appeal from commissioner of patents.]

Interference.

The Commissioner:

1. There is no distinction between an "invention" and an "improvement," except in degree. If the alleged improvement be an improvement within the meaning of the law, it is indubitably the subject of a patent; but if it be an improvement simply because the screw works better than a pinion or a band, then it is not necessarily the subject of a patent. An improvement on an original invention is itself an invention, and must be such to authorize the grant of a patent; and the term "improvement," in the connection in which it is introduced in the law, has the same signification as if the law authorized the grant of a patent for an invention on an invention instead of for an improvement on an invention. Whittemore v. Cutter [Case No. 17,601]; Odiorne v. Winkley, [Id. 10,432]. All writers on the patent law admit the patentability of an improvement on an original invention, but limit this to such improvements as are inventions. No decisions on the patent law can be found that will sustain the position that the substitution of a mechanical equivalent is an invention.

2. The use of the endless screw as a means of communicating motion to a cog-wheel instead of a pinion is taught in all elementary works on mechanics. Borgnis' Traute de Mechanique Appliquee aux Arts, vol. 1; Gregory's Mechanics, art. "Screw," and others. It is only used in machinery generally, when a great multiplication of power is required, with little complexity, and when the loss of power by friction is not deemed very important; for it is admitted that the friction between the threads of the screw and the cogs of the wheel is much greater to produce a given result than by a combination of cog-wheels; but every constructor of a machine has the option to obtain a certain increase of power or velocity by the employment of either of the three equivalents—cog-wheels and pinions, band-wheels and bands, or cog-wheels and endless screw. They all have their advantages and disadvantages under different circumstances, and the machinist best shows his knowledge and skill who selects the one best adapted to the purpose in view in this selection; however, he does not invent, and is not therefore entitled to a patent.

3. As to the caveat, the only protection which the law guarantees to a person filing a caveat is a notice of an interfering application for a patent and for a withholding of all further action on the same application for the space of three months, to enable the caveator to complete an application for a patent; and then, in case of an actual interference, the two applications are to be referred for a hearing. This hearing has been granted in this case; and the only difference between the circumstances as they have occurred and what they would have been had the officer noticed the caveat, is that he is called upon to contest against a patent instead of an application; and had he proved priority of invention and obtained a patent, he would have been obliged to apply to the courts for a repeal, of Waterman's patent. Cochrane is in fact in a better position with reference to the controversy, as the practice of the office has always been, in contest between applicants and patentees, to give the applicant the benefit of every reasonable doubt; so that this oversight has been beneficial to him so far as this office could exercise a discretion.

4. There is no evidence to show that the patent was surreptitiously granted.

5. With reference to the applicant's claim to have a patent, on his statement that he made the invention at a certain time, unsupported by any evidence to show when he made the drawings, models, &c., and reduced the invention to practical form, it is evident that the rules furnish no warrant for such a proceeding. The commissioner is not bound to instruct parties as to what they shall submit in evidence; and any suggestion of the kind in the rules must be regarded as a suggestion merely, and not as a requirement upon a compliance with which a party can rely.

Oba Meeker, for Cochrane.

CRANCH, Chief Judge. John Cochrane appeals from the decision of the commissioner of patents refusing to grant him a patent for a machine for steering vessels, styled "The Spring-Tiller Self-Compensating Steering Machine." By the eleventh section of the act of March 3, 1839 [5 Stat. 354], c. 88, the revision of the decision of the commissioner of patents is to be "confined to the grounds of his decision, fully set forth in writing, touching all the points involved by the reasons of appeal." Mr. Cochrane, in his specification, says that the nature of his invention consists in applying the endless screw or worm, working in cogs on the periphery of a quadrant, to the moving or holding of the rudder; and also in the application of springs to compensate for the action of the sea on the rudder. The commissioner refused to grant the patent, because, as to the first supposed improvement, viz., the application of the endless screw to the cogs on the periphery of a quadrant, it was not the invention of an improvement; and as to the second improvement, viz., the springs on the tiller, it would interfere with a patent already granted to Henry Waterman. The reasons of appeal from the decision are, in substance, first, that the application of the endless screw, &c., is an invention of an improvement on the machinery of steering vessels, within the meaning of the sixth section of the act of the 4th of July, 1836 [5 Stat.

119], c. 575; and, second, that he was the first inventor of the spring-tiller, and therefore the patent ought not to have been granted to Waterman, and ought now to be granted to him (Cochrane).

The commissioner, in stating his reasons for his decision, contends that the substitution of a known mechanical equivalent is not an invention within the patent laws; and I think he is right. In some machines the moving power is communicated by a band. If I were to substitute a pinion for the band, I do not think it could be considered as an invention for which I could obtain a patent. The endless screw and wheel is a common mechanical power applicable to an indefinite number of machines; and the mere application of it to a machine to which it had never before been applied would not be an invention, although it might make the machine better than it would have been without it. There may be innumerable cases in which that mechanical power may be used with good effect, but it does not follow that the person using it is thereby entitled to a patent. The fact that it enables the helmsman to hold and stay the rudder with more ease, results from the nature of the power, and it is a property belonging to it wherever used, for the power of the helmsman is applied slowly at the long end of the lever against the power of the rudder, which works at the short end. This property is not now for the first time discovered. The application of it to the steering of a vessel seems to be no more entitled to a patent than if it had been applied to a kitchen jack for washing. It seems to be an ordinary power applied to an ordinary purpose, and that the application of it is not invention within the meaning of the patent law. Upon the first point, therefore, the decision of the commissioner is affirmed.

The second question is whether Mr. Cochrane was the first inventor of the spring-tiller, according to the evidence before the commissioner. Upon this point it is necessary to ascertain what that evidence was. 1. James Cochrane testifies, in his deposition taken on the 13th of March, 1844, at Baltimore, "that he knows that the compensating principle in the steering machine was invented by John Cochrane, the claimant, by the application of that spring to the rudder, prior to the 19th day of October, 1835." He heard him describe its position on the rudder and explain its use, which was to ease the action of the sea on the rudder, previous to the said 19th of October, 1835. 2. Richard Cochrane, in his deposition taken at Newark, N. J., March 16th, 1844, says "that the invention was made in the year 1835, but cannot now recollect any fact by which to ascertain in his own mind the exact date." That part of his deposition in which he says that he distinctly remembers that the inventor (John Cochrane) said, years ago, that it was on the 7th of February, at 10 o'clock at night, is not competent evidence in this cause. The deponent further testifies "that he was present when the invention was made, and recollects that it was at night." He further testifies "that in the month of October, 1835, he had a conversation with Captain Scott, of the brig 'Planter,' at Baltimore, Maryland, on the principle on which steering machines should act, for the purpose of ascertaining whether the springs were as important in steering as the said John Cochrane supposed; but that he (deponent) is certain that this invention was in existence before said conversation with Captain Scott." He further testifies that "the model deposited at Washington is the same in substance or principle as when first invented by John Cochrane." The letter of Captain Bunker of the 13th of February, 1843, a copy of which was inclosed in Mr. John Cochrane's letter of the 22d of March, 1844, to the commissioner of patents, is not evidence in this cause; and if it were, it does not give any information as to the priority of invention of the spring-tiller.

All the evidence in favor of the appellant upon that point is contained in the depositions of James and Richard Cochrane; and they do not carry back the date of the invention to any certain time prior to the 19th of October, 1835. The only evidence of Henry Waterman's priority of invention of spring-tillers is contained in the deposition of Stephen Waterman, who testified that in April or May, 1835, he had a conversation with his brother Henry in relation to the application of springs to the head of the rudder, and again in July, 1837; "that at both of said interviews said Henry Waterman described to said deponent his said invention, the same as the one patented to him in Washington;" that in February, 1843, the deponent being about to go to Washington, Henry Waterman furnished him with a model of his invention; that being in New York, they called to see Mr. Cochrane's model, and Henry Waterman showed his own model; that the deponent asked Mr. Halstead, who had charge of Mr. Cochrane's model, how long it had been invented, and the deponent thinks he stated in reply, seven or eight years. The deponent annexes to his deposition an original letter from himself to his brother Henry, but it is of no importance. This deposition appears to have been taken in the presence of Mr. Cochrane, and carries back the date of Waterman's invention of the spring-tiller to April or May, 1835, whereas the date of Mr. Cochrane's invention is not carried back with any degree of certainty beyond the 19th of October, 1835. The commissioner of patents, therefore, was bound, as the case appeared in evidence before him, to refuse to grant a patent to Mr. Cochrane. Mr. Cochrane, in stating the reasons of his appeal, has alleged that Mr. Waterman obtained his patent surreptitiously. There is no evidence to

support this charge. The reasons of appeal are extended at great length, and for the most part are founded upon the assumption of facts of which there was no competent evidence before the commissioner: 1. There is no evidence that either of the applicants for the patent had reduced the invention of the spring-tiller to practice. The letter of Captain Bunker is not admissible evidence. 2. There is no evidence of the protest of W. W. Kingsley mentioned in the reasons of appeal. 3. There is no evidence that in the interview between the Watermans and Halstead in New York in 1843 Henry Waterman said that he invented the spring-tiller "four or five years ago;" nor that he had never tried it; nor that Mr. Halstead informed them "that this machine was then on board of two ships, viz., the 'Alabama' and the 'Vicksburg,' and was in operation about six months, and so far appeared to answer well." nor "that Mr. Cochrane had been at great expense in maturing the invention and reducing it to practice, and had it in actual operation;" nor "that Mr. Waterman had bestowed no labor and gone to no expense upon the invention." 4. There is no evidence that Mr. Waterman claimed to have invented this application of springs in 1838 or 1839. 5. There is no evidence that Stephen Waterman protested that if Ellsworth should take back the patent they would enter a suit for damages against him. 6. There is no evidence that Richard Cochrane had the books of the brig "Planter" examined to ascertain the date of the conversation with Captain Scott. 7. What Mr. John Cochrane says, in his reasons of appeal, he told his brother Richard is not evidence. 8. There is no evidence that James Cochrane stated as a reason for fixing the date of the invention before the 19th of October, 1835, that on that day he left Baltimore to reside in Richmond. 9. There is no evidence that Stephen Waterman stated in evidence that Cochrane's "machines were in operation." 10. There is no evidence that Richard Waterman was intentionally assisted by the patent office in disregarding the caveat, as insinuated in the reasons of appeal; nor is there any evidence that the evidence of one of Mr. Cochrane's witnesses was mutilated; nor that any important evidence was suppressed; nor that a portion of the evidence was passed over without notice, as charged in the reasons of appeal. All those reasons of appeal, therefore, which were founded on supposed facts, of which there was no evidence, must be disregarded. The fact that the patent to Mr. Waterman was granted while Mr. Cochrane's caveat was pending and in force does not of itself vacate that patent, nor authorize the commissioner to grant to Mr. Cochrane a patent, unless he should establish his priority of invention. The commissioner could act only upon the evidence before him, and I can act only upon the same evidence. If Mr. Cochrane had other evidence, and did not produce it, it was his own fault or misfortune; but perhaps he may yet file a bill in equity under the sixteenth section of the act of congress of the 4th of July, 1836, and establish his priority and obtain a patent. Upon consideration of the reasons of appeal, and the reasons of the commissioner of patents for his decision, I am of opinion that the decision is correct, and ought to be affirmed.

Case No. 2,929a.

COCKE v. HENSON et al.

[Hempst. 187.] [1]

Superior Court, D. Arkansas. July, 1832.

STAYING PROCEEDINGS FOR NONPAYMENT OF COSTS.

1. It is within the discretionary power of a court to stay proceedings in a second suit until the costs of the first are paid.

2. The rule, if granted at all, is always on the ground of vexation.

[At law. Action by John H. Cocke, assignee of Charles Fisher, against James W. Henson, Benjamin Johnson, and Ambrose H. Sevier.]

Motion to stay proceedings. Before ESKRIDGE and CROSS, Judges.

CROSS, Judge. In this case a motion is made for a rule to stay proceedings until the costs of a former suit for the same cause of action be paid. It appears that some two or three years ago the plaintiff brought suit on the instrument which forms the basis of the present action, and prosecuted the same against the defendants until the last term of this court, when he applied for and obtained leave to suffer a non-suit. Judgment was thereupon rendered against him, in favor of the defendants, for their costs. At the time of this proceeding, the pleadings had been made up, and the defendants had taken depositions to be used on the trial. The writ in the present suit has been sued out since the last term of this court. The motion involves a question of practice, in which there has been no former adjudication in the courts of this territory, of which we have any knowledge, and we have therefore taken something more than ordinary pains to investigate the subject.

Although questions of this kind have never, heretofore, been raised in the courts of this country, they have been of frequent recurrence in the courts of many of the states. There they have been regarded as an appeal to the discretion of the court; and such we consider the present motion. The exercise of discretionary power by judicial tribunals is not only essential to the ends of justice, but to their existence. Without it, the very object of their creation would in some degree be thwarted. When resorted to,

[1] [Reported by Samuel H. Hempstead, Esq.]

however, it should be exercised with great caution, and in such a manner as is best calculated to promote the object of its existence. It has been urged that, although courts necessarily possess discretionary power in many cases, the rule asked for in the present motion is not embraced, and that, in the absence of statutory provision and the sanction of common law, the motion must fail. If the state of facts presented in the case before the court be such as to justify the exercise of the power, we can perceive no objection to its exercise. We have been unable to find any positive prohibitory enactment on the subject; nor have we found anything in our statutes restrictive by inference. In the court of king's bench, in England, the power is constantly exercised. In New York, the supreme court has recognized its existence in a case similar in principle to the one before us. So in Pennsylvania, Massachusetts, and, as is believed, in Tennessee. Such rules have, however, always been refused in the English courts, when the body is in custody for the costs for the prior suit. No delay in suing out execution, that we can find, has ever been allowed to have any influence in granting such rules. The rule, if granted at all, is always allowed upon the ground of vexation. 1 Tidd, Pr. 480. In the case before the court, the plaintiff prosecuted a former suit for the same cause of action for upwards of two years, and when the defendants had prepared their pleadings, and had been at the trouble of summoning witnesses and taking depositions to be used on the trial, and preparing themselves fully for trial, the plaintiff voluntarily, and without any apparent reason for doing so, asked for and obtained a dismissal of his suit, and a few weeks thereafter brought suit in the same court for the same cause of action against the same individuals. Whatever may have been the reasons by which he was influenced to pursue this course, we cannot but presume that justice might have been as well obtained in the first as the present action. The defendants are now driven to the alternative of submitting to his claim, or travelling over the same ground again, in defending against the second suit. Should the plaintiff choose to do so at any subsequent stage of the present suit, he may again suffer a nonsuit and proceed anew against the defendants, and they again be compelled to submit to the claim or defend against it.

In the mean time heavy bills of costs might, and would, doubtless, accumulate, if he were allowed to progress without their payment, and, in this state of things, insolvency or elopement might close the scene of vexation. Although such, we apprehend, would not be the case in the present instance, as the plaintiff is said to be abundantly able to meet any demands against him, yet in others it might be so. The principle is the same, regardless of the condition of parties, and we are therefore conclusively of the opinion that the question embraced by the defendants' motion is within the scope of the discretionary power of this court, and that the facts of this case fully justify its exercise. Rule ordered accordingly.

Case No. 2,929b.

COCKE v. KENDALL.

[Hempst. 236.] [1]

Superior Court, D. Arkansas. Feb., 1834.

PLEADING—VENUE—"LAWFUL MONEY."

1. A venue is technically necessary to every material traversable fact; and where one is laid in the count, all matters following refer to it.

2. Venue in the margin sufficient; and the want of one only reachable by special demurrer.

3. "Lawful money" of any state is equivalent to federal money.

Error to Pulaski circuit court.

[At law. Action by James B. Kendall, assignee of John Brown, against John H. Cocke. There was judgment for plaintiff. and defendant brings error.]

Before JOHNSON, ESKRIDGE and CROSS, Judges.

OPINION OF THE COURT. This case comes up on a writ of error to the Pulaski circuit court. The principal grounds relied upon for the reversal of the judgment in the court below, are: 1. That there is no place or venue stated in the declaration where the assignment of the writing declared upon was made. 2. That the judgment is rendered for federal money, when it should have been for lawful money of Virginia. 3. That the judgment is for more than was due. 4. That the court erred in sustaining the demurrer to the defendant's first plea,—of payment.

These objections will be considered in the order they are stated. And first, as to the want of a sufficient venue. The plaintiff in his declaration states a venue in the margin, and alleges "that on the 6th day of April in the year 1824, in the state of Virginia, to wit, in the county of Pulaski and territory of Arkansas aforesaid, and within the jurisdiction of this court, the defendant John H. Cocke, by this certain writing obligatory, acknowledged himself to be held and firmly bound unto one John Brown in the sum of 157 dollars and 75 cents, lawful money of Virginia, &c., to be paid to said Brown six months after the date of said writing obligatory, and that the said Brown, in the day and year last aforesaid, assigned his interest in the aforesaid writing obligatory to the said plaintiff by writing on the back of said writing obligatory in the words following, to wit, 'I assign,' of which the

[1] [Reported by Samuel H. Hempstead, Esq.]

defendant had notice." The authorities are abundant to prove the necessity of a venue to every material traversable fact. 6 Com. Dig. tit. "Pleader," C 20; 10 East, 364; 1 Chit. Pl. 307. But, when there are several facts, the venue stated as to the first will apply to all the sentences connected by the conjunction "and." 1 Chit. Pl. 307. In the case of Skinner v. Gunton, 1 Saund. 229, it is decided that, when the venue is laid for the first matter in the count, all the matter which follows refers to it. In the state of New York, it has been decided that, where no venue is laid in the body of the declaration (if the action be transitory), the venue in the margin is sufficient. 9 Johns. 81. The courts of Massachusetts have said that the want of venue can only be reached by special demurrer. Briggs v. Bank, 5 Mass. 96. These authorities, we think, apply with great force to the case before us. The venue stated in the margin of the declaration alone would be considered sufficient, according to the rule that prevails in most of the states. It is also stated in the body of the count as to the execution of the writing and assignment alleged on the day of its date. The venue, therefore, as to assignment, must be considered the same with that stated for the execution of the writing declared on. We think, without considering the effect of a verdict, that the objection as to venue cannot prevail.

The second objection relates to the judgment, which is rendered for money, in the usual form. It is insisted that it should have been rendered for lawful money of Virginia, according to the expression used in the writing. This, we think, in substance has been done, as lawful money of the United States would be lawful money of Virginia, or any other state or territory. At all events, the attitude in which the question is now presented would preclude us from reversing the judgment for that cause. The third and fourth errors assigned have not been urged with much seriousness, and, indeed, they both present questions that have been heretofore settled by this court. Upon the whole, we see no cause for reversing the judgment of the circuit court. Judgment affirmed.

COCKE (MUNROE v.). See Case No. 9,928.

Case No. 2,930.

COCKER et al. v. FRANKLIN HEMP & BAGGING CO.

[1 Story, 169.] [1]

Circuit Court, D. Massachusetts. May Term, 1840.

DEPOSITIONS—PRACTICE—WAIVER OF EXCEPTIONS TO INTERROGATORIES.

1. In cases of disagreement between parties in regard to interrogatories and cross interrogatories, they should be referred to a master in chancery to be settled by him, subject to the ultimate review of the court upon an appeal from such report.

[Cited in Zunkel v. Litchfield, 21 Fed. 197.]

2. Exceptions to interrogatories or cross interrogatories should be propounded as objections, before the commission issues, or they will be deemed waived.

At law. Assumpsit [by Robert Cocker and others against the Franklin Hemp & Bagging Company] for goods bargained and sold. Plea, the general issue. At a former term, upon a trial of the cause the jury disagreed, and no verdict was given. [Case No. 2,932.] At the present term, a commission was moved for by the defendants to examine witnesses in England, in support of their defence, and the motion was granted by the court. Interrogatories and cross interrogatories were filed according to the rules of the court. But exceptions were taken by the plaintiffs, to the second, fourth, fifth, sixth, ninth, tenth, eleventh, and twelfth interrogatories of the defendants; and by the defendants to the fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and nineteenth cross interrogatories of the plaintiffs.

The exceptions were briefly argued by Mr. Bartlett, for defendants, and by Loring and Dehon, for plaintiffs.

STORY, Circuit Justice. Applications to review interrogatories in cases of this sort are rare in this court. And I wish, therefore, to say a few words as to the proper course of practice. In general, it seems to me, the most fit course is, that in cases of disagreement between the parties as to the form of the interrogatories and cross interrogatories, it should be referred to a master to settle the proper form of them, subject, of course, to an ultimate review by the court upon an appeal from his decision and report. In this way, by a hearing of the parties, as to the points in issue, the master will generally be able to direct the ultimate form of the interrogatories, so as to make them satisfactory to the parties. In reviewing interrogatories, it is impossible, in many cases, to decide, whether the interrogatory itself, or the particular form, in which it is propounded, is the proper one or not, without a knowledge of the general merits of the cause, or of the points in issue between the parties. Under such circumstances, it seems proper, that the court should reserve their ultimate decision until the trial in all doubtful cases, so that the party affected thereby may have a full opportunity to file exceptions to the ruling of the court, and thus to bring the matter under the review of the appellate court, or to move for a new trial. I shall deem it my duty generally to act upon this course of practice, as best adapted to secure the rights of all parties. When, therefore, exceptions are intended to be taken to any particular interrogatories or cross interrogatories, they should be propounded,

[1] [Reported by William W. Story, Esq.]

as objections before the commission issues, otherwise they will be deemed to be waived. When objected to, if I entertain doubts as to their relevancy or propriety, I shall let them go, and reserve the matter for a final hearing at the trial. If I entertain no doubt, that they are irrelevant or improper, I shall not hesitate to overrule them, and order them to be struck out. In the present case I have varied the form of some of the cross interrogatories, and, with this alteration, I have allowed them. I overrule all the exceptions, taken by the defendants to the cross interrogatories, except to the nineteenth, which I allow, and direct the same to be suppressed. I overrule all the exceptions taken by the plaintiffs to the interrogatories of the defendants, except to the eleventh and twelfth, which I allow, and direct the same to be suppressed. I do not mean to be understood, as being perfectly satisfied, that some of the exceptions taken by the parties may not be good to others of the interrogatories and cross interrogatories. But I desire to reserve a final opinion thereon, until the hearing at the trial.

[NOTE. On the trial the jury rendered a verdict for plaintiffs. Case No. 2,931.]

Case No. 2,931.

COCKER et al. v. FRANKLIN HEMP & BAGGING CO.

[1 Story, 332.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1840.

SALE AND DELIVERY — REASONABLE TIME—VARYING WRITTEN CONTRACT.

Where a contract was made to manufacture certain articles, and no time was specified in the contract, within which they should be completed and delivered; it was *held*, that the law imported, that the goods should be manufactured and delivered within a reasonable time; and that parol evidence was admissible, as evidence of what the parties considered reasonable time, but not for the purpose of varying or controlling the terms of the written contract.

At law. This was an action of assumpsit, brought by the house of [Robert] Cocker & Sons, extensive manufacturers of machinery and hardware in England, against the Franklin Hemp and Bagging Company, a corporation formerly engaged in the manufacture of cotton bagging in Boston, to recover damages, upon the refusal of defendants to accept certain copper gill stocks and steel pins manufactured by the plaintiffs, upon a contract in writing made by them with the defendants, in July, 1836. The articles ordered by the defendants were to be used as a part of the machinery in their factory. The contract, on which the action was brought, was in writing, and contained the agreements of the parties, as to the size, quantity, and construction of the articles ordered; the price and mode of payment for the same, and place of delivery, viz. at New York; but it contained no stipulation whatever, as to the time in which the articles were to be completed and delivered to the defendants.

The defence rested on two grounds: 1. That a specific time had been verbally agreed upon between the agents of the contracting parties, within which the articles were to be delivered, which time had elapsed before their delivery. And 2. That if that were not so, the articles ordered were in any event to be delivered within a reasonable time; and that there had been such an unreasonable delay in the execution of the order on the part of the plaintiffs, as to discharge the defendants from any obligation to accept and pay for the articles. It appeared in evidence, that the order for the articles was dated the 13th of July, 1836, and was received in England on the 27th of August of that year; that the manufacture of the articles was commenced about the last of October, or the 1st of November, and was completed on the 31st of December, 1836, and they were forwarded to New York by the first packet from Liverpool, which could take them, where, however, they did not arrive until March 14th, 1837, owing to an unusually long passage. Upon arrival there, they were tendered to the defendants, and refused by them. Evidence was also introduced by the plaintiffs, showing, that in the whole year, 1836, and more especially in the two months preceding the receipt of this order on England, there had been a very great press of business upon the plaintiffs, and a vast increase of orders for gill stocks and pins of the usual kinds. It was also proved by an inspection and examination of their order-book, which was sent out from England upon the requisition of the defendants, that the plaintiffs had not previously received any orders for an article of a pattern and construction like that ordered by the defendants. And several machinists were introduced, whose evidence tended to show, that the articles ordered by the defendants were of a very peculiar and unusual construction; which circumstances, as the plaintiffs contended, accounted reasonably for the delay in the execution of the order.

There was a direct conflict of evidence upon the other point, whether any specific time had been agreed upon by the parties as a part of the contract. Several witnesses testifying in behalf of the defendants, that it was distinctly agreed by the plaintiffs' agent, when the order was given, and as a part of it, that the articles should be delivered in four months, or by the end of November, at farthest. Upon the other hand, the plaintiffs' agent, Mr. James Cocker, testified, that he did not agree, that the articles should be completed and delivered within any specified time, though it was admitted, that

[1] [Reported by William W. Story, Esq.]

he had stated (see 1 Story, 169 [Case No. 2,930]), he had no doubt, that the articles could be completed in thirty days, and delivered in ninety days or four months at farthest; and that such was his expectation at the time of entering into the contract; and he further testified, that he absolutely refused, when requested by the defendants, to fix a time as a part of the contract, because he could not know the state and condition of the plaintiffs' business, or their engagements, or their ability to execute the order in the time named. The written contract itself, and sundry letters of the parties relating to the contract, written before any controversy arose, and which were silent on the matter of time, as making a part of the contract, were strongly urged, and relied upon by the plaintiffs, as supporting and entirely confirming Mr. Cocker's testimony in this respect.

[On the first trial, the jury disagreed. Case No. 2,932. For a hearing on exceptions to the interrogatories and cross interrogatories, see Id. 2,930.]

C. G. Loring and Dehon, for plaintiffs.
Fletcher and Bartlett, for defendants.

STORY, Circuit Justice. Where parties have reduced their contracts to writing, the contract so written must be taken to contain all the agreement between them in relation to the subject matter thereof. And when no time (as in this instance) is mentioned in the contract, the law fixes that element of the contract, and declares it to be intended by the parties, that it is to be executed within a reasonable time. Under such circumstances, parol evidence is inadmissible to vary and control the written contract, by proving, that a specific time has been verbally agreed on by the parties, within which the contract should be executed. But such evidence may be admitted for the purpose of showing, what the parties considered to be a reasonable time, when they made the contract, and, as a fact, tending to show, what is a reasonable time. But for special reasons in this case, I shall leave it to the jury to find, whether or not any specific time was verbally agreed upon, as a part of the contract, within which the goods were to be delivered, as is contended for by the defendants. And, if they are satisfied, that a time was so agreed upon, I instruct them to find a verdict for the defendants.

The judge further instructed the jury, that what was a reasonable time in this case, was a question depending upon the peculiar circumstances of the case; and, after reviewing the evidence in the cause, applicable to that question, he left it to the jury to say, whether the plaintiffs had used due diligence, and executed the order, under all circumstances, within a reasonable time; or whether there was such delay in the execution of the order on their part, as discharged the defendants.

The jury returned a verdict for the plaintiffs, for the whole amount claimed and interest.

Case No. 2,932.

COCKER et al. v. FRANKLIN HEMP & FLAX MANUF'G CO.

[3 Sumn. 530.] [1]

Circuit Court, D. Massachusetts. May Term, 1839.

SALE AND DELIVERY — REASONABLE TIME — CONTRADICTION OF WRITTEN CONTRACT.

1. If a contract or order, under which goods are to be furnished, does not specify any time at which they are to be delivered, the law implies a contract, that they should be delivered within a reasonable time; and no evidence will be admissible to prove a specific time at which they were to be delivered, for that would be to contradict and vary the legal interpretation of the instrument.

2. The question of reasonable time is determined by a view of all the circumstances of the case; and parol evidence of the conversations of the parties may be admitted to show the circumstances under which the contract was made, and what the parties thought was a reasonable time for performing it.

[Cited in Nunez v. Dautel, 19 Wall. (86 U. S.) 563.]

At law. Assumpsit [by Robert Cocker & Co. against the Franklin Hemp & Flax Manufacturing Company]. There were several counts in the declaration. (1.) On an account annexed, for $2,157.97. (2.) Money counts. (3.) Special count, for not accepting certain articles (gill pins), made by the plaintiffs at the request of the defendants. Plea, general issue.

At the trial, it appeared, that, on the 13th of July, 1836, an order or contract had been entered into at Boston, by the agent of the plaintiffs (who were manufacturers at Hathersage, Sheffield, England), with the agents of the defendants, a manufacturing company in Boston, for the manufacture for the defendants of certain gill pins. The contract was in the following terms: "Boston, July 13, 1836. The Franklin Hemp and Flax Manufacturing Company of Boston order from Cocker & Sons, Hathersage, Sheffield, the following copper gills, which are charged at sterling prices, and to be imported by Cocker & Sons, and charged forty-five per cent. advance for importation; all expenses of importation to be paid by Cocker & Sons. The gill pins will be charged as stated below, at net prices. The F. H. & F. M. Company paying cash on delivery of goods in New York, or drawn upon them at one day's sight." (The list of articles ordered is omitted.)

The principal ground of defense was, that the gill pins were not furnished within the period, at which it was agreed between the agent of the plaintiffs and the agent of the defendants, at the time when the contract was entered into. Parol evidence was of-

[1] [Reported by Charles Sumner, Esq.]

fered by the defendants, to show, that, at the time when the contract was made, certain conversations were had between the respective agents, in which the agent for the plaintiffs expressly agreed to furnish the articles, deliverable at New York, within four months from the time of making the contract, that is to say, on or before the 13th of November, 1836. In point of fact, the articles were not begun to be manufactured until the latter part of October, or the beginning of November; and they were not completed, so as to be shipped, until the end of December, 1836. They arrived in New York about the 18th of March, 1837, and notice was immediately given to the company, who refused to receive them. In fact, on the 19th of January, 1837, the agent of the defendants had written to the agent of the plaintiffs, informing him, that the company did not hold themselves bound to receive them, as they were to have been delivered in the month of November. The manufactory of the defendants, in which the articles were to be used, was in a state to receive the articles for use in November and December, 1837; and the articles not having then arrived, other articles for the same purpose, of an inferior quality, were used as a substitute. The manufactory of the defendants was accidentally burnt down about the 14th of February, 1837. It was proved at the trial, that the sole reason of the delay in manufacturing the articles, was the unusual pressure of orders in the year 1836, and that it was impracticable, consistently with the other engagements of the plaintiffs, to have furnished them at an earlier period. Several witnesses swore, that there was this unusual pressure during that year; and that the shortest time to furnish such articles would be, if they were to be manufactured, from five to six months. And they stated, that they thought these articles were furnished within a reasonable time. The main defence at the trial being, that the goods were not furnished according to the agreement, a question was made, whether the parol evidence of the conversations between the parties, at the time of the contract, was admissible. It was ruled by the court to be admissible, not for the purpose of establishing the specific time when the contract was to be performed, for that would be to add to and vary the written contract; but to show the circumstances under which the contract was made, and what the parties then thought was a reasonable time for furnishing them.

The cause was argued to the jury by Mr. Dehon and Charles G. Loring, for plaintiffs and by Mr. Bartlett for defendants. The latter cited [Pearson v. Bank of Metropolis] 1 Pet. [26 U. S.] 89. The former cited 2 Greenl. 249, and Ellis v. Thompson, 3 Mees. & W. 445.

STORY, Circuit Justice, in summing up to the jury, said:

The contract or order, under which these gill pins were to be furnished, does not specify any time at which they were to be delivered. The result of this omission is, that the law treats the contract, as if it had expressly stated, that they were deliverable within a reasonable time. No evidence, therefore, could properly be admissible to prove a specific time, at which they were to be delivered; for that would be to contradict and vary the legal construction of the instrument. But the parol evidence was admitted of the conversations, to show what, at the time, the parties understood was a reasonable time, within which, under ordinary circumstances, the contract might be fulfilled. In this view, the parol evidence did not contradict or vary the written contract, but went merely to show the opinions of the parties as to the reasonable time for executing it. I thought, and still think, that in this view the evidence was clearly admissible. And I am very glad to find, that this my view of the matter is confirmed by the opinion of the court of exchequer in Ellis v. Thompson, 3 Mees. & W. 445. Mr. Baron Alderson, (a very able judge), on that occasion used the following language, which I cite, as fully expressive of the very opinion, which I entertain on the same subject. "There is no specification," said he, "in the contract, as to the time when the delivery is to take place, and, therefore, the law would imply, that the delivery should take place within a reasonable time. And it is a question for the jury at the trial; and this was the question put to them: How the reasonable time, which is an implied part of the contract, is to be ascertained? It seems to me, that the correct mode of ascertaining it is, in such a case as this, by placing the court and jury in the same situation as the contracting parties themselves were in, at the time they made the contract; that is to say, by placing before the jury all the circumstances, which were known to both parties at the time the contract itself took place. By so doing, you enable the court and jury to form a safer conclusion, as to what is the reasonable time, which the law implies, and under which the contract itself took place." So far the learned judge has expressed himself on the very point of this case. The whole question now before the jury is, whether these articles were manufactured and offered to be delivered within a reasonable time. That reasonable time must be judged of by all the circumstances, and, of course, with all the natural calculations, which might fairly arise from the distance of the countries, the season of the year, the state of the markets, and orders, the pressure of business, and the common disappointments and retardations incident to the manufacture of any new article. The contract was made in Boston; the articles were to be manufactured in England. Of course, a reasonable time for the transmission of the order, for its due and

faithful execution, and for the shipment and arrival at New York, was necessarily in the contemplation of the parties. Were the goods, then, delivered, or offered to be delivered, within such reasonable time? If they were, then the defendants are bound to pay for them. If not, then they ought to be exonerated. The conversations which have been admitted, as I have stated, are evidence, not of a contract to deliver at a specified time (four months), at all events, or otherwise the bargain was to be void. But merely as statements of opinion and probabilities, uttered by a young man, sanguine in his expectations, and, without doubt, honestly made. But the other side must be presumed to be as good judges as himself, of the time which might or would be required for the transaction of the order and the shipment and arrival of the goods, if not of the time required for the actual execution of the order. Opinions are not contracts, but expressions of belief; and must so be understood. They affirm what may be, not what will or shall be absolutely done.

Let us then see, how the evidence stands on this subject as to the reasonableness of the time and the diligence in executing the order. (Here the judge recapitulated the evidence. The case was then left to the jury upon the matter of fact.) [2]

The jury disagreed, and no verdict was found.

[NOTE. A new trial was had, and the jury rendered a verdict for plaintiffs. Case No. 2,931. For hearing on exceptions to interrogatories and cross interrogatories, see Case No. 2,930.]

COCKERILL (CONNER v.). See Case No. 3,112.

COCKREM (BIRD v.). See Case No. 1,429.

COCKRIN (UNITED STATES v.). See Case No. 14,822.

COCKRUN v. McLEAN. See Case No. 2,927a.

Case No. 2,933.

In re COCKS.

[3 Ben. 260.] [1]

District Court, E. D. New York. May, 1869.

BANKRUPTCY—BAKER—TRADESMAN.

A baker, who buys flour, which he makes into bread, and sells the bread to daily customers, is a tradesman within the meaning of the 29th section of the bankruptcy act [of 1867 (14 Stat. 531)], and is not entitled to a discharge, if he has not kept proper books of account.

[In the matter of John F. Cocks, a bankrupt.]

BENEDICT, District Judge. This case raises the question whether a person whose occupation is that of a baker, and who buys flour, which he converts into bread, and then sells the bread to daily customers, is to be deemed a tradesman, within the meaning of the 29th section of the bankrupt act, and therefore not entitled to a discharge, where it appears that he has kept no books of account whatever.

As neither counsel have referred to any authority bearing upon the question, I am justified in assuming for the purposes of this case that no authorities exist, either in this country or in England, which throw any light upon the subject. In the absence of any light from authorities, I incline to the opinion that the petitioner must be held to be a tradesman, and, therefore, not entitled to a discharge, for the reason that it appears that he has kept no books of account.

Case No. 2,934.

COCKS v. IZARD et al.

[4 Am. Law T. Rep. U. S. Cts. 68.]

Circuit Court, D. Louisiana. March, 1871.

ALIEN ENEMY — RIGHT TO SUE IN ENEMY COUNTRY—PRINCIPAL AND AGENT — EXECUTION SALE —PROMISE TO RECONVEY.

1. An alien enemy may sue and be sued in the courts of the enemy country.

2. The authority of an agent is not affected by war, and proceedings had against an agent during a state of war, to which the principal could not answer by reason of the existence of war, are valid, and hold the principal.

[3. An oral promise by a purchaser on execution sale to reconvey to the debtor, upon reimbursement of his advances and charges, is not enforceable in equity.]

[See note at end of case.]

WOODS, Circuit Judge. On the 24th day of March, 1863, Robert Anderson, a citizen of the state of New York, and a general in the United States army, brought an action in the United States provisional court for the state of Louisiana, against John G. Cocks. The plaintiff in that suit alleged that defendant was indebted to him in the sum of $8,840, being the balance due on certain promissory notes executed by defendant, and of which plaintiff was the holder, and including certain costs incurred by plaintiff for which defendant was bound. The citation was returned "served on defendant at his last place of residence, No. 192 Canal street." A citation was also served on Charles Hyllested, who the petitioner averred was the duly authorized agent of the said defendant, and authorized to represent him and stand in judgment for and against him. Defendant having made default on the 30th day of May, 1863, judgment was rendered against him in favor of the plaintiff for $8,440. Upon this judgment a writ of fieri facias was issued on the 25th day of November, 1864, which was levied on two improved lots in the city of

[2] In Bottomley v. Forbes, 5 Bing. N. C. 127, the court held, that, where a doubt was raised by evidence upon the meaning of a mercantile contract, evidence was admissible of the usage or course of trade at the place where the contract was to be carried into effect, to explain or remove that doubt.

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

New Orleans, of which the defendant was seized in fee, and after appraisement and advertisement, the same were sold at public auction, by the marshal of said court, to Charles Izard, one of the defendants in this case. By virtue of a subsequent judicial proceeding and sale, Paul H. Lewis, the other defendant, became vested with all the title of Izard to the premises. John G. Cocks, who, at the time of these proceedings against him, alleges that he was a citizen and resident of the state of Mississippi, files his bill in equity against Izard and Lewis, the object and prayer of which is that they may be compelled to convey to him the property sold under said judgment, that an account of the rents and profits may be taken, and if any balance shall be found due to plaintiff after deducting the amount paid by Izard for the property, he may have a decree therefor.

In support of prayer, the complainant in his bill alleges: 1. That the said United States provisional court was not a legal court, and that, therefore, the judgment and proceedings thereunder were absolutely void. 2. That no legal service of the citation in the case of Anderson v. Cocks was made on complainant. 3. That, at the sale of the property by the marshal of the provisional court, the defendant, Izard, gave out that he was bidding on said property on account of the complainant, for which reason persons who were in attendance refrained from bidding, because they did not desire to compete with complainant, whereby competition was prevented and the property sold at rates greatly disproportioned to its actual value. 4. That, after the sale, Izard promised to reconvey the property to complainant upon reimbursement of his advance and charges, which conveyance he has failed to make.

I do not understand that the first ground on which the prayer for relief is based, is still insisted on by complainant: that, in the case of The Grapeshot, 9 Wall. [76 U. S.] 129, the supreme court of the United States has held that the United States provisional court of Louisiana was a lawful and constitutional court. We may, then, consider that point as out of the case. But it is claimed that no service of the citation or summons was made upon Cocks, the defendant in the suit before the provisional court, nor upon his agent duly authorized to receive service by the state law. It appears from the record that the citation was twice served—once, as the return of the marshal shows, by leaving a copy at the last place of residence of said Cocks, No. 192 Canal street, and once by delivering a copy to Charles Hyllested, the agent of said Cocks. The attempted service at the domicil is clearly ineffectual and void. The Code of Practice (section 189) requires that when service of citation is made at the domicil, it shall be by copy left at the usual domicil or residence of the defendant. The return of the marshal does not show that the citation was so served, and the proof shows clearly that the house No. 192 Canal street was not the domicil or residence of Cocks. It is admitted, however, that service was made on Charles Hyllested, who, defendants aver, was duly authorized to receive service from Cocks. If Hyllested was the duly-authorized agent of Cocks to receive service or process, or to defend suit, the service upon him might be a good service. Section 196 of the Code of Practice provides that if the person absent has an attorney in fact, whose name appears in the petition, the sheriff shall make service on the attorney in fact. But complainant says that the procuration, or power of attorney held by Hyllested, did not authorize him to receive service, or appear and defend suits against his principal. I have examined this power with some care, and am clear that the authority to appear and defend suits against the principal is conferred upon the agent. It appoints Hyllested as the true and lawful attorney in fact of Cocks, giving him full power and authority to manage and transact, all and singular, the affairs, business, and concerns of the principal in the city of New Orleans and state of Louisiana, of every nature and kind, without any exception or reservation whatever; to open and answer letters, sign and indorse the name of the principal on promissory notes or bills of exchange; to appear before all courts of law and equity, there to do and prosecute, as occasion shall require, or to compromise, compound, or agree in the premises by arbitration or otherwise; and, generally, to do and perform all and every other act, matter, and thing whatsoever, as shall or may be necessary or requisite, touching or concerning the affairs, business, and concern of the principal, as fully, amply, and effectually, and to all intents and purposes and with the same validity as if all and every such act, matter, or thing were or had been particularly stated, expressed, or especially provided for, as he, the said principal, could or might do if personally present. It is difficult to see how broader powers could be conferred on an agent, or to escape the conclusion that Cocks intended to authorize his attorney in fact to appear and defend actions against him. In Fuselier v. Robin, 4 La. Ann. 61, it was held by the supreme court of this state that the power to represent a principal in the defence of actions must result from the express terms of the instrument, or from an implication so clear as to be irresistible. I think, in this case, the implication is irresistible. But complainant says that, at the time of service on his attorney in fact, he was within the confederate lines; that communication with his agent, who was within the federal lines, was forbidden, and, therefore, the agency ceased, and to support this view cites article 2996, Civ. Code.

This article provides that procuration expires by change of the condition of the principal, or the seclusion or interdiction of the agent or principal. I do not think that this

article touches the question. By a change of condition is meant such a change of state as produces an incapacity in either party. Thus, if an unmarried woman should, as principal, execute a power of attorney, or give any other authority to an agent, and afterwards should marry, the marriage would ipso facto amount to a revocation of the power. This proceeds upon the principle that the derivative authority expires with the original from which it proceeds. The bankruptcy of the principal is another illustration of what is meant by change of condition. By seclusion I understand this article to mean religious seclusion—the taking of such religious vows as makes the party civiliter mortuus. It is strange that such a provision should be found in the Code of Louisiana. That it was inadvertently incorporated into the jurisprudence of this state from the civil law I think clear. Interdiction occurs when a party becomes non compos mentis, and the law interferes and places his affairs in the hands of a curator or guardian. This article of the Code does not therefore apply. Although the Civil Code does not, in my opinion, by its provision revoke the power of the attorney under the circumstances of this case, yet there remains the question whether or not the state of war operated to effect such revocation, the principal and agent being citizens and residents of the countries at war with each other. I understand the rule of law to be this:—That when before the declaration of war, or commencement of hostilities, a principal in one country creates an agent in another, the agency continues notwithstanding the subsequent outbreak of war between the two countries, for all lawful purposes not forbidden by the laws of war. The agent of an alien enemy is not authorized by the state of war to abandon, or destroy, or squander the property of his principal. It is his duty to preserve it and protect it. He may receive money due his principal, and give acquittances therefor, and he may carry out and fulfill any lawful contract of his principal. 19 Johns. 139; [Ward v. Smith] 7 Wall. [74 U. S.] 452; [U. S. v. Grossmayer] 9 Wall. [76 U. S.] 74. It has even been held that the subjects of an enemy nation, ordered away in consequence of war, are entitled to leave a power of attorney, and to collect debts by virtue thereof. Emerigon, Traité des Assurances, tom. 1, p. 567. The power of attorney given by Cocks to Hyllested was not revoked by the war.

But another question still remains in this branch of the case, namely: Can an alien enemy be sued in the courts of the country in which his own is at war? For, if a suit would not lie against Cocks on account of his enemy's character, if he were present in person, and personally served with process, a fortiori, it would not lie when the service was upon his attorney in fact. There has been some slight conflict of authorities on the question whether an alien enemy could sue in the courts of the enemy country. But it appears to be now well settled that he can sue, and, as a consequence, that he can be sued. In Sparenburgh v. Bannatyne, 1 Bos. & P. 163, it was held in the common pleas at Westminster that an alien under the king's protection, even if he were a prisoner, might sue and be sued. This point has long before been decided in Wells v. Williams, 1 Ld. Raym. 282. So in Clarke v. Morey, 10 Johns. 69, it was held by Kent, C. J., upon a plea of alien enemy, that an alien or subject of Great Britain, who came to reside in the United States after the breaking out of the war between the United States and Great Britain, might, during the war, sue and be sued, as in time of peace. If an alien enemy is served with process, or submits to the jurisdiction of the court, there is no rule of public policy which forbids a suit against him. The policy of the laws of war forbids any intercourse between the belligerents, or that money or other resources shall be transferred so as to strengthen the enemy. But when an alien enemy has left an agent upon whom process can be served, there is no reason why suit should not be brought against him; for it does not necessitate intercourse, nor does it tend to strengthen the enemy. On the contrary, its effect is in the other direction.

I am of opinion, therefore, that the power of attorney from Cocks to Hyllested continued in force, notwithstanding the war; that the power of attorney authorized Hyllested to receive service of process for his principal, and to defend actions brought against them, and that, under the Code of Practice of this state, the service upon Hyllested, the attorney, was a good service upon his principal. It follows, therefore, that the judgment of the provisional court in favor of Anderson, and against Cocks, was a valid judgment. Nevertheless, if Izard, being the tenant of Cocks, gave out and let it be understood that he was bidding for the property sold under the judgment of Anderson at the time of the auction, for account of Cocks and in his interest, and persons in attendance, who were ready and willing to bid more for the property than the price at which it was sold to Izard, refrained from bidding, not willing to compete in bidding with Cocks or any person who was understood to represent him, and thus competition was prevented and the property sold for a grossly inadequate price, then the sale was a fraudulent one and ought to be set aside. It has been so decided by the supreme court of the United States. Cocks v. Izard, 7 Wall. [74 U. S.] 559. So that the question is presented for decision: Does the proof establish the alleged fraudulent practice of Izard? The answer of Izard is under oath. It is true that the bill waives an answer under oath; but such waiver is not authorized by any rule of the United States courts sitting in equity, nor has there been any order of this court directing that the answer of the defendant be received without oath. Under these circumstances, the defendant has the right to

answer under oath, and to make his answer testimony. To overcome the denial of the answer responsive to the bill, there must be the testimony of two witnesses, or one witness and strong corroborating circumstances. I have examined the evidence in this case, and am satisfied that the charge of fraudulent practices on the part of Izard with respect to this sale is not affirmatively established. As to the last ground on which the plaintiff bases his prayer for relief—namely, that Izard promised to re-convey the property to complainant upon reimbursement of his advances and charges—it is sufficient to say that this alleged contract not being in writing, even if satisfactorily proved, cannot be in force in a court either of law or equity. The complainant having failed to establish any of the grounds for the relief prayed, his bill must be dismissed at his costs. Decree accordingly.

[NOTE. On appeal by complainant, the supreme court reversed the decree of the circuit court, and remanded the case, on the ground, as set forth in the opinion of Mr. Justice Davis, that Izard, the tenant of complainant, obtained possession of the property by unfair practices which prevented intending purchasers from bidding at the sale, and enabled him to acquire the property at a sum hardly equal to its yearly rental value, and that the failure of complainant to apply summarily to set aside the sale, and for a resale, did not forfeit his right to redress in equity according to the prayer of the bill. Cocks v. Izard, 7 Wall. (74 U. S.) 559.]

CODDINGTON (HATCH v.). See Case No. 6,205.

CODMAN (ROBISON v.). See Case No. 11,970.

Case No. 2,935.

CODMAN et al. v. VERMONT & C. R. CO.

[16 Blatchf. 165.] [1]

Circuit Court, D. Vermont. April 15, 1879.

GUARANTY—NEGOTIABILITY—FIXATION OF LIABILITY—INTEREST.

1. The trustees and managers of the Vermont Central Railroad Company and the Vermont and Canada Railroad Company issued notes, to the amount of $1,000,000, in sums of $1,000 each, by which they, as trustees and managers only, reciting that it was in accordance with the votes of the stockholders of the two companies, and by virtue of a decree of the court of chancery of the state of Vermont and of a special act of the legislature of Vermont, promised to pay to the order of the defendant the sum, 20 years from date, with interest at the rate of 8 per cent. per annum payable semi-annually, at their office in Boston, on presentation of the interest coupons attached. The notes were signed by the trustees and managers, as such, and interest coupons, payable to bearer, for each instalment of interest, were attached. On each note was this endorsement, signed by the treasurer of the defendant, under its seal: "For value received, the Vermont and Canada Railroad Company hereby guarantee the payment of the within note, principal and interest, according to its tenor, and order the contents thereof to be paid to the bearer." The notes were put on the market, and C. purchased 50 of them at par and ⅛, without notice in regard to them, beyond the general knowledge, open to all, of the location and situation of the railroads, and what appeared upon, and would be suggested by, the face of the instrument. C. sued the defendant to recover the amount of 2 coupons on each of the 50 bonds. The defendant admitted the "demand, notices and protest of said coupons, as they fell due." *Held*: The defendant became liable upon the notes, as guarantor, to any one to whom the guaranty would run and who would be entitled to sue upon it.

2. Whether the guaranty was negotiable, quaere.

3. The endorsement was a contract of endorsement, running to the bearer.

4. The admission as to demand, notices and protest, is sufficient to show that the liability of the defendant as endorser became fixed.

5. Interest at the rate of 7 per cent. per annum, and no more, can be recovered on the notes, with interest at that rate, on such interest, as damages, from the time when payment should have been made.

[At law. Action by Robert Codman and Henry A. Johnson against the Vermont & Canada Railroad Company.]

Plaintiffs, pro se, and William G. Shaw, and Benjamin F. Fifield with them.

Francis A. Brooks and Edward J. Phelps, for defendants.

WHEELER, District Judge. This is an action of assumpsit against the defendant, as guarantor and endorser of fifty negotiable bonds, of one thousand dollars each, to recover arrears of interest thereon, and has been tried by the court upon stipulation of the parties waiving a jury, filed. The defendant leased its road, before it was built, to the Vermont Central Railroad Company, reserving semi-annual rent equal to eight per cent. annual interest on its cost, and, to secure payment, took a stipulation for reentry and a conveyance of the Vermont Central Railroad, to be operative on default, giving a right "to receive all tolls, fares and other lawful income receivable for the use of the said railroads," and, after paying expenses, to "apply the residue of its said receipts in and towards the payment of all rent then in arrear and unpaid." The Vermont Central Railroad Company also mortgaged its road by two successive mortgages, subject to the security for the Vermont and Canada rent. Default was made of the mortgaged debts, and also of the rent, and the roads were surrendered to the mortgage trustees. The Vermont and Canada Company brought a bill in equity, in the court of chancery of the state, to enforce its security for the payment of its rent, and the roads were by that court placed in the hands of receivers. Much question was made, in that proceeding, as to the effect and validity of the lease and conveyance to secure rent, but they were finally held valid and operative, by the supreme court of the state, on appeal, and the amount of the annual

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

rent was fixed, but it was not decided that the possession of the roads should go to the Vermont and Canada Company, and they were left in the hands of receivers, to be operated, and to have the income applied in satisfaction of the rent, and, after that, of the mortgage debt, subject to the control of the court of chancery. Vermont & C. R. Co. v. Vermont Cent. R. Co., 34 Vt. 1. After that decree, an agreement was entered into between the Vermont and Canada Company and other security holders, sanctioned by a special act of the legislature of the state, by virtue of which a further decree was entered up in the cause, authorizing an increase of the stock of the Vermont and Canada Company to two millions of dollars, and providing for the payment of rent equal to eight per cent. annual interest on that amount, which was to "be paid by the trustees and receivers from time to time in possession of said roads and property, and from the income thereof," and, for the payment of the residue, after paying certain expenses, to the subsequent security holders, and for keeping the cause on foot, with liberty to any party to apply to the court for further orders therein. The trustees and receivers in possession, from time to time, with consent of the Vermont and Canada Company, and some of the other security holders and representatives of others, obtained orders of the court for, and negotiated, equivalent loans. In the fore part of 1871, they represented to the directors of the defendant, that they were under a large floating debt, incurred in building extensions of the Vermont and Canada Railroad, in improving the road-beds and superstructures of the Vermont Central and Vermont and Canada roads, and in procuring additional equipment for them, and proposed measures for relief. They adopted a resolution providing for new stock to pay for and represent the cost of the extension, and for a new loan of a million of dollars, to be endorsed and guaranteed by that company, and for a meeting of the stockholders to consider the subject. Meetings of the directors and stockholders were held on the 16th day of May in that year, and it was voted at each, that the company should endorse and guarantee the notes of the trustees and managers, to the amount of one million of dollars, payable in twenty years from date, and bearing interest at the rate of eight per cent. per annum, payable semi-annually, and the treasurer was authorized to execute the endorsement and guarantee. Application to the court was made immediately by the trustees and managers, for leave to the Vermont and Canada Company to issue new stock, and for them to issue their notes for the loan, which was granted, and that company was authorized to issue five hundred thousand dollars of new stock, on account of the construction of the branches, to meet a part of the floating debt, and the trustees were authorized to issue their notes, as stated, to the amount of a million of dollars, to be endorsed and guaranteed by the company, to meet the residue. The notes were issued in sums of one thousand dollars each, by which the trustees and managers, as trustees and managers only, reciting that it was in accordance with the votes of the stockholders of the Vermont Central and Vermont and Canada Railroad Companies, and by virtue of a decree of the court of chancery, as well as of a special act of the legislature of Vermont, promised to pay to the order of the Vermont and Canada Railroad Company, the sum, at the time specified, with interest at the rate specified, at their office in Boston, on presentation of the interest coupons attached, and signed by the trustees and managers as such; and interest coupons, payable to bearer, for each instalment of interest, were attached. On each was endorsed, by the treasurer, under the seal of the defendant company: "For value received, the Vermont and Canada Railroad Company hereby guarantee the payment of the within note, principal and interest, according to its tenor, and order the contents thereof to be paid to the bearer." The notes so executed and endorsed were put upon the market, and the plaintiffs purchased fifty of them at par and one-eighth, without notice in regard to them beyond the general knowledge, open to all, of the location and situation of these railroads, and what appeared upon, and would be suggested by, the face of the instrument. The coupons were paid by the trustees and managers to January 1st, 1876. Those falling due July 1st, 1876, and January 1st, 1877, were not paid. The "demand, notices and protest of said coupons as they fell due." is admitted in writing by the defendant. This suit is brought to recover the amount due upon them.

The defendant insists, that the agreement of guarantee and the obligations of endorser were, under the circumstances, wholly outside the scope of the corporate powers of the defendant and not binding; that it was mere accommodation paper as to the defendant, and that the guarantee was, therefore, not binding; that the endorsement is not sufficient in form to bind the defendant as endorser; that its liability as endorser would not become fixed by the demand, notice and protest admitted of the coupons; that, if the endorsement was sufficient and the protest good, the guarantee, coupled with the endorsement, would show that both were for accommodation and prevent liability of the defendant.

The statute law of the state then was and now is: "Every railroad corporation within this state, if it shall vote so to do, at a meeting of the stockholders, called for such purpose, shall have power to issue their notes or bonds, for the purpose of building or furnishing their roads, or pay-

ing any debts contracted for building or furnishing the same, bearing such a rate of interest, not exceeding seven per cent., and secured in such manner, as they may deem expedient." Gen. St. Vt. 237, § 97. "All notes or bonds which may be issued under and by virtue of the provisions of this chapter shall be issued for a sum not less than one hundred dollars, and shall be made payable in not less than three years, nor more than twenty years, from the time of issuing the same." Id. § 99. The form in which railroad companies should become parties to notes or bonds issued, whether as makers, guarantors or endorsers, would not seem to be important for bringing them within the provisions of these sections, if their object should be within the scope of the power conferred, and they should not be issued contrary to the provisions. The power extends to building and furnishing their roads and to paying debts for those things. In this case, no witness has testified directly to what the purpose was for which these notes were made and sold. All that appears on that subject is what appears from the corporate acts and conduct of the defendant in connection with, and upon the representations of, the trustees and managers. They were issued and sold to pay a floating debt. This debt was represented to be for construction of new road under the charter of the Vermont and Canada Railroad, and for improving the road-beds and superstructures and providing equipment for both roads. The defendant voted to issue its new stock to pay for the construction, and to endorse and guarantee the notes to pay the rest of the debt, upon these representations. The question of fact involved is to be found upon such evidence as is competent to bind the defendant. This corporate action is deemed sufficient to show, as against the defendant, that the debt was, and it is found to have been, a debt contracted for those purposes. This purpose was building and furnishing the roads, within the meaning of the statute. The power only extends, however, to building and furnishing their roads, and, if these were not the defendant's roads, this building and furnishing did not come within the statute. It is said, in argument, that the defendant has never actually had any railroad at all; for, it leased its road by perpetual lease, before it was built, reserving to itself rent, so that it had nothing left but a rent charge upon the roads of others. Litt. § 218; Co. Litt. 144a. This is true, except as to the stipulation for reentry into the road leased, and the conveyance taken of the other to secure the rent, and true notwithstanding them, until there was a default entitling them to the roads, and until it availed itself of its right to the roads. When their proceeding in equity to enforce the security produced a receiver of the roads and put them into the possession of receivers, the receivers were mere officers of the court, without any rights whatever of their own, and they held the property under the direction of the court, by the title of and for whoever should ultimately be entitled to it. The supreme court of the state held that the defendant was entitled to it to hold until the profits should pay the rent, but, under the then existing circumstances, left the roads in the hands of the receivers, and accorded to the defendant its rights, by requiring the profits to be paid upon the rent. The roads were, then, the roads of the defendant, and would continue to be so until the rent should be paid. The agreements and transactions which resulted in the compromise decree did not vary the title and right of the defendant to the property. By the express terms of the decree, it was provided, clause fourth: "That rent shall be paid to said Vermont and Canada Railroad Company, upon said sums of two millions of dollars, chargeable upon the whole property and income of said roads, as a first lien thereon," &c. There was no conveyance by anybody to the trustees and receivers. They were there in possession, under the orders of the court, without title of their own, and were merely left there without title of their own, and with no provision for them to acquire title. The ownership was that of the defendant, to the extent of its rent, then, in the mortgagees of the first mortgage, to the extent of the mortgage debt, and then in the mortgagees of the second mortgage, to the extent of that debt, and then in the Vermont Central Railroad Company. The arrangement, so far as its terms were concerned, was perpetual. If successful enough, it might work out a right in the Central Company to the possession of the roads, subject to the lien of the defendant, by paying off the mortgage, after satisfying the accruing rent, but that would never increase the rights of the trustees and receivers; they would all the while remain in possession for others. In this situation they were claimed to be, and for some purposes were held to be, receivers of the court. Vermont & C. R. Co. v. Vermont Cent. R. Co., 46 Vt. 792. When they asked for an order to sell the property as receivers, the supreme court of the state held that they were not receivers strictly, but rather managing agents. Id., 50 Vt. 500. It is no part of the present purpose here to do more than ascertain whether, under the laws of the state, and the procedure, as expounded by the courts of the state, the roads were the roads of the defendant for furnishing and equipment. For this purpose it is not necessary that they should belong to the defendant absolutely, to every intent and for all other purposes, but is enough if they so belonged for the present purposes needing the furniture and equipment. If agents, there must be a principal, and, in the transactions creating the

agency, there was no party more prominent in the character of principal than the defendant. If receivers, they wanted the money got for these notes for the improvement of the defendant's property in their hands as receivers, in the manner authorized by the statute; if agents, they wanted it for the same purposes for the property in their hands as agents. They executed the notes in the character only in which they held the property, and not as individuals. That would only bind the right by which they held the property, which was all subject to the defendant's right, except so far as, if at all, they represented the defendant. So that, until the defendant's right to the property should be satisfied, the defendant was the sole party, in reality, to the notes, and the sole party to be benefited by the consideration of the notes. Without the furniture and equipment of the roads, the trustees could earn nothing for the defendant. Its interest was that of an owner, direct, and not remote. In this view the defendant became liable upon the notes, as guarantor, to any one to whom the guarantee would run, and who would be entitled to sue upon it.

This guarantee is not, in terms, negotiable. By it the defendant guarantees the payment of the note, principal and interest, "according to its tenor." The note being negotiable, perhaps these words draw that quality into the guarantee. If they do, the guarantee would seem to be negotiable. Story, Prom. Notes, § 484. If not, in Partridge v. Davis, 20 Vt. 499, Davis, J., seems to have thought such a guarantee would, in effect, be negotiable; while in Sanford v. Norton, 14 Vt. 228, and Sylvester v. Downer, 20 Vt. 355, the late Chief Justice Redfield was clearly of the opinion that, like ordinary simple contracts, such guarantees would not be negotiable. No case has been noticed in which this precise question has been settled by the decision of the highest court of the state of Vermont, where this contract was made. The plaintiffs are remote holders, and had no transaction directly with the defendant, and cannot recover upon the guarantee itself, unless it is negotiable. It is not, however, necessary to decide upon this here, unless the endorsement or protest is defective, for, the amount and effect of recovery would be the same upon the endorsement as upon the guarantee.

The endorsement was filled up by the endorser when it was made; therefore, it is not capable of being filled up by an implied authority to write what would be according to commercial usage and the presumed intention of the parties, or of being altered to that, as would have been the case if the endorsement had been in blank and been left so, or had been wrongly or defectively filled up by some one besides the defendant, afterward. It is what the defendant made it, and all that was made or authorized in that behalf, and must speak for itself. The notes were payable to the defendant or order; the defendant, by the endorsement, ordered the contents of the notes to be paid to the bearer. The language used is like that which would have been used by the defendant in drawing a bill of exchange in favor of the bearer, on the makers of these notes. In that case, the defendant would order them to pay the sum named in the bill to the bearer. In this case, the defendant orders them to pay the sums named in the notes to the bearer. In each case, by assuming to order the money to be paid, the party undertakes that it shall be paid, if due diligence, according to the law-merchant, is used. This endorsement seems to be ample and appropriate for the purpose of laying a foundation for liability, and not to be unusual. Story, Prom. Notes, § 138, note. Vincent v. Horlock, 1 Camp. 442, and the language of Lord Ellenborough used therein, have been referred to by counsel for the defendant, as showing that such an endorsement would create no liability, although it would carry the title to the note. One Jacks drew the bill payable to his own order and endorsed it in blank and delivered it to the defendants. One of the defendants, a firm, wrote over the signature of Jacks: "Pay the contents to Vincent & Co.," without signing it at all. So, the defendants' names were not on the bill at all. The point was, whether writing those words over the name of Jacks made the defendants liable as endorsers. As to that, Lord Ellenborough did say: "We see these words, 'Pay the contents to such a one,' written over a blank endorsement every day, without any thought of contracting an obligation; and no obligation is thereby contracted." That all would agree to.

The protest itself is not shown, but demand, notices and protest of the coupons, as they fell due, are admitted. The endorsements are upon the notes and not upon the coupons. The only question about this is, whether the case shows that the instruments endorsed are the ones protested. If not, the liability as endorser may not be fixed, for want of that connection. The notes ran, that interest should be paid on presentation of the coupons. The plaintiffs held both notes and coupons. The coupons themselves contain promises to pay, but there is no reference to the defendant in them. The notice admitted, which must have been notice to the defendant, could not have been given without production of the notes as well as of the coupons. So, the admission, in connection with the circumstances, is taken to mean, that the notes and coupons were presented together, and payment thereupon was refused, and that protest was made for that non-payment, whereby the liability of the defendant as endorser became well fixed.

These notes were issued in sums of not less than one hundred dollars each, and made payable in not less than three nor more than twenty years from the date of issue, and are in accordance with the provisions of the stat-

ute in all respects, except that their rate of interest is eight per cent., while the statute recited provides for a rate not exceeding seven. In Vermont, where this contract was made, stipulating for or taking interest at a rate greater than the law allows does not vitiate the obligation. If such interest is not paid, it may be recovered for at the legal rate; if it is paid, the excess may be recovered back. In Massachusetts, where the notes were payable, no rate of interest was unlawful. If the law of Massachusetts is to govern, this feature of the notes cannot affect the right of recovery at all; if that of Vermont, it can only affect the rate of recovery and the amount.

In ordinary cases, where there is no limitation upon the power to enter into such a contract, nor anything otherwise to affect its inherent validity, interest may be stipulated for, and is to be paid according to the law of the place of payment or performance. 2 Kent, Comm. 460, note c; Story, Prom. Notes, § 155; Andrews v. Pond, 13 Pet. [38 U. S.] 65. But, where the power to enter into such a contract, or the validity of it when entered into, depends upon the law of the place where made, or the contract is made apparently with special reference to the law of that place where made, that law governs. De Wolf v. Johnson, 10 Wheat. [23 U. S.] 367; Andrews v. Pond, 13 Pet. [38 U. S.] 65. In Cheever v. Rutland & B. R. Co., not reported, the notes were executed in Boston and payable there, but were made by a railroad corporation of Vermont, and were to bear interest at seven per cent., and, on their face, referred to the statute before recited, as authority for issuing them at that rate. The legal rate in Massachusetts was, at that time, six per cent., and the defendants contended that the law there should govern, and that only six per cent. could be recovered. The supreme court of Vermont held that the law and rate of Vermont must govern. Steele, J., in the opinion, (Pamph. p. 16,) said: "The situation of the parties and of the subject-matter of the contract may conclusively show that the parties contracted, in good faith, with reference to the law of the state where the security was located, and fixed upon some commercial centre as the place of payment, merely for the convenience of the holders of the loan, who, in such cases, are often widely scattered and continually changing." In Andrews v. Pond, 13 Pet. [38 U. S.] 65, 78, Chief Justice Taney said: "The question is not which law is to govern in executing the contract, but which is to decide the fate of a security taken upon an usurious agreement, which neither will execute. Unquestionably it must be the law of the state where the agreement was made and the instrument taken to secure its performance."

These notes, on their face, are executed by trustees and managers, as such only, and refer to votes of stockholders of the Vermont Central Railroad Company, and of the Vermont and Canada Railroad Company, Vermont railroad corporations, to a decree of the court of chancery, and to a special act of the legislature of Vermont, as authority for their issue. The endorsement of the defendant was made expressly by virtue of a vote of the stockholders, at a meeting duly called. The whole life of the contracts, as well of that shown by the endorsement, as of that shown by the note itself, not only in fact depended upon the law of Vermont, but was upon the face of each instrument shown to so depend. The law which gave the authority limited the rate of interest to be paid. The law was as if a part of the contract, and the limitation was inseparable from it, and would follow it everywhere. The contract of endorsement is separate from that in the notes, and may be so as to interest, as well as in respect to any other feature. Slacum v. Pomery, 6 Cranch [10 U. S.] 221; 2 Kent, Comm. 460.

This action is upon the notes themselves, for a breach of the contract expressed there, to pay the interest on the notes, on presentation of the coupons. It is not exclusively upon the coupons, although they each contain an express contract, and would furnish ground for an action. So, the action is wholly for interest, as such, and the plaintiffs are entitled to recover for the interest at the rate allowed by law, and not more. The right to recover stands upon the same ground precisely as the right to recover interest, when due, upon ordinary contracts to pay interest annually or semi-annually, except that here the law allows seven per cent., while in ordinary contracts it allows only six.

There are two instalments of interest on fifty notes of one thousand dollars each, one of which was due July 1st, 1876, the other January 1st, 1877. On each the defendant became liable to pay seventeen hundred and fifty dollars at those respective times. Payment was not made. There was no agreement to pay interest on those sums if payment should not be made. The statute quoted did not fix a rate in the absence of a contract, but merely permitted a valid contract to be made up to that rate. As the defendant did not pay, it became liable for interest as damages, as in cases of the breach of ordinary money obligations, from the time when payment should have been made. The same question arose in Cheever v. Rutland & B. R. Co., before mentioned, upon this same statute, and was so decided there. Pamph. p. 19.

These conclusions make it unnecessary to decide the questions so fully and ably discussed by counsel, as to whether the defendant could be held, under the circumstances, if the undertaking had been without the scope of the corporate powers of the defendant. As great pains as have been practicable, and more space than usual, have been taken with this cause, as well on account of

the large interests otherwise involved in these questions, as of the just rights of the parties to this suit. There must be a judgment for the plaintiffs, for the two instalments of seventeen hundred and fifty dollars each, with simple interest thereon, in all, $4,033.75.

[NOTE. Defendant subsequently moved for a new trial, and the motion was denied. Case No. 2,936.]

Case No. 2,936.

CODMAN et al. v. VERMONT & C. R. CO.

[17 Blatchf. 1.][1]

Circuit Court, D. Vermont. Aug. 5, 1879.

JURISDICTION—ACTION BY ASSIGNEE OF NOTE—PROTEST—NEWLY-DISCOVERED EVIDENCE.

1. The decision in Codman v. Vermont & C. R. Co. [Case No. 2,935] adhered to.

2. This suit being against the endorser of the notes, and the endorsement having been filled up when it was made, and ordering the contents of the notes to be paid to the bearer, and this having been done before the notes were put into circulation, the contract of the endorser was with the bearer, and no disability of the bearer to sue, as an assignee, could arise under section 11 of the judiciary act of September 24, 1789 (1 Stat. 79), now section 629 of the Revised Statutes.

3. It was of no consequence that the notary protesting the notes did not have the notes, as well as the coupons, to present for payment, at the time of making demand of payment.

4. Evidence which counsel did not, on a trial, think would be material, and did not know of and so did not obtain, although it might easily have been discovered, will not, generally, be allowed to furnish ground for a new trial, although its materiality may arise from the views of the court in deciding the cause.

[This was an action of assumpsit by Robert Codman and Henry A. Johnson against the Vermont & Canada Railroad Company.]

Plaintiffs, in person, and with them William G. Shaw.

Edward J. Phelps and Francis A. Brooks, for defendant.

WHEELER, District Judge. After the opinion heretofore filed in this cause was delivered, (16 Blatchf. 165 [Case No. 2,935]), and before judgment, the defendant moved for a new trial, for the purpose of introducing new evidence, to the effect that the notary making the protest conceded did not have the notes themselves, as well as the coupons, to present for payment, at the time of making demand of payment, and moved that the cause be dismissed for want of jurisdiction in this court. The cause has been further heard upon these motions.

The objection to the jurisdiction rests upon the proviso to section 11 of the judiciary act of September 24th, 1789 (1 Stat. 79, now Rev. St. § 629), which is: "That no circuit court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." These are not foreign bills of exchange. The makers and payee were citizens of the same state, the notes themselves were made payable to order and not to the bearer, so that no suit could be brought against the makers, upon them, by any one but the payee, without an endorsement, which would be an assignment, and, as to suits against the makers, they come precisely within the terms of that proviso. Gibson v. Chew, 16 Pet. [41 U. S.] 315; Dromgoole v. Farmers' Bank, 2 How. [43 U. S.] 241. It was settled early, that notes payable to bearer were payable to any one, and not affected with the disabilities of the original holder, under this statute. Bank of Kentucky v. Wister, 2 Pet. [27 U. S.] 318; Smith v. Clapp, 15 Pet. [40 U. S.] 125; White v. Vermont & M. R. Co., 21 How. [62 U. S.] 575. This suit is against the endorser and not the payee. The endorsement was filled up when it was made, and ordered the contents of the notes paid to the bearer. The evidence showed that this was done before the notes were put into circulation at all. The contract of the endorser was with the bearer, who might be anybody, so that no assignment of that liability would be necessary, and no disability of the original payee to sue would follow the cause of action arising upon that liability. This is expressly stated by Mr. Justice Clifford to be the law, in Lexington v. Butler, 14 Wall. [81 U. S.] 282, 293. The objection to the jurisdiction, although not out of time, even at this late stage of the case, cannot prevail.

The defendant professes to wish to introduce the new evidence to add to the facts conceded, and not to contradict the terms of the concession. The evidence itself is newly discovered in fact, but might easily have been discovered before trial, if it had been thought that such evidence would be material; but it was not so thought by those having charge of the defence. They claim that the views of the court make it appear to be material, and that, therefore, they ought now to have an opportunity to avail themselves of it. It is quite clear that the defendant has no right, upon any legal grounds, to have the case opened now for that purpose. If parties could first put in enough of their case to get the opinion of the court, and then have an opportunity to make a case to fit the opinion, the administration of justice would be much protracted and large opportunities opened for abuse, although it is but just to say, that, in this instance, no attempt to patch up the case in any improper way is seen. The only wholesome mode of trial is for the parties to put in, and be required to put in, their evidence

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

upon all points upon which they are to put in evidence at all, before the judgment of the court is passed upon it. There are, probably, few cases tried but that the losing parties in which, or their counsel, are able afterwards to see, or think they see, some place where they could improve their side, if they had another opportunity. Still, it is better, in view of the whole, generally, that they should not have the opportunity. Nevertheless, there may be cases where the parties cannot bring themselves strictly within the rules for granting new trials, that the court might and, perhaps, ought, in the exercise of its discretion, while the matter is wholly under the control of the court, as in this case, before judgment, it is, to grant an opportunity to put in further evidence. In view of these considerations, the probable effect of the new evidence brought forward has been looked into. The evidence was full and clear that the plaintiffs owned and held both notes and coupons. The deposition of the notary tends to show that he had only the coupons. The action is upon the notes themselves, for not paying the interest, according to the contract in the notes, on presentation of the coupons. Ordinarily, the instrument endorsed should be presented when demand of payment is made, in order that, upon payment, it may be delivered up. Freeman v. Boynton, 7 Mass. 483; Shaw v. Reed, 12 Pick. 132. In this case nothing but the coupons were to be delivered up. The notes would be retained properly and necessarily. Notice to the endorser could not be dispensed with, but that was properly given, as is expressly conceded. The contract was, that payment should be made when the coupons were presented. They were presented and payment was not made, so there was clearly a default of the maker, of which the endorser had due notice, as is also conceded. This would seem to be sufficient, whether the notary learned whom to notify from the endorsements themselves, as was before inferred by the court, or otherwise. Gilbert v. Dennis, 3 Metc. [Mass.] 495.

Besides, on further consideration of the terms of this guaranty, it seems probable that the defendant might be liable upon that alone. The only question about that is, whether it would follow the note into the hands of the plaintiffs, as bearers merely, to whom the guaranty was not otherwise made. The guaranty and endorsement are placed together over one signature, and the defendant guaranteed the payment of the notes, and ordered the contents paid to the bearer, at the same time. Such contracts are construed according to the expressed intention of the parties, as it is to be collected from the words used. Good v. Martin, 95 U. S. 90. In view of the form and connection of the guaranty, it may well be understood, as suggested by one of the defendant's counsel on this argument, that the intention was that the notes should take the guaranty into circulation with them, and that the guaranty should run to the bearer, the same as the endorsement.

In arguing these motions it was still insisted, that the defendant became a mere accommodation guarantor or endorser, and that all its undertakings in that direction were ultra vires. But, for the reasons before stated, the consideration was adequate and moved directly to the benefit of the defendant, and the statute quoted, as well as the general principles of the common law without the statute, brought the giving such notes, or becoming parties to them in other forms to the same effect, clearly within the scope of the corporate powers of the defendant. So, the evidence, if in, would not be likely to produce any different result, and there is no just occasion for delaying the cause to receive it.

Case No. 2,937.

CODRINGTON v. ADAMS.

[Brunner, Col. Cas. 650;[1] 21 Law Rep. 586.]

Circuit Court, D. Massachusetts. 1857.

BANK—DUTY OF, AS TO NOTE RECEIVED FOR COLLECTION.

A bank which receives a note for collection in the ordinary course of business, from a bank in another city, bearing the indorsement of the latter's cashier, is not bound to send notice of non-payment to any other party than its principal; and the fact that the first indorser resided in the same city with the first bank, even if known, would not change the duty of its agency.

This was an action on the case against [Charles B. F. Adams] a notary public for negligently omitting to give due notice to Theodore Otis, an indorser of a note which had been committed to the notary to be protested. The note was signed by William Blanchard, and payable to Theodore Otis or order, and indorsed by him, by the plaintiff [J. B. Codrington], and by F. W. Edmands, cashier. The plaintiff called the defendant as a witness, who testified that he received the note from Mr. Hall, the cashier of the Bank of North America, in the city of Boston; that F. W. Edmands was the cashier of a bank in the city of New York; that the witness had general instructions from the Bank of North America that when a note is indorsed by a cashier out of Boston, the notices to indorsers were to be sent to such indorsing cashier. That when he received the note at the Bank of North America he inquired if they knew the parties. The answer by Mr. Hall, the cashier, was, no; he must enclose the notices to the cashier in New York. That he went to the place of business of the maker in Boston on the maturity of the note, and demanded payment of the person in charge there. The answer was the maker was absent, and there was no one to pay.

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

He then inquired if they knew who Otis was; to which it was replied he was an out of town man. He did not inquire where he lived, nor look in the directory. He knew a Mr. Otis, but did not know his Christian name, nor that the person whom he knew was Otis, the indorser of this note. He put the protest of the note for non-payment and notices to Otis and the other indorsers into the postoffice the same afternoon, directed to Mr. Edmands, cashier, at New York. In point of fact, Mr. Otis was a member of the bar in the city of Boston, and his name was in the directory. Upon this evidence, which was all that was offered in behalf of the plaintiff to support the charge of negligence of the defendant, the court intimated that, in its opinion, the jury would not be warranted in finding a verdict for the plaintiff, and thereupon the plaintiff submitted to a verdict for the defendant. He now moves for a new trial, and assigns for cause that there was evidence which would have warranted a different verdict.

R. H. Dana, for plaintiff.
Mr. Fiske, contra.

CURTIS, Circuit Justice. I consider it to be settled, that the Bank of North America, which received this note for collection as an agent of the New York bank, was employed only to make due demand of payment, and if it should be refused, give seasonable notice to the New York bank, which was its principal; and that the fact that the first indorser resided in the city of Boston, even if known to the Bank of North America, does not change the duty of its agency. Bank of U. S. v. Goddard [Case No. 917]; Phipps v. Millbury Bank, 8 Metc. [Mass.] 79. Whether, if the Bank of North America had actually employed the defendant to do more than this, and he had neglected such additional employment, the plaintiff could have availed himself of the act of the Boston bank in contracting for such additional employment, it is not necessary to determine. I do not mean to express any doubt that he might, for I have not fully considered the question in all its bearings. But as the Bank of North America, so far as appears, received this note in the usual course of business for collection, and was not bound to give notice of non-payment to any party except the New York bank, which sent it bearing the indorsement of its cashier, there is no presumption that when the plaintiff was employed it was to do anything more than his employer was bound to do. And certainly there is no evidence that his employment extended further. The only witness testifies that his employment was expressly restricted to giving notice to the bank in New York, both by general instructions applicable to this note, and also by an express direction given when he received the note. The witness was called by the plaintiff, and though he is the party defendant, the plaintiff could not argue to the jury that he did not intend to testify truly.

The plaintiff's counsel urges that he might have argued to the jury there was no such absolute direction given to send the notices to New York, as the witness testified to, but only to send them there if it should be ascertained the indorsers were not residents; and that he might have so argued from the fact that the defendant inquired at the maker's place of business if Otis was known there. But the witness gives a satisfactory explanation of that; for he says that though he did not consider himself employed to give notices to the indorsers, save by sending them to the cashier in New York, he should, as a matter of courtesy have given Mr. Otis a notice, if he had known or been informed that he lived in Boston.

Undoubtedly, I should have formally submitted this case to the jury, with instructions as to the law, and left it for them to find the extent of the employment of the defendant, for it is matter of fact, if I had not understood the plaintiff's counsel, at the time, not to desire to have it so submitted. And I should set aside the verdict now, and allow the evidence to be submitted to a jury, were I not clearly of opinion that the intimation given at the trial was correct, that the evidence would not warrant, in point of law, a verdict for the plaintiff, and if I did not consider that if a verdict for the plaintiff were rendered, I must set it aside as against the evidence. The motion for a new trial is overruled, and there must be judgment on the verdict.

Case No. 2,938.

CODWISE et al. v. GLEASON et al.

[Brunner, Col. Cas. 33;[1] 3 Day, 3.]

Circuit Court, D. Connecticut. Sept., 1807.

JURISDICTION—CITIZENSHIP ESSENTIAL TO.

An action in favor of the indorsee of a promissory note, a citizen of one state, against the indorsor, a citizen of a different state, may be brought before the circuit court of the United States though the maker and payee of such note are citizens of the same state.

In the writ the plaintiffs [George Codwise, Jr., Peter Ludlow, and James Codwise] were described as being "all of the city and county of New York, in the state of New York, and citizens of said state of New York, late (viz., on or about the 1st of March, 1796, and for a long time before and since) merchants in company;" and the defendants [Chauncey Gleason, Elijah Cowles, Jonathan Cowles, Gad Cowles, Seth Cowles, and Martin Cowles] as being "all citizens of the state of Connecticut, resident in said state," and as being "lately, viz., on or about the

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1st day of March, 1796, and for a long time before and since, merchants in company," etc. The declaration alleged "that on or about said 1st day of March, 1796, the defendants possessed a certain paper writing, purporting to be a promissory note, payable to them, the defendants, by one Erastus Gay, in the words and figures following, viz: 'On the 1st day of October next I promise to pay Gleason & Cowles, or order, at the Hartford Bank, nine hundred and forty-five dollars, value received, in the city of said Hartford, this 14th day of November, 1795. $945. Erastus Gay.' And afterwards, viz., on or about the said 1st day of March, 1796, the defendants (being so possessed of such paper writing, and the said sum of nine hundred and forty-five dollars being unpaid), did by their indorsement, by them made on said paper writing, by their said firm of Gleason & Cowles, order and appoint the contents of the said paper writing (being the said sum of nine hundred and forty-five dollars), to be paid to the plaintiffs, for value received, according to the tenor of said paper writing, by their indorsement thereon signed with their said names."

The plaintiffs then averred "that on the 1st day of October, 1796, and also on the 3d day of the same month of October, at the uttermost convenient time of said days, at said Hartford, they showed and exhibited said paper writing and indorsement at said Hartford Bank (being the place where said note was payable as aforesaid), and then and there, on said both days, demanded payment of the aforesaid sum of nine hundred and forty-five dollars, according to the tenor of said paper writing, and the indorsement thereon; but said Erastus Gay neglected to pay the same; and neither the same nor any part thereof hath ever been in any way paid, and said Erastus hath ever refused and still refuses to pay the same. Whereupon the plaintiffs, on the 4th day of October, 1796, gave notice of the premises to the defendants, and required of them payment of the said sum of nine hundred and forty-five dollars, mentioned in said paper writing; and afterwards, viz., on the 31st day of October, 1796, the plaintiffs caused an action to be commenced on said paper writing, in the name of the said Chauncey, Elijah, Jonathan, Gad, Seth, and Martin, against the said Erastus Gay, by writ of that date returnable to the city court, holden within and for the city of Hartford, in the county of Hartford, on the second Tuesday of December, 1796; and said writ was duly served and returned to said city court. And in the declaration in said action it was and is alleged that the said paper writing was a promissory note, under the hand of the said Erastus, by him well executed, within the limits of said city of Hartford, and that thereby the said Erastus promised the said Chauncey, Elijah, Jonathan, Gad, Seth, and Martin, by their said name of Gleason & Cowles, for value received, to pay to them at the said Hartford Bank (which then was and is in said city of Hartford), the said sum of nine hundred and forty-five dollars, on the 1st day of October next after the date of said writing; and that the said Erastus had never in any way performed the said promise. And such proceedings were had in the said action, that the same, by divers legal removes, came regularly before the superior court holden at Hartford, within and for the county of Hartford, on the second Tuesday of February, 1797, when and where said parties to said action appeared therein before said court, and the said Erastus pleaded thereto, that he did not assume and promise in manner and form, as in said declaration was alleged; on which plea issue was then and there joined, and said action, by legal continuances, came before the superior court holden at Hartford, on the third Tuesday of February, 1803, when and where the said parties to said action appeared therein before said court, and with their evidence and exhibits and by their counsel, were fully heard before said court and the jury attending said court, on the issue joined in said action, which issue being then and there by said court committed to said jury, said jury found a verdict thereon that the said Erastus did not assume and promise, in manner and form, as in said declaration was alleged, which verdict was then and there returned to and accepted by said court; and thereupon it was, by said court, at their said term, considered and adjudged that the said Erastus did not assume and promise, in manner and form as the plaintiffs had alleged, and that he should recover of the said Chauncey, Elijah, Jonathan, Gad, Seth, and Martin his costs of said suit, allowed and taxed at sixty-two dollars and ten cents, as by the files and records of said court, ready in court to be produced, appears; and in prosecuting said suit, the said Codwise, Ludlow & Co. incurred great charges and expenses, amounting to the sum of two hundred dollars, of which the defendants aforesaid, viz., on the 1st day of March, 1803, had notice." The plaintiffs further stated "that the said Erastus Gay never did, in and by the aforesaid paper writing (purporting to be a promissory note as aforesaid), assume and promise, for value received, to pay to them, the said Chauncey, Elijah, Jonathan, Gad, Seth, and Martin, the sum of nine hundred and forty-five dollars therein mentioned, nor any part thereof; and said paper writing never was the promissory note of said Erastus. But the plaintiffs received said paper writing as indorsees thereof as aforesaid; and paid therefor the full amount of the said sum of nine hundred and forty-five dollars as aforesaid, believing it to have been the promissory note of him the said Erastus, and believing that the said Erastus, in and by said paper writing, as-

sumed and promised, for value received, to pay to the said Chauncey, Elijah, Jonathan, Gad, Seth, and Martin, the said sum of nine hundred and forty-five dollars, according to the tenor of said paper writing, and the defendants indorsed and assigned the same as aforesaid, as and for a good and valid promissory note, payable to them by the said Erastus according to the tenor thereof. And by means of the premises the defendants became liable to pay to the plaintiffs the aforesaid sum of nine hundred and forty-five dollars (specified in said paper writing), and the lawful interest thereon from and after the said 1st day of October, 1796, and also the aforesaid charges and expense of prosecuting the aforesaid suit against the said Erastus Gay; and being so liable the defendants, in consideration thereof, afterwards, viz., on or about the 1st day of March, 1803, at said Hartford, upon themselves assumed, and to the plaintiffs promised to pay to them the said sum of nine hundred and forty-five dollars, and said interest thereon, and the aforesaid charges and expense, within a reasonable time afterwards, when they should be thereto required. But the defendants, and each of them, their assumption and promise aforesaid not regarding, have never paid to the plaintiffs or either of them the aforesaid sum of nine hundred and forty-five dollars, and the interest thereon, and said charges and expense, or any part thereof, though they have been often by the plaintiffs thereto required, and though a reasonable time for that purpose hath long since elapsed." The damages were laid at three thousand dollars.

The defendants pleaded in abatement that Erastus Gay, named in the plaintiff's declaration, who made and executed the note on which, etc., was at the time he executed said note, and ever since has been, an inhabitant of Farmington, in the district of Connecticut, and the note was executed at Hartford in said district; and that said Gleason & Cowles, the defendants to whom said note was made payable, were at the time of making said note, and ever since have been, inhabitants of said district of Connecticut and there residing; and at the time of indorsing their names on the back of said note, the defendants were, and ever since have been, inhabitants of said district of Connecticut, and there residing; and that the defendants indorsed their names on said note at said Hartford, and there delivered said note to Peleg Sanford, then of said Hartford, since deceased, and thereby assigned said note to said Sanford. The plea concluded by alleging that this court had not jurisdiction of this action, and praying judgment that it should be dismissed.

To this plea there was a demurrer and joinder in demurrer.

Goodrich & Griswold, in support of the plea, relied upon the following clause of the 11th section of the act to establish the judicial courts of the United States: "Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note, or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." 1 Stat. (Swift's Ed.) pp. 55, 56. It appears from the declaration that the note which is the foundation of this suit was made in Connecticut, and that the maker and payees belonged to Connecticut. If this note had not been assigned, it is clear that no suit could have been brought to recover its contents before this court. The restrictive clause of the act, therefore, is applicable to this case, and is decisive against the jurisdiction.

Daggett and E. Perkins, contra.

The plaintiffs in this case are citizens of New York, the defendants of Connecticut. This court has jurisdiction unless the defendants can bring their case within the restrictive clause of the 11th section of the judiciary act. The limitation of the general jurisdiction of the court is to be construed strictly. But that clause is not applicable, either in its letter or spirit, to this case. The suit is not brought to recover the contents of any promissory note or other chose in action. In the first place the declaration states expressly that the writing in question never was the promissory note of Erastus Gay. It, indeed, purported to be, but in truth was not.

EDWARDS, District Judge. The consideration that the note is stated not to have been a valid one, will not have much weight with the court. In the next place, if the note had been genuine and valid, still this suit might be sustained in this court. The defendants, by the assignment, entered into a new contract with the plaintiffs for the breach of which the present action is brought, not for the non-payment of the note by the maker. The contract between the maker and payee, and that between the indorsor and indorsee, are distinct and essentially different. To the latter the restrictive clause of the act does not extend. The reason of the law is that where a man enters into a contract of which this court has not jurisdiction, he shall not afterwards be subjected to its jurisdiction on account of such contract, by the acts of other persons. But this reason is applicable only to the case of the maker. But it may be said that if the plaintiffs recover in this case the rule of damages will be the contents of the note. Admitting this, it does not follow that this case is within the restrictive clause. It is surely too much to say that the clause extends to every case where the plaintiff, if he

prevails, will recover the same amount with the contents of the note. Suppose a note executed by A. to B., both citizens of Connecticut. C., a citizen of Massachusetts, enters into a contract with A. by the terms of which he is to pay and take up A.'s note. It will not be contended that the clause in question would deprive the circuit court of jurisdiction over this contract; and yet if C. were to sue upon it and recover, the rule of damages would be the contents of A.'s note. Or, suppose C. in the case put should tortiously take the note from B., and B. should bring trover for it and recover; the rule of damages would be the amount of the note, but might not the circuit court have jurisdiction? But we deny that the rule of damages in the case before the court will be the contents of the note merely. The rule of damages will be the damages sustained by the breach of the contract implied by the indorsement, which may include the expenses of protest, of a suit against the maker, etc. At any rate the damages are not necessarily the precise amount of the note, which is sufficient for our purpose.

2. The averments in the plea are insufficient. It is not alleged that the original parties to the note were not citizens of different states. If they were citizens of different states, then a suit might have been prosecuted in this court before any assignment was made, and of course the statute has no bearing upon this case. Again, the plea is defective, as it does not show what court has jurisdiction.

EDWARDS, District Judge. I have no doubt as to the jurisdiction of the court in this case; but I am not prepared to give a formal opinion on a point of this importance, at this time. My opinion will be that the plea in abatement is insufficient. It appears to me that the argument in favor of the jurisdiction is irresistible.

On a subsequent day his honor delivered an elaborate opinion on this point, but the reporter heard only a part of it, and was not at that time in a situation which admitted of his taking any minutes.

The case was afterwards continued to the next term for trial on the merits.

NOTE [from original report]. Jurisdiction—Citizenship Essential to.—It is settled by the decisions that in an action by an indorsee against an indorsor of a note or bill, if they are citizens of different states, this citizenship is sufficient to give jurisdiction though the maker and payee be citizens of the same state. See Coffee v. Planters' Bank of Tenn., 13 How. [54 U. S.] 183; Evans v. Gee, 11 Pet. [36 U. S.] 80; Young v. Bryan, 6 Wheat. [19 U. S.] 146; Mollan v. Torrance, 9 Wheat. [22 U. S.] 537; Campbell v. Jordan [Case No. 2,362]; Gaylord v. Johnson [Id. 5,285]; Dennison v. Larned [Id. 3,798].

[NOTE. On the trial on the merits, the jury rendered a verdict for plaintiffs. Case No. 2,939.]

Case No. 2,939.

CODWISE et al. v. GLEASON et al.

[Brunner, Col. Cas. 40;[1] 3 Day, 12.]

Circuit Court, D. Connecticut. April, 1808.

PROMISSORY NOTE—LIABILITY OF INDORSOR.

Though a note is void as against the maker, it may be good against an indorsor, in favor of indorsor of a note or bill, if they are citizens dorsement. The contract made by indorsement extends to all future indorsees, even where notes are not negotiable.

This case was argued on a plea in abatement at the last term; a respondeat ouster was ordered; and the case continued to this term for trial on the merits. The declaration having been already stated at length, it may be sufficient to refer to that statement (Brunner, Col. Cas. 33 [Case No. 2,938]), without repeating it here; but the case will be better understood by a statement of the following facts, in addition to those which appear on the declaration: Erastus Gay made a contract for a title to some Georgia lands with Peleg Sanford and another person, according to the terms of which he was obliged to give them a note for nine hundred and forty-five dollars, payable at the Hartford Bank, with a good indorsor. To comply with this contract Gay induced Gleason & Cowles to indorse the note in question, and after it was so indorsed he delivered it to Sanford. It was then sold to Timothy Burr, but without any indorsement; and by him it was again sold to Codwise, Ludlow & Co. for goods, and without any indorsement by Burr. It was afterwards indorsed by Codwise, Ludlow & Co. and sent to John Dodd of Hartford for collection, and by him indorsed and lodged in the bank. As it was not paid when it became due, demand was made of Burr as well as of Gay, and Gleason & Cowles. After the note was taken from the bank, the names of Codwise, Ludlow & Co. were erased, they having been entered merely for the purpose of collection. The suit in the name of Gleason & Cowles against Gay failed on the ground of fraud, and consequently of want of consideration in the contract to comply with which the note was given. An action was then brought against Burr by Codwise, Ludlow & Co., in which they claimed to recover of him as having sold, and thus become responsible for the note. His defense was that though he sold, he did not warrant the note, but that it was received by the plaintiffs entirely at their own risk. That suit also failed, and the present action was immediately commenced.

On the trial, after all the material facts alleged had been either admitted or proved, the counsel for the defendants offered evidence to prove, first, that this indorsement

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

was not intended to give a general credit to the note; and secondly, that the plaintiffs were, in reality, remote indorsees.

Mr. Daggett, for plaintiffs, objected to the testimony.

This indorsement by Gleason & Cowles needs no explanation. It admits of none. No evidence as to the intention of the parties can alter the legal nature of the instrument. This note appears to have been sent into the world under the sanction of the names of Gleason & Cowles. So merchants would universally understand it, and so courts will consider it.

Before LIVINGSTON, Circuit Justice, and EDWARDS, District Judge.

LIVINGSTON, Circuit Justice. Evidence that Gleason & Cowles indorsed the note and gave it back to Gay, in order to give him credit, and that they never negotiated it, may have some important bearing on the case. Perhaps the same fraud which procured the note to be given was used in obtaining the indorsement; and if so it may be properly laid before the jury. The evidence may, therefore, be heard.

In the argument of the case, Ingersoll and Griswold, for the defendants, contended:

1. The plaintiffs cannot recover because the note has been decided by a competent tribunal to be void. The indorsement must of course be void. The indorsement is in the nature of security, and where notes are not negotiable it can be viewed in no other light. It is the same thing, then, as if Gleason & Cowles had signed this note with Gay, as his sureties. And it must be acknowledged that a surety cannot be holden when the obligation of his principal is void.

2. From the tesimony which has been let in, it appears that the plaintiffs are remote indorsees, and the defendants never indorsed the note to them. There is no privity of contract between the plaintiffs and defendants. To decide that upon these facts the defendants are liable to the plaintiffs would be giving to an indorsement all the efficacy which it has where notes are negotiable. On this principle, an indorsor can alter the nature of an instrument, and make that negotiable which was not so in its creation, which is absurd.

Mr. Daggett, for plaintiffs.

1. The contract of the indorsor is, in every case, that the sum contained in the note shall be paid when due, and for this payment he pledges himself to be responsible. It makes no difference whether the note is not paid by the maker because he is unable, or because the instrument is void, or on account of any other impediment in the way of collection. Let the cause of failure of payment be what it may, the indorsor is liable. If the note is forged the indorsor is still holden; and in a suit against an indorsor it is not necessary to prove the handwriting of the maker.

2. Nor is the contract made with the next indorsee only. It extends to all future indorsees. An indorsement in blank is a letter of credit to the whole world; and every man who trusts to it can recover of the indorsor. This principle is clearly illustrated and supported by the case of Russel v. Langstaffe, Doug. 514, where Lord Mansfield declared that the defendant, by indorsing blank copper-plate checks, gave a letter of credit for an indefinite sum; and that it did not lie in his mouth to say the indorsements were not regular. Indeed, this is a direct authority to both points, for it not only decides the general liability of indorsors on account of having given their names to the world, but declares further that the indorsor is holden though the paper indorsed was, at the time, a mere nullity.

LIVINGSTON, Circuit Justice, directed the jury that as to the first point, though he had had doubts, they were almost entirely removed. If a note were forged, the indorsement would bind the man who made it.

The second point he declared not to have altered the decision of the case from what it would have been, if the plaintiffs were the only indorsees, and the defendants the only persons through whose hands the note had passed. Gleason & Cowles gave the weight of their names to the world, and must be responsible to every man who trusts to the note relying on their credit, as every subsequent indorsee must be supposed to do, from the nature of the transaction. The case is, therefore, clearly with the plaintiffs on both points.

A verdict was accordingly found for plaintiffs to recover $1,599.20 damages.

Case No. 2,940.

CODY v. CENTRAL PAC. R. CO.

[4 Sawy. 114; 15 Alb. Law J. 52.][1]

Circuit Court, D. Nevada. Nov. 9, 1876.

RAILROAD—THROUGH TICKET—CONTINUOUS EMIGRANT PASSAGE.

1. M. purchased a through emigrant ticket from Baltimore to San Francisco, at reduced rates, over the Union and Central Pacific Railroads as a part of the route. The contract, containing certain limitations, one of which is, that it was not transferable, was signed by M. At Omaha the contract was taken up and an exchange check issued to M., which purported upon its face to call for "one continuous emigrant passage" from Omaha to San Francisco. M. traveled on the check to Palisade, in the state of Nevada, and sold it to C., who attempted to ride on the ticket upon the same train; *Held*, that he was not entitled to ride on that check.

2. A contract for "one continuous emigrant passage from Omaha to San Francisco," is not a contract to carry one person from Omaha to

[1][Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 15 Alb. Law J. 52, contains only a partial report.]

an intermediate station, and a second to another station, and so on, but only a contract to carry the same person through the entire route.

Action at law to recover damages from the defendant [the Central Pacific Railroad Company] for ejecting the plaintiff [H. A. Cody] from its cars, upon the following state of facts:

August 10, 1875, the Baltimore and Ohio Railroad Company issued, from its office in the city of Baltimore, to one Michel Meur, a ticket or contract for a passage to San Francisco, Cal., in the words and figures following:

"Issued by the Baltimore and Ohio Railroad Company. Acting for itself on its own road and as agent only of the other companies owning portions of the route respectively. Good for one emigrant passage to San Francisco, Cal., only, on presentation of this ticket with checks attached. Not good unless dated and bearing official stamp of office at the point sold. Not transferable. Good only in forward car. Responsibility for the safety of person or loss of baggage on each portion of the route is confined to the proprietors of that portion alone.

"Contract.—In consideration of the reduced rate at which this ticket is sold, it will be forfeited if not presented to the Union Pacific Railroad Company, for passage, within ten days from date of sale, officially stamped on the back, with the same date in writing on the face, and signed by the purchaser. No stop-over check to be issued on this ticket, and the coupons hereto will not be received for passage if detached from the contract. This ticket is to be exchanged by the Union Pacific Railroad Company, at Omaha, for one limited to nine days from date of issue, on which baggage will be checked to destination only. I hereby agree that the purchase of this ticket with the coupons attached is made subject to each and all of the above conditions.

"Dated August 10, 1875.

"(Signed) Michel Meur."

Upon his arrival at Omaha the Union Pacific Railroad Company gave to Meur, in exchange for the ticket set forth above, another ticket, known as the Union Pacific Railroad emigrant exchange check, which, omitting the names of stations and marginal figures and letters not material here, is in the following words:

"Union and Central Pacific Railroad Line.

"Thos. L. Kimball,

"3442. Gen'l Ticket Agent U. P. R. R.

"One continuous emigrant passage from Omaha to station canceled. Good for nine days from date indicated in the margin, after which time it will be void. No stop-over check given on this ticket. Baggage checked only to destination. Whole, 1875. Half."

With this ticket Meur traveled to Palisade, a station on defendant's road, and there sold it to the plaintiff, Cody. Cody then took the same train which Meur had just left, and in turn traveled to Battle Mountain, fifty miles west of Palisade. The conductor refused to recognize the ticket purchased by Cody as entitling him to a passage, and demanded fare of him, which he refused to pay. Thereupon he was ejected from the cars, at Battle Mountain, without any unnecessary force or severity. It further appeared, from the evidence, that the rate of fare per mile for a through third-class or emigrant passage is much less than the rate on the same train from intermediate stations to San Francisco, or from one intermediate station to another; that one inducement for issuing these third-class tickets and running an emigrant train is the local travel paid for at the increased local rates; that, except this through emigrant train, there is no emigrant train run on the defendant's road between Ogden and San Francisco, nor are any third-class tickets sold by the defendant. Passengers who get on this through emigrant train at way stations along the defendant's road pay local rates of fare. The case was tried by the court without a jury.

Charles N. Harris, for plaintiff.

T. B. McFarland, for defendant.

Before SAWYER, Circuit Judge, and HILLYER, District Judge.

SAWYER, Circuit Judge. It is clear to our minds that the plaintiff had no right to ride on defendant's road upon the check purchased of Meur at Palisade, and that he was properly excluded from the cars on that ground. Meur made a contract for a through emigrant passage from Baltimore to San Francisco at a reduced rate in consequence of taking a through passage. His contract stated in terms that it was not transferable, and he signed the contract assenting to its conditions. The written contract was surrendered in pursuance of its provisions at Omaha, where Meur received from the Union Pacific Railroad Company the usual check given in such cases, known as the "Union Pacific Railroad Emigrant Exchange Check," which called for "one continuous emigrant passage from Omaha to station canceled," viz.: San Francisco. The contract entered into with Meur was to carry him through the whole distance as an emigrant, and not to carry him to one station, and some one else to another. And it was an express term of the contract that it was "not transferable." It does not affect the question, that the evidence of the original contract was surrendered at Omaha, and the exchange check given not fully expressing the terms of the contract. The check was, doubtless, evidence in Meur's hands that he was entitled to a "continuous emigrant passage" from Omaha to San Francisco. But it did not purport to give the terms of the contract. The fact that through emigrant rates are lower than rates for local travel from station to station is one of general notoriety.

The check had marks and numbers referring to the written contract at first executed, by which the connection of the two could be traced and identified. It was the duty of the purchaser to ascertain before purchasing what his rights under the purchase would be. If he did not understand the numbers and reference, as well as the other matter expressed upon the check, he should have ascertained what they signified. He knew, at all events, that the check only called for a "continuous emigrant passage" from Omaha to San Francisco, and that he was not an emigrant and not a passenger from one of these points to the other. But if the check is considered only as evidence of a right to a passage from Omaha to San Francisco, without regard to the previous contract in pursuance of which it was in fact issued, the result, in our judgment, would be the same. It is still evidence upon its face only of a right to "one continuous emigrant passage" from Omaha to San Francisco. The evidence showed that through rates from Omaha to San Francisco are considerably less than local rates from one station to another; that a railroad company can afford to carry cheaper on long through routes than on short local portions of the route; and that their tariff of fares is based upon this principle. It is evident that this must be the case. A contract, therefore, for one "continuous emigrant passage" from Omaha to San Francisco is not a contract to carry one man from Omaha to the next station, another to the next station, and so on through the entire line, but an entirely different contract, and one upon different terms, and for a different rate of compensation. If this experiment should succeed, parties could readily arrange privately for local travel at through rates without the consent of the companies. A party might as well contract to carry a ton of freight from Omaha to San Francisco, and then insist that he could have a ton carried to the first station, and transfer a right to another party to carry another and different ton of freight to the next station, and so on through the entire line. The inconvenience and loss to the company would doubtless be greater than in the case of a passenger, but the difference is only in degree, not in principle. In the case in hand, then, whether we regard the exchange check issued to Meur as a part of the original contract, or as an independent contract for one "continuous emigrant passage from Omaha to San Francisco," it was not a contract to carry Meur from Omaha to Palisade, and Cody or some one else to some other station on the road. The right to ride upon the road upon this check from Palisade could not be transferred to Cody without defendant's consent. And the fact that the contract was for one through passage appeared on the face of the check itself. Plaintiff, therefore, was not entitled to ride on the check, as the defendant never contracted to carry him on it. As he refused to pay the usual fare, he was properly ejected from the defendant's cars on that ground. Let judgment be entered for defendant.

Case No. 2,941.

COE v. BRADLEY.

[9 O. G. 541; Cox, Manual Trade-Mark Cas. 276.]

Circuit Court, D. Massachusetts. Feb. 17, 1876.

ACTION FOR BREACH OF COVENANT — PLEADING — SPECIFIC PERFORMANCE.

1. Where a covenant goes only to a part of the consideration on both sides, and a breach of it may be paid for in damages, it is an independent covenant, and an action can be maintained for a breach of the covenant, on the part of the defendant, without averring performance in the declaration.

2. Where the plaintiff's covenants, which form the consideration, be dependent, yet if part of the consideration be accepted and enjoyed by the defendant, and the plaintiff have no other remedy than on the covenant, and the breach on the part of the plaintiff can be compensated for in damages, the plaintiff may recover without alleging performance of the residue.

3. Courts of equity are still more liberal in their interpretation of contracts, allowing a specific performance of a contract, sometimes to be enforced at the suit of a party who has not punctually performed the contract on his own part, but has been in default, where the default on his part is such as admits of compensation.

[In equity. Bill by Andrew Coe against William L. Bradley for an accounting.]

George S. Boutwell, for complainant.

H. G. Parker, for defendant.

SHEPLEY, Circuit Judge. This bill is filed upon a written contract between the parties dated February 13, 1862. By this contract Coe assigns to Bradley the exclusive use for seven years of his trade-mark, "Coe's Superphosphate of Lime," reserving a limited right previously granted to the firm of Coe & Co. Coe covenants that he is the exclusive owner of said trade-mark, with the exception above named. He constitutes Bradley his attorney, irrevocable, with authority to prosecute any suits necessary to make his rights available, and protect himself in their full enjoyment. These are the only express covenants and agreements on the part of Coe. Bradley covenants to energetically prosecute the business of manufacturing and selling the superphosphate, and to continue to make it of as good quality as that before made by Coe; and, so long as the agreements above mentioned shall be kept by Coe, Bradley shall have the use of the trade-mark, to pay him one-third of the net profits of the business, and of other "bone business," first reserving out of the profits of the business, as his own compensation, three thousand dollars. This clause is also to be found at the close of the contract, "any breach of the agreements

above cited by either party or his representatives shall be a release to the other party and his representatives from all obligations by him or them to be performed but for such breach." By a supplementary contract of May 2, 1862, between Coe and Bradley, and Russell and Coe, and Elmore Coe, the plaintiff's share of profits is reduced from one-third to one-sixth part. During the existence of this contract Coe, (in violation of his agreement, as implied from his conveyance of the exclusive right of the trade-mark to Bradley,) at Chelsea, and other places, manufactured and put on the market a fertilizer of an inferior quality, sometimes under the trade-mark of "Coe's Superphosphate of Lime," and sometimes "Andrew Coe's Superphosphate of Lime," which last name so nearly resembled the original trade-mark that it was calculated to deceive, and did deceive, purchasers, and, therefore, the use of it was as much a violation of his implied agreement with Bradley as the unauthorized use of the words "Coe's Superphosphate of Lime." A court of equity will examine to see if the differences are merely colorable. Dixon Crucible Co. v. Benham, Am. Trade-Mark Cas. 449; 2 Kent, Comm. (12th Ed.) 366, cases in note; Meriden Britannia Co. v. Parker, 39 Conn. 450.

It is claimed on the part of the defendants that such unauthorized use of the trade-mark by Coe himself, in violation of the letter and spirit of the contract, was such a breach of the contract as exonerated the defendants from any liability to account and pay over to the complainant one-sixth part of the profits of the manufacture under the contract. In support of this position, reliance is placed on the clause in the contract that "any breach of the agreements above cited by either party or his representatives shall be a release to the other party and his representatives from all obligations by him or them to be performed but for said breach." The effect of this clause in the contract is only to enlarge the right of rescission, and enable one party to discharge himself from the contract, and terminate his obligations under it, at his election, in case of the failure of the other party to perform some portion of the contract not otherwise regarded as an essential part of one entire act. Wallace v. Antrim Shovel Co., 44 N. H. 521. But, although Bradley well knew that Coe was manufacturing and selling under the trade-mark in violation of his implied agreements under the contract, and of an express agreement under a later and supplementary contract, he did not elect to terminate his obligations and abandon his rights under the contract by rescission, but continued to manufacture in great quantities, and to put the manufactured article upon the market under the trade-mark. No construction can be given to this clause which would enable one party to the contract to enjoy the fruits of it without compensation, upon the ground that the other party had failed to perform some stipulation on his part which was not so essential to the contract, but that the breach of it could well be compensated by damages. The claim of the defendant that the covenants broken by the complainant were of such a nature that no recovery can be had by him of the defendant cannot be sustained. The consideration of the promises of Bradley was the conveyance by Coe of the exclusive right to the trade-mark, and there is no question but that the conveyance was operative to vest in Bradley the exclusive right to it for the term of seven years, subject only to the exception in the contract itself. The express covenant of Coe was only of exclusive ownership in himself, and that no person besides the excepted party specified had been authorized to use it. There has been no breach of this express covenant. The implied covenant that he would not himself be a trespasser or infringer on the right and title he had vested in Bradley is the one which he violated, and Bradley had a right to elect to retain the title, and claim damages against Coe for infringement of his right, or to rescind the contract under the final clause enlarging his right of rescission. Where a covenant goes only to a part of the consideration on both sides, and a breach of it may be paid for in damages, it is an independent covenant, and an action can be maintained for a breach of the covenant on the part of the defendant without averring performance in the declaration. Where the plaintiff's covenants which form the consideration be dependent, yet if part of the consideration be accepted and enjoyed by the defendant, and the plaintiff have no other remedy than on the covenant, and the breach on the part of the plaintiff can be compensated in damages, the plaintiff may recover without alleging performance of the residue. Stevers v. Curling, 3 Bing. N. C. 355; Cutter v. Powell, 2 Smith, Lead. Cas. 28, cases in note; Pordage v. Cole, 1 Saund. 320, and Williams' note, 4; Campbell v. Jones, 6 Term R. 573; Carpenter v. Cresswell, 4 Bing. 409; Foster v. Purdy, 5 Metc. [Mass.] 442–444; Wallace v. Antrim Shovel Co., 44 N. H. 521. These are the well-settled rules applicable to proceedings in courts of law.

Courts of equity are still more liberal in their interpretation of contracts, allowing a specific performance of a contract sometimes to be enforced at the suit of a party who has not punctually performed the contract on his own part, but has been in default, where the default on his part is such as admits of compensation. In Hayward v. Angell, 1 Vern. 223, the lord keeper said: "In all cases where the matter lies in compensation, be the condition precedent or subsequent, he thought there ought to be relief." The defendant relies upon certain other contracts set up in his answer between himself and the complainant. Two of these are prior in date to the contract of February 13, 1862, and it

is not perceived how that contract is affected by them. The subsequent contracts recognize the right to the trade-mark which Bradley has under the contract of February 13, 1862, but do not confer upon him such a right independent of that contract. The contract of August 1, 1862, recognizes the existence and validity of the previous contracts. The case should be referred to a master to report the amount to which the complainant is entitled for his one-sixth part of the net profits under the contract, and also to report what sum is to be allowed the complainant in reduction by way of compensation in damages for the infringement of the defendant's exclusive right to the trade-mark by the complainant by his use during the term of the trade-mark "Coe's Superphosphate of Lime," or of the trade-mark "Andrew Coe's Superphosphate of Lime."

Decree for reference to master in accordance with the opinion to be prepared and submitted to the court.

COE (KEYSER v.). See Case No. 7,750.

Case No. 2,942.

COE v. PENNOCK et al.

[6 Am. Law Reg. 27.]

Circuit Court, N. D. Ohio. July Term, 1857.[1]

RAILROAD MORTGAGE — SUBSEQUENTLY ACQUIRED PROPERTY — CONSTRUCTION OF CHARTER — LIEN FOR ROLLING STOCK FURNISHED — ADJUSTMENT OF LIENS.

1. A mortgage given on the entire property of a railroad, including future receipts for transportation, with an agreement that property on the road subsequently acquired, shall be bound, and a conveyance of it be duly executed, gives an equitable lien on property subsequently acquired, to the bondholders of bonds secured by the mortgage.

[See note at end of case.]

2. A charter must be construed according to the intent of the legislature, if such intent can be ascertained, by the language used.

[See note at end of case.]

3. A person who constructs cars, or other rolling stock, for a railroad, if he deliver the stock to the company, without any special provision to receive the payment, can claim no lien on the work. He may effect this lien while the work is in his possession. And if he obtain a judgment against the company for the work, an execution cannot be levied on the rolling stock on which a former lien exists.

[See note at end of case.]

4. Where there are liens on the property of a railroad company, the liens must be adjusted in chancery, where each claimant shall receive his proportionate share of the proceeds. The appointment of a receiver is generally ruinous, and a sale of such property should not be made, under a reasonable prospect of payment, by a faithful application of the profits of the road.

[See note at end of case.]

In equity. Bill by George S. Coe, trustee of the Cleveland, Zanesville and Cincinnati Railroad Company, against Joseph Pennock and Nathan F. Hart and the said company.]

Otis & Weyman, for complainant.

Spalding & Parsons, for respondents.

McLEAN, Circuit Justice. The questions arise in this case on a motion to dissolve an injunction which had been granted, to stay an execution on a judgment at law. The bill states that the Cleveland, Zanesville and Cincinnati Railroad Company, a body corporate and politic, created by the laws of Ohio, and having its principal place of business at Akron, in Ohio, and within the northern district, on the first day of April, 1852, for the purpose of borrowing money to construct a railroad from Hudson, in the county of Summit, to Millersburgh, in the county of Holmes, executed and issued five hundred bonds of one thousand dollars each, payable in ten years from date, with interest thereon at the rate of seven per cent. per annum, payable semi-annually, until the principal shall be paid. That the company sold the bonds for cash, which bonds were duly transferred to the complainant in trust, &c. And the company duly executed a deed to the complainant and to his successors in the trust, and thereby made him assignee of all the present and future to be acquired property of the company in the road to be made, including the right of way, and the land occupied thereby, together with the superstructures and tracks thereon, and all rails and equipments procured or to be procured with the proceeds of said bonds, together with all franchises, rights and privileges of said company; and all property connected with the road was pledged for the payment of the bonds and the interest. And in case of failure to pay the interest or principal, as stipulated, the complainant, or those who should succeed him in the trust, at the discretion or at the request, in writing, of one-half of the bondholders, then unpaid and unconverted into stock, might cause said premises or so much thereof as might be necessary to discharge the principal and interest of all said bonds as might be unpaid, to be sold at public auction, in the city of Cleveland or in New York City, giving at least forty days' notice of the time and place, and the specific property to be sold, etc., and execute a conveyance of the property sold, which should bar the company, &c. No advantage to be taken of stay laws or injunctions, &c. Several locomotives and tenders were purchased, and a great number of passenger and freight cars for the road, also baggage, platform and gravel cars. And the complainant represents that several of these cars have been levied on by the marshal of the northern district of Ohio, by virtue of an execution issued on a judgment obtained by the defendants, Pennock & Hart, against the company. And the company subsequently contracted a large amount of indebtment to

[1] [Affirmed in Pennock v. Coe, 23 How. (64 U. S.) 117.]

various banking institutions and individuals, for money borrowed, and expended the same upon said road and for other purposes connected therewith; and afterwards, on the 1st of December, 1854, and after all the aforesaid locomotives, tenders, passenger cars, baggage cars, platform cars, gravel and freight cars, had been procured and placed upon said road, the company executed and issued bonds of that date, for various sums, amounting, in the whole, to the sum of seven hundred thousand dollars, payable in fifteen years from the date thereof, and also interest thereon at the rate of seven per cent. per annum, payable semi-annually, and delivered said bonds to its creditors, in some instances as collateral security for, and in other instances in payment of, said indebtment. And the company, by its deed, duly executed, conveyed and transferred to George Mygott and his successors, in the trust thereby created, its said equipments and appurtenances in the same manner, to the same extent, and upon similar trusts to those expressed in the deed to the complainant, &c. The said George Mygott accepted the trust, and caused the deed to be recorded. About twenty-five thousand dollars of these bonds have been used in payment to creditors.

The complainant alleges that the company made default in the payment of the semi-annual instalment of interest due in October, 1854, and has ever since failed to pay the interest in full, which has become due, by which the legal title to the locomotives and other property above specified on the road mortgaged or pledged as above said, became vested in the complainant, to be divested only on the payment of the semi-annual instalments of interest now due on said bonds, and in fulfilment of the deed to make any further assurance to complainant for more fully carrying into effect the object of the first conveyance,—and particularly for the conveyance of any property more perfectly acquired subsequent to the said deed, on the 7th of April, 1855, executed and delivered to complainant a further deed of said road, its equipments and appurtenances, embracing the property specified, which said deed the complainant had duly recorded. And the complainant represents that the whole of said property is an inadequate security for the interest and principal, as they shall become due, on the first bonds of five hundred thousand dollars; and that the company have no other means of payment than by the use of the machinery on the road, in the transportation of passengers and freight. And the complainant further states, that sixteen bonds, dated 1st November, 1854, came into the hands and possession of the defendants, Pennock & Hart, with full knowledge of the aforesaid conveyances made to the complainant and the said George Mygott, but they commenced suit on them, and on the 16th May, 1856, obtained a judgment for $17,765.50, with costs, against the said company. And that an execution, having been issued, was levied on the locomotives, tenders, passenger cars, platform cars, gravel cars and freight cars of the road, which have been advertised for sale by the marshal, &c. The Cleveland, Zanesville and Cincinnati Railroad Company, in its answer, admits the facts substantially as alleged by the complainant; and it alleges that the entire line of road proposed to be constructed by it, extended from Hudson, aforesaid, to Zanesville, in the county of Muskingum, at which place it would connect with the Ohio Central Railroad, and also with the Zanesville, Wilmington and Cincinnati road. And with the view of conforming the name of the corporation to these lines of road, application was made to the court of common pleas of Summit county, for a change of the name from that of Akron Branch of the Cleveland and Pittsburg Railroad Company, by which it was incorporated and known, to that of the Cleveland, Zanesville, and Cincinnati Railroad Company; and such proceedings were had, that at the March term of said court, 1853, it was ordered and adjudged that the name of the defendant should be changed as requested; which decree was filed in the secretary of state's office the 17th of March, 1853, and also published in a newspaper in general circulation in the county of Summit. The defendants, Pennock & Hart, admit in their answers, that the deed of 1852 was executed as alleged in the bill, but they deny the validity of that deed, as it was not made in pursuance of the authority conferred on the company by law. They admit the issuing of the five hundred bonds of one thousand dollars each, as charged in the bill, but they allege the bonds were void, not having been made legally. The power to construct a railroad from Hudson to Millersburgh is denied. When the deed of trust was executed, they say, the right of way was not procured by the company, and that the chattels on which the execution was levied had then no existence. They say the interest has not for three years been paid to the bondholders, or to persons for their benefit. They admit the execution of another trust deed in 1854, to secure seven hundred thousand dollars in bonds; and they admit the execution of another deed to the complainant in 1855, but they say that sixteen bonds, of one thousand dollars each, were issued under the mortgage of 1854, which came into the hands of the defendants in due course of trade; but they deny any notice of the mortgage to the complainant. These bonds were accepted by the treasurer of the company, and were payable in New York, in 1853 and 1854; but they were not paid when due, and were protested. They were received as cash in payment for making thirty-five house or freight cars, and forty platform cars. These cars were made and delivered to the company, between the 19th

of May, 1853, and the 15th of February, 1854; and the levy complained of in the bill was made on these cars and others. As the motion was made by the defendants, Pennock & Hart, to dissolve the injunction formerly granted and dismiss the bill, the case must be considered on its final hearing. The merits seem to be fully presented by the pleadings and the deposition of Simon Perkins, the president of the company.

The first ground assumed in the defence is, that "the railroad company, by whatever name it may have been called, had no authority as a corporate body to make a railway from Hudson to Millersburgh; and as a necessary consequence, had no power to borrow money for that purpose. The charter authorizes the construction of a railroad between certain termini, to wit, "from some convenient point on the Cleveland and Pittsburg Railroad, in Hudson, Summit county, through Cuyahoga Falls and Akron to Wooster, or some other point on the Ohio and Pennsylvania Railroad, between Massillon and Wooster." The doctrine stated in the brief, "that corporate powers can never be created by implication nor extended by construction," is admitted. The act under which this company was organized, was unskillfully drawn, and some of its provisions require a careful consideration to ascertain the intent of the legislature. It is entitled "An act to amend an act to incorporate the Cleveland and Pittsburg Railroad Company, passed March 14, 1836." The first section provides, "that the Cleveland and Pittsburg Railroad Company be and they are hereby authorized to construct, under the provisions of their charter, and in the manner hereafter indicated, a branch railroad from some convenient point on the Cleveland and Pittsburg Railroad, in Hudson, Summit county, through Cuyahoga Falls and Akron, to Wooster, or some other point on the Ohio and Pennsylvania Railroad, between Massillon and Wooster, and to connect with said Ohio and Pennsylvania Railroad, and any other railroad running in the direction of Columbus; and for this purpose may increase their capital stock one million of dollars." The second section provides, that for the purpose of constructing and managing said Akron branch road, such persons as may have subscribed for the stock thereof, or for the major part of said stock, may organize by the election of not more than seven directors, who shall elect a president from their number; and, under the name of the "Akron Branch of the Cleveland and Pittsburg Railroad Company," be entitled to all the privileges, and subject to all the restrictions and limitations, granted or imposed by the charter of the Cleveland and Pittsburg Railroad Company, and the amendments thereto; and the Cleveland and Pittsburg Railroad Company may subscribe stock to said Akron branch road, and may aid the said Akron branch organization, by the sale or guaranty of its bonds or otherwise, as they may deem proper. And power was given to the Akron branch to make an arrangement with the Cleveland and Pittsburg Railroad Company, in regard to the use of their road, and with any other company: provided that the Akron branch and the Cleveland road might merge the same, so as to be under the direction of one company. The first section gives the power to the Cleveland and Pittsburg company to construct the Akron branch under their charter, designating the direction and limit of the branch. No other company or organization is referred to, in regard to the structure and management of the road. But the second section provides for a distinct and an independent organization. The subscribers to the stock of the Akron branch are authorized to organize by electing one of their number president, and under the name of the "Akron Branch of the Cleveland and Pittsburg Railroad Company," be entitled to all the privileges and subject to all the restrictions and liabilities granted or imposed by the charter of the Cleveland and Pittsburg Railroad Company, and the amendments thereto." This adopts the Cleveland charter, and applies to the structure and management of the Akron branch, the same as to the Cleveland and Pittsburg road. The provision in the fourth section of the act which authorizes the Cleveland Company to call a meeting of its stockholders at Ravenna, to act upon the amendments of its charter and for the organization of the Akron branch, in no respect conflicts with the second section. They were required also to call, at the same time, a meeting of the subscribers for the branch stock. Under the act, the subscribers had power to accept the amendment as an extension of the Cleveland charter, as the same interest, or to enter into a separate organization. The latter was adopted, and the road has been constructed under it from Hudson to Millersburgh. This construction of the charter seems to be clear of doubt. The organization was made the 17th of March, 1851, and was continued until the month of March, 1853. At the term of the court of common pleas held in that month, in Summit county, it was ordered, on application of the company, that its name should be changed to that of the "Cleveland, Zanesville and Cincinnati Railroad Company." The requisites of the statute seem to have been complied with, which authorized a change of the corporate name, as was decreed by the court. But it is objected that the company had no authority to construct a road from "Hudson to Williamsburg." The construction of the road was commenced at Hudson, the northern terminus named in the charter, in July, 1851. In 1852 it was extended by the way of the Cuyahoga Falls, to Akron, and it was made to Williamsburg in 1854. The distance from Hudson to Orrville, which is the point where the road intersects the Pittsburg, Fort Wayne and Chicago railroad, is thirty-eight miles; and

from Orrville to Williamsburg, in Holmes county, it is about twenty-three miles, and this is the southern terminus of the road at present. The first section of the act provides that the road shall begin "at some convenient point on the Cleveland and Pittsburg road, in Hudson, Summit county, and run through Cuyahoga Falls and Akron to Wooster, or some other point on the Ohio and Pennsylvania Railroad, now called the Fort Wayne and Chicago Railroad, between Massillon and Wooster, and to connect with said Ohio and Pennsylvania Railroad, and any other railroad running in the direction of Columbus." All the points named in the charter are touched by the road, until it strikes Orrville, which is on the Ohio and Pennsylvania Railroad, and between Wooster and Massillon. Thus far there is an exact compliance with the charter. The Pennsylvania and Ohio road was not named in the charter as its southern terminus. It was to connect with that road and any other railroad running in the direction of Columbus. This language cannot be construed. Millersburgh it appears is twenty-three miles south of Orrville, in the direction to Zanesville, to which place it is the intention of the company to extend their road. At that point it will connect with the Central Ohio road, which leads to Columbus. I think the company was authorized by the charter to extend their road to Zanesville. No one can suppose that the connection with the Pennsylvania and Ohio road by the way of Crestline to Columbus, was intended as the terminus of the road, as the distance, if not double, would be much greater on that line than on a direct route. The same objection applies, in a less degree, perhaps, to the Steubenville and Newark road. The connection at Zanesville, on the Central road, was the most direct route to Columbus, and it is within a reasonable construction of the charter. I think, therefore, that Millersburgh, being in the direction from Orrville to Zanesville, the road was properly constructed to that point, with the view of its being extended to Zanesville. The first section of the act authorized the Cleveland Company, in view of the Akron branch, to increase its capital a million dollars; and under the second section of the act, this provision is applied to an independent organization, and gives to it all the privileges of the Cleveland and Pittsburg Company under its original charter, subject to all the restrictions and liabilities which it imposes. Here are corporate powers conferred to the extent of the charter referred to. From an act to revise and amend "An act to incorporate the Cleveland and Pittsburg Railroad Company," dated March 14th, 1836 (section 6), power was given to said company, by its proper officer duly authorized by the directors, to "mortgage, hypothecate or pledge, all or any part of said railroad, or of any other real or personal property belonging to said company, or of any portion of the tolls and revenues of said company, which may thereafter accrue, for the purpose of raising money to construct said road, or to pay debts incurred in the construction thereof." And in the act regulating railroad companies, passed February, 11, 1848, in the sixth section, it is provided, "Such company shall have power to borrow money on the credit of the corporation, not exceeding its authorized capital stock, at a rate of interest not exceeding seven per cent. per annum, and may execute bonds or promissory notes therefor, and to secure the payment thereof, may pledge the property and income of such company." To the same purport is the act of 1852. Swan, Dig. 199–203.

In the defence it is assumed, that the mortgage or trust deed made by the railroad company to the complainant is void, for the reason that it pledges property "thereafter to be acquired," at least so far as regards such after acquired property, and a number of authorities are cited to sustain this position. In 4 Comyn, Dig. "Grant," D, p. 310, it is said, "A man cannot grant a thing which he has not." Moody v. Wright, 13 Metc. [Mass.] 32, Chapman v. Weiner, 4 Ohio, 481, 2 Story, Eq. Jur. § 1021, and other authorities are cited as sustaining this doctrine. It is admitted that at common law, a man cannot grant or convey an effective title to land or anything else to which he has no right; but if this be done by general warranty, and he afterwards acquires a title to the land granted, the first deed operates as a good title by way of estoppel. The term "grant," in its largest sense, comprehends everything that is granted, or may be passed from one to another. It includes incorporeal as well as corporeal rights; but a feoffment was void without livery of seisin. In his treatise on Equity Jurisprudence, Mr. Justice Story says, in regard to property that may be mortgaged (volume 2, § 1021): "In equity, whatever property, personal or real, is capable of an absolute sale, may be the subject of a mortgage." Rights in remainder and reversion, possibilities coupled with an interest, rents, franchises, and choses in action may be mortgaged, but a naked possibility or expectancy, such as that of an heir, cannot be. By the civil law a party may mortgage property to which he has no present title, by contract or otherwise. But it is not necessary to consider, at large, whether the mortgage in question, in regard to the equipments of the road acquired subsequent to the date of the mortgage, is operative at common law; as, if it cannot be so considered, there can be no doubt it is good in equity, and the question comes before us on a bill in equity. It seems to be admitted, as it is not denied, that the future profits of the road are subject to the mortgage. And what difference in principle can there be in the future profits, and the necessary expenditure to produce such profits? Repairs, when necessary, of

the rolling stock on the road, are not more within the mortgage than the purchase of the necessary supplies of such stock, as the public accommodation shall require. The mortgage was on a railroad in full operation, embracing every necessary equipment and accommodation to give to it the utmost efficiency. This entered into consideration of the parties to the mortgage, and anything short of this, would, in a great degree, impair the security of that instrument. Suppose a sheriff or constable had levied upon one or more of the passenger cars or of the locomotives, within a few days after the machinery on the road was in motion; can any one suppose that the mortgage could have been defeated or its security impaired by such a step. Will it not be said that in such a case the stock would be within the protection of the mortgage? This no one could doubt, as a withdrawal of the stock from the road would not only impair the obligations of the mortgage, but defeat its object. In this respect, a railroad in operation must be considered as protected in the capacity in which it was mortgaged; and this is so manifest that the public, and especially subsequent creditors, are bound to know it. But the protection by the mortgage of the equipments upon the road, in the case supposed, is not more indispensable than to keep them in repair, replace them when destroyed, or add to them when required by the public exigencies; these are all within the purview of the mortgage, the contemplation of the parties, and known to the public. Does this view impose any hardship on the manufacturer of a part of the equipments, subsequent to the date of the mortgage? Certainly it does not. He has a right to retain the possession of his work until it is paid for or the payment secured. Having delivered possession to the company in the ordinary course of business, without receiving the payment, he can assert no lien upon it either in law or equity; he stands in relation to the company on a footing with other creditors who have no security for their debts. In Mitchell v. Winslow [Case No. 9,673], Mr. Justice Story says, "Courts of equity give effect to assignments, not only of choses in action, but of contingent interests, expectancies, and also of things which have no actual or potential existence, but rest in mere possibility only. In respect to the latter, it is true, the assignment can have no positive operation to transfer, in praesenti, property in things not in esse; but it operates by way of present contract, to take effect and attach to the things assigned, when and as soon as they come in esse; and it may be enforced as such a contract in rem, in equity." The same doctrine is laid down by Lord Hardwicke. Also, it was held in Hobson v. Trevor, 2 P. Wms. 191; Carleton v. Leighton, 3 Mer. 667; 5 Maule & S. 228; Curtis v. Auber, 1 Jac. & W. 526, 532; 1 Mylne & K. 488; Langton v. Horton, 1 Hare, 549; Mitford v. Mitford, 9 Ves. 100. In his Equity Jurisprudence (section 1231), Mr. Justice Story says, "In equity there is a lien, not only on real estate, but on personal property, or on money in the hands of a third person, wherever that is a matter of agreement, at least against the party himself, and third persons who are volunteers and have notice. For it is a general principle in equity, that as against the party himself, and any claiming under him voluntarily or with notice, such an agreement raises a trust." The mortgage having been placed upon record in the three counties through which the road was to be constructed, and was in fact constructed, I suppose it must operate as a notice of its contents. See Hawthorn v. New Castle & N. S. Ry. Co., reported in Criss on Liens, Append. 408; Abbot v. Goodwin, 20 Me. 408; 2 Appl. & Shep. [20 Me.] 408; Macomber v. Parker, 14 Pick. 497.

The third ground assumed is, "that the trust deed is void for uncertainty as to the nature and extent of the grant." The instrument has been attentively read and considered, and no uncertainty is perceived in its conditions, or as to the objects on which it is to operate. If its language were so vague as not to specify these matters with at least reasonable certainty, the mortgage could not be specifically enforced. But as this objection does not seem to arise on the face of the instrument, and has not been shown in the brief of counsel, no further examination will be given to it.

In the fourth ground, it is contended that the mortgage is void under the statute of frauds. As the trust deed was entered into under the enactments of the legislature, it certainly cannot be said to be against the policy of the law; and it is not perceived that any of its provisions conflict with the statute of frauds, seeing that they are authorized by a law subsequent to that statute.

In the fifth and last ground, it is contended, "the plaintiff does not show himself entitled to call upon this court to stay the hand of the judgment creditors." The first mortgage to the complainant, Coe, was dated the 1st of April, 1852; the second to the same individual bears date in March, 1855. Prior to the execution of the second deed of trust to the complainant, a mortgage, similar to the one first executed to the complainant, was given to George Mygott, by the same company, and on the same road, its equipments, &c., dated 1st of November, 1854, to secure the payment of bonds to the amount of seven hundred thousand dollars, which it was proposed to issue for the completion of the road, &c. It appears that the company employed P. F. Geisse to build, for its use on the road, a number of cars, of different descriptions; and that in payment of the balance of his account, on the 20th of November, 1854, he received sixteen of the second mortgage bonds secured by the trust deed given to George Mygott. The judgment complained of was obtained on these

bonds by Pennock & Hart. As the first mortgage of the complainant was executed the 1st of April, 1852, it is contended by the defendants' counsel, that the first mortgage cannot avail him, as to the two locomotives, the Hercules and Vulcan, and the passenger cars 3, 4, 5 and 6, none of which were in existence until the fall of 1853, and the spring of 1854, and that before the execution of the complainant's second mortgage, in March, 1855, this property had been conveyed to George Mygott, by the trust deed dated November 1st, 1854, to secure sundry bonds, of which the sixteen on which the judgment was entered, formed a part. This argument rests upon the hypothesis, that as the two locomotives and passenger cars referred to were received by the company after the date of the first mortgage, and before the second mortgage was given to Mygott, and as the bonds on which the judgment was obtained were secured by the second mortgage, the complainant can claim no lien on this property under his first mortgage. The passenger cars and the locomotives referred to were in possession of the company, and employed upon the road, some months before the mortgage was executed to Mygott. It appears that Geisse, before he received the sixteen bonds, had taken from the company a draft for the amount due, on New York or some other place, which was returned protested for non-payment. On the return of the draft, the bonds were paid to him as the only means of payment, within the power of the company. From this statement it is clear, that the defendants Pennock & Hart, as creditors of the company, stand upon no other ground and have no higher claim than any other holders of bonds issued under the second mortgage. Geisse, the builder of the cars, having delivered them to the company, without taking a special lien, if he continued to be the holder of the bonds, would have no better claim than the defendants, who are his assignees. The bonds, it is presumed, are payable to bearer, and pass by delivery. Pennock & Hart are purchasers in the market, the same as other holders of bonds, covered by the second mortgage. A part of the gravel cars levied on by the sheriff were sold, with the consent of the counsel in this case, and also of the complainant and the first bondholders; but the levy is understood still to include cars, &c., which belonged to the company when the first mortgage was given. In the first mortgage, for the consideration stated, the company covenanted to "execute and deliver any further reasonable and necessary conveyance of the premises, or any part thereof, to the party of the second part, his successors in said trust, and assigns, for more fully carrying into effect the objects hereof, particularly for the conveyance of any property acquired by said parties of the first part, subsequently to the date hereof, and comprehended in the description contained in the premises." It is presumed the third mortgage deed to the complainant was executed in 1855, under this covenant. Entertaining the opinion that the first mortgage, by virtue of the above and other covenants which it contains, operated as an equitable mortgage on subsequently acquired equipments for the road, which was not displaced by the second mortgage, it is not deemed necessary to inquire what, if any, legal effect can be given to the last mortgage. Holly v. Brown, 14 Conn. 255.

It is alleged in the bill, that the entire property of the road will be inadequate to the payment of the first mortgage. The wisdom of the first bondholders was manifestly shown, by permitting the road to remain under its present management, being satisfied that the directors had discharged their duties faithfully and economically. This seems to be the only course that can retrieve the affairs of the company. In most cases, to place such a concern in the hands of a receiver, involves it in hopeless ruin.

Had Pennock & Hart, as holders of the sixteen bonds, a right to bring suit on them at law, and having obtained a judgment, to sell on execution a part of the mortgage property without reference to the claims of other creditors under the same or other mortgages? Against such a procedure there are three insuperable objections: 1. A sale on execution would convey to the purchaser no exclusive right to the property sold. 2. Such a sale would not divest the equitable rights of other bondholders. The purchasers could receive only the same and no greater right than that which was vested in them by the bonds. 3. The claim must be prosecuted in equity, where all who have an interest in the subject matter may be made parties. In equity, only, can the rights of all the parties be properly adjusted. And this is especially the case where the property mortgaged is inadequate to the payment of all the creditors. In addition to these considerations, from the nature of the property levied on, it could not be separated from the road, without suspending, in whole or in part, its operations. And what could be more unjust than this, to the other bondholders? The operation of the machinery on the road, in the transportation of passengers and freight, constitutes its chief value. The railroad, like a complicated machine, consists of a great number of parts, a combined action of which is essential to produce revenue. And as well might a creditor claim the right to levy on and abstract some essential part from Woodworth's planing machine, or any other combination of machinery, as to take from a railroad its locomotives or its passenger cars. Such an abstraction would cause the operations to cease in both cases. As before remarked the proper mode of enforcing payment against a railroad company,

on bonds secured by mortgage, is, to bring the creditors and the railroad company into chancery, where the earnings of the road, through a faithful agency, may be distributed equitably among the creditors. And in a case where such a course would not satisfy the reasonable demands of creditors, to sell the road and distribute among them its proceeds. Such an extreme procedure, however, should not be authorized by any court, except under circumstances of absolute necessity. 13 Serg. & R. 210; 9 Ga. 377; 9 Watts & S. 27. A stronger ground for an injunction than is taken in this case, could not well be conceived. The defendants, under a judgment at law, have levied upon a large part of the rolling stock on the road, which, if sold and removed, will stop its operations, while the same stock is under mortgage to creditors whose lien is prior to that of the defendants. Such a procedure, if carried out, in this and other cases, would defeat the liens of creditors, in such cases, to many millions of dollars, and put an end to the structure, if not the maintenance, of railroads. The court will perpetually enjoin the proceedings in the case at law, as prayed by the bill, at the costs of the defendants, Pennock & Hart.

[NOTE. The defendants Pennock & Hart appealed to the supreme court, where the decree of the circuit court was affirmed.

[The court (Mr. Justice Nelson delivering the opinion) substantially held that complainant's mortgage attached to the future acquisitions, as therein described, from the time they came into existence; that, the mortgage being a valid and effective security for the bondholders of prior date, they had the superior equity to have the property in question applied to the discharge of the bonds; that the individual bondholders under the second mortgage were properly restrained from proceeding at law to collect their debt, as such a course would not only give them a preference over their associates, but would also have the effect to prejudice the superior equity of the first mortgage bondholders; and that the extension of the road to the Ohio Central road at Zanesville was fairly within the terms of the charter requiring the connection with the Ohio & Pennsylvania Railroad, "and any other railroad running in the direction of Columbus." Pennock v. Coe, 23 How. (64 U. S.) 117.]

Case No. 2,943.

COE v. RANKIN et al.

[5 McLean, 354.] [1]

Circuit Court, D. Michigan. Oct. Term, 1852.

ACTION ON INDEMNITY BOND—PLEADING.

1. No action can be brought on a bond of indemnity, unless the plaintiff has been damnified; and this must be shown in the declaration.

2. A promise to account and indemnify, will only require the defendant to respond to the injury shown.

3. A general averment of loss is insufficient.

[At law. Action by Israel Coe against Rankin and Prince.]

Mr. Howard, for plaintiff.
Mr. Emmons, for defendants.

WILKINS, District Judge. Action brought upon a bond, conditioned that the principal obligor should well and truly account to the said plaintiff, and indemnify and keep him harmless as the holder of certain stock which he had delivered to the said obligor. The declaration recites, that certain matters in controversy between the plaintiff and Rankin had been, by their covenant, submitted to arbitration; that the controversy was in relation to the liability of Rankin as acceptor of a certain bill of exchange drawn by one Thomas Bristol for $7,200; that the said Rankin had deposited with one Brown certain certificates of stock for the purpose—as mentioned in a certain letter from the said Rankin and Bristol to Brown—true copies of which certificates were then and there delivered to said Coe, who, as the holder of the said certificates then delivered the originals to the said Rankin, who, with his co-obligor and co-defendant, entered into the bond on which the action is instituted. The obligation of the bond is stated to be to indemnify and save harmless, and well and truly to account to the said Coe for the said certificates, the value of which is laid at $10,000.

The declaration avers that the said Rankin has been called upon to account for the said certificates of stock, and that he has refused either to account for the said stock, or redeliver the said certificates, and furthermore, that he has not indemnified or saved harmless the said plaintiff, in consequence of his having delivered to him the original certificates of the stock, but that he had sold the same, and converted the proceeds to his own use. The declaration concludes with the general averment that the said breaches of the bond thus exhibited entitled the plaintiff to demand the penal sum, &c. To this declaration the defendants have demurred, and assigned several reasons, one of which is sufficient, viz: That it does not contain or set forth in what manner, or to what extent the alleged failure upon the part of Rankin to account for the stock damnified the plaintiff, or show that any sum was rightfully due said plaintiff under the assigned breaches of the bond.

The recital of the provisions of the arbitration covenant which precedes the averment of the conditions of the bond clearly sets forth the nature of the transaction. The certificates of stock were deposited with Brown, the depositor not divesting himself of his interest in them, and Brown being but a stakeholder, having the custody, but not the proprietorship, which still continued in Rankin. The recital of the arbitration covenant exhibits very loosely the relation which the plaintiff bore to those certificates. But it is clear-

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

ly inferable that they were but a trust deposit with Brown, to meet the exigency of the suit instituted on the acceptance of the bill of exchange. A holder of stock negotiable or otherwise is not like the holder of a bill of exchange which forms part of the commercial currency of the country, but the former may or may not be according to circumstances the owner or proprietor. Now, Coe was the holder of the certificates on the same principle (and with the same interest) that Brown held them. He held them then as a trustee. In case a recovery was had against Rankin on the acceptance, then, the certificates were to be appropriated to the payment of the sum recovered, but if there was no recovery against Rankin, and his defense to the action to the bill of exchange was sustained, then, the certificates of stock as a deposit, should be returned to the depositor, Rankin, who alone was entitled to them, the deposit having fulfilled its purpose, Coe, under such circumstances, stood in Brown's shoes, and had no proprietory interest; and, consequently, the declaration is defective in not averring that he had some such valuable interest in the stock, either as owner thereof, or having such a lien as would entitle him to transfer the same for a valuable consideration.

The covenants to account as contained in this bond with the recital of the occasion of the obligation, is not equivalent to a promise to pay. To pay what? may be asked. To pay the value of the certificates? If so—to whom? No one is entitled to payment unless he has the right to demand payment. The holder of these certificates, under the circumstances stated in the declaration, had no right to demand payment at any time. A promise to him to account for them must be connected with the covenant to indemnify, and is not a distinct covenant. On the accounting for the stock, the defendants were only to pay whatever loss might have accrued in consequence of the stockholder parting with the security placed in his possession for the purpose defined at the time of the deposit.

The declaration avers no loss except in general terms; if there had been an averment that a recovery had been obtained against Rankin on his acceptance, and which formed the subject matter of the arbitration; and that the certificates of stock were needed for the purpose of meeting the demands of such recovery, and they not being re-delivered or accounted for when demanded, and that consequently the plaintiff had been compelled to pay the amount so recovered, and that a loss thereby had been incurred, the declaration would have set forth on the bond a sufficient cause of action. But such is not the case here, and the court give judgment for defendant on demurrer, with leave, &c.

COE, The MARY. See Case No. 9,204.

Case No. 2,943a.

COELLE v. LOEKHEAD et al.

[Hempst. 194.][1]

Superior Court, D. Arkansas. July, 1832.

AMENDMENT OF JUDGMENT.

Amendment made by adding the name of another person, four years after the rendition of judgment.

[At law. Action by John H. Coelle against Thomas D. Loekhead and James McFarland.]

Motion to amend a judgment.

Before JOHNSON and CROSS, Judges.

This day, the court, being sufficiently advised of the motion of the defendants in error to correct and amend the judgment rendered in this case at the April term of this court, 1828, it appearing that the said judgment should have been affirmed in the names of Thomas D. Loekhead and James McFarland, partners, under the name of Thomas D. Loekhead & Co., instead of in the name of Thomas D. Loekhead alone, sustained the motion, and ordered this amendment to be made nunc pro tunc.

Case No. 2,944.

The COERNINE.

[21 Law Rep. 343; 7 Am. Law Reg. 5; 39 Hunt, Mer. Mag. 197.]

District Court, S. D. New York. May Term, 1858.

MARITIME CONTRACT—LIEN BY STATE STATUTE.

1. A contract by parties, resident in New York, with a citizen of North Carolina, to furnish labor, materials, and stores for building and equipping a vessel in North Carolina is not a maritime contract within the admiralty jurisdiction of the federal courts, and no lien is thereby created which can be enforced in rem.

[Cited in Whitlock v. The Thales, Case No. 17,578; Smith v. The Royal George, Id. 13,102.]

2. It seems that no enactment by a state legislature can be administered as the foundation of any right or remedy in admiralty. It is therefore immaterial whether any lien is given by a state law, or whether such law is of any force out of the limits of such state.

[2]The libellants, ship-chandlers and traders, residents and doing business in New York, were in the habit of dealing on credit in the line of their trade with Gilbert L. Moore, a resident of Williamston, in North Carolina, engaged in building and sailing vessels, and other transactions, in that state. The correspondence between those parties proves that such course of dealing was in use between them anterior to the month of September, 1856, and was continued subsequently on open accounts of debit

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[1] [Reported by Samuel H. Hempstead, Esq.]

[2] [From 7 Am. Law Reg. 5.]

and credit. At that time, in an interview between them in New York, it was agreed that the libellants should supply the equipments and outfits necessary to complete the schooner Coernine, which Moore was about constructing at his residence in North Carolina, and that they should furnish whatever should be required to that end upon the written or verbal orders of Moore. On the 5th of March, 1857, Moore wrote the libellants from Williamston by Samuel D. Hines, introducing the latter as the intended master of the Coernine when completed, and requesting that his memoranda of materials and supplies should be filled by the libellants "at as low rates as possible," the large amounts of course on the regular times, "in order to give the vessel some time to make a port before it is due;" "the small memoranda of which I shall expect to pay between one and three months;" for instance "the bill for making sails, iron works, &c." The same letter had advised the libellants that Moore would, between July and September, pay them a considerable amount for the purchase of the sails and rigging for the Coernine; those, as it appears from the correspondence between the parties, being articles not dealt in by the libellants, but with some others were to be purchased by them in New York for Moore. By letters of dates of March 14 and 20, the libellants advised Moore that they were hastening to fulfill all Hines' orders; that hemp, sails, blocks, &c., had been purchased by them. On the 28th March they further wrote that all the goods were then ready, and requested a remittance of funds, as they had to make large purchases, and their payments for duck, &c., "then, for the next sixty days, will be heavy." By letters of April 8, the libellants informed Moore that the goods were all on board the vessel at New York, for transportation to North Carolina, and that they inclose "bill of lading and amount of supplies, amounting in all to $4,074.35," "the cash bills, amounting to $916.77," they desired him to remit immediately. On the 11th July, 1856, Moore executed at North Carolina, a promissory note to the libellants, or order for $600, payable at ninety days, and on the 31st of July, at the same place, another note for the same amount ($600), payable in ninety days thereafter to the libellants, or order; and on the 24th of September, following another promissory note, dated at New York, payable to libellants or order for $1,000, four months after date. These several promissory notes were produced in open court by the counsel for the libellants on the hearing of the cause, as having been given for the debt in prosecution, and were delivered up to be cancelled.

[It appeared in proof that the materials supplied by the libellants were necessary for the construction and use of the schooner, and could not have been procured at the place where she was built and fitted out. They were supplied for her service, and after her completion she was dispatched by Moore, her owner, from Plymouth, North Carolina, her port of registry, upon a series of foreign voyages. June 2, 1857, she sailed for Guadaloupe, thence to Marie Galante, thence to St. Pierre, Martinique, thence to the Island of Nevis, on trading voyages; thence to St. Thomas, where she was chartered for Porto Rico and New York, at which last place she arrived in the month of August, remained in the port fifteen days at quarantine, and eight days afterward in discharging and reloading, and on the 22nd day of September sailed again on round charters by the way of the West Indies back to New York, where she arrived Jan. 26, 1858, and the libel in this cause was filed the next day. The libellants were personally apprised of the vessel being in this port within two or three days after her first arrival here, and also knew the whole period of her continuance in port. The libellants charged that the schooner being in Wilmington, N. C., and in want of ship chandlery, sails, rigging, materials, labor and supplies, to render her seaworthy and fit to navigate the high seas and proceed upon a voyage to the West Indies, they furnished and delivered such articles to the vessel at that place, &c. These claimants intervened and set up a title to the vessel under an assignment of her in trust for the payment of debts made to them by Gilbert L. Moore prior to the commencement of this action; and by formal answer they denied every material allegation in the libel upon which the action is based. They especially denied the jurisdiction of this court over the subject matter, and insisted on the argument upon an explicit judgment upon that branch of the defence, because of its eminent importance to the interests of navigation and commerce in American vessels, and because it is supposed the law governing that subject is obscure or indefinite in its provisions, or has become seemingly so, under the rules by which it is interpreted and administered by the courts.

[There was also a separate intervention and defence to the action in the name of James C. Willett, sheriff of the city and county of New York, who interposed and claimed the vessel by virtue of process of attachment out of a state court in favor of a creditor of Gilbert L. Moore, the alleged owner of the schooner. This branch of the defence was disposed of at the last May term of the court, on an issue in law (24 MS. Dec. 40) and will not be further regarded in the report of this case.] [1]

N. Hoxie and E. C. Benedict, for libellants.

J. Gerard, Jr., and B. D. Silliman, for claimants.

[1] [From 7 Am. Law Reg. 5.]

BETTS, District Judge. The libellants place their right of action in this cause upon the grounds that the transaction between them and Gilbert L. Moore, in relation to the outfit and supply of materials for building and equipping the schooner Coernine, was a maritime contract concerning a foreign vessel and her employment in navigation and commerce, and that a debt was thereby created which became by implication of law a lien upon the vessel, accompanying her wherever she went; or that by the local law of North Carolina, under which she was built, registered and owned, and where the supplies were used, the schooner was made subject to a lien for that debt, which, by the principles of the general maritime law, is enforceable in this court. The position on the part of the claimants is, that this court has no jurisdiction over the subject matter of the suit, in any aspect of the case under which it is presented by the pleadings and proofs, and the cases of Pratt v. Reed, 19 How. [60 U. S.] 359, and People's Ferry Co. of Boston v. Beers [20 How. (61 U. S.) 393],[1] are relied upon as having settled, by the solemn adjudications of the supreme court, the law definitely to that effect. In view of the magnitude of interests depending upon the general question in this district, and its importance practically in the every-day business dealings within the port between mechanics and material men, and ship-owners and masters, it is deemed desirable that this specific point should be made the prominent subject of consideration and decision; especially if those judgments of the supreme court have worked any change in the rules heretofore applied to this class of cases, and have diminished the securities formerly enforced in this court in behalf of that order of creditors.

In the first place, it is important to consider what were the special features in the case of Pratt v. Reed [supra] adjudged upon by the supreme court, and what character was affixed by that decision to the contract or credit in regard to necessaries supplied a foreign vessel on a voyage, in order to give them a privilege or lien against the vessel. The steamboat Sultana was employed on the western lakes in the transportation of passengers and freight. She was enrolled and owned at Buffalo, and a debt was contracted at Erie, Pennsylvania, by her owner and master, for supplies of coal to her during the performance of a succession of trips, for a period of about two years. It was assumed by the court to have been necessary for the navigation of the vessel, that she should be furnished with coal on those occasions, although the proof on that head was held to be loose and indefinite. The libellant furnished her coal in that manner when demanded, from June, 1852, to May, 1854, and rendered a bill therefor, containing a running account of debits and credits. The owner of the boat usually navigated her as master, and was present when the supplies were furnished. When he was not present they were furnished at the request of the person in command. The answer denied that the supplies were furnished on the credit of the boat, and averred that they were furnished on the credit of the master. The court laid out of view the inadequacy of proof that the supply of coal was an actual necessity to the navigation of the vessel, within the admiralty rule, at the time it was supplied her, because of the more serious difficulty in the case of the libellant, in the entire absence of any proof to show that there was also a necessity at the time, of procuring the supplies, for a credit upon the vessel, which was asserted by the court to be as essential as that of the necessity of the article itself. "It seems to be supposed," the court remarks, "that circumstances of less pressing necessity for supplies or repairs, and an implied hypothecation of the vessel to procure them, will satisfy the rule, than in case of a necessity sufficient to justify a loan of money on bottomry for the like purpose. We think this is a misapprehension." The court proceeds to fortify the position of law taken by them on those facts, by reasoning against the sufficiency of the facts to authorize an implication of a lien in the case, and by an intimation strongly disfavoring the increase of maritime liens of this class, upon the lakes and rivers, as tending to perplex and embarrass business, rather than furnish facilities for carrying forward, and declaring that such liens should be strictly limited to the necessities of commerce which created them. The jurisdiction of the court over the question is one and the same when it concerns the business of commerce and navigation between ports and places in different states and territories upon the lakes and navigable waters connecting the lakes, as is possessed and exercised in case the vessels are employed in navigation and commerce upon the high seas or tide-waters within the admiralty and maritime jurisdiction of the United States. Act Cong. Feb. 26, 1845 (5 Stat. 726).

The similitude, and indeed identity, of the present case with that of Pratt v. Reed, in their leading features, appear thus to be nearly exact. In both instances the supplies and necessaries were obtained in ports of states foreign to those to which the vessels respectively belonged, and were procured through the direct contract and orders of the owner, who also, in each case, was master of the vessel at the time. In neither case was there any stipulation for direct payment of the purchase prices at the time of purchase, nor any terms of credit agreed upon between the parties. The decision in Pratt v. Reed, therefore, in no way rested upon a question of implied authority in a

[1] [From 7 Am. Law Reg. 5.]

master to pledge a vessel on such a credit, because the dealing was by the owner directly; but the controlling consideration which governed the case was, that however imminent the necessity of the vessel for the supplies might be, the case could not be brought within the cognizance of the federal court, unless it appeared that the necessity was equally urgent that the responsibility of the vessel should be pledged for payment. It seems to me, therefore, that the case of Pratt v. Reed is susceptible of no other interpretation than that an implied lien for stores, materials, supplies, or outfits of any kind, can never be raised against an American vessel in the courts of the United States upon the mere fact that they were furnished her on credit out of her home port and are necessary to her navigation and employment. The further fact must be shown, that the supplies could not be obtained on the personal credit of her owners. That principle covers and negatives every claim to a hypothecation of the schooner in security of the debt in the present case. It is unnecessary to go further, and say the doctrine of the decision significantly implies that the act of the owner of the vessel in personally incurring the debt and obtaining the credit has no higher effect in imparting a lien than the act of a master solely, for the entire dealing in that case appears to have been conducted or sanctioned personally by the owner himself. The particulars in which the present case is distinguishable from that, weaken, instead of strengthening, the presumption that both parties contemplated at the time of the sale and purchase of the materials furnished by the libellants any lien therefor upon the schooner; but for the reasons before suggested I do not recapitulate and press the considerations arising out of the pleadings and proofs tending to show that no liability against the vessel was in view of the parties at the time, and that the dealing was more probably on the footing of their accustomed transactions, and wholly one of personal credit. One distinction, however, ought not to be passed by, which is, that the materials, labor, &c., obtained in this case, were not for the necessary repair of this schooner, but were for her original construction, she then being on the stocks in a course of building. It is intended to dispose of this case in subordination to the judgment of the supreme court in the two recent cases referred to, and to restrain it carefully within the fair and plain import of the doctrines laid down in those decisions without any inquiry into the correspondence or disaccord of those judgments or either of them, with the rule of law antecedently prevailing in maritime courts upon those subjects. It is not the province of this court to canvass the reasons upon which those decisions are founded, or attempt to measure their validity by any supposed inconsistency or incongruity with prior doctrines of the supreme court. They stand the final existing law which governs analogous facts coming within their just scope and meaning.

People's Ferry Co. of Boston v. Beers was a case decided by the supreme court in December term, 1857 [20 How. (61 U. S.) 393.][1] A vessel, owned in New Jersey, was built and supplied with materials in that state by the libellants, residents in New York, on credit, and without any express pledge of the vessel for the debt. The propositions of law determined by the court, and the facts to which they are applied, are specifically stated by the judge who delivered the opinion of the court. "The only matter in controversy is (say the court) whether the district courts of the United States have jurisdiction to proceed in admiralty to enforce liens for labor and materials furnished in constructing vessels to be employed in the navigation of waters to which the admiralty jurisdiction extends." "We have the simple case," continues the judge, "whether these ship carpenters had a lien for work and materials that can be enforced in rem in admiralty." "The question presented involves a contest between the state and federal government. The latter has no power or jurisdiction beyond what the constitution confers. The contest here is not so much between rival tribunals, as between distinct sovereignties claiming to exercise power over contracts, property, and personal franchises." "What were meant in 1789 by 'cases of admiralty and maritime jurisdiction,' must be meant now. What was reserved to the states to be regulated by their own institutions, cannot be rightfully infringed by the general government, either through its legislation or judiciary department." "The contract (in the case) is simply for building the hull of a ship, and delivering it on the water. 'She was constructed and delivered according to the contract.' 'The admiralty jurisdiction is limited to contracts, claims, and services purely maritime, and touching rights and duties appertaining to commerce and navigation.' Judge Hopkinson, in 1781, declared, as respects ship-builders, that the practice of former times doth not justify the admiralty's taking cognizance of their suits. 'We feel warranted in saying that at no time since this has been an independent nation has such a practice been allowed.'" The judge adds: "It is proper, however, to notice the fact, that district courts have recognized the existence of admiralty jurisdiction in rem against a vessel to enforce a carpenter's bill for work and materials in constructing it, in cases where a lien had been created by the local law of the state where the vessel was built. Thus far, however, in our judicial history, no case of the kind has been sanctioned by this court." This ad-

[1] [From 7 Am. Law Reg. 5.]

judication very explicitly determines that a contract in a port of one of the United States, to construct a vessel in a port of another state by actually building her or supplying materials for such construction, is not a maritime contract creating a lien upon the vessel, for the value of the labor or supplies, which can be enforced in a federal court. That the debt or contract does not make a case of admiralty and maritime jurisdiction within the meaning of the constitution and laws of the United States; and if it may be any way cognizable in those tribunals, it is only by the force of state legislation, imposing the debt as a lien on the vessel, which obligation the national court executes and carries into effect; but the same judgment emphatically declares that no instance of such proceedings, which appear to have occurred in some of the inferior national courts, has been sanctioned by the supreme court. I had never supposed the jurisdiction of the United States district courts over this class of liens was imparted by state legislation, or that those tribunals could in any way derive judicial competency or jurisdiction from state grant; and without being restrained by the significant intimation of the supreme court, I should not be any way inclined to administer affirmatively, as the foundation of a right and remedy in admiralty, any enactment by a state legislature. Considering that the decision last referred to withdraws from the cognizance of this court the subject-matter of the present action, as not being one of admiralty and maritime jurisdiction, I deem it wholly useless and extrajudicial to inquire whether the statute of North Carolina, put in evidence in this cause, is applicable in its provisions to the contract and debt now in suit, or is of any force out of the territorial jurisdiction of that state. The labor claimed by the libellants to have been furnished this schooner in North Carolina must be understood to be the work of builders, personally or by their agents, and falls directly within the judgment of the court, as not a claim of a maritime character.

The latest decision of the supreme court upon a legal question within its jurisdiction settles for the government of all inferior judicatories the practical meaning and force of the proposition so determined; and it is no part of the function of subordinate courts to adjudge, or even inquire whether such determination comports with, or subverts, antecedent judgments, of the same forum, upon similar questions. The last decision is, practically, the final one. Neither of the two cases last passed upon by the supreme court, in relation to implied liens in favor of material men and laborers, against American vessels in American ports, demanded the direct and broad answer to the inquiry whether those liens exist or can be enforced in the federal courts in any form, by virtue of the general maritime law; but the principles announced by the court, in those cases, render it quite palpable that scarcely another advance remains to be made in order to abrogate that remedy absolutely, and reinstate and restrict the admiralty powers of the judiciary in respect to those credits, in subordination to the rule of the common law as that was administered under the English jurisprudence, at the time of the adoption of the United States constitution. It is my province to accept and pursue the law as declared by the supreme court; and, in my opinion, the rule established by that tribunal, in those cases, determines that the claim put forth in this action, either for building or constructing, or outfitting or providing materials, supplies, labor, rigging, or ship-stores necessary to render this vessel sea-worthy, and fit for navigation at sea, is not within the jurisdiction of the court, and accordingly the libel must be dismissed with costs.

The amount in demand being sufficient to authorize an appeal of the case to the court of last resort, I put the decision specifically upon the question of jurisdiction, that being directly involved, and being a point of high practical moment to the mercantile, manufacturing and shipping interests of the country, and shall forbear discussing those other features in the case bearing strongly against the adequacy of the pleadings and proofs to sustain the action in this form, if the cases of Pratt v. Reed [supra] and People's Ferry Co. of Boston v. Beers [supra] had interposed no legal impediment to the suit. Decree accordingly.

Case No. 2,945.

COFFEE v. EASTLAND.

[Brunner, Col. Cas. 216;[1] Cooke, 159.]

Circuit Court, D. Tennessee. 1812.

PLEADING — NON-JOINDER OF PARTNER, HOW ALLEGED — PARTNERSHIP — NON-JOINDER OF PARTNER IN SUIT BY.

1. If one of two partners be sued upon a partnership demand, he must plead the matter in abatement and set out the names of the partners; defendant may take advantage of the non-joinder for the first time on the general issue.

2. Where one of two partners brings a suit upon a partnership demand, the defendant may take advantage of it at the trial of the cause.

At law. This was an action of assumpsit brought by [John] Coffee against [Thomas] Eastland to recover the price of locating five thousand acres of land. It appeared that the plaintiff and John Drake had entered into a partnership to locate lands, whereby the profits were to be equally divided between them. And it was also proved that to the location for the making of which this action is brought the names of John Coffee and John Drake were subscribed. On the part of the plaintiff evidence was introduced to show certain promises made by the defendant to him, with

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

a view not only of supporting the action upon the merits, but also to establish that the plaintiff was the only person entitled to make a claim upon the defendant.

Grundy, Dickinson, and Cooke, for defendant, moved the court to instruct the jury that the action could not be supported, inasmuch as it was brought in the name of Coffee alone. And they cited 1 Esp. 116; 1 Saund. 291f.

Whiteside and Hayes, contra, endeavored to show that the evidence did not amount to proof of the existence of a partnership, particularly as it applied to the location in question.

M'NAIRY, District Judge (absent TODD, Circuit Justice). It is a question of fact for the determination of the jury whether a partnership existed between the plaintiff and Drake; but if they find the partnership to have existed it follows that Coffee alone cannot maintain the present action. It is no objection that advantage for the first time is taken of the partnership upon the plea of non-assumpsit, and upon the trial of the cause. The plaintiff declares upon a promise made to himself; if it turns out in evidence that the promise was made to him and another, it cannot be said that the defendant assumed upon himself "in manner and form as the plaintiff in declaring hath alleged."

As to the mode of taking advantage of a partnership in an action of assumpsit the rule is this: If one of two partners be sued upon a partnership demand he must plead the matter in abatement, and set out the names of the partners, so that the plaintiff may, if need be, sue them altogether. But if one of the two partners brings a suit upon a partnership demand, the defendant may take advantage of it at the trial of the cause; for he may not know until it comes out in evidence that the fact is so.

Verdict for the defendant.

COFFEE, The JOSEPH E. See Case No. 7,536.

Case No. 2,946.

COFFEEN v. BRUNTON.

[4 McLean, 516; 7 West. Law J. 59; Cox, Am. Trade-Mark Cas. 82; Cox, Manual Trade-Mark Cas. 52.] [1]

Circuit Court. D. Indiana. May Term, 1849.

INFRINGEMENT OF TRADE-MARK—INJUNCTION—DAMAGES.

1. Where a label or mark of another is used by an individual, with a fraudulent intent to recommend to purchasers an article similar in appearance to one favorably known in the market, an injunction will be granted.

[Cited in Walton v. Crowley, Case No. 17,133; Hostetter v. Vowinkle, Id. 6,714.]

2. In commercial transactions, good faith is required. And where a deception is attempted to be practiced, by recommending a spurious article as genuine, to the injury of a party, chancery will restrain the aggressor.

3. In such a case at law, nominal damages will be given where no specific injury has been proved.

4. In such cases, the inquiry is, whether the label or mark is so assimilated to the label or mark of the complainant, as to deceive purchasers. And it seems not to be essential that there should be a fraudulent intent proved.

[Cited in Hostetter v. Vowinkle, Case No. 6,714.]

5. This principle as well applies for the protection of foreigners as citizens.

[Motion for a preliminary injunction to restrain infringement of a trade-mark.]

Mr. Norton, for complainant.

McLEAN, Circuit Justice. In his bill, the plaintiff represents that he was the inventor of a certain medicine, called the "Chinese Liniment," at great labor and expense; that the medicine was found to be efficacious in the cure of many diseases; and on being made known to the public, was purchased extensively, so as to afford a great profit to the plaintiff. It was sold in small bottles, with a suitable label, and accompanied by another paper containing directions for taking and applying the medicine in various complaints. And the complainant represents that the defendant, in the early part of the year 1848, in combination with one John Loree and others, fraudulently issued to the public a preparation called "Ohio Liniment," having upon the bottles containing it, labels, with directions exactly similar to that used by the complainant for his "Chinese Liniment," and that the said Brunton pretends that Loree was the inventor of said liniment, and so represents by hand-bills and advertisements; and that by these representations, which are charged to be false, the defendant has induced the public to believe that the composition sold by him contains the same ingredients as the "Chinese Liniment," and that by such means it is extensively purchased and used to the injury of the complainant, and the great benefit of the defendant. All which representations are alleged to be false, etc.

The complainant has not obtained a patent for his alleged invention; and if, in this respect, the allegations of his bill be admitted in regard to the invention, yet this gives him no exclusive right of property in the medicine. Any other individual has a right to make and sell the same medicine. An exclusive right, as the inventor, can only be obtained under the patent law, by a compliance with its provisions. Nor has the complainant an exclusive right to the label, as it is not a book, within the provisions of the statute. On neither of these grounds can the complainant claim an injunction. But if there be found in the representations of the defendant that his liniment is the same

[1] [Reported by Hon. John McLean, Circuit Justice. Cox, Manual Trade-Mark Cas. 52, contains only a partial report.]

as the "Chinese Liniment," which recommends it to the public to the injury of the complainant, it may be ground for the equitable interposition of this court. Suppose the article sold by the defendant is not only different from the "Chinese Liniment," but greatly inferior to it, the effect must be to destroy in the market the value of the plaintiff's liniment. And this is an injury for which a court of law can not give adequate compensation. However valuable the plaintiff's invention may be, yet if it be discredited by a worthless article, it would be impossible, in any reasonable time, to restore the public confidence in the genuine article. In this consists the injury; and the fraud arises from the false representations that the composition is the same. In Blanchard v. Hill, 2 Atk. 484, Lord Hardwicke said: "Every particular trader has some particular mark or stamp; but I do not know any instance of granting an injunction here to restrain one trader from using the same mark with another; and I think it would be of mischievous consequence to do it." And he further remarks: "It is not the single act of making use of the mark that was sufficient to maintain the action, but the doing it with a fraudulent design to put off bad cloths by this means, and to draw away customers from the other clothier." And in support of this doctrine he referred to Popham, 151, where it was held that an action at law would lie against a cloth-worker for using the same mark as another in the same trade. This doctrine of Lord Hardwicke is sustained by subsequent decisions. In Singleton v. Bolton, 3 Doug. 293, Lord Mansfield said: "If the defendant had sold a medicine of his own under the plaintiff's name or mark, there would be a fraud for which an action would lie." In the case of Sykes v. Sykes, 3 Barn. & C. 541, it was held that the defendant was liable for attempting to sell an article which he falsely represented as manufactured by the plaintiff. In Canham v. Jones, 2 Ves. & B. 218, it was held that the defendant had a right to sell the same kind of medicine, of as good or better quality, than the plaintiff's. The court decided in the case of Knott v. Morgan, 2 Keene, 213, that a company who run omnibuses, and who were named on their carriages, "The London Conveyance Company," had a right to call upon a court of chancery to restrain another company who called themselves "The London Conveyancer Company," as the words and devices were substantially the same, which would deprive the plaintiffs of profits arising from their established character. And in this case the doctrine of Lord Hardwicke, limiting the interference of the court to cases of fraud, is much shaken, if not overruled. In the case of Gout v. Aleploglu [6 Beav. 69, and 1 Chit. Gen. Pr. 721],[2] 7 Am. Jur. 277, "the vice chancellor granted an injunction restraining the defendants from manufacturing and vending watches with the word 'Pessendede,' in Turkish characters, or with the plaintiff's cypher engraved on them, the plaintiffs having been in the habit for many years of supplying watches for the Turkish markets with those marks and words upon them, although the defendants used such word and cypher with their own name, and not the names of the plaintiffs, and the word 'pessendede' signified in the Turkish language, 'warranted.' The court then held that in this case the principle of fraudulent representation applied." And in Millington v. Fox, 3 Mylne & C. 338, the court carried the doctrine further, for they granted an injunction where certain marks had been used in ignorance of any other right.

From the above, it would seem that an intentional fraud is not necessary to entitle the plaintiff to protection; but that where the same mark or label is used, which recommends the article to the public by the established reputation of another, who sells a similar article, and the spurious article can not be distinguished from the genuine one, an injunction will be granted, although there was no intentional fraud. And I am inclined to think that this is a correct view of the principle; for the injury will be neither greater nor less by the knowledge of the party. If he has adopted the same mark which will cause his article to be taken for another in the market which is known and approved of, it is an injury which the law will redress. In commercial dealings the utmost good faith should be observed, and no one is permitted to go into the market with a deception of this character, so as to profit by the ingenuity, good faith, or established reputation of another. "A man may have no abstract right to use a particular mark," as was remarked by Judge Creswell, in Crawshay v. Thompson, 4 Man. & G. 386, but when such a mark is used to deceive purchasers, to the injury of a third party, an action will lie. In Bell v. Locke, 8 Paige, 75, Chancellor Walworth held a fraudulent use of the mark was a ground for relief. Day & Martin, manufacturers of blacking, complained of Binning, who also manufactured blacking, and sold it in bottles similar to theirs, and labelled with this difference only: Day & Martin described their blacking as "manufactured" by Day & Martin, whilst Binning described his as "equal to Day & Martin's." The words "equal to" were printed in very small type. In that case an injunction was granted, on the ground that the label of the defendant would deceive the purchaser. It has been stated by Judge Story, that where one of our own citizens fraudulently uses the mark of a foreigner, to recommend an article of domestic manufacture, he is liable to an action. In this respect there is no difference between

[2][From Cox, Am. Trade-Mark Cas. 82.]

a citizen and an alien. In an action at law, Blofield v. Payne, 4 Barn. & Adol. 410, the declaration stated that plaintiff, being the inventor and manufacturer of metallic hones, used certain envelopes for the same, denoting them to be his, and that defendant wrongfully made other hones, wrapped them in envelopes resembling the plaintiff's, and sold them as his own, whereby the plaintiff was prevented from selling many of his hones, and they were depreciated in value and reputation, those of the defendant being inferior. And the court held that the plaintiff was entitled to some damages for the invasion of his right by the fraud of the defendants, though he did not prove that their hones were inferior, or that he had sustained any specific damage. Where a right is invaded by a fraudulent act, though no specific injury be proved, some damages, at law, must be given. In the case above cited, on a motion for a new trial, Judge Patterson said, "it is clear the verdict ought to stand." A publisher of a magazine or newspaper, can not assume the name of one previously published, or represent the new publication as a continuation of the former, when it is not so. Hogg v. Kirby, 8 Ves. 215.

In the case under consideration, in his label, the plaintiff calls his medicine the "Chinese Liniment;" the defendant calls his the "Ohio Liniment;" but from the body of the label, and of the directions for the use of the medicine, it is clear that the language of the defendant is so assimilated to that of the plaintiff, as to appear to be the same medicine, the alterations being only colorable. There would seem to be no doubt that the intention of Loree, who prepared the liniment sold by the defendant, as his agent, was to avail himself of the favorable reputation acquired by the "Chinese Liniment," in the sale of his; and by most persons it would be received as the same medicine. From the hand-bill published by Loree, the medicine sold by him is asserted to contain the qualities or ingredients of the "Chinese Liniment," and some other ingredient which renders it more efficacious. In his bill the plaintiff avers that this allegation is false; and especially in saying that the "Ohio Liniment" contains the ingredients of which the "Chinese Liniment" is composed. The case is considered as coming within the principles above cited, and an injunction is granted to enjoin the defendant from using the label or directions accompanying the liniment he sells, as aforesaid, or other labels or directions, or any advertisements or hand-bills respecting the same words and sentences which are used by the complainant in his label and directions, and which tend to produce an impression on the purchaser and the public that the liniment sold by the defendant contains the same ingredients as the "Chinese Liniment," and is, in effect, the same medicine. On the filing of the answer, a motion will be heard to dissolve the injunction.

[NOTE. On the final hearing the court apparently refused to grant an injunction. See the denial of an application for rehearing, Case No. 2,947.]

Case No. 2,947.

COFFEEN v. BRUNTON.

[5 McLean, 256; Cox, Am. Trade-Mark Cas. 132; Cox, Manual Trade-Mark Cas. 60.] [1]

Circuit Court, D. Indiana. May Term, 1851.

INFRINGEMENT OF TRADE-MARK—INJUNCTION.

1. A party is not entitled to an injunction to protect him against another person who has assumed the same label, as to a medicine or drug claimed to have been invented by the complainant, unless his right is clear.

2. If they were concerned in getting up the medicine, both contributing to the compound as a partnership action, neither can claim the exclusive right.

3. In such a case the court will leave the parties to their legal remedies.

4. Injunction should only be granted where the right is clear, and where, from its nature, a remedy at law would be inadequate.

[Bill to enjoin infringement of a trade-mark. Complainant obtained a preliminary injunction (Case No. 2,946), which was apparently subsequently dissolved, and a motion is now made for a rehearing.]

Smith & Yandes, for complainant.

Mr. Test, for defendant.

OPINION OF THE COURT. This bill was brought by the complainant to enjoin the defendant from using a label, or any other representation which would mislead the public in purchasing his liniment, for that which is manufactured and sold by the complainant. The charge in the bill is, that the label of the defendant is so assimilated to the plaintiff's as to lead to this imposition by which the defendant is greatly benefited, and the plaintiff injured. That the complainant, at great expense, has established his business, and that his medicine, called the "Chinese Liniment," is in great demand as an efficacious remedy in many cases of disease and injuries; and that the defendant is enabled to sell his liniment by assuming the false fact, that it is the same as the plaintiff's.

The defendant, in his defense, sets up, that John Loree, of whom he purchased, is the inventor of the "Chinese Liniment," having furnished the complainant with a recipe for making the same, except two ingredients which were added on their mutual consultation. That the complainant agreed to take the said Loree as a partner into the business, so soon as he could advance capital;

[1] [Reported by Hon. John McLean, Circuit Justice. Cox, Manual Trade-Mark Cas. 60, contains only a partial report.]

until which time he was constituted the general agent of the complainant to sell the medicine, and was so designated in his handbills. But when he had procured the necessary capital, the complainant refused to take him as a partner. That Loree then made his liniment, called the "Ohio Liniment," which contains the same ingredients of which the complainant's liniment is composed, with the addition of two or three others, which make it more valuable.

A great number of depositions were taken on both sides, which show, on the part of the complainant, that in the early part of the year 1846 he went to Cincinnati, and remained there several weeks, to make what he called the "Chinese Liniment." He selected several of the ingredients from the store of Mr. Burdsell, a very respectable druggist, and concocted the liniment, and gave it the name of the "Chinese Liniment," procured vials, had labels and handbills printed, and thus prepared the article for sale. Neither Mr. Burdsell nor any other witness has stated of what ingredients this liniment is composed. The witnesses state they do not know of what the compound is made, but all of them agree in saying that it is a valuable medicine; and they give the same character to the liniment of the defendant.

The following letter, written by the complainant, is relied on, as sustaining the answer: "Blue Ball, Aug. 9th, 1845. Dr. John:—We had expected to have heard from you before this time. I got home in two weeks after I left your house. I made myself some acquainted with the prospect of selling the liniment we have been talking of. It appears to me the prospect is first rate, if the thing is properly managed. I divided the little I took with me among more than a dozen persons, who say they look with great anxiety for the thing to come out. If I had the receipt, I would take pains to ascertain what would be the cost of preparing it in quantity. Mr. Freeman says he would like, when he goes east, to bring any stock that we may want, which would make it come cheaper than to procure the stock in this country. I feel fully confident that a nice business may be done. The country is as ripe now as ever it was for a thing that is new. If you will send me the receipt, I will go to Cincinnati and ascertain, as near as I can, what will be the whole cost, including the necessary handbills, to accompany the articles; and also the expense of the vials; they ought to be done up in the neatest manner. It seems to me that they would look well of a square form, about four inches long, and holding three oz. By going to the glass factory any form can be obtained. When you send the receipt write out the names of the articles very plain, so as to avoid any mistake; as the whole list will not be shown to any apothecary. I think we ought to have always a supply of the article on hand. I have no doubt if I had a supply when I went to Kentucky, I could have sold twenty or thirty dollars worth." This letter was dated in August, 1845, and it appears, from the evidence, that the recipe was forwarded to the complainant by one of his daughters, in August, 1845, some months before he went to Cincinnati to prepare the medicine. And in regard to a small amount of the medicine referred to in the above letter, it is in proof that in June, 1845, Loree brought to the house of the complainant, a jug full, as he said, of the ingredients of which the liniment was made; and the daughter of the complainant assisted him in making the liniment. A part of this, probably, was taken by him to Kentucky. On the 28th of February, 1846, the complainant writes to the defendant from Cincinnati, that "every thing seems to be going as favorably as we can desire. There is one universal burst of praise in favor of the liniment," &c. "I have as favorable and flattering expressions from gentlemen of the highest respectability as I could desire, and shall append them to the bills I am now getting printed, of which I will send you some as soon as they are done," &c. "Our great object must be to move the thing, and give it notoriety. One hundred thousand bottles, I have no doubt, could be sold in the United States, if they were only in the market, in a year."

From these letters and other evidence in the case, it satisfactorily appears, that the defendant was engaged with the complainant in making this medicine. The recipe spoken of by Loree, obtained from a Doctor Diffendaffer, with whom it is alleged he studied medicine, named many of the materials out of which, in all probability, the compound was made. Two or three other ingredients, the defendant admits, were added to those named in the recipe; and, it is probable, though there is no positive evidence on the subject, that the complainant, at Cincinnati, when compounding the ingredients, may have added some others, and that this is the ground on which he declares the defendant is ignorant of the ingredients which compose the "Chinese Liniment." However this may be, I cannot doubt that the defendant was at first actually concerned in getting up and bringing out the medicine, and that a partnership between the parties was contemplated. Some time after the defendant had commenced his general agency in selling the medicine, the parties quarrelled, and afterwards had a compromise, in which, from some of the witnesses, the defendant seems to have relinquished his interest. But that compromise does not appear to have been carried out, and the defendant asserted his right, and prepared the "Ohio Liniment," and through his agents, handbills, &c., distributed it through the country. These facts are referred to, to show that in a case like the present, where rights are contested between the parties, chancery will not interfere and enjoin a party from using labels, or

marks, to recommend his article, though it may, to some extent, be substituted for that of the plaintiff's. The matter, of right, must first be determined by an action at law or otherwise, and this is not the object of the present bill. Both medicines are highly recommended by those who have used them, and several of the witnesses think they are composed of the same ingredients. If the "Ohio Liniment" is the same as that of the plaintiff's, he having no exclusive right to it, is not injured by the representations of the defendant.

To entitle a complainant to protection against a false representation, it is not essential that the article should be inferior in quality, or that the individual should fraudulently represent it, so as to impose upon the public; but, if by representation, it be so assimilated, as to be taken in the market for an established manufacture, or compound of another, the injured person is entitled to an injunction. The injury is not the less, though the false representations be made without a knowledge of such interference. False marks or brands are generally fraudulently assumed. As where, in the manufacture of cotton cloth, a mark is assumed intentionally, of a manufacturer whose products stand high in the market, it will be considered as fraudulent. No one can interfere with another's business, injuriously, for his own benefit, with impunity. This is an important commercial principle, of extensive application. And, as in such cases, the damages cannot be ascertained at law, relief will be given by injunction. But where, as in the present instance, there is a controversy between the parties, whether both were not concerned in the establishment of the business, it is not a case for an injunction. The bill is not framed with the view of adjusting such a controversy. The right of the plaintiff who claims protection in this form, must be clear. If it be controverted, chancery will leave the parties to their remedy at law; or at least, to such a proceeding as shall present the whole merits of the controversy, and enable the court to decide it. I concur in the opinion of my brother judge, that the application for a rehearing must be overruled.

COFFIN (GODDARD v.). See Case No. 5,490.

Case No. 2,948.

COFFIN v. JENKINS.

[3 Story, 108.][1]

Circuit Court, D. Massachusetts. May Term, 1844.

WHALING VOYAGE — FORFEITURE OF LAY BY DESERTION—ADMIRALTY—PRACTICE — PLEADING — VERIFICATION—NEW MATTER ON APPEAL.

1. A lay or share in the proceeds or catchings of a whaling voyage does not create a partnership in the profits of the voyage, but is in the nature of seamen's wages, and governed by the same rules.

[Cited in Joy v. Allen, Case No. 7,552; Macy v. De Wolf, Id. 8,933.]

2. By the general maritime law, desertion is an unauthorized absence from the ship, with an intention not to return, and it creates a forfeiture of wages.

3. The statute of the United States [Act 1790; 1 Stat. 133] declaring any unauthorized absence of a seaman from his ship for forty-eight hours to be desertion, applies to all cases, where the seaman does not return within such time, although he may have been prevented by the sailing of the ship. For the ship is not bound to wait for him, but he is bound to rejoin the ship within that period, suo periculo.

[Cited in The John Martin, Case No. 7,357; Welcome v. The Yosemite, 18 Fed. 384.]

4. In the present case, it was *held*, that the circumstances showed, that the desertion by the plaintiff was the result of a previous and deliberate intention to desert; and at all events, an opportunity having been offered to him to rejoin his ship within the forty-eight hours, that his refusal to do so constituted a desertion, and he had thereby forfeited his wages.

5. The only cases where desertion does not carry with it a forfeiture of wages, are cases having mitigating circumstances, where the party deserting has a strong excuse, founded on gross misconduct or harsh usage towards him; or where, having a locus poenitentiae, he has acknowledged his fault, and offered to return to his duty within a reasonable time, and his services have been rejected; or cases of a similar nature.

[Explained in Swain v. Holland, Case No. 13,661.]

6. The doctrine in case of Cloutman v. Tunison [Case No. 2,907], affirmed.

7. In cases of appeal from the district court, this court is very cautious in admitting new matters of defence or allegation to be introduced, where the facts, on which they rest, are not new or newly discovered, but were perfectly known at or before the hearing in the district court.

[Cited in The Mabey, 10 Wall. (77 U. S.) 420; The Saunders, 23 Fed. 304; The Venezuela, 3 C. C. A. 319, 52 Fed. 875; Re Hawkins, 147 U. S. 486, 13 Sup. Ct. 521.]

8. The answer to a libel should be sworn to by the respondent, but the libellant is not bound to swear to the libel.

[Cited in The J. R. Hoyle, Case No. 7,557.]

9. A special replication by the libellant under oath is not admissible, unless it be demanded by the respondents, or ordered by the court, and then it is in the nature of a cross-bill or reconventio of the civil law.

[Cited in The Atlantic, Case No. 620.]

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

Libel in the admiralty for the lay or share of the libellant, the second mate of the whaling ship Columbus, against the respondent [Peter Coffin], the master of the ship. The libel in substance stated, that in June, 1835, the libellant, John Jenkins, shipped on board the ship Columbus, of Nantucket, of which the respondent was master, on a whaling voyage from Nantucket to the Pacific ocean, as second mate, for a certain lay or share of the said voyage and of the oil which might

[1] [Reported by William W. Story, Esq.]

be obtained; that he signed the shipping articles, and went aboard the said ship on the 10th day of the said June, and entered into the service of the same as second mate. That the ship proceeded forthwith, with the libellant on board, to the Pacific ocean, and obtained 41,948 gallons of sperm oil; that he continued on board, and in the service of the said ship until about the 10th day of June, 1838, when, without reasonable or sufficient cause, and without fault or neglect on his part; and while he was engaged in the performance of his duty, under the orders of the master, in looking after certain seamen, who had deserted from the said ship, he was abandoned and left at Talcahuana, on the coast of Chili, by the said respondent, and was prevented from rejoining the ship, as she never returned to the port. That the said Coffin, well knowing, that the libellant was engaged in the performance of his duty, after wilfully abandoning the libellant as aforesaid, cruised about for the space of two months for more oil, and then returned to the said Nantucket, where he arrived on the 30th day of November, 1838. That during all the time the libellant was on board, he well and truly performed his duty as second mate, according to his best ability, and was obedient to all the lawful commands of the said master, and is entitled to his lay, amounting to $512.33, with interest. The libellant then prays, that the aforesaid wages be decreed to him.

The answer admitted, that the libellant was hired, and that the ship proceeded to sea and put in to Talcahuana, as set forth in the libel, at which place it alleges, that the said libellant wilfully and without cause, or pretence for cause, deserted from the said ship. It then proceeds to aver, that the libellant did not well and faithfully perform his duty on board the said ship, but often neglected it, and slept upon his watch, and permitted the men to sleep, to the injury of the vessel and the voyage. That the said Jenkins was ashore with the respondent on or about the 15th of June, 1838, the latter being in quest of seamen, to supply the places of four seamen, who had deserted, and that, having shipped four men, he ordered the libellant to return to the ship, and direct the mate to heave in the slack of the chain, and be ready to take in the anchor as soon as he, the respondent, should return to the ship with the four men, and then to return to the shore in the boat, and to wait by it until the respondent should arrive with the four men. That the said libellant returned to the ship, and gave the said orders, and returned with the boat and two or three hands to the shore. That when he was on board, in pursuance of the said order, he procured from his chest his best clothing, which he tied up in a bundle, and took with him in the boat, without the knowledge of the mate. That when he reached the shore, instead of remaining with the boat, he took the said bundle of clothing, and went up to the town of Talcahuana, and that the said respondent did not again see him during the voyage. That when the said master arrived with the four men to the boat, not finding the said Jenkins, and learning where he had gone, he sent the hands in search of him, but that they could not find him, and that then the respondent returned to the ship with the men, and found it ready to sail. That the ship was to have sailed, as Jenkins well knew, as soon as the said master returned, and would have sailed forthwith, but for the absence of the said Jenkins. That when the respondent arrived aboard the ship, he returned to search for Jenkins, directing the mate to get under weigh and proceed to the entrance of the harbor, if the master did not return at night. That the said master then proceeded to the town, and in company with Benjamin F. Coffin and a person by the name of Bates, whom he employed, searched through the town for Jenkins, but without success. That they then proceeded to the office of Paul Delano, American consul at that port, and asked his advice, and that he advised him to proceed to sea. That the master then returned to the ship, and anchored at the entrance of the harbor in full sight of the town, and remained there till the next morning, for the space of thirty hours, in order that Jenkins might return, if he chose, and then commenced beating out of the harbor with a head wind. That he verily believes, that the said Jenkins did not mean to return, but intended to desert, and denies that the said Jenkins was left without sufficient cause. That after the said Jenkins deserted, the ship proceeded on her voyage, and arrived at Nantucket about the middle of November, 1838; that the said Jenkins remained at Talcahuana until September last past, when he might well have returned before, and that the said respondent verily believes, that the said Jenkins deserted with the intention of remaining and residing at that place. That after the return of the said Jenkins, the said respondent believes, that the said Jenkins transferred all interest in the voyage to George B. Elkins. To this answer, which was not sworn to, a special replication was made by the libellant.

The decree of the district judge at the hearing of the cause was for the libellant, that he recover the sum of $500 and costs of suit; from which decree the present appeal to this court was taken. The cause was now heard upon the original evidence, and also upon new evidence, and was argued by—

Charles P. Curtis, for appellant.
Crowninshield & Choate, for appellee.

STORY, Circuit Justice. This cause has been argued at great length; but after all, it turns upon a single inquiry, and that is, whether there has been a desertion on the part

of the libellant, during the whaling voyage, by which he has, according to the principles of the maritime law, forfeited his right to his lay or share in the proceeds and catchings of the voyage. This lay or share does not, according to law, create any partnership in the profits of the voyage, as has been sometimes erroneously supposed; but it is in the nature of wages for seamen in the common merchants service, and is governed by the same rules. This opinion was adopted by Lord Alvanley in Wilkinson v. Frasier, 4 Esp. 182; and more recently in the court of exchequer, in Perrott v. Bryant, 2 Younge & C. Exch. 61; in Mair v. Glennie, 4 Maule & S. 240; by the court of king's bench, and by the supreme court of Massachusetts in Boston, in Baxter v. Rodman, 3 Pick. 435, in Rice v. Austin, 17 Mass. 197, 203, 206, and in Grozier v. Atwood, 4 Pick. 234. The same doctrine was held by Lord Stowell in The Frederick, 5 C. Rob. Adm. 8. Indeed, I consider it too well settled now to admit of any reasonable doubt. See Story, Partn. § 42.

In respect to desertion, there is no doubt, that it constitutes, by the general maritime law, a forfeiture of all title to wages, and to rights in the proceeds in the nature of wages. And by desertion, in the sense of the maritime law, is meant, not a mere unauthorized absence from the ship without leave; but an unauthorized leaving or absence from the ship, with an intention not to return to her service, or, as it is often expressed, animo non revertendi, that is, with an intention to desert. The statute of the United States, for the regulation of seamen in the merchants service—Act 1790, c. 56, § 5 [1 Story's Laws, 104; 1 Stat. 133, c. 29]—has created an auxiliary statute desertion, distinct from and independent of that of the maritime law, and it declares, that forty-eight hours' absence from the ship without leave, if a proper entry thereof is at the time made in the log book, shall be deemed a desertion and a forfeiture of all wages due to the party. This subject was fully discussed and considered in the case of Cloutman v. Tunison [Case No. 2,907], and to the doctrine there stated I adhere with unhesitating confidence. But I advert to it in this connexion simply to answer an argument, suggested at the bar, that, under this statute, if a seaman should, without leave, voluntarily absent himself from the ship at the time, when she is about to sail from the port on the voyage, nay, when she is about to weigh anchor, for the very purpose, and she should actually sail on the voyage before the forty-eight hours had elapsed, it would not, in the sense of the law, amount to a statute desertion; because he would not have the opportunity of rejoining the ship within the forty-eight hours. In short, the argument went to this, that it was not a desertion at all, either by the maritime law or under the statute, unless, at the time of the seaman's leaving, he left it with the intent absolutely to desert, or animo non revertendi. To this doctrine I cannot, in any manner subscribe. I understand the statute to declare, that an absence from on board the ship without leave is a forfeiture of his wages, and a desertion, unless he actually rejoins the ship within forty-eight hours; and that it is at his own peril, under such circumstances, to absent himself; and if he is unable to rejoin the ship, whether by reason of her sailing on the voyage or otherwise, within the forty-eight hours, the forfeiture is complete and absolute. The ship is not bound to wait for him; but he is bound to rejoin the ship within that period, suo periculo. But I should go farther and say, that if, upon the eve of the departure of the ship from the port on the voyage, a seaman should, with a full knowledge of the fact of her intended departure, voluntarily or secretly without leave quit the ship, that would of itself be strong prima facie evidence of a positive intention to desert, and it would require the fullest and clearest evidence of bona fides, and sincerity of intention, to displace the presumption.

Now, in the present case, it appears to me, that there are very strong circumstances, which go to establish a meditated intention to desert, and an effectual execution of that intention. I agree, that it is not to be presumed, that an officer of a ship does intend an act of such gross disobedience and departure from duty, which must weaken public confidence in his character, and take from him, in many cases, the means of future support. I agree further, that, in the present case, there was apparently a large lay or share due to the libellant, and that a very strong motive to desert seems to be taken away. I say apparently a large lay or share due to him, for, there is no direct evidence to show, satisfactorily to my mind, what his real interest therein was at the time when he left the ship. It is true, that no assignment was, in fact, made of his lay or share, until after his return home, two years or more after the supposed desertion. But then, of the facts and circumstances attending that assignment, the consideration actually given for it, and the occasion of making it, we have no strict or searching account. I should have been glad to know, whether the assignee was the agent of the libellant during his absence, and had made advances to his family during his absence upon the whaling voyage, and was entitled to reimbursement therefor out of the lay or share, and that the assignment was made on that account to him; or whether he made a bona fide purchase thereof at the time of the assignment, and what value, if any, he paid or was to pay therefor. There are circumstances in this case which imperatively require some explanations on this head. In the first place, the assignment was made at a time, when the owners had refused to pay the lay or share. There was not merely a controversy, but a defence founded upon the supposed

desertion, intended to meet the lis mota, if a suit should be brought. Men do not ordinarily, under such circumstances, buy up law suits at a fair or reasonable price, but as a matter of desperate, even if it be lawful, speculation.

In the next place, certain declarations are asserted to have been made by the libellant, which point to his interest in the lay or share. Benjamin F. Coffin says, "While we were at Talcahuana, in the afternoon of the day before Mr. Jenkins left the ship, he told me, that if Captain Coffin would not discharge him, he should run away. He said, that it was of no use for him to go home; that he should have nothing to receive if he went home." Now Coffin's testimony has been assailed, with intense zeal and strength of expression, as false, and deliberately false. If it stood alone, it might perhaps not be sufficient to found a safe judgment upon it. But if the intention to desert is, as I think it clearly is, made out upon other independent evidence of acts and declarations, it certainly furnishes no reason to suspect, that Coffin has not here uttered the truth. Certainly, if the statement imputed to the libellant was false in point of fact, "That it was of no use for him to go home, that he should have nothing to receive if he went home;" he could have shown that by proofs of substantial, subsisting interest, before or at the time of the assignment. Yet he has left this part of the case a blank, although it was peculiarly within his privity and knowledge how the matter really stood. But passing from this, let us proceed to other important considerations in the case. In the first place, it is admitted, that the libellant, in consequence of some part, which the respondent took in some difference between the libellant and Swain, (the third mate of the ship), favorable to the latter, was discontented and dissatisfied with the respondent, and requested repeatedly to be discharged. The respondent refused, and advised the libellant to go home in the ship. In the next place, the libellant, on the morning of the sailing of the ship, went on shore with the respondent, and returned by his orders to the ship, with directions to the chief mate to heave short the anchor, or to get the ship under weigh. The ship was hove short and did get under weigh. The libellant returned to the shore, having put on a pair of new duck trousers over his others then on, and took also a bundle of clothing with him tied up in a handkerchief. He left on board a quadrant; and some few other things, which were, however, but of trifling value. When he left the ship, he bade Swain, (the third mate), "Good-bye," a circumstance, not of itself, ordinarily, of much significance, and yet not wholly without effect, under circumstances like those in the present case, especially considering, that there had been some difficulty between Swain and the libellant.

The question here naturally meets us, what did the libellant go ashore for, and why did he carry a bundle of clothing? His excuse or justification is, that he had sold the clothes to a person on shore, and that he was absent from the boat, hunting for deserters from the ship. Neither of these suggestions is, in my judgment, satisfactorily or probably made out. It was of little use, without the knowledge or consent of the master, who had hired other men in lieu of the deserters, who were then either on board or going on board, to search for deserters, when the anchor was a-trip for the voyage, or the ship under weigh. That was a time for speed and watchfulness, and not for fruitless searches. As little is there in the other suggestion. If the libellant was to go the voyage, he would or might want these clothes in the course of the return voyage, and if he had really sold them, he would seem to have left himself with scarcely a decent supply. Putting on the new duck trousers over those he then had on, could not be for sale, and scarcely for immediate use, if he was then about to go to sea. But if he intended to desert, both the clothes and the trousers might be important. I do not dwell on these facts, because, although they inflame every suspicion, they do not constitute the ground, upon which my judgment rests. Let us look to the subsequent acts and declarations of the libellant after he was on shore, and the ship was gone. He then said in the presence of Orpin, who belonged to another ship, in a billiard house, "That he did not intend to go out in the ship which he came in." This would almost seem decisive of his intention to desert, if he could not obtain his discharge. But turn to the other facts. The ship went below about eight or nine miles distance, and there came to anchor, and did not sail until the next day. Did the libellant make even the slightest effort to get on board the ship, although it is most clearly in proof, that boats could have been obtained, and were going down to the island where the ship lay? The answer, which is admitted on all sides, is, that he made no such effort. Nay, the masters of two other ships offered in their own boats to send him to the ship. But he declined. We have the testimony of one of these masters, and it is admitted to be above all exception; and he (Capt. Hussey), states a motive for the desertion, which cannot be misunderstood or winked out of sight. Capt. Hussey deposes to a conversation, which he had with the libellant a few days after the Columbus sailed. It occurred at the boarding house of a Mr. Bates. He says; "I said to Mr. Jenkins, I suppose you left Capt. Coffin with an expectation of joining my ship. (I was in want of a second mate.) Mr. Jenkins said, that he did. I told him, that I did not feel at liberty to ship him, because Capt. Coffin might think I enticed him to leave the Columbus." In addition to this, Capt. Hussey states, that while the Columbus was going down the harbor, not three miles off, and

could have been easily reached by a boat, he, being in company with Capt. Shearman, of the ship Orozimbo, offered to send the libellant on board. His language is, "Both Capt. Shearman and myself advised Mr. Jenkins to go on board of the Columbus. We said that we did not think he was doing right to leave Capt. Coffin, and that we would man a boat, taking some of Capt. Shearman's men, and the rest of mine, and would put him on board of the Columbus, if he would go. He said he thought he could do as well there on shore, and declined our offer."

Now, what was the duty of the libellant upon this occasion, and under these circumstances? It clearly was, to seek to rejoin the ship, if he did not mean to desert. It was a duty, which he owed not merely to the respondent, but to the owners. His services might be most important and valuable to both, under certain exigencies, on the voyage home. He chose to remain behind. What pretence then can there, in reality, be for him now to say, that he did not mean to desert, when, in fact, he chose not to rejoin the ship? In truth, it is most manifest, that he left the ship and not the ship him. He chose to be a voluntary absentee, and even if, at first, he meant to return, or doubted whether or not he could return, his subsequent refusal to go on board pronounces it, ab initio, a desertion. We are to judge of men by their acts as well as their words; and if the libellant had, as he now suggests he had, no intention to desert, because he had an interest in the proceeds of the voyage, how happens it, that he did not rejoin the ship and take care of that interest? How happens it that he remained abroad afterwards for two years? He has no right now to say, I went from the ship, hoping and expecting to be left behind; and I was, by my own fault and with my own consent, left behind, contrary to my duty; and I meant to avail myself of this fault and dereliction of duty to escape the forfeiture, which is attached to desertion; and my acts are now to be construed as if I did not finally intend to desert, but simply never to rejoin the ship. I trust that the law is strong enough to inform him, that what a man does, at least where the act is voluntary, is presumed to be purely what he intended to do, ab initio. The maxim, "finis coronat opus," although not precisely intended to meet such a case, does not fail to illustrate it. It is, at best, absence consummated by desertion. But it is said, that if this is a case of desertion, it is one, in which the court is not bound to inflict a total forfeiture; but may mitigate it to a remunerative or moderated compensation. There are, without question, cases, where desertion will not be visited by a total forfeiture of wages, or quasi wages. But what are the cases to which the mitigation of compensation is applied? They are those, in which the party has a strong excuse, founded on gross misconduct or harsh usage on the other side; and where the party is, therefore, more in the situation of a victim than of a sinner; or where, having a locus poenitentiae, he has acknowledged his fault, and offered to return to duty within a reasonable time, and his services have been improperly rejected. It is to such cases, and cases of a similar nature, that the rule of compensation or mitigation is, in the benignity of the maritime law, fairly and justly and upon principles of public policy, applied. Here, there is a total absence of all exculpatory and alleviating circumstances. The opportunity for repentance or return was given, and was not embraced; but was deliberately and obstinately refused. Under such circumstances, it appears to me, that this court would ill perform its duty, if it did not pronounce for a total forfeiture. It is not the case of an ignorant seaman; but of an officer of the ship. My judgment accordingly is, that the decree of the district court ought to be reversed, and that the libel be dismissed with costs for the appellee, the original respondent.

Mem.—In the course of the present cause, the respondent asked leave to file an amendment to his answer, insisting upon a new point of defence in the circuit court, which had not been presented in the district court. It was, in effect, that no suit in a case of this sort, being in the whale fisheries, lay against the master; but only against the owners or other agents in possession of the proceeds of the voyage. The motion was opposed by the counsel for the libellant.

STORY, Circuit Justice. I do not think that, under the circumstances, the amendment ought to be allowed. The matter of defence must have been well known when the cause was in the court below, and ought then, if ever, to have been insisted on, as, if well founded, it disposed of the whole suit. This court ought, in all cases, to be very cautious in admitting any new matters, either of allegation or of defence, to be introduced here, where the facts, on which they rest, are not new or newly discovered; but were perfectly known at or before the hearing in the district court. We should otherwise constantly have appeals here entertained upon matters never brought to the notice of the district court, and might virtually exercise an entirely original jurisdiction instead of an appellate jurisdiction. The rule, "in appellatio a sententia de finitiva licet non allegata allegare et non probata probare," has many limitations, and requires many. See Combe, Pr. Adm. tits. 54, 60; 1 Browne, Civ. & Adm. Law, 499, 500; 2 Browne, Civ. & Adm. Law, 415, 416, 457. I observe, too, that there are some irregularities in the present case. The libel is sworn to, but not the answer. The reverse is the usual and proper practice, although there is no objection to the libel being sworn to, if the libellant

chooses. But the answer should be sworn to, and indeed, I do not remember to have seen an answer before, which was not sworn to. Then, again, the libellant has put in and sworn to a special replication, without being called upon by the respondent to answer the allegations in the answer. This is irregular; according to the modern and correct practice, no special replication is admissible, unless the respondent requires the libellant to give an answer on oath to the matters propounded in his own answer, and then it is in the nature of a cross bill, or reconventio of the civil law. Story, Eq. Pl. § 402. It is, therefore, the privilege of the respondent to require such a reply, but not a right of the libellant to put it in, without its being demanded by the respondent, or specially ordered by the court. Motion to amend denied.

Case No. 2,949.

COFFIN et al. v. The JOHN SHAW.

[1 Cliff. 230.][1]

Circuit Court, D. New Hampshire. May Term, 1859.

BAR TO SALVAGE CLAIM—COMPENSATION.

1. The failure of libellants to refer their claim for salvage, as agreed, was *held*, under the circumstances of this case, to be no bar to the suit, and could only be taken into the account as evidence to reduce the amount which libellants were entitled to recover.

2. Nothing short of a contract to pay a given sum for the service to be rendered, or a binding engagement to pay at all events, whether successful or unsuccessful in the enterprise, will operate as a bar to a meritorious salvage claim.

[Cited in The Camanche, 8 Wall. (75 U. S.) 478; The Louisa Jane, Case No. 8,532.]

3. Obiter. A proposition by salvors that, in case they were unsuccessful in raising the vessel, they should have the privilege of stripping her, being made in advance of any effort by them to save the vessel, was highly objectionable, and must be regarded as detracting very materially from the merit of their service.

4. That the risk was slight, and the duration of the salvage service comparatively brief, affect the value of the same, and the amount to be allowed, but cannot be a bar to the claim.

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

This was an appeal in admiralty. The libel set forth that the schooner John Shaw, laden with hard-pine timber, and of the burden of about one hundred and sixty tons, was wrecked on the 12th of August, 1858, and in peril of being entirely lost on the high seas, west of Nantucket, near Nantasket; that the master and crew requested the libellants [George B. Coffin and others] to assist in saving the vessel and her cargo; that, at the risk of their lives, they commenced their efforts to save the vessel, and for forty-eight hours, during the most of which time a violent gale was blowing, and the sea running high, they continued their exertions, and finally succeeded in bringing the schooner and most of her cargo safely into the harbor of Edgartown, in the district of Massachusetts. It was further alleged, that without the aid of the libellants the schooner and her cargo would not have been saved, as she was in a dangerous position, with no anchors out, and her master and crew were throwing overboard the cargo for the purpose of lightening the vessel. The claimants of the schooner and cargo both filed answers to the libel. These answers were in substance the same. That the schooner was wrecked, or in danger of being lost, or was unmanageable, or that her master requested the assistance of the libellants, were denied in both answers. It was further set up in the answers, that the schooner was not near any reefs or breakers; that the water was of sufficient depth between the shoal on which she was aground and the land to float the vessel; that no signals of distress were set; and that the schooner was not considered by her master in peril of being lost. The answers allege that the libellants assisted in anchoring the schooner and getting her off under a contract, and that the libellants volunteered their services, which were in the first instance declined by the master, but were afterwards received upon condition that their compensation should be estimated by two referees, one to be chosen by the master of the schooner, and the other by the libellants. All the allegations of the libel concerning the violence of the wind and the condition of the sea were also denied, and it was alleged that the crew of the schooner shared in the labor and service performed by the libellants. The loss of twenty-three thousand feet of lumber, with which the schooner was loaded, was set forth; denial of any salvage service by the libellants was made, and the willingness of the respondents to account with the libellants, and pay them such sum as might be due, subject to any claim of respondents for the loss of lumber by the act or default of libellants, was averred in the answers. In the district court a decree was entered for the libellants in the sum of ninety dollars, to be equally divided among them, and for a further sum of twenty dollars to one of said libellants for the loss of his boat, without costs.

Horace Webster, for libellants.
W. H. Y. Hackett, for claimants.

CLIFFORD, Circuit Justice. According to the testimony, the schooner sailed from Savannah, in the state of Georgia, bound on a voyage to Portsmouth, in the state of New Hampshire. She was a vessel of about one hundred and fifty-six tons' burden, with a company of five men, consisting of the master and mate, two foremast hands, a cook,

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

and steward. They had on board a cargo of hard-pine timber, measuring about one hundred thousand feet. It filled the hold of the vessel, and there was about thirty-five thousand feet on the deck. On the 11th of August, 1858, about ten o'clock at night, the schooner ran on to a sand shoal between Maskeget and Tuckernuck islands, and stuck fast at a point where the water at low tide is about six feet deep. After the vessel struck, she swung round stem off, heading south-southwest. Her master then trimmed her sails accordingly, and she remained in that position until the following morning. In the mean time he began to get off part of her deck load, supposing that he was on a reef at the new south shoal, and thinking that, by lightening the vessel, she might pass over the shoal as the tide rose. He threw over three sticks of hewn timber of about a thousand feet each, cutting one in two pieces because it was so long that he could not otherwise get it over the rail. Two or three smaller sticks were also thrown over during the night; but finding that the vessel lay without thumping, he ordered the crew to stop heaving the timber over till daylight, when he could see what was the position of the vessel. Seven large sticks of hewn timber still remained on board, and in the morning the master renewed the direction to the crew to commence heaving it over. Shortly after this order was given, and while the crew were employed in carrying it into effect, one of the libellants came to the schooner in a boat, and inquired of the master whether he wanted assistance, and the master told him he wanted a pilot. At the time the schooner ran on to the shoal the master says he was steering north by west, as ascertained by the compass. He had determined the longitude, however, by the chronometer, which made him forty miles farther east than he really was, and it does not appear that his mistake was in any manner corrected until he was visited by the libellants. The master inquired of the libellant, when he first went on board, whether he was acquainted with these shoals, and whether he could pilot the vessel out. Both of these questions were answered in the affirmative, and the libellant expressed the opinion that by lightening the vessel she might be got off during that tide. They then went to work heaving over the timber from the deck, and continued to do so until the tide began to slacken. When the tide slackened, they ran out the kedge anchor about one hundred and twenty fathoms, and the master also let the larboard anchor drop. During the time they were so engaged the other seven libellants arrived in a boat from Tuckernuck, and went on board. After some conversation, the libellant first named informd the master that they wanted fifteen hundred dollars in case they should assist in getting off the schooner, which the master declined to give. On hearing that remark of the master, five of the libellants left the schooner, and went and picked up several other sticks of the floating timber. They were absent about three quarters of an hour. Some further conversation ensued, during their absence, between the master and those who remained, which was renewed and continued after their return. As the result of these several conversations, it was arranged between the parties, as the master says, that the libellants should assist in getting off the schooner, and that they would leave the matter to two disinterested men, one to be chosen by each party, to settle the amount of the compensation, and with that understanding they went to work. Three of the libellants were examined upon this point. One of them testifies that the master, when asked the second time if he wanted assistance, answered in the affirmative, and that the arrangement was, if they got her off, and could not agree upon the amount of compensation, that they were to leave it out, and in case they failed, they were to have the privilege of stripping the vessel. Another says that the master, after the five men returned, desired them to proceed and get the vessel off, remarking, at the same time, that if they could not agree upon the price, they would leave it out. George B. Coffin testifies that the master requested them to take the vessel and proceed, and that they thought he could get her off, and that one of the libellants remarked that if they did not succeed they were to have the privilege of stripping her, and on these terms they proceeded in the undertaking. One of the seamen on board the schooner was also examined on this point by the respondents. He testifies that the master declined the offer first made by the libellants; but he admits that he afterwards heard him assent that they might go to work while he and one of their number went aft to converse about the terms. All the testimony shows that the master accepted the services of the libellants, and that no definite sum was agreed on as the measure of compensation for the service to be performed. They finally went to work under the arrangement, and on the terms that if successful, and they could not agree as to the price, the matter should be submitted to referees, to be chosen as stated in the testimony of the master. It seems that so much of the suggestion of the libellants as contemplated the stripping of the vessel, in case they were unsuccessful, was not acceded to by the master. That proposition, made as it was in advance of any efforts on the part of the libellants to save property, was highly objectionable, and must be regarded as detracting very materially from the merit of the service. That the schooner was in some peril cannot successfully be denied. Many other vessels have been stranded on this shoal, and few had ever found effectual relief. She was fast in her position, and the efforts of her officers and crew were insufficient to work her free. The master had lost his course; and being without any knowl-

edge that his chronometer was imperfect or out of order, it is not probable that he would have discovered his mistake without other means than those he had at hand. Part of the cargo had already been thrown overboard, and the crew had become exhausted with continued labor, and stood in need of relief. Under such circumstances it is impossible to say that the vessel was in no peril. It is no sufficient answer to this state of facts to say, even if it were true, as is supposed by the respondents, that the risk and duration of the service were less than they would have been had the elements been more threatening and unpropitious. That argument is a proper and forcible one as affecting the value of the service, and the amount to be allowed, but it is wholly insufficient under the circumstances of this case as a bar to the claim for salvage. Forty-eight hours or more were spent in performing the service, and during some portion of the time there was a strong tide and considerable wind. As before remarked, some portion of her deck load had been thrown overboard before the libellants arrived, and after they took charge of the schooner they found it impossible to work her off by heaving at the windlass until her deck had been nearly or quite cleared. Two boats were used in carrying out the anchors, and one or more of the witnesses testified that the anchor and chain loaded them so deep that one or two men had to bail water nearly all the time they were carrying them out to prevent the boats from sinking. All the circumstances show, not only that the vessel and cargo stood in need of relief, but that the assistance as finally rendered, at the request, or at least by the assent, of the master, was not unattended with some danger and personal risk. In the first instance, it is true that the master only requested a pilot, and declined the proffered aid, hoping, doubtless, to get his vessel off by the efforts of his own crew; but the case clearly shows that he subsequently changed his mind, and set the libellants at work. They demanded unrestricted salvage compensation, which the master refused to allow. Efforts were then made to agree upon a definite sum; but the parties could not, and did not, agree. Finding they could not agree upon a fixed compensation, it was arranged that the libellants should render the service, and, in case they disagreed, the matter was to be submitted to referees. That stipulation was never carried into effect, and each party charges the other with fault in that particular. Propositions to that effect were made on both sides, and as often as they were made they were rejected by the opposite party. As compared with the arrangement between them before the service was rendered, no one of the propositions appears to be entirely free from objection. One or more of those made by the libellants were unreasonable, and their conduct in that behalf cannot be altogether overlooked in fixing upon the amount of the compensation they are entitled to receive. Their failure to refer, under the circumstances of this case, is no bar to the suit, and can only be taken into the account as evidence to reduce the amount they are entitled to recover. Nothing short of a contract to pay a given sum for the service to be rendered, or a binding engagement to pay at all events, whether successful or unsuccessful in the enterprise, will operate as a bar to a meritorious salvage claim. Hennessey v. The Versailles [Case No. 6,365]; The William Lushington, 7 Notes Cas. 361; The Centurion [Case No. 2,554]; The H. B. Foster [Id. 6,290]; The Independence [Id. 7,014]. Some of the timber was lost, but it is not perceived that there is any sufficient evidence in the case to show that it was by the neglect or through the default of the libellants. Salvors are allowed a liberal compensation for their services for two reasons: first, as an inducement to engage in the service; and, secondly, to withdraw from them every motive of unfaithfulness in the performance of their duties. Fraud or gross negligence is visited by the law with an entire forfeiture of claim to compensation. But the burden of proof, when any such imputation is made, lies on the party making it, and when not proved, of course the charge cannot be sustained. In view of all the circumstances, I think the libellants are entitled to a salvage compensation, but less than is usually allowed in cases of this description. Five hundred dollars I think a reasonable compensation. Accordingly, the decree of the district court is reversed, and let a decree be entered in favor of the libellants for that amount, with costs in both courts.

Case No. 2,950.

COFFIN v. OGDEN et al.

[7 Blatchf. 61;[1] 3 Fish. Pat. Cas. 640; Merw. Pat. Inv. 669.]

Circuit Court, S. D. New York. Nov. 29, 1869.[2]

PATENTS—"LOCKS"—CONSTRUCTION — COMPLETED INVENTION—DEDICATION.

1. Where, in a suit for the infringement of a patent for an improvement in a lock, the defendant's lock contained the entire mechanical arrangement, in substance, which was found in the description of the plaintiff's patent, so far as the invention of the patentee was concerned, with only such variations as the skill of a mechanic would suggest: *Held*, that the plaintiff's patent ought, if possible, to be so construed as to make it valid with reference to the defendant's lock.

2. The claims of the reissued patent granted to Charles A. Miller, assignee of William S. Kirkham, the inventor, January 27th, 1863, for an improvement in locks and latches, on the surrender of the original patent granted to Kirkham, June 11th, 1861, namely: 1. So dividing the hub or follower, and so combining the same with a reversible latch, that the arms,

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

[2] [Affirmed in Coffin v. Ogden, 18 Wall. (85 U. S.) 120.]

or their equivalents, of the divided hub or follower, may be released, for the purpose of allowing the latch to be reversed or turned; 2. So constructing and arranging the individual parts of a divided hub or follower, that the reversal or turning of the latch is prevented only by the presence of the spindle within the lock—so construed as to relieve them from the objection that they claim results or effects or functions.

3. The first claim is a claim to dividing the hub or follower in substantially the manner described by the patentee, and to combining the hub, so divided, with a reversible latch, in substantially the manner described by the patentee, the arms of the hub being released in substantially the manner described by the patentee, for the purpose of allowing the latch to be reversed.

4. The second claim is a claim to constructing and arranging the individual parts of the divided hub in substantially the manner described by the patentee, the reversal of the latch being prevented only by the presence of the spindle in the lock in substantially the manner described by the patentee.

5. The proper rule is to construe the claims in connection with the descriptive parts of the specification, and with reference to what is seen to be the real invention.

6. Where a lock containing a reversible latch, embodying the inventions covered by such claims, was, prior to the making of the invention by the patentee, made by E., and shown to three lock-makers, who examined it and understood its construction, and it was not put upon a door or put into use, or tested otherwise than by the exhibition of it and its working to the three lock-makers, but was a complete working reversible latch: *Held*, that it was a complete and perfected invention, and that such a knowledge of it, as a completed invention, was given to the public, before the patentee made his invention of the same thing, as to deprive the patentee of his right as first inventor.

7. The reversible latch of E. was a completed invention, although the lock containing in it was not actually put into use on a door.

[See note at end of case.]

In equity. This was a final hearing, on pleadings and proofs, of a suit [against James B. Ogden and Lucius Woodruff] founded on reissued letters patent of the United States [No. 1,390] granted to Charles A. Miller, assignee of William S. Kirkham, the inventor, January 27th, 1863, for an improvement in locks and latches, and assigned to the plaintiff [Paul C. Coffin]. The original letters patent [No. 32,521] were granted to Kirkham, June 11th, 1861.

George Gifford, for plaintiff.

Benjamin F. Thurston and Stephen D. Law, for defendants.

BLATCHFORD, District Judge. The defences set up in the answer, that are relied on, are: 1. That the invention in question was previously made by one Barthol Erbe, at Birmingham, near Pittsburg, Pennsylvania; 2. That the claims of the reissued patent are not for any patentable invention, or for any device or mechanism arranged and operating for a particular purpose or to produce a particular effect, but are for an effect or function, irrespective of any particular mechanism, and that such patent is, therefore, void; 3. That, if the patent is valid, the defendants have not infringed it.

The object of the invention is stated, in the specification, to be, to render a door latch "readily applicable to either right or left hand doors." The drawings annexed to the patent represent a structure, the whole of which is called, in the specification, a door-lock, containing as well a bolt to be operated by a key, as a latch to be operated by a spindle attached to a knob or handle. The invention relates only to those parts of the structure which are connected with the operation of the latch. The specification states, that the invention is applicable to door-locks generally—as well to a lock let into the edge of a door, and consequently concealed from view, as to a lock secured to the outer surface of a door. The latch, which is operated by the turning of the spindle, has its head, that is, the portion which projects beyond the face plate of the lock, made square, and bevelled or rounded off at one end. The stem of the latch and the portion adjacent to the head are cylindrical. While the lock is in working order, the square portion of the latch fits snugly in a square opening in the face plate, but such portion is arranged to slide freely in such opening, and, when such portion is pulled so far forward that the cylindrical portion takes its place in such opening, the latch can be readily turned and its bevelled edge be reversed. The arrangement to allow of such reversal is as follows: At or near the centre of the cylindrical portion of the latch is a recess therein, in which fits the lower end of a lever, which has its fulcrum on a lug projecting from the inside of the upper edge of the case, a spring bearing against the short arm of the lever. A slide is connected by a pin to such lever, and on such slide are two projections or lugs, against which the arms of the hub or follower bear. This hub or follower consists of two parts. One of them is arranged to turn in both faces of the lock, and has a square opening for the reception of the spindle, and is partly cut away for the reception of the other part, a portion of which is also adapted to the spindle. It is this latter part of the hub that acts on the projections on the slide before mentioned, the points which bear against such projections being termed arms. When the spindle is out of the hub, this latter part of the hub can be slid in a direction away from the face plate, independently of the other portion of the hub, which remains stationary, as it is confined to the front and rear plates of the lock case. When the spindle is in the hub, the two portions of the hub become as one portion, and perform the functions of an ordinary hub, that is, on turning the spindle, one or the other of the arms acts on one of the projections on the slide before mentioned, and causes the slide to operate the latch. When the spindle is withdrawn, the two portions of the hub are released, from each other, and the arms are

released so far as their action on such projections is concerned. When it is desirable to reverse the latch, the first thing to be done is, to withdraw the spindle, after which the latch can be pulled out from the face plate to a certain distance, which the presence of the spindle in the hub has hitherto prevented. On thus pulling the latch out, the lever and the slide move in the same direction, such movement being permitted by the yielding of the arms, which have been released on the withdrawing of the spindle. After the latch has been drawn out so far that its cylindrical portion takes the place before occupied by its head in the square opening in the face plate, the latch can be readily turned and reversed, and then be pushed back to its proper position, and the spindle can then be reinserted. A spring is arranged to restore to its proper position the movable portion of the hub. By this construction of the hub, its arms can be released, and the reversal of the latch be promptly accomplished, while such reversal is effectually prevented by the presence of the spindle in the hub. In this way, the lock is capable of being applied to either a right hand or a left hand door.

The claims of the patent are two in number: 1. So dividing the hub or follower, and so combining the same with a reversible latch, that the arms, or their equivalents, of the divided hub or follower may be released, for the purpose of allowing the latch to be reversed or turned; 2. So constructing and arranging the individual parts of a divided hub or follower, that the reversal or turning of the latch is prevented only by the presence of the spindle within the lock.

The lock made and sold by the defendants is, in its mechanical construction, substantially the same as the lock described in the plaintiff's patent, so far as the arrangement of the parts of its divided hub and their combination with a reversible latch are concerned. The defendants' hub is divided into three parts, one of which is movable relatively to the other two. The movable part carries the arms for operating the latch. When such movable part is released from the other parts, the latch can be moved the necessary distance to allow its bevelled head to be turned or reversed. The parts of the divided hub, thus arranged, are combined with the reversible latch. The presence of the spindle in the hub prevents the action of the movable part of the hub, while the withdrawing of such spindle releases such movable part of the hub, so as to allow of the reversal of the latch. There is no lever connecting the slide with the shank of the latch, but the slide is connected directly with such shank—a variation which is merely formal and does not concern the invention. So, also, the variation, by dividing the stationary part of the hub into two parts, is merely formal. The defendants' lock contains the entire mechanical arrangement, in substance, which is found in the description of the plaintiff's patent, so far as the invention of Kirkham is concerned, with only such variations as the skill of a mechanic would suggest. The invention of Kirkham is taken, in its mechanical construction and arrangement. This being so, and the invention of Kirkham, as described, being infringed, the rules of law require that the plaintiff's patent shall, if possible, be so construed, as to make it valid with reference to the defendants' lock—ut magis valeat quam pereat. Upon this principle, there is no difficulty in so construing the claims of the patent as to relieve them from the objection made, that they claim results or effects or functions. The first claim must be held to be a claim to dividing the hub or follower in substantially the manner described by the patentee, and to combining the hub, so divided, with a reversible latch, in substantially the manner described by the patentee, the arms of the hub being released in substantially the manner described by the patentee, for the purpose of allowing the latch to be reversed. The second claim must be held to be a claim to constructing and arranging the individual parts of the divided hub in substantially the manner described by the patentee, the reversal of the latch being prevented only by the presence of the spindle in the lock, in substantially the manner described by the patentee. The claims must be construed in connection with the descriptive parts of the specification, and with reference to what is seen to be the real invention. Case v. Brown, 2 Wall. [69 U. S.] 320. If the defendants' division of the hub, and their combination of such hub with a reversible latch, and their release of the arms of the hub, and their arrangement of the individual parts of the divided hub, and their prevention, by the presence of the spindle in the lock, of the reversal of the latch, were not all of them effected substantally in the same way, and by the same mechanical constructions, described in the plaintiff's patent, the question whether the claims of such patent could be so construed as to be made to embrace mechanical constructions not substantially described in such patent, for dividing the hub, and combining it with a reversible latch, and releasing the arms of the hub, and arranging the individual parts of the divided hub, and preventing the reversal of the latch by the presence of the spindle, would become an important one. In the present case, such question is unimportant, for, on the construction which the claims must receive, the defendants' lock is clearly an infringement.

The remaining question is that of novelty. The reversible latch claimed to have been invented and made by Erbe, prior to Kirkham's invention, undoubtedly embodied the inventions claimed in the plaintiff's patent, as above construed. The lock of Erbe, containing such latch, had a hub divided into

three parts. The central portion of the hub was no thicker than the space between the walls of the lock-case, while the other two portions were like washers, and of the same thickness as the walls of the lock-case. The central portion was rendered movable by the withdrawal of the spindle, and was so combined with a reversible latch as to permit the movement of such central portion to a sufficient distance to allow of the withdrawal of the latch far enough to allow of its reversal. It possessed all three of the features which go to make up the reversible latch of the plaintiff's patent: 1. A reversible latch-bolt, capable of being reversed when pulled out from the face of the lock-case to a distance greater than the distance to which it is usually shot; 2. A hub so divided that the part carrying the arms can be detached at will from the other parts of the hub, and allowed to slide within the walls of the lock; 3. A spindle capable of being withdrawn from the parts forming the hub. The parts of the hub in the Erbe lock, and their combinations with the latch and the spindle, are, in mechanical construction and arrangement, substantially the same as the corresponding parts described in the plaintiff's patent and found in the defendants' lock. In the feature of having a hub divided into three parts instead of two, that is, one movable part, and two separated stationary parts embracing the movable part, when the latch is set, the Erbe lock is formally more like the defendants' lock than it is like the Kirkham lock. But, as this formal difference does not relieve the defendants' lock from being an infringement, so it does not destroy the identity between the Kirkham lock and the Erbe lock, in the features which characterize the patented invention. The fact that there is a permanent connection, in the Kirkham lock, between the two parts of the hub which enter the walls of the lock, has no relation to any of the arrangements or combinations through which the latch is made reversible.

The question, then, arises, as to whether the Erbe lock antedates, as a completed invention, the Kirkham lock. The weight of the evidence is, that Kirkham did not make his invention at an earlier date than the 1st of March, 1861. The testimony of Miller, as to the exhibition by Kirkham, as early as the 1st of September, 1860, of a drawing of the invention, is not to be relied on, in view of the testimony given by Allport and Hill, in reference to the circumstances attending the construction by Kirkham of the first lock which embodied his invention. Besides, the testimony of Miller as to when the drawing was exhibited is, in itself, vague and inconclusive and is not corroborated by any reliable fact or circumstance in the case.

What, then, is the date of the Erbe invention? Erbe himself testifies, that he first made a lock containing such invention in the latter part of the year 1860. A duplicate or counterpart of the lock so then made is in evidence, and contains the construction and arrangement of mechanism before stated as characterizing the Erbe lock. He made but one of such locks at that time. He was at the time foreman of a lock-making establishment at Birmingham. He exhibited such lock before the 1st of January, 1861, and about Christmas day, in 1860, to Bernhard Brosi, a lock-maker, who then resided at Birmingham, and worked in the same establishment with him. He also exhibited such lock on the 1st day of January, 1861, to Henry Masta, who was at the time a pattern-maker in the same establishment. He also exhibited it in January, 1861, to Andrew Patterson, who was at the time superintendent of the same establishment. Erbe showed Brosi how the lock worked, so as to be used either right or left, and showed him the hub or follower made in two pieces, one of them capable of being taken out when the knob was taken away, and the other part, being the main part of the follower, sliding forward in the case of the lock with the latch, so that the square part of the latch could be reversed. Brosi had, at that time, been a lock-maker for eight years. He examined the lock carefully at the time, and had never seen a reversible latch before. He says, that the lock which Erbe then exhibited to him was the same, in construction, as the duplicate or counterpart before referred to, and was a complete lock, capable of working, although the inside part of the latch was roughly made, of wrought iron. Erbe showed him the same lock on two other occasions, shortly afterwards, at the establishment where both of them were employed. Masta says, that he examined the lock at the time with the case open; that the hub was in three pieces, the middle one of which would slide between the plate and the case, and let the latch forward, when the spindle was pulled out; that the arrangement by which the latch was made capable of reversal, in the lock shown to him by Erbe, was the same as the arrangement for that purpose in the duplicate or counterpart before referred to; and that, when he first saw Erbe's latch, he had never before seen or heard of a reversible latch. Patterson says, that the reversible latch which Erbe showed to him was like the duplicate or counterpart before referred to; that the hub or follower was so constructed that, when the spindle was withdrawn, the hub would slide forward between the cases, and allow the head of the latch to protrude beyond the face of the lock, so as to be reversed, there being a swivel joint connection between the head of the latch and the yoke; that the movable part of the hub was a single piece with arms, like an ordinary follower or hub, and there was, in one side of the case, on the spindle, a shoulder or boss, which filled the spindle hole, and on the other side a ring or washer on the spindle, which centered the spindle in the hole in the case; that he, the witness, at the time, regarded the thing as a new invention; and

that the latch part and its connections were complete.

Erbe did not make a second lock of the kind until he made one which was deposited in the patent office in connection with an application he made for a patent in 1864. Nor did he put any such lock into use on a door until after he had so applied for a patent. I am not satisfied, from the evidence, that the lock which Erbe so made in 1860 was put upon a door, or that any other lock of the kind made by Erbe was put upon a door, until after such application for a patent was made by Erbe. On this evidence, it is insisted, on the part of the plaintiff, that, as but one lock was made by Erbe before Kirkham made his invention and obtained his patent, and as the lock so made by Erbe was not put upon a door, or put into use or tested otherwise than by such exhibition of it and its working to the three witnesses to whom it was shown, before Kirkham made his invention and obtained his patent, the invention of Erbe was not one reduced to practice before the invention of Kirkham was made, but rested only in experiment, and was not a completed invention. I think this position cannot be maintained in reference to this reversible latch of Erbe's. It was no mere experiment. In the shape in which it was exhibited by Erbe, and is reproduced now in the duplicate or counterpart before referred to, it is a complete working reversible latch, requiring no alteration, adaptation, addition or improvement to fit it for use as a latch, and as a reversible latch. It was put into practical form, in working metal, as a latch, and was ready for practical use, in itself, and as a pattern or model from which any number like it could have been made by Erbe and the three other persons who saw it and understood its construction. It was, therefore, a completed and perfected invention, and the imparting of a knowledge of its construction by its exhibition by Erbe to the three persons, connected with the business of lock making, who saw it and understood its arrangement, was the giving to the public of such a knowledge of it, as a complete invention, before Kirkland made his invention of the same thing, as to deprive Kirkham of the right to be considered, in law, as the first inventor of such invention, even though he was an original and independent inventor of it. A putting of an invention into use is generally strong evidence of a reduction of it to practice. But it may be a completed invention, put into practical form, ready for practical use and reduced to practice, without being put into use, in the general acceptation of that word. If the adaptation to use, or even the use itself, is merely experimental, the invention is not perfected. But use is not necessarily required in order to show perfection or completion. In respect to most inventions, use, not merely experimental, is one of the best proofs of the reduction of an invention to practice. But the particular invention in question is an illustration of the fact, that a piece of mechanism may be shown to have been completed, and not to have rested in experiment, and to have been capable, from its structure, of working successfully, so as to deprive of the merit of novelty, in the patent law, a subsequent independent invention of the same thing, without its being shown that such piece of mechanism was actually used before the making of such subsequent invention. To put upon a door a reversible latch constructed like Kirkham's and Erbe's and the defendants', so that such latch shall be in working order and be used practically as a latch, is to deprive it of its active reversible character. The only occasion on which such a latch ever needs to be reversed or ever can be reversed, is when it is off from a door, and is not in use as a latch. So long as it is on a door and is in use as a latch, the mechanism for reversing the latch is dormant and inactive. It in no manner demonstrates the capacity for successful action of the mechanism for reversing, to put the latch in use upon a door. Such use is the mose effective way of depriving any observer of all opportunity of testing the capacity of the mechanism for reversing, and can only test the action of the latch as a latch not possessed of any capacity of being reversed. The only point of view in which the necessity for use on a door of a lock containing such a reversible latch can be urged is, that, until that is done, it cannot be seen or known that the latch with such reversible mechanism attached to it will work successfully as a latch, or that the reversing mechanism will not have to be regarded as an unsuccessful experiment, because attached to a latch not shown to work successfully as a latch with such attachment. In the present case, however, it is not pretended that the latch of Erbe, represented by the duplicate or counterpart before referred to, will not work successfully as a latch on a door, when the spindle is in position, or that any experiment or use was necessary to ascertain whether the presence of the reversing mechanism would or would not interfere with the action of the latch as a latch when on a door. The only use of the reversing mechanism is to enable the bevelled side of the projecting head of the latch to be turned to the proper position to suit the door on which the latch is to be put, as a right-handed or a left-handed door, and, when once the latch is arranged to suit a particular door and is put on such door, the reversing mechanism is of no more use or service, while the latch remains on such door, than if such mechanism had no existence. It can never again be of any use until and unless the same latch is required to be put upon a door differently hung, in respect to being right-handed or left-handed. Therefore, the principal scope of the use of such reversing mechanism is to release the house-builder from the necessi-

ty of exercising any choice as to selecting locks with latches made especially for right-handed or left-handed doors, and to relieve lockmakers from the necessity of making locks especially for each class of doors. In view of these facts, in reference to this invention, the exhibition of a lock containing it to persons versed in lock-making, who understood its construction and working, and who recognized it at the time as a completed thing, capable of working and effecting the result intended, as to reversing the latch, and who were shown how it worked, so as to be capable of being used for either a right-handed or a left-handed door, must be regarded as substantially a use of the reversing mechanism, which is the whole invention. Such use as Erbe put the lock to in showing Brosi and Masta and Patterson how the reversing mechanism practically worked, embodied as extensive and effective a use of such mechanism as it would have been likely to have had, if such lock had been sold to a purchaser who should have put it in use upon a door. These views are confirmed by, and result from, the most carefully considered cases and authorities which are to be met with on this subject. Reed v. Cutter [Case No. 11,645]; Bedford v. Hunt [Id. 1,217]; Curt. Pat. § 87; Whitely v. Swayne, 7 Wall. [74 U. S.] 685.

It follows, from these considerations, that the invention of Kirkham was fully anticipated by that of Erbe, and that the bill must be dismissed, with costs.

[NOTE. Complainant appealed to the supreme court, where the decree of the circuit court was affirmed.

[Mr. Justice Swayne who delivered the opinion, after reviewing the testimony, stated: "Here it is abundantly proved that the lock originally made by Erbe 'was complete, and capable of working.' The priority of Erbe's invention is clearly shown. It was known at the time to at least five persons, including Jones, and probably to many others, in the shop where Erbe worked; and the lock was put in use, being applied to a door, as proved by Brosi. It was thus tested, and shown to be successful. These facts bring the case made by the appellees within the severest legal tests which can be applied to them. The defense relied upon is fully made out." Coffin v. Ogden, 18 Wall. (85 U. S.) 120.]

COFFIN (PAYSON v.). See Cases Nos. 10,858 and 10,859.

Case No. 2,951.

COFFIN v. SHAW.

[21 Law Rep. 463.]

Circuit Court, D. Massachusetts. May Term, 1856.[1]

SEAMEN'S WAGES — DESERTION BY MINOR — RIGHT OF FATHER — MEASURE OF DAMAGES.

1. Where a minor, with the assent and allowance of his father, signed shipping articles for a whaling voyage, in the course of which, after arriving at full age, he deserted, it was *held* that, at the common law in Massachusetts, such desertion did not work a forfeiture of the father's right to his wages during minority.

2. The effect of the father's assent is to make it a contract with himself to the extent of his legal interest, namely, the term of minority, after which neither father nor son is bound.

3. The measure of damages in such case is the value of the son's proportion of the oil taken during his minority.

[Appeal from the district court of the United States for the district of Massachusetts.

[In admiralty. Libel by Jesse Coffin against John H. Shaw. There was a decree for libellant (Case No. 2,952), and respondent appeals.]

Mr. Stone, for appellant.

Mr. Cushman, contra.

CURTIS, Circuit Justice. This libel was filed to recover the share or lay of the minor son of the libellant, earned in a whaling voyage on board the ship Alabama. The minor, with the assent and allowance of the father, signed a shipping paper at Nantucket, in the month of May, in the year 1846, for a whaling voyage to the Pacific ocean and elsewhere. The boy arrived at full age on the seventeenth of August, 1850, and on the twenty-first day of the following November deserted, while the vessel was lying at the Sandwich Islands. It is insisted that this desertion worked a forfeiture of the lay earned by the minor during his minority, and so the father cannot recover. The argument is, that the son contracted, by signing the shipping paper, to serve during the entire voyage: that, as he made this contract with his father's consent, he represented and bound his father, and, consequently, the express contract to perform the entire voyage being broken, the father's rights are forfeited. But this argument assumes several positions which I think untenable. A father is entitled to the earnings of his minor children, and if one of them enters into an express written contract for work and labor, at a certain rate, to be performed during his minority, in his own name, the father may recover a compensation for such work. If the father did not assent to the contract, or allow his son to make it, he can recover on a quantum meruit, which the law implies; if he did assent, the contract affords the measure and conditions of the compensation. And if the nature of the contract which the father assents to is such that there is to be no compensation if the entire work shall not be performed, then the father can recover nothing for part performance, because the employer has not agreed to pay any one any amount for part performance; and the law will not imply a promise to pay for that, for which, by an express contract it appears that there was to be no payment. So that the true inquiry in this case is, whether there was an express contract made by the son, and assented to by the father as binding his rights, by force of which no compensation was to be made if the son

[1] [Affirming Case No. 2,952.]

should desert the vessel after he became of age.

To determine this question, it will be useful to consider what would have been the legal effect of this contract by the son, if he had been emancipated; or, as it is familiarly expressed in New England, if he had had his time given him by his father. In Vent v. Osgood, 19 Pick. 572, it was held, that if a minor, after the death of his father, ship himself in a whale ship, the contract is voidable; and is avoided by his leaving the vessel before the completion of the voyage; and he may thereupon recover in a quantum meruit for his services. In my opinion this case contains a correct exposition of the common law of Massachusetts, where the contract now in question was made. It follows that, if the minor in this case had contracted without the assent of his father, his desertion of the vessel, on the first opportunity which occurred after he became of age, would not have worked a forfeiture; his express contract would have been avoided, and he would have been remitted to his rights, independent of that contract. What then is the effect of his father's assent? Simply, that so far as it is a contract for service during minority, it becomes a contract with the father, which he may enforce, and by which he is obliged, and which is not voidable by the minor, not being for his account. But neither the father nor the son is bound by the contract any further than this. The assent of the father is only to a contract for service by his son during minority; further than that he has no legal interest, and no legal right. And the son is not bound to serve after he comes of age. His own agreement, independent of his father's assent, does not bind him; for, being under age, his contract is voidable, and his father's assent to it can have no operation after he becomes of age, and the parental control and right to his services no longer exist. It is true the father may contract that his son shall begin a voyage during his minority, and serve while he continues under age, and not desert before the completion of the voyage, though, it should not be terminated until after the son's majority. Under such a contract, what would be the legal effect of a desertion by the son, after his majority, upon the rights of the father to the stipulated compensation for his services while under age, may admit of doubt. So far as respects the service of majority, such a contract would be in the nature of a suretyship and the compensation for its breach might not be a forfeiture, but damages. But however this may be, the libellant has made no such contract. His assent to the contract made by his son cannot be carried further than his right and interest in that contract. Its legal effect was, that to the extent of the father's interest in the subject matter, that is, the services of the son during minority, the son contracted on the father's account, and as his representative. But beyond this the son did not represent the father; he acted for himself. My opinion therefore, is that there was no breach of any contract by the father; that so far as he was concerned the agreed service was fully performed and consequently there was no forfeiture.

It should be observed that this is not a case of statute desertion, the effect of which, by force of the act of congress, may be different from the effect attached to the same act by the principles of the maritime law. But upon that I give no opinion.

Another question has been made, whether the libellant should recover the value of his son's proportion of the oil taken during his minority, or only such a proportion of an entire lay as the time before he arrived at full age bore to the whole time spent in the voyage. The district court adopted the former rule. It is most consistent with the nature of the contracts of seamen in whaling voyages, and I think it the proper rule. The decree of the district court is affirmed, with six per cent. damages and costs.

Case No. 2,952.

COFFIN v. SHAW.

[3 Ware, 82;[1] 19 Law Rep. 146.]

District Court, D. Massachusetts. June 11, 1856.[2]

SHIPMENT OF MINOR — DESERTION AFTER MINORITY—FORFEITURE OF WAGES—RIGHT OF FATHER —GUARANTY.

1. A father shipped his son, a minor, under the age of seventeen, by a contract in the common form, for a whaling voyage to the Pacific ocean and elsewhere. The son faithfully did duty during the whole period of his minority, and afterwards deserted before the termination of the voyage.

2. *Held*, that the desertion did not forfeit the wages of the son during his minority, which were due to the father. The obligations of the father's contract terminated with his son's minority, and his responsibility for his acts ceased at the same time.

3. A simple promise, by one, of the act of another person who is sui juris is void. But a contract of guaranty or suretyship for the act of another, if on a sufficient consideration, is valid.

4. In this case no such guaranty being proved, it could not be presumed.

[In admiralty. Libel by Jesse Coffin against John H. Shaw.]

A. S. Cushman, for libellant.

J. C. Stone, for respondent.

WARE, District Judge. This is a libel brought by Jesse Coffin, to recover, against the owners of the ship Alabama, of Nantucket, the lay or wages earned by George M. Coffin, his son, in a whaling voyage described in the shipping-paper as a voyage to the Pacific ocean and elsewhere. There

[1] [Reported by George F. Emery, Esq.]

[2] [Affirmed in Case No. 2,951.]

is no controversy as to the facts in the case. It is admitted that George M. Coffin was at the time of the contract a minor; that he was regularly shipped by the libellant, his father, for the voyage, on the 26th of May, 1846, as a cooper; that his lay or wages was to be one seventy-fifth of the proceeds of the cruise; that he proceeded on the voyage, and faithfully and with fully an ordinary share of ability performed the service for which he was engaged, and remained in the ship till the 21st of November, 1850, four years and within a few days of six months. It is also admitted that he then deserted, while the vessel lay at the Sandwich Islands, the voyage or cruise not being at the time completed. The cause or inducement to the desertion is proved by the libellant's own witness. Not long before that time the discovery had been made of the great mineral riches of California. The tempting prospect of sudden and easily acquired wealth was too strong for the young man, and he abandoned the ship for the purpose of seeking a fortune among the gold mines of this new El Dorado. He had no cause of complaint against the master of the vessel, and he deserted purely from motives of interest, on the calculation of finding a more lucrative employment. It was, therefore, a desertion not only without justification, but without palliation.

In every age of the maritime law, a wanton and wilful desertion before the termination of the voyage, has been held to work a forfeiture of all wages antecedently earned. In the case of Gifford v. Kollock [Case No. 5,409], I thought, though this was the general rule, that the law was not imperative on the court to inflict the entire forfeiture; but when the desertion was attended by extenuating circumstances, not amounting to a justification, these circumstances might be taken into consideration, and the penalty mitigated to a reasonable deduction from the wages, or even to a case of mere compensation and indemnity to the owners for the actual damage sustained. Perhaps when the desertion is proved precisely according to the requirements of the act of 1790, c. 29, § 5 (1 Stat. 133), it may be otherwise. It may be that the act makes it a statute penalty, and by its terms takes from the court all power of qualifying the offence, and reducing the penalty in consideration of palliating circumstances, that do not constitute a full justification. The facts of the case did not call for the expression of an opinion on that point. But to the doctrine held in that case, I still adhere. In the present, however, there were no extenuating circumstances. The desertion was not only without justification but without palliation. But there is another admitted fact to be adverted to in this case, and it is the only one that creates any difficulty in my mind. This boy was shipped by his father while he was a minor. During his minority he was earning wages for his father's benefit, and working out his contract. And while that continued, his father must be held so far responsible for his conduct; that any act in breach of the contract, which legally affected the right to wages, is imputable to him. But the desertion took place on the 21st of November, 1850, and the boy arrived at the age of twenty-one on the 17th day of the preceding August, and then ceased to be under the parental power. He then ceased to earn wages for his father, was entitled to his own earnings, and became alone responsible for his own acts. The shipping contract made by his father then terminated by operation of law, and up to that time there had been no forfeiture. The father had then acquired all the rights he could acquire under the contract, and as he had no longer any right of control over his son, he ceased to be responsible for his acts. How then could his rights be affected by any subsequent acts, or how can there be a breach of a contract that no longer existed, but which was dissolved by operation of law? It appears to me that there is but one possible condition of the contract by which he could be so affected.

It is a principle of common sense and natural justice, as well as of law, that contracts have their effects, both of benefit and burden of right and obligation, only between the parties. No one can stipulate or promise but for himself. A promise that another shall give a particular thing, or do a particular act, is simply void, conferring no right and producing no obligation. It is an exception to the rule, when the person whose act is promised is under the control of the promisor; as, if he promises the acts of a hired servant in his employment, the promise binds him as if he had promised his own act; or if he promises the act of a minor, being an apprentice or a child, as in this case. 6 Toullier, Droit Civil Francais, No. 136. The libellant, in his character of a parent, had the right of control over his son, and if he engaged, by this contract, that his son should faithfully serve the owners as a cooper in the voyage, as he must be considered to have done, he will be equally affected by a breach of this engagement by his child as if he had promised his own personal act and violated his promise, and must bear the legal consequences of such violation. But his responsibility lasted only as long as his contract, and that terminated with his son's minority. But though the simple promise of the act of another is merely void, and neither binds the promisor nor the person whose act is promised, by varying the form of the engagement, it may become binding on the promisor. The distinction is succinctly and clearly expressed in the Institutes of Justinian: "If one promises that another shall give or do anything, he is not bound, as if he promises that Titius shall give five pieces of gold. But if he promises that he will take care or cause that Titius gives it, he is bound." "Si quis alium daturum facturumve quid spoponderit, non obligabitur, veluti si spondeat Titi-

um quinque aureos daturum. Quod si effecturum se ut Titius daret, spoponderit, obligatur." Lib. 3, 20, § 3. He then promises not for another but for himself, and as persons are not presumed to trifle in business transactions with nugatory promises, a person will easily be presumed to mean by such a promise, that he will be surety for the one whose act is promised, when the circumstances are such as to favor the presumption or not to bring it into doubt. Poth. Obl. No. 56. In stating the general principle, that one can stipulate or promise but for himself, I have borrowed the language of the Roman law, because it is put there into a neat and succinct formula. But the general rule is as true in our law as in that of Rome, for it is founded in the nature of things. There are exceptions in both, but they do not reach the present case. It was, doubtless, competent for the libellant to engage in the event that the voyage should not be ended when his son attained his majority, and to bind himself as a surety for him, that he should continue in the vessel and faithfully do duty until the final termination of the voyage, and to make himself responsible for any forfeiture his son might incur, and it is only by such an engagement that he could be affected by acts of his son after his parental authority ceased. The owners might have stipulated for such a promise, and it would have been binding on the promisor. But the circumstances must be peculiar to authorize the presumption of such an engagement without direct evidence, and surely it will not be presumed against probability. Are the circumstances of this case such that an engagement of this kind can fairly and reasonably be inferred? I think not. To authorize such a presumption, we must suppose that the parties, at the time of the contract, contemplated the contingency that the voyage might not be completed until after the son had passed his minority. But more than four years of his minority yet remained, and it is agreed that the ordinary length of whaling voyages in 1846 was three years, and that they never exceeded four. The supposition is, therefore, not only without probability but against it, and there is no direct evidence tending to show that the possibility that the voyage might outlast the boy's minority occurred to the minds of either party. The case then stands on the naked facts and the law applicable to them. My opinion is, that the obligations of the shipping contract made by the father terminated, by the understanding of the parties, as they certainly did in law, when the son attained his majority; and that the rights acquired by the father, during his minority, cannot be affected by any act of the son after the parental authority terminated, and he became sui juris.

Decree for libellant.

[NOTE. Respondent appealed to the circuit court, where the decree herein was affirmed. Case No. 2,951.]

COFFIN (SWEENEY v.). See Case No. 13,686.

COFFIN (UNITED STATES v.). See Cases Nos. 14,823 and 14,824.

Case No. 2,953.

COFFIN v. WELD et al.

[2 Lowell, 81.][1]

District Court, D. Massachusetts. Dec., 1871.

DISCHARGE OF SEAMAN FOR ILL-TREATMENT—DUTY OF CONSUL—CONSTRUCTION OF STATUTES — EXTRA WAGES—ONE THIRD TO UNITED STATES.

1. Seamen who are persistently ill-treated by their officers have the right to demand a discharge from their contract; and, if they leave the vessel, they are not deserters.

2. The statute of 1840, cl. 17 (5 Stat. 396), requiring consuls, when deserters are apprehended and brought before them, to inquire into the facts, and, if satisfied that the desertion was caused by unusual or cruel treatment, to discharge the deserter, who shall have three months' extra pay, is to be construed to give consuls the like power and duty when applied to by seamen who have not deserted.

3. Taking into consideration the other acts in pari materia, and especially the statute of 1856, § 26 (11 Stat. 62), one-third of the three months' pay mentioned in clause 17 of the act of 1840 is to go to the United States.

4. Where it appeared that the crew justly complained of cruel conduct on the part of the mate, and the consul at a foreign port effected a compromise, by which the master was to discharge the mate and the crew were to navigate the ship to the next port; and the crew went on board the ship again, but afterwards refused duty, upon a suspicion, which appeared not wholly unfounded, that the mate had not been discharged, and the consul then discharged them for disobedience,—*held*, they might recover two months' wages; because they were entitled to their discharge, and the consul had never adjudged that they were not.

[Cited in the Paul Revere, 10 Fed. 158; Gove v. Judson, 19 Fed. 524.]

In February, 1870, the libellant [F. B. Coffin] was shipped at Boston on the ship Fearless, belonging to the respondents [W. F. Weld and others], for a voyage to Batavia and other ports in the East Indies, and back to the United States. He was discharged at Batavia in May, and was sent thence to Singapore, where he took service on board another ship, at a less rate of wages, and arrived home in November, 1870. The Fearless reached this port in January, 1871. The libellant alleged that he was discharged by the consul at Batavia on account of ill-usage received from the master and mate. The answer insisted that eight of the men complained to the consul of the mate's harsh and cruel conduct, and made no charges against the master; and that it was agreed, upon the suggestion of the consul, that the mate should be discharged, and the men should return to duty; that the mate was discharged, and left the ship; but the men, on being required to get the ship under weigh, refused to do any duty, and were discharged by the consul for

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

disobedience. The evidence tended to show that the original ship's company consisted of a master, two mates, a cook, a steward, a carpenter, and sixteen men before the mast; that the ship arrived at Batavia in May, and eight of the men insisted on seeing the consul, and complained to him of ill-usage, and that the others afterwards made a similar complaint. The consul testified, that, according to the best of his recollection, the mate only was accused of cruelty, and not the master; and he further said, that it was agreed that the first mate, who was the cause of the difficulty, should be discharged, that the captain should give an agreement in writing that the crew should be well treated during the further prosecution of the voyage to Singapore, and the men should return to duty; that these terms were fully carried out by himself and the master, but the eight men still refused duty, and were discharged by him for disobedience. Whether the complaint was solely against the mate, or included the master, and whether the libellant agreed to the compromise, were disputed points upon the evidence. It was proved that the men returned to the vessel either voluntarily or through fear or coercion, and that the vessel was ready for sea, and the order was given to weigh anchor; that the mate was then on board, and in his working-dress, and witnesses on both sides said that they inferred he had not been discharged. It was at this time the eight men refused duty. The mate afterwards left the ship, but when, or under what circumstances, did not appear. The second mate had already been discharged, with his own consent, and a man had been promoted to his place. The remaining seven men made the trip to Singapore, and were all discharged by the consul there; and for cause of discharge the consul entered on the articles against the name of each man some act of cruelty or some threats on the part of the mate. The mate was reshipped at the same port, with a new crew.

H. M. Knowlton, for libellant.

H. C. Hutchins and H. H. Currier, for respondents.

LOWELL, District Judge. The libellant and seven others of the crew of the Fearless were discharged at Batavia, with the consul's consent. Neither the libel nor the answer states the facts correctly. The man was not discharged for ill-usage, as he alleges; nor is it exactly true that the master agreed to discharge the mate, and did discharge him, and that the men agreed to return to duty, as the answer puts it. The agreement appears to have been that the men would serve as far as Singapore, and be discharged there, for causes already existing; but the mate was not to go on that trip. The master broke his part of the compromise, or at least appeared to break it, by permitting the mate to be on board the ship in his working-dress, though he afterwards sent him on shore. The consul tried, in vain, to induce the men to return to duty, and to induce the master to take them to Singapore in irons; and at last discharged them for disobedience. Two questions arise from these facts: 1. Is the action of the consul conclusive of the right of the master to dismiss the men without pay? 2. If not, is the libellant, on the facts, entitled to any thing? Fraud excepted, the consul's action is binding on all parties in those cases in which the law gives him a discretion. By the very terms of the act of 1803 [2 Stat. 203], the production of his certificate that a seaman was discharged with his consent is a compliance with the master's bond to return the seaman, or produce the consul's certificate of his discharge. Wilson v. The Mary [Case No. 17,823]. His order is held in this circuit to be a bar to an action against the master for causing the men to be imprisoned in a foreign port by the authorities thereof. Jordan v. Williams [Id. 7,528]; Chester v. Benner [Id. 2,660]. When seamen are sent home by the consul to be tried for a crime, their right to wages has been held to end with the arrest. Tingle v. Tucker [Id. 14,057]. And his certificate of the assent of the seaman to his own discharge is conclusive. Lamb v. Briard [Id. 8,010]. But the certificate of the consul must show clearly his jurisdiction and the grounds of his action. The Atlantic [Id. 620]. And, as a general rule, the right to wages after a discharge, which is not made at the request of the mariner, may be supported or contested on its merits, notwithstanding the action of the consul; because the statutes give him no express authority to remit wages, excepting in the cases mentioned in the ninth and subsequent clauses of the act of 1840, the fifth, sixth, and seventh clauses of that act having been repealed by section 33 of the statute of 1856 (11 Stat. 65). In other cases, settlements of wages and other terms of discharge made by or with the sanction of consuls may be inquired into, and varied. See Hutchinson v. Coombs [Case No. 6,955]; Jay v. Almy [Id. 7,236]; Brunent v. Taber [Id. 2,054]; The Atlantic [supra]; Foye v. Dabney [Case No. 5,022]; Jenks v. Cox [Id. 7,277]. The consul has jurisdiction, as will presently appear, to inquire into cruel treatment of the crew by the master and officers; and if the consul in this case had decided that there had been no cruelty, his finding might be conclusive: but he made no such decision at any time. Cruelty was admitted to have been used towards all the men; and all that the consul decided was, that they had broken a compromise, which he thought a fair one.

Coming to the facts presented by the testimony here, I may say that I know of no authority that the consul has to discharge a seamen for disobedience. I do not mean that he may not and ought not to advise the master, or that the latter may not discharge a man for willful and obstinate refusal of

duty; but that, in a suit for wages, the ultimate responsibility rests on the master, and that the advice of the consul is only evidence, and not a judicial and conclusive finding, that the man ought to be discharged. U. S. v. Lunt [Case No. 15,642].

The evidence on both sides in this case proves beyond any doubt that the mate was unfit for his office, and that he had given the men just cause to demand their discharge. Indeed, this was conceded; and all the remaining foremast hands, excepting the one promoted to be second mate, were discharged for this cause at Singapore, three weeks after the time now under consideration, and that cause was certified upon the articles, but the cruelty had all been committed on the voyage out to Batavia.

The case for the respondents is, that the libellant and seven others who were discharged at Batavia had agreed to a compromise, by which they were all to go to Singapore and be discharged there; and that the master kept his part of the arrangement, but they broke theirs. This defence is not made out. The evidence is equally clear, and from witnesses on both sides, that the mate was not discharged, even for the three weeks; but that, when the men refused to go to sea from Batavia, the mate was on board, in his working dress, and apparently occupying his old position. Under these circumstances, the men were justified in refusing to go on. Mariners have a right to leave a vessel on which they are constantly and persistently ill-treated; and by the general maritime law such conduct is not desertion; and they may recover full wages notwithstanding. Brown v. The Independence [Case No. 2,014]; Knowlton v. Boss [Id. 7,901]; The America [Id. 286]. It appears to me that the statute of 1840 has introduced a most important modification of this doctrine; for by the seventeenth clause (5 Stat. 396), it is enacted, that in all cases where deserters are apprehended the consul or commercial agent shall inquire into the facts, and, if satisfied that the desertion was caused by unusual or cruel treatment, the mariner shall be discharged, and receive, in addition to his wages to the time of his discharge, three months' pay; and the officer discharging him shall enter upon the crew list and the shipping articles the cause of discharge, and the particulars in which the cruelty or unusual treatment consisted, and subscribe his name thereto officially. In construing this statute, it is impossible to maintain that its scope is limited to cases in which deserters are apprehended. The rights of the seaman and of the owners do not depend on the desertion, but on the treatment; else the master, by forcing the crew from the ship without permitting them to see the consul, and then refusing to apprehend them, might rob them of their wages, by treating them as deserters not worthy of being reclaimed. The consul at Singapore took the right course, and discharged the men for cruel treatment by the mate, and noted the cause of discharge upon the articles, though they had not deserted. The statute is a remedial one, and states a general rule under guise of a particular example, as is not uncommon with acts of congress. It cannot be read and understood in any other sense. The rights of the seamen may, in some cases, —perhaps in this case,—be abridged by this statute, for it gives a certain fixed measure of damages instead of wages to the end of the voyage; but that it applies to all cases of cruel treatment, by whomsoever the case is brought before the consul, I cannot doubt.

The libellant was clearly and confessedly entitled to his discharge; and, if he waived it for a time, which is very doubtful, it was upon conditions which were broken by the other contracting party. But even if that breach by the master were not made out, the only contract that the libellant broke was for a trip from Batavia to Singapore. I must therefore award him three months' pay, unless the meaning of the statute is that one-third of this is to go to the United States. Upon the mere language of this clause, it would be plain enough that the man himself is to have the full three months' pay; but a comparison of the several statutes on the same subject throws much doubt upon it. I am inclined to think, upon the whole that section 26 of the act of 1856 (11 Stat. 62), modifies the seventeenth clause of the act of 1840, if the latter means to give the man the whole of this sum. That section says: That in all cases in which a seaman is entitled to his discharge under any act of congress, or according to the general principles or usages of maritime law, there shall be a payment of three months' wages, excepting only as provided in the ninth clause of the act of 1840 (that is, where a voyage has been prolonged, &c., without any fault of the master); and that these extra wages shall be applicable to the same purposes and in the same manner as is directed by the act of 1803, which gives two-thirds only to the mariner, and that subject to certain charges, if he has incurred them. My decree, therefore, will be for two months' wages, or forty dollars, unless the libellant had received advances beyond the wages due him on the 23d of May, 1870, which I did not distinctly gather from the evidence, or unless there is a balance due him on that account to be added to the forty dollars. He is also to have his costs.

Interlocutory decree for the libellant.

COFFIN (WIGGIN v.). See Case No. 17,624.

COFFIN v. The WITCH QUEEN. See Cases Nos. 17,915 and 17,916.

COFFIN, The E. H. See Cases Nos. 4,309 and 4,310.

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